

Title 38 Decision Paper
Department of Veterans Affairs
St. Louis Health Care System, St. Louis, Missouri

FACTS

On February 2, 2017, the Department of Veterans Affairs (VA) St. Louis Health Care System (VASTLHCS) Primary Care Service notified the American Federation of Government Employees, Local 96 (Union) that Primary Care would end ten-hour compressed tours, effective March 6, 2017, to “improve access for the Veterans Monday-Friday and Saturday.” Attachment B. The VASTLHCS provided ten reasons supporting its decision to discontinue compressed tour. *Id.*

On March 24, 2017, the VASTLHCS notified Primary Care physician providers on compressed tours that, effective June 5, 2017, all compressed tours in Primary Care would be discontinued and that their tour of duty would be Monday through Friday from 8:00 am to 4:30 p.m., with appropriate adjustments for extended hours on Wednesdays and Saturdays in clinics with extended hours. Attachment C. The notification specifically stated that “[a]fter reviewing Clinic Access data . . . and clinical coverage needs in the [Patient Aligned Care] Teams [(PACT)], it appears that Primary Care Service can improve patient access, and timely services by making [the compressed work schedule (CWS)] changes.” *Id.* “VHA Access Implementation Guide recommends a standard Appointment grid for PACT Providers. All Clinic Appointment grids are therefore being standardized throughout Primary Care Service to reflect the same tour and Appointment grid for all Provider staff.” *Id.* On April 4, 2017, the Union filed a Demand to Bargain. Attachment D.

On April 18, 2017, the Union provided the VASTLHCS with proposals to maintain the CWS for Primary Care providers. Attachment E. On May 2, 2017, VASTLHCS responded to the Union’s proposals, addressed the impact the CWS had on workload, leave, and morale, and notified the Union that the ten-hour compressed tours would be terminated, effective June 5, 2017, in Primary Care to “improve access for the Veterans Monday-Friday and Saturday.” Attachment G.

On June 6, 2017, the VASTLHCS responded to the Union’s specific arguments in favor of, and proposals concerning, the CWS. Attachment J. The VASTLHCS also agreed to delay the discontinuance of the CWS until June 26, 2017 and agreed to delay providing notification to impacted employees on the CWS for 30 days (i.e., until July 31, 2017). *Id.* On June 29, 2017, the Union filed an Unfair Labor Practice charge (ULP) with the Federal Labor Relations authority (FLRA). Attachment L. Among other things, the ULP asserted that VASTLHCS had violated 5 U.S.C. § 7116(a)(1), (5), and (8) by unilaterally terminating all four (4) day work week – ten (10) hour day CWS schedules in Primary Care. *Id.* On August 14, 2017, the Union also requested Panel consideration from the Federal Service Impasses Panel (FSIP). Attachment A; Attachment M.

On October 18, 2017, the Union submitted a request for a 38 U.S.C. § 7422 determination. Attachment A. The VASTLHCS submitted a response to the issues raised in the Union's request on October 20, 2017. Attachment N.

AUTHORITY

The Secretary of Veterans Affairs has the final authority to decide whether a matter or question concerns or arises out of professional conduct or competence (i.e., direct patient care or clinical competence), peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b). On October 18, 2017, the Secretary delegated this authority to the Under Secretary for Health. Attachment O.

ISSUES

1. Whether the Union has a legal right to request a 38 U.S.C. § 7422 determination.
2. Whether the VASTLHCS unilateral termination of CWS for Primary Care clinicians appointed under 38 U.S.C. § 7401(1), and the ULP charge and FSIP request filed by the Union on that issue, involves a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b), and thus, is excluded from collective bargaining.

DISCUSSION

38 U.S.C. § 7422 granted limited collective bargaining rights to employees appointed under title 38 of the United States Code (Title 38) and specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence (i.e., direct patient care or clinical competence), peer review, or employee compensation, as determined by the Secretary. 38 U.S.C. § 7422.

1. Whether the Union has a legal right to request a 38 U.S.C. § 7422 determination.

On October 18, 2017, the Union submitted a request for a 38 U.S.C. § 7422 determination. Attachment A. The request fails to specify the legal authority for the Union to request that the Secretary, or his designee, issue a 38 U.S.C. § 7422 determination. Absent such a legal authority, the Union does not have a legal right to request a 38 U.S.C. § 7422 determination. Nevertheless, because of the importance of this case, I have decided to issue a 38 U.S.C. § 7422 determination.

2. Whether the VASTLHCS unilateral termination of CWS for Primary Care clinicians appointed under 38 U.S.C. § 7401(1), and the ULP charge and FSIP request filed by the Union on that issue, involves a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b), and thus, is excluded from collective bargaining.

The VASTLHCS's decision to discontinue CWS for providers in Primary Care was effectuated to increase Veterans' access to care at the VASTLHCS. Attachment C. Prior to cancelling the providers' CWS, VASTLHCS shared the data it used to make the decision with the Union, considered the Union's proposals with respect to the CWS, and addressed the Union's arguments against cancelling the CWS. Attachment G; Attachment J. Although VASTLHCS engaged in a good faith dialogue with the Union concerning the discontinuance of the CWS, it maintained throughout the process that the change was necessary to increase patient access using a standardized PACT Appointment grid. See, e.g., Attachment C; Attachment I.

The VASTLHCS decision to discontinue the CWS to increase Veterans' access to patient care was consistent with VA policy. 38 U.S.C. § 7421(a) authorizes the Secretary to prescribe by regulation the "hours and conditions of employment" of Title 38 medical professionals. Attachment S. VA Handbook 5011 addresses the Hours of Duty of Title 38 medical professionals. See generally, Attachment R. VA Handbook 5011, part II, chapter 1, paragraph 2b requires that "proper care and treatment of patients" serve as "the primary consideration in scheduling tours of duty" and states that "[d]uty schedules shall be established as appropriate and necessary for performance of services in the care and treatment of patients and other essential activities." *Id.* VA Handbook 5011, part II, chapter 3, paragraph 2d permits Medical Center Directors to "prescribe any tour of duty to ensure adequate professional care and treatment" to patients. Attachment P. Further, VA Handbook 5011, part II, chapter 3, paragraph 5g states that the use of a CWS "shall be consistent with patient care requirements." Attachment Q.

The record indicates that VASTLHCS decision to discontinue the CWS in Primary Care was supported by numerous patient care centered factors, including low patient care utilization rates for providers on CWS, inadequate clinical staff to support physicians on CWS resulting in diminished access to care, and improper coverage resulting in a lack of patient care. Attachment N. While VASTLHCS acknowledged the impact that eliminating the CWS would have on Primary Care clinicians, its decision was ultimately driven by its desire to improve Veterans' timely access to Primary Care services at the VASTLHCS. *Id.* Therefore, VASTLHCS unilateral termination of CWS for Primary Care clinicians appointed under 38 U.S.C. § 7401(1), and the ULP charge and FSIP request filed by the Union on that issue, involves a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b), and thus, is excluded from collective bargaining.

This decision is consistent with prior 38 U.S.C. § 7422 decisions on CWS. For example, in *VAMC Cleveland*, management eliminated the CWS for registered nurses on the on the Short Stay Unit because there were not enough staff "to adequately take care of patients" on the days the unit was open. Attachment T (*VAMC Cleveland* (July 9, 2008)). In *VAMC Palo Alto*, management determined that the continuation of a CWS in an acute psychiatric ward was causing serious staffing gaps and adversely impacting patient care. Attachment U (*VAMC Palo Alto* (Oct. 11, 2005)). In both cases, the elimination of a CWS for patient care related reasons was determined to be a matter

involving professional conduct or competence (i.e. direct patient care) within the meaning of 38 U.S.C. § 7422 and therefore non-negotiable under 38 U.S.C. § 7422. Attachment T; Attachment U.

DECISION

Regarding issue one: The Union does not have a legal right to request a 38 U.S.C. § 7422 determination. Nevertheless, because of the importance of this case, I have decided to issue a 38 U.S.C. § 7422 determination.

Regarding issue two: VASTLHCS unilateral termination of CWS for Primary Care clinicians appointed under 38 U.S.C. § 7401(1), and the ULP charge and FSIP request filed by the Union on that issue, involves a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b), and thus, is excluded from collective bargaining.



Richard A. Stone, M.D.
Acting Under Secretary for Health

January 26, 2021
Date