

**Title 38 Decision Paper
Department of Veterans Affairs (VA)
Overton Brooks VA Medical Center (VAMC)**

FACTS

On October 9, 2020, the Overton Brooks VA Medical Center (Medical Center) held a preparation meeting with Phillips TeleICU project manager and other key Medical Center stakeholders regarding the Phillips TeleICU Site Assessment scheduled for October 20, 2020. Attachment A.

On November 12, 2020, the Phillips TeleICU project manager commenced a TeleICU Implementation Status Weekly Call to review the tasks and timeline for implementation of the TeleICU system. Attachment B.

Installation of the TeleICU equipment began in January 2021. Attachment C, *see also* Attachment I.

During the February 25, 2021 TeleICU Implementation Status Weekly Call, the Medical Center stated that the Louisiana State University (LSU) “residents are not withdrawing until April 1st, so the team decided we will not move forward with the 3/1 soft Go-Live. This allows the team an extra month to prepare.” Attachment C. In an email from the same day, the Chief of Medical Service, requested the “soft live date [trial] be in the last two weeks of March as we’ll be transitioning from a house staff-based model to attending -NP-Nurses model from April.” *Id.*

On March 30, 2021, the Medical Center’s Chief Nurse-Critical Care, instructed her staff to “utilize TeleICU as your first resource.” Attachment D.

On April 1, 2021, LSU Health Sciences Center “pulled six medical residents” from the Medical Center’s ICU department. Attachment E. Due to the loss of 6 medical resident ICU providers, “TeleICU was implemented as the anchor support for all bedside-virtual management in the ICU department.” Attachment I.

On April 5, 2021, the Medical Center’s Chief Nurse-Critical Care scheduled “a 30 minute question/answer time for ICU nursing and respiratory staff” for April 8, 2021, to answer questions regarding “bed closure and processes” in the ICU. Attachment F. The Union was invited and accepted the invitation but did not attend. Attachment I.

On April 16, 2021, the Union filed an Unfair Labor Practice Charge (ULP) with the Federal Labor Relations Authority (FLRA). Attachment G. The ULP asserted that the Medical Center “implemented the use of telework in the ICU department of the hospital without notifying the union and giving the union a chance to bargain the changes in working conditions.” *Id.*

On May 11, 2021, the Medical Center provided a response to the Union's ULP. Attachment H.

In June 2021, TeleICU's Go-Live was implemented. Attachment I.

On August 3, 2021, the Medical Center formally requested a 38 U.S.C. § 7422 determination. Attachment I. The Union did not submit a response.

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 J.

ISSUE

Whether a ULP charge claiming that the Medical Center refused to bargain over the Medical Center's implementation of TeleICU, a VA telehealth and modernization initiative to improve Veteran patients access to health care, concerns direct patient care and is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b), and thereby 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). 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, podiatrists, optometrists, registered nurses, physician's assistants, expanded-duty function dental auxiliaries, and chiropractors. *Id.*; see 38 U.S.C. § 7401(1).

The TeleICU program is a national program sponsored by the Office of Connected Care and the Veterans Health Administration (VHA). Attachment K. The Veterans Integrated Service Network (VISN) assists in "facilitating installation by participating in national calls with the project manager from the company that supplies the TeleICU equipment (Phillips), and assists in connecting the facility with the TeleICU clinical staff for education, questions, etc." *Id.* "TeleICU uses health information and telecommunication technologies to provide health care services in situations in which patient and practitioner are separated by geographic distance. TeleICU makes it possible to provide specialist advice to support the care of patients in an Intensive Care Unit in which this

expertise is required but not locally or readily available. The services provided range from consultative to full clinical support and may be time-based such as PRN (Pro Re Nata; as the situation demands), only at night, or up to 24/7 coverage.” Attachment L.

In April 2021, in response to the loss of six medical residents from the ICU, as well as the increased VA-wide initiatives to deliver virtual modalities of patient care through Telehealth services, the Medical Center implemented TeleICU “as the anchor support for all bedside-virtual management in the ICU. With loss of staff and complete dependence on Fee-basis and Locums attendings, TeleICU provides a layer of oversight and patient care that will not be possible without. If we were to stop TeleICU, the impact will lead to the shut down of the ICU.” Attachment M. TeleICU is utilized by 33 registered nurses, 3 physicians, and 6 contract registered nurses. Attachment I, see *also* Attachment N. Since the GO-LIVE implementation in June 2021, the Monthly Statistical data indicated the total patient interventions in June alone was 1157 video activations with providers for the care provided to Veteran patients in the ICU. Attachment I; see *also* Attachment O.

Providing care to patients, whether it is in person or virtual, is direct patient care. Determinations by the Medical Center as to modalities of patient care is a matter concerning direct patient care and is excluded from bargaining by the application of 38 U.S.C. § 7422.

The Secretary addressed a similar issue in a prior 7422 decision. In 2014, The Huntington Medical Center conducted multidisciplinary team rounds on a daily basis in which various teams comprised of health care disciplines to include RNs “meet as a group with patients to assess their comprehensive needs” and “collaborate to formulate short and long term health care plans specific to each patient.” VAMC Huntington (January 29, 2014) Attachment P. “One of the responsibilities of Intensive Care Unit (ICU) registered nurses participating on the multidisciplinary teams was to input initial and follow-up notes into the Computerized Patient Records System (CPRS), the electronic patient file.” *Id.* The Union filed a demand to bargain and the “ICU RNs informed management that the ‘core issue related to the Demand to Bargain was not related to participating in the rounds, but specifically the process where the RNs would input a note into CPRS.” *Id.* The Secretary concluded that “[C]ompleting the initial notes in CPRS and updating those notes as the patient progresses through treatment is unquestionably an important component of the patient’s care. Determinations by the Medical Center as to how much involvement ICU registered nurses will have in creating or updating the patient’s electronic treatment file is a matter concerning direct patient care and is excluded from bargaining by application of 38 U.S.C. § 7422.” *Id.*

As illustrated by the above decision, the Secretary has held the processes involved in patient care, including the timely provision of care to Veterans, is inextricably tied to direct patient care and excluded from bargaining by the application of 38 U.S.C. § 7422.

RECOMMENDED DECISION

A ULP charge claiming that the Medical Center refused to bargain over the Medical Center's implementation of TeleICU, a VA telehealth and modernization initiative to improve Veteran patients access to health care, concerns direct patient care and is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b), and thereby excluded from collective bargaining.

APPROVED/DISAPPROVED



Shereef Elnahal, M.D., MBA
Under Secretary for Health

10/13/2022

Date