

**Title 38 Decision Paper  
Department of Veterans Affairs (VA)  
Poplar Bluff, Missouri**

**FACTS**

On July 25, 2017, the American Federation of Government Employees (AFGE) Local 2338 (Union) filed a Step 3 grievance on behalf of the physician providers who are being scheduled to “perform roundings on a scheduled rotation.” Attachment A. The Union’s grievance charged the John J. Pershing VA Medical Center (Medical Center) with violating Article 21, Hours of Work and Overtime of the VA-AFGE Master Collective Bargaining Agreement (Master Agreement). *Id.* Specifically, the Union charged the Medical Center with “scheduling providers to work more than 40 hours per week or 80 hours within a two week pay period, by scheduling the providers to perform roundings on a scheduled rotation.” *Id.* The grievance further alleged that the Medical Center “has no system of records for the amount of time the employees have been performing rounding’s.” *Id.*<sup>1</sup>

On August 16, 2017, the Medical Center provided a formal written response to the Union’s grievance. Attachment B. The Medical Center denied the grievance in its entirety explaining that the Union did not offer a justification as to how the Agency had violated the Master Agreement and Agency policy. *Id.* Further, the Agency would not be “granting a scheduled day off within fourteen days of rounding being performed.” *Id.* The Medical Center also asserted that 38 U.S.C § 7422 excluded the subject matter from collective bargaining. *Id.*

On August 21, 2017, the Union invoked arbitration. Attachment C.

On March 6, 2019, and May 1, 2019, the arbitration hearing was held. Attachment D.

On November 13, 2019, the arbitrator issued a decision that sustained the grievance. Attachment D. The arbitrator ordered the Medical Center to adjust provider schedules to account for scheduled “weekend rounding on Saturdays and Sundays” by shortening the length of a workday “within the basic 40-hour administrative workweek.” *Id.* The arbitrator also ordered the Medical Center to retroactively apply “rest and relaxation of two hours for each weekend day of rounding performed.” *Id.* Finally, the arbitrator ordered the Medical Center to “keep records of all weekend tours of rounding by bargaining unit and non-bargaining unit physicians and make the records available to the employees and the Union.” *Id.* The arbitrator retained jurisdiction to consider and rule upon any disputes regarding remedies called to his attention in writing within 60 days of the date of the award. *Id.*

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<sup>1</sup> As a resolution, the Union requested the Medical Center “provide the providers a scheduled day off within fourteen days of roundings being performed from this day forward,” as well as “a day off for rest and relaxation for days in which the providers have perform roundings dating back the maximum allowed under the law or Back Pay Act of 1966.” Attachment A.

On January 14, 2020, the arbitrator denied the Union's request for attorney's fees.<sup>2</sup> Attachment E. While the Union claimed that the Agency had committed an "unwarranted personnel action that resulted in the loss of physician pay," the arbitrator disagreed, concluding that the failure to grant rest and relaxation to physicians was not a "withdrawal, reduction, or denial of all or part of pay, allowance, or differentials due to employees." *Id.*

On November 23, 2020, the Federal Labor Relations Authority (FLRA) held "that a grievance disputing the Agency's process of scheduling Title 38 physicians to perform patient care duties on weekends is excluded from the negotiated grievance procedure pursuant to 38 U.S.C. § 7422(b)." Attachment F, Dep't of Veterans Affairs Med. Ctr. Poplar Bluff & AFGE, 71 F.L.R.A. 217 (November 23, 2020). The FLRA specifically noted that the scheduling of weekend rounding duties for Title 38 physicians involved a matter of professional conduct or conduct and was thus excluded from negotiated grievance procedures under 38 U.S.C. § 7422. *Id.*

The Union filed a motion for reconsideration as to whether the FLRA has the authority to determine that a matter is excluded from the negotiated grievance procedure under 38 U.S.C. § 7422(b). Attachment H, Dep't of Veterans Affairs Med. Ctr. Poplar Bluff & AFGE, 72 F.L.R.A. 47 (May 3, 2021). The FLRA granted the Union's motion for reconsideration stating, "[W]e find that the Authority erred in its legal conclusion in VA when it held that the grievance concerned a matter of professional conduct or competence within the meaning of § 7422(b)—thus excluding it from the grievance procedure—without such a determination from the VA Secretary to that effect. The Authority should have determined that the award was not contrary to 38 U.S.C. § 7422 and specified that the grievance was procedurally arbitrable because there was no 7422-determination holding otherwise." *Id.*

On July 16, 2021, the Medical Center submitted a request for a 38 U.S.C. § 7422 determination. Attachment I. The Medical Center asserted that scheduling of physicians and physician rounding involves and impacts direct patient care and as such are matters that concern or arise from professional conduct or competence under 38 U.S.C. § 7422(b). *Id.*

On August 10, 2021, the Union filed a response to the Medical Center's request for § 7422 determination. Attachment J. The Union contested the Medical Center's § 7422 request, by asserting that: (1) the Agency waived its right to request a §7422 determination when the matter was first filed and arbitrated; (2) the current §7422 request was unreasonably untimely; (3) the "Rest and Relaxation" Section of Article 20 of the Master Agreement had survived Agency Head Review and is consistent with the law; and (4) the Arbitration Decision concerned matters merely peripheral in nature to the §7422(b) exclusions. *Id.*

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<sup>2</sup> The Federal Labor Relations Authority (FLRA) upheld the arbitrator's ruling that the Union was not entitled to attorney's fees. Dep't of Veterans Affairs Med. Ctr. Poplar Bluff & AFGE, 72 F.L.R.A. 46 (May 3, 2021). Attachment G.

## **AUTHORITY**

The VA Secretary has the final authority to decide whether a matter or question concerns or arises out of professional competence (i.e., direct patient care or clinical competence), peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b). This authority is delegated within VA policy. Attachment K.

## **ISSUE**

Whether a grievance claiming that the Medical Center regularly assigned physicians to work in excess of 40-hour work weeks or 80 hours within a two week pay period by scheduling the providers to perform roundings on a scheduled rotation 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**

The Department of Veterans Affairs Labor Relations Improvement Act of 1991, codified in part at 38 U.S.C. § 7422, granted collective bargaining rights to Title 38 employees under 38 U.S.C. § 7422(a)<sup>3</sup>. However, for Title 38 employees described in 38 U.S.C. § 7421(b), collective bargaining may not cover any matter or question concerning or arising out of professional conduct or competence (i.e., direct patient care or clinical competence), peer review, or any matter or question concerning or arising from employee compensation, as determined by the Secretary. 38 U.S.C. § 7422(b). The following employees are described in 38 U.S.C. § 7421(b)—physicians, dentists, podiatrist, optometrist, registered nurses, physicians assistants, expanded-duty function dental auxiliaries, and chiropractors. *Id.*; see 38 U.S.C. § 7401(1).

### *Professional Conduct or Competence*

38 U.S.C. § 7421(a) authorizes the Secretary of Veterans Affairs to prescribe by regulation the “hours and conditions of employment” of Title 38 medical professionals. Medical Center Directors are authorized to “prescribe any tour of duty to ensure adequate professional care and treatment.” Attachment M, VA Handbook 5011, pt. II, ch. 3, ¶ 2a. VA policy requires that “proper care and treatment of patients” serve as “the primary consideration in scheduling tours of duty.” Attachment L, VA Handbook 5011, pt. II, ch. 1, ¶ 2b. VA policy 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.* Specific to physicians and direct care providers, VA policy further states, “[F]ull-time physicians, dentists, podiatrists, chiropractors, and optometrists to whom the provisions of this chapter apply shall be continuously subject to call unless officially excused by proper authority. This

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<sup>3</sup> 38 U.S.C. § 7422 does not set forth timeframes regarding requests for determinations.

requirement as to availability exists 24 hours per day, 7 days per week.” Attachment M, VA Handbook 5011, pt. II, ch. 3, ¶ 2a. Therefore, if participation by Title 38 medical professionals in a weekend on-call schedule is necessary for direct patient care, management has the ability to manage Title 38 medical professionals’ tours of duty and assignments to ensure the appropriate professional care and treatment of patients.

The Union’s grievance, dated July 25, 2017, alleges that the Medical Center violated VHA Handbook 5011, *Hours of Duty and Leave* by “scheduling providers to work more than 40 hours per week or 80 hours within a two week pay period, by scheduling providers to perform roundings on a scheduled rotation.” Attachment A, *see also* Attachment J. The Medical Center responded by citing to VA policy on physicians being continuously subject to call for 24 hours per day, 7 days per week in VA Handbook 5011 and noting, “Physicians have always been required where the workday shall not be less than 2 hours and may not exceed 12 hours in a given workday.” Attachment B. The Union’s grievance contains no evidence demonstrating that the Medical Center violated VA policy as outlined in VA Handbook 5011, *Hours of Duty and Leave*. As summarized above, scheduling the providers to perform roundings on a scheduled rotation would not be a violation of current policy given the need to ensure direct patient care.

This is further supported by evidence provided by the Medical Center in their request for the § 7422 decision. In the November 13, 2019, arbitration decision, the arbitrator not only sustained the grievance, he also required retroactive relief from February 1, 2018.<sup>4</sup> Attachment D. According to the Medical Center, if the Arbitrator’s decision had been followed from February 2018, to July 16, 2021, the date the Medical Center submitted a request for a 38 U.S.C. § 7422 determination, the impact to direct care would have been as follows:

- a. The impact over the past 28-month period would have been 512 hours of lost productivity and an annualized rate of lost productivity moving forward of 219.6 hours per year. Calculations: 512 divided by 28 results in a monthly impact of 18.3 hours multiplied by 12 months results in the annualized rate of impact to be 19.6 hours of lost productivity. The impact to specific programs follows:
  - i. Primary Care Impact: 186 hours of lost provider productivity negatively impacting up to 371 Veterans. At an annualized rate this would result in an on-going impact to approximately 159 Veterans per year by removing a provider from the schedule for approximately 80 hours per year. Calculations: 186 hours divided by 28 months results in a monthly rate of 6.6 hours multiplied by 12 months results in an annualized rate of 79.2 hours per year.
  - ii. Acute Care Impact: 208 hours of lost productivity negatively impacting in-patient Veterans for 26 days without a hospitalist. At an annualized

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<sup>4</sup> The arbitrator also ordered the Medical Center to adjust provider schedules to account for scheduled “weekend rounding on Saturdays and Sundays” by shortening the length of a workday “within the basic 40-hour administrative workweek.” Attachment D.

rate this would result in an on-going impact of approximately 89 hours, or 11 days per year. Calculations: 208 hours divided by 28 months results in a monthly rate of 7.4 hours multiplied by 12 months results in an annualized rate of 88.8 hours per year.

- iii. Urgent Care Impact: 118 hours of lost productivity affecting Veterans and employees seeking urgent care services. With an average of 11 patients seen per shift by a provider, this would impact approximately 165 Veterans seeking urgent care. At an annualized rate this would result in an on-going impact to approximately 70 Veterans per year by removing a provider from the schedule for approximately 50 hours, or 6.25 days per year. Calculations: 118 divided by 28 months results in month rate of 4.2 hours multiplied by 12 months results in an annualized rate of 50.4 hours per year. An average of 11 patients seen per shift results in an hour's average of 1.4 patients per hour. 50.4 multiplied by 1.4 patients per hours results in an annualized rate of 70.5 Veteran patients impacted per year.

- b. This would have delayed care for 372 Veterans in Primary Care, substantially impacting in-patient care for 26 days, and impacting 165 Urgent Care encounters during the 28-month period from February 2018 to present. The future impact is projected to be a reduction in patient care in Primary Care affecting 159 Veterans per year, leave in-patients without a hospitalist for 11 days per year; requiring the JJPVAMC to pull more hours from elsewhere for coverage, and reducing the ability to provide Urgent Care services for approximately 70 Veteran and employee patients per year.

#### Attachment I.

VA has addressed a Medical Center's ability to arrange physician schedules in order to meet patient care needs a number of times in prior 38 U.S.C. § 7422 decisions. In 2008, the Spokane VAMC changed the tour of hospitalists to provide for weekend rounds. Attachment N, VAMC Spokane (July 7, 2008). The USH determined that the decision to change the tour for hospitalists (inpatient physicians) was directly related to patient care and was excluded from collective bargaining. *Id.* In VAMC Charleston, the Charleston VA Medical Center began assigning Primary Care providers to the Urgent Care Unit which included scheduled "late stay" coverage thereby creating mandatory overtime. Attachment O, VAMC Charleston (May 27, 2005). The Union argued that "physicians are asked to work in Urgent Care after completing a full 8-hour tour of duty in Primary Care." *Id.* However, the USH determined that the decision to bargain over the hours of work of Primary Care physicians assigned to cover Urgent Care and scheduled "late stay" coverage was excluded from collective bargaining as a matter of professional conduct or competence, specifically direct patient care. *Id.*

As illustrated by decisions cited above, the Secretary has repeatedly held that physician schedules to meet patient care is a matter relating to direct patient care, a component of professional conduct or competence.

**DECISION**

The grievance claiming that the Medical Center regularly assigned physicians to work in excess of 40-hour work weeks or 80 hours within a two week pay period by scheduling the providers to perform roundings on a scheduled rotation 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.

APPROVED   XX  

DISAPPROVED \_\_\_\_\_



July 6, 2022

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Steven L. Lieberman, M.D.  
Deputy Under Secretary for Health,  
Performing the Delegable Duties of the  
Under Secretary for Health

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Date