

**Title 38 Decision Paper  
Department of Veterans Affairs (VA)  
VA Northern California Health Care System**

**FACTS**

On February 24, 2011, the VA Northern California Health Care System (VANCHCS or Management) submitted a request for a 38 United States Code (U.S.C.) § 7422 decision. In the request, VANCHCS states that it has had several shared clinical programs with the David Grant Medical Center (DGMC) at Travis Air Force Base, a Department of Defense (DoD) facility, since 1994. (Attachment A). VANCHCS asserts that its sharing agreements with DoD allow it to take advantage of joint incentive funding (JIF) opportunities and to offer a number of jointly staffed programs, including dialysis, neurosurgery, radiation oncology, cardiovascular care, physical therapy, endovascular surgery, hematology oncology infusion, and inpatient psychiatric care, that benefit its Veteran patients. (Attachment A-1). The most recent work force sharing agreement between VANCHCS and DGMC is from 2008 (2008 VA/DoD Sharing Agreement). (Attachment N-2).

In or around 2008, VANCHCS and DGMC submitted a JIF proposal for a Joint Inpatient Mental Health Unit that would be located at DGMC, would be jointly staffed by DoD and VA psychiatrists, and would provide “full service mental health inpatient care” for DOD and Veteran patients at a DoD/VA acute care psychiatric 20-bed unit. (Attachment A-1). The JIF proposal states that the Joint Inpatient Mental Health Unit would “allow for an increase in patient acuity and involuntary admissions enabling both services to expand and improve care for Global War on Terrorism (GWOT) [V]eterans and active duty members...and enhance the seamless transition of care from those patients being medically boarded from active duty to the VA for further care and treatment.” (Attachment A-1).

VANCHCS asserts that the mental health unit at DGMC was expanded from an 11-bed inpatient unit to a 20-bed acute care unit once the Joint Inpatient Mental Health Unit was established and that access to the Joint Inpatient Mental Health Unit has permitted Veteran patients to receive care “close to home and family support systems.” (Attachment A-2). Although it is not clear from the record when the parties’ JIF submission was approved, once the Joint Inpatient Mental Health Unit was established, VANCHCS asserts that the inpatient unit required around-the-clock access to VA and DoD psychiatrists. (Attachments A; A-1). Moreover, because of the expanded inpatient service available at the Joint Inpatient Mental Health Unit, VANCHCS asserts that VANCHCS psychiatrists were required to share half of the on-call schedule with DGMC psychiatrists and to take call approximately five times per year. (Attachment A). VANCHSC asserts that shared psychiatric call is not a new concept under the sharing

agreements between VANCHCS and DGMC; another joint psychiatric unit was established at DGMC in April 1994 that required VANCHCS psychiatrists to pull secondary call at DGMC; however, that unit was dissolved in July 1998. (Attachment A).

By e-mail dated February 12, 2010, the Director of the Mental Health Service Line at VANCHCS notified VANCHCS psychiatrists that DGMC was in the process of developing an on-call proposal for the Joint Inpatient Mental Health Unit and that Management would keep them informed of any changes in the status of the call schedule at DGMC. (Attachment C).

By e-mail dated March 24, 2010, the Union President of the American Federation of Government Employees Local 1206 (AFGE Local 1206 or Union) informed Management that it had recently been brought to the attention of AFGE Local 1206 that a work force sharing agreement had been reached between VANCHCS and DoD without prior notification to the Union. (Attachment D). The e-mail cited to Article 1 – Recognition and Coverage of the VA-AFGE 1997 Master Agreement to note that Management is obligated to not bypass the Union and Article 46 – Rights and Responsibilities of the VA-AFGE 1997 Master Agreement to note that Management is obligated to provide the Union with advance notice prior to changing conditions of employment. The e-mail stated the Union's official notice to cease and desist and demand to bargain the impact and implementation of the 24/7 on-call schedule. The e-mail went on to say that the Union was ready to bargain with Management on April 6, 2010, at 11:00 a.m. at the Fairfield Outpatient Clinic. (Attachment D).

By e-mail dated March 26, 2010, Management responded to the Union and indicated that the Mental Health Administration was available to meet on April 6, 2010, at 11:00 a.m. at the Fairfield Outpatient Clinic. (Attachment E).

By e-mail dated April 1, 2010, the Union President informed Management that the meeting needed to be rescheduled to either April 29 or May 4, 2010, at the same time and place, in order to accommodate all of the parties' schedules. (Attachment F).

By e-mail dated April 15, 2010, the Director of the Mental Health Service Line at VANCHCS notified VANCHCS psychiatrists that "DGMC on-call is a patient care issue, and is necessary now that VA NCHCS shares responsibility for the psychiatric inpatient unit at DGMC. Having two psychiatric inpatient units (one in the East Bay and one in the Sacramento Valley) has greatly enhanced the care that VA NCHCS MC can provide [V]eterans suffering with acute emotional and behavioral disorders. When the Mather Psychiatric Intensive Care unit (PICU) opened in March 2009, psychiatrists at Mather and McClellan began taking PICU on-call." (Attachment G). The e-mail went on to state that the DGMC on-call schedule would not be implemented until after Management had met with

VANCHCS psychiatrists as a group to explain what was involved and they had been oriented to the DGMC unit. (Attachment G).

By e-mail dated April 19, 2010, the Union President notified Management that "AFGE LOCAL 1206 is not attempting to negotiate the patient care aspect of "on-call" but demanding to bargain the adverse impact and implementation... [i]ncluding: commutes, safety, long work hours and length of time on duty." (Attachment H). The Union President's e-mail went on to state that the long commute to DGMC would likely deter VANCHCS psychiatrists from lengthy employment with VA and cited to "Article 16 – Employee Rights." "AFGE and the Department agrees that group meetings of employees serve as a useful means of communication and also agrees that AFGE Local 1206 shall be notified of such meetings and given the opportunity to attend. The Department will not bypass the Union by entering into any formal discussions or agreements with other bargaining unit employees concerning all matters affecting personnel policies, practices, or working conditions."<sup>1</sup> The e-mail closed with a request that Management notify the Union when a date and time was arranged to meet with the group of affected employees. (Attachment H).

By e-mail dated April 20, 2010, Management contacted the Union President and stated the following: "Under the provisions of 38 U.S.C., Physicians are subject to duty hours 24 hours a day and 7 days a week. Physicians are today, and always have been[,] subject to call back duty whenever the agency deems it necessary. As a matter of law, this is not negotiable. Additional[ly], we assert that the issue of coverage at the DGMC is a patient care matter exempt from negotiations under 38 U.S.C. 7422. We therefore respectfully decline your demand to bargain and negotiate this matter." (Attachment I). Nonetheless, the e-mail went on to say that in the spirit of partnership, the Union President would be invited to the meeting being scheduled with VANCHCS psychiatrists concerning the DGMC call schedule and that Management would listen and address concerns raised by the Union and VANCHCS psychiatrists. The e-mail further stated: "Your attendance and involvement in this meeting ... is welcomed and appreciated." Also, it stated Management would honor the Union President's request for a pre-meeting with Mental Health Officials. (Attachment I).

On June 18, 2010, Management met with the Union and VANCHCS psychiatrists to discuss the DGMC on-call schedule and their concerns, including arrangements for providers to sleep at DGMC, orientation, access to food and drink, etc. (Attachment K).

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<sup>1</sup> This is not the exact language from Article 16, Section 12 of the VA-AFGE 1997 Master Agreement. Section 12 states: "The Department agrees that group meetings of employees serve as a useful means of communication and agrees that regular and periodic (preferably monthly) group meetings will be held within each service, department, or unit to discuss concerns of both the Department and employees. The Union shall be notified of such meetings and given the opportunity to attend." Based on the parties' submissions, it is unclear if this language is from an applicable Local Supplemental Agreement.

On July 16, 2010, a Management representative, \_\_\_\_\_, e-mailed the Union President and informed her that, "Mental health has gone over the terms you are requesting to support the implementation of the on call schedule. They have also ran it by the Director for his support on providing much of what you have asked." \_\_\_\_\_ inquired if the Union President was available the following week to discuss the matter and stated that, "in the event that [the Union President was] satisfied with their response, [did the Union President] see a need to come back to the table for negotiating?" (Attachment N-3A). Although the Union had asked for the parties to participate in a meeting in Oakland, California, to finalize negotiations, \_\_\_\_\_ indicated that Mental Health did not believe such a meeting was necessary in light of the time and resources it would require for 10 to 14 managers to attend. (Attachment N-3C). In addition, he asserted that Management already agreed to many of the items the Union requested but could not agree to items for which there was no funding. (Attachment N-3C). \_\_\_\_\_ did indicate that he was available to meet with the Union as the Management representative and to finalize an agreement. (Attachment N-3C).

By e-mail dated July 23, 2010, the Medical Director for Inpatient Services for Mental Health at VANCHCS contacted VANCHCS psychiatrists concerning their in-processing at DGMC. (Attachment J). The e-mail addressed training for providing on-call duties at DGMC that would commence at the beginning of September as well as training on the use of DGMC computer systems, orientation, and credentialing. (Attachment J).

By e-mail dated July 26, 2010, the Union President contacted Management and reiterated its formal request that Management cease and desist on call implementation. (Attachment K). The e-mail also referenced concerns held by VANCHCS psychiatrists concerning malpractice liability while performing call at DGMC and Management's obligation to not bypass the Union when communicating with bargaining unit employees. The Union requested dates and times for a follow-up meeting. (Attachment K).

By e-mail dated July 30, 2010, the Union President contacted Management again to state that the Chief of Psychiatry at DGMC, a non-VA authority, had been directing VANCHCS psychiatrists to perform work. (Attachment L). The e-mail reiterated the Union's concerns about VA psychiatrists' malpractice liability while performing call at DGMC and Management's obligation to not bypass the Union. (Attachment L).

On that same date, the VA medical center Director advised the Union President and VANCHCS psychiatrists that the affected physicians would be covered by the Federal Tort Claims Act for any alleged malpractice in connection with the joint venture. (Attachment L-1). Regional Counsel confirmed this in an e-mail dated August 16, 2010. (Attachment L-2).

On August 2, 2010, the Union filed an unfair labor practice (ULP) charge with the Federal Labor Relations Authority (FLRA) concerning VANCHCS' alleged violation of 5 U.S.C §§ 7116(a) (1), (5) and (8) of the Federal Service Labor-Management Relations Statute (FSLMRS). (Attachment M). Among other things, the ULP asserted that Management bypassed the Union "by negotiating directly with bargaining unit employees regarding conditions of employment, specifically on call scheduling at a military base," failed to submit counter proposal to the Union, and failed to provide the Union with "the information/material relied upon to determine that a drastic change in working conditions [was] necessary."

On September 9, 2010, [redacted] e-mailed the Union President in order to inform her of the VAMC's "position as it pertain[ed] to the requirement for the Psychiatrist[s] to provide on call coverage at the David Grant Medical Center, and to see if [she was] willing to finalize the MOU [the parties] started under Partnership." (Attachment N-3C). [redacted] summarized the parties' communications concerning VANCHCS psychiatrists' on-call duties at DGMC to date. (Attachment N-3C). His e-mail also stated that the on call schedule could not "be delayed any longer," that VA needed to provide "on call coverage to the Mental Health unit," and that VA needed to honor "VA's agreement with the Air Force to share coverage" and provide the "critical assistance" to patients. (Attachment N-3C). Finally, [redacted] notified the Union that "Management [was] developing a request to forward to the Under Secretary for Health informing him that the VANCHCS consider[ed] the on call requirement ...[to be] an issue involving Direct Patient Care." (Attachment N-3C).

On or about September 28, 2010, VANCHCS implemented the on-call schedule at DGMC, which required VANCHCS psychiatrists to share weekday/weekend call on a 7-day rotation schedule with DGMC psychiatrists. (Attachment A).

On October 13, 2010, VANCHCS Management, through Regional Counsel, responded to the ULP charge, advising the FLRA that VANCHCS would be seeking a 38 U.S.C. § 7422 determination, and asking that the matter be suspended pending that determination. (Attachment M-1).

On November 5, 2010, the Union submitted a request for a 38 U.S.C. § 7422 decision directly to the Secretary of the Department of Veterans Affairs. (Attachment N). The Union's request references a 38 U.S.C. § 7422 request that had been submitted, or that was going to be submitted, by VANCHCS concerning the assignment of VA psychiatrists, who normally perform outpatient mental health service duties at VANCHCS, to a weekday/weekend call schedule that would require them to provide inpatient mental health services at DGMC pursuant to the 2008 VA/DoD Sharing Agreement. The Union included copies of VA Handbook 5011 and the 2008 VA/DoD Sharing Agreement with its request. (Attachments N-1; N-2).

Management submitted its related request for a 38 U.S.C. § 7422 decision on or around February 24, 2011.<sup>2</sup> (Attachments A; A-1; and A-2).

The Union's request<sup>3</sup> for a 38 U.S.C. § 7422 decision alleges that VANCHCS committed a ULP when it denied the Union its pre-decisional involvement rights, failed to give the Union advance notice, bypassed the Union, and refused to bargain with the Union prior to implementing a change in working conditions. (Attachment N). Specifically, the Union alleges that the change in working conditions – the requirement that VANCHCS psychiatrists who had previously worked at VA outpatient clinics travel from their primary duty stations to DGMC to provide inpatient mental health services for weekday/weekend call – was more than a de minimis change that was implemented without advance notice to the Union or bargaining, in violation of the FSLMRS. (Attachment N). In addition, the Union asserts that the change violated “VA Regulation 5401<sup>4</sup>” and that the VANCHCS unilaterally asserted 38 U.S.C. § 7422 and refused to engage in bargaining prior to obtaining a decision from the VA Secretary.<sup>5</sup> Att. N. Further, the Union contends that VANCHCS violated Article 46, Section 4, of the parties' 1997 Master Agreement which, among other things, requires Management to “provide reasonable advance notice to the Union... prior to changing conditions of employment of bargaining unit employee.” (Attachment N). The Union also argues that the regular tour of duty of the at-issue VANCHCS psychiatrists is from 8:00 a.m. to 4:30 p.m. and that “travelling from their primary duty station to Travis AFB, which is approximately 120 miles from their regular duty station to perform Inpatient hospital duties ... create[s] undue burdens and safety risk on these physicians” and forces them to work more than 40 hours per week. (Attachment N). The Union argues that the provision of in-patient mental health services, on a 24-hour basis, at DGMC and associated travel to DGMC constitutes “work outside [the VA psychiatrists'] job descriptions.” (Attachment N). The Union references pages 17 and 18 of 2008 VA/DoD Sharing Agreement as support for its contention that DoD, and not VA, psychiatrists are responsible for staffing the Joint Inpatient Mental Health Unit at

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<sup>2</sup> Since requests for 38 U.S.C. § 7422 decisions must be submitted through the VA Office of Labor Management Relations and the VANCHCS had yet to submit a request for a 38 U.S.C. § 7422 decision, it took some time for the Union's request to be appropriately routed through the Department. Due to the length of time between the parties' original requests for a 38 U.S.C. § 7422 decision and this decision, the parties were given the opportunity to submit additional documentation. Both the Union and Management were given the opportunity to submit additional documentation that has been included in the administrative record. (Attachments C–R).

<sup>3</sup> In parts, the Union's 38 U.S.C. § 7422 request appears to address arguments previously asserted by VANCHCS in another forum or in other correspondence. This decision only addresses the arguments and documentation that the Union and Management forwarded to the Secretary.

<sup>4</sup> We are aware of no “VA Regulation 5401” and are unable to address it since the Union neither described it nor provided a copy with its submissions.

<sup>5</sup> The VA Secretary, or designee, has the sole authority to determine the issue of whether a matter or question concerns or arises out of professional conduct or competence, peer review, or the establishment, determination, or adjustment of employee compensation under 38 U.S.C. § 7422. 38 U.S.C. § 7422 (d).

DGMC. (Attachments N; and N-2). Finally, the Union cites VA Handbook 5011 to support its argument that VANCHCS psychiatrists are entitled to two administrative non-duty days each week and that VA psychiatrists' provision of inpatient psychiatric call at DGMC are not considered "administrative duties." (Attachments N; and N-1).

On April 26, 2011, the FLRA issued a Complaint and Notice of Hearing concerning the Union's ULP. (Attachment N-3). The complaint stated that when Management "changed conditions of employment for bargaining unit employees [by] implement[ing] on-call assignments" at DGMC and failed to give "notice to the [Union]...without bargaining to the extent required by the [FSLMRS]," Management "committed an unfair labor practice in violation of 5 U.S.C. §§ 7116(a)(1) and (5)." (Attachment N-3). Management filed an answer to the FLRA's complaint on May 19, 2011. (Attachment N-3B).

After being notified that the FLRA was prepared to litigate the Union's ULP, Management and AFGE Local 1206 entered into a settlement agreement on May 26, 2011, that required the parties "to engage in prospective impact and implementation bargaining to the extent required by the [FSLMRS] over the assignment of outpatient psychiatrists to inpatient on-call duties at the [DGMC], including but not limited to the use of government vehicles for on-call duties; mileage and meal reimbursement, and, lodging..." (Attachments N-4; and O).

Although the Union submitted a set of impact and implementation proposals to Management on September 5, 2011, the parties have not met to bargain the proposals to date. (Attachments P; P-1; Q; R; and S).

### **38 U.S.C. § 7422 AUTHORITY**

The Secretary has the final authority in VA 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).

### **ISSUE**

Whether the Union's ULP concerning VANCHCS Management's assignment of VANCHCS psychiatrists to take call for the acute care of Veteran patients at DGMC Joint Inpatient Mental Health Unit and doing so without notice to and bargaining with the Union involve issues concerning or arising out of professional conduct or competence (i.e., direct patient care).

### **DISCUSSION**

The Department of Veterans Affairs Labor Relations Act of 1991, codified at

38 U.S.C. § 7422, granted collective bargaining rights to Title 38 employees in accordance with Title 5 provisions, but 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 and employee compensation as determined by the VA Secretary.

Pursuant to 38 U.S.C. § 7421(a), the VA Secretary has prescribed regulations contained in VA Directive and Handbook 5011 concerning the hours of duty and leave of Title 38 medical professionals, including physicians. (Attachment N-1). These regulations, in relevant part, provide:

“Full-time physicians... shall be continuously subject to call unless officially excused by proper authority. This requirement as to availability exists 24 hours per day, 7 days per week.” VA Handbook 5011/12, Part I, Paragraph 3 (e)(2).

“In scheduling hours and tours of duty for VA employees, primary consideration will be given to efficiency in management and conduct of agency functions, and equitable treatment of individual employees. Work schedules will be established in a manner that realistically reflects the actual work requirement... In [the] Veterans Health Administration (VHA), the proper care and treatment of patients shall be the primary consideration in scheduling tours of duty under these instructions. Duty schedules shall be established as appropriate and necessary for performance of services in the care and treatment of patients and other essential activities within the administrative discretion of the Under Secretary for Health or designated officials...” VA Handbook 5011, Part II, Chapter 1, Paragraph 2(a)-(b).

“Unless otherwise indicated, the “basic workweek” for full-time employees shall be 40 hours in length. The normal tour of duty within the 40-hour basic workweek shall consist of five 8-hour days, exclusive of the meal period. Directors of field facilities, or their designees, are authorized to fix the hours of duty constituting the normal tours of duty within the 40-hour basic workweek. Full-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 requirement as to availability exists 24 hours per day, 7 days per week.” VA Handbook 5011/12, Part II, Chapter 3, Paragraph 2 (a).

“Full-time physicians... shall be permitted some periods of time free from official duty to the extent that this does not impair provision of essential services in patient treatment and care. Each such full day granted shall be called an “administrative non-duty day.” VA Handbook 5011/12, Part II, Chapter 3, Paragraph 2 (b).



“Because of the continuous nature of the services rendered at hospitals, the facility Director, or designee (in no case less than a chief of service), has the authority to prescribe any tour of duty to ensure adequate professional care and treatment to the patient, consistent with these provisions.” VA Handbook 5011, Part II, Chapter 3, Paragraph 2(d). (Attachment N-1).

Pursuant to VA Handbook 5011, the proper care and treatment of Veteran patients is the primary consideration in the scheduling of VA physician tours of duty, full-time VA physicians must be available 24 hours per day, 7 days per week, VA physicians are continuously subject to call unless officially excused by proper authority, and a facility Director or designee has the authority to prescribe any tour of duty to ensure adequate professional care and treatment of Veteran patients. (Attachment N-1). In the instant case, Management asserts that it implemented the new on-call requirement for VANCHCS psychiatrists at DGMC Joint Inpatient Mental Health Unit to provide acute psychiatric care in the expanded inpatient program resulting from the 2008 VA/DoD Sharing Agreement. (Attachment A). The JIF Proposal for the 2008 VA/DoD Sharing Agreement states that DGMC Joint Inpatient Mental Health Unit would “allow for an increase in patient acuity and involuntary admissions enabling both services to expand and improve care for Global War on Terrorism (GWOT) [V]eterans and active duty members...and enhance the seamless transition of care from those patients being medically boarded from active duty to the VA for further care and treatment.” (Attachment A-1). Management also asserts that the Joint Inpatient Mental Health Unit has enabled Veteran patients to receive 24/7, full-service mental health inpatient care closer to their homes and family support systems. (Attachments A; and A-1).

The underlying Management decision to assign VANCHCS psychiatrists to share weekday/weekend call on a 7-day rotating schedule at DGMC Joint Inpatient Mental Health Unit is not subject to collective bargaining under 38 U.S.C. § 7422. Management implemented the change to allow Veteran patients to receive acute psychiatric care in an inpatient unit. Thus, the scheduling change concerns or arises out of professional conduct or competence (i.e., direct patient care) and is therefore non-negotiable under 38 U.S.C. § 7422(b)(1). This decision is consistent with previous 38 U.S.C. § 7422 determinations concerning physician scheduling. The Under Secretary for Health has determined in prior 38 U.S.C. § 7422 decisions that changes in physician schedules to meet patient care needs were matters involving professional care and competence within the meaning of U.S.C. § 7422 and therefore non-negotiable. See, e.g., VAMC Mountain Home, November 30, 2009; VAMC Spokane, July 7, 2008; Alaska VA Health Care System, August 22, 2005; VA Palo Alto Health Care System, October 11, 2005; and, VAMC West Palm Beach, March 15, 2005.

In its ULP and 38 U.S.C. § 7422 request, the Union asserts: (1) Management instituted the scheduling change for VANCHCS psychiatrists in violation of VA

policy; (2) Management bypassed the Union when it directly communicated with VANCHCS psychiatrists concerning their on-call scheduling at DGMC in violation of the FSLMRS and Articles 1 and 16 of the VA-AFGE 1997 Master Agreement; (3) Management refused to bargain with the Union prior to implementing the scheduling change in violation of the FSLMRS and Article 46 of the VA-AFGE 1997 Master Agreement; (4) Management did not provide the Union with the information/material relied upon to determine that an on-call scheduling change was necessary in violation of the FSLMRS; and (5) Management denied the Union its right to pre-decisional involvement and advanced notice prior to significantly changing VANCHCS psychiatrists' working conditions, which placed an undue burden upon them.

The Union cites several provisions in VA Handbook 5011 to support its argument that the VANCHCS failed to follow VA policy when instituting the scheduling change. (Attachment N). Specifically, the Union points to VA Handbook 5011, Part II, Chapter 1, paragraph 2(b) to argue that Management failed to consider that the "physicians in question have a normal schedule where they are on call during workweeks and weekends." (Attachments N; and N-1). However, VANCHCS Management's actions and the scheduling change were consistent with the requirements of VA Handbook 5011, Part 1, Paragraph 3(e)(1), which requires full-time VA physicians to be available for call 24-hours per day, 7 days per week. (Attachment N-1). In addition, the Union cites VA Handbook 5011, Part II, Chapter 3, paragraph 2(b) and emphasizes that the policy states: "VA outpatient clinic employees will normally perform duty Monday through Friday of each workweek. The remaining 2 days (Sunday, the first day of the workweek and Saturday, the last day of the workweek) shall be designated as the administrative non-duty days of the workweek for physicians." (Attachments N; and N-1). The Union also cites to VA Handbook 5011, Part II, Chapter 3, Paragraph 2(d) to emphasize that it focuses on "...the continuous nature of the services rendered at hospitals..." and not out-patient clinics. (Attachments N; and N-1). While VA Handbook 5011 notes what the general scheduling practice at VA outpatient clinics normally is, it does not prohibit the use of weekend/weekday call for providers at VA outpatient clinics. (Attachment N-1). In fact, VA Handbook 5011, Part II, Chapter 3, Paragraph 2(b) states that: "[u]nusual circumstances may make it necessary, however, for the Under Secretary for Health, chief consultants, or facility directors, as appropriate, to alter these provisions [concerning the normal workweek of an outpatient clinic provider] for specific individuals or groups of individuals in the best interests of the service." (Attachment N-1). The Joint Inpatient Mental Health Unit at DGMC does not function in the same way as an outpatient clinic that provides non-acute care; Management argues that an "acute care psychiatric unit requires full-time, around-the-clock access to psychiatrists." (Attachments A; and A-1).

The Union also argues that Management bypassed the Union, refused to bargain in good faith with the Union, and failed to furnish the Union with requested information in violation of the FSLMRS and the VA-AFGE 1997

Master Agreement when it implemented the scheduling change. However, since these claims directly concern or arise out of Management's assignment of a weekday/weekend rotating on-call schedule at DGMC to VANCHCS psychiatrists, neither the collective bargaining provisions of the FSLMRS nor the general requirements of the VA-AFGE 1997 Master Agreement apply. 38 U.S.C. § 7422 (b); VA-AFGE 1997 Master Agreement – Article 1, Section 1 (Federal statutes, like 38 U.S.C. § 7422, govern the parties' administration of all matters covered by the Master Agreement). Therefore, Management was not required to consult or bargain with, or provide advance notice or information, to the Union over the scheduling change.

Pursuant to the parties' ULP settlement agreement, Management agreed to engage in prospective impact and implementation bargaining "to the extent required by the [FSLMRS] over the assignment of outpatient psychiatrists to inpatient on-call duties at the [DGMC], including but not limited to the use of government vehicles for on-call duties; mileage and meal reimbursement, and lodging." (Attachment O). Although Management agreed to engage in impact and implementation bargaining under the terms of the FLRA settlement, impact and implementation bargaining is inapplicable to matters covered by 38 U.S.C. § 7422 (b).<sup>6</sup> This conclusion follows from the expansive nature of the language in 38 U.S.C. § 7422(b), which states in part that collective bargaining "may not cover, or have any applicability to, any matter or question concerning or arising out of" professional conduct or competence. When an issue, such as assignment of psychiatrists to on-call duty at another facility, is determined to be a matter excluded by application of 38 U.S.C. § 7422, any proposals concerning or arising out of the excluded matter are similarly excluded from bargaining. This understanding was reemphasized in the preamble to the Joint 38 U.S.C. § 7422 Workgroup Recommendations as revised and approved by the Secretary of the Department of Veterans Affairs (Secretary's Decision Document): "Nothing in this means 7422 is being expanded to appropriate arrangements and procedures (impact and implementation)." (Attachment T). At the same time, the Secretary's Decision Document requires Management to "engage in good faith dialogue" with the Union when Management "intends to make a change in personnel policies, practices and matters affecting working conditions." (Attachment T, Section C(5)).<sup>7</sup> While the record is replete with efforts by Management to meet and discuss the new on-call scheduling arrangements with both the affected VANCHCS psychiatrists and the Union, Management may, and

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<sup>6</sup> While neither party addressed the Union's impact and implementation proposals in their 38 U.S.C. § 7422 requests, presumably because the requests pre-dated the ULP settlement agreement, the proposals were subsequently submitted for inclusion in the administrative record. (Attachment P-1).

<sup>7</sup> Section C(4) of the Secretary's Decision Document also states that "Management will strive to provide advance notice of proposed changes in personnel policies, practices and matters affecting working conditions before implementation of the change whenever possible." (Attachment T).

should, continue to discuss any remaining concerns about the changes in working conditions.<sup>8</sup> (Attachments I; K; N-3A; and N-3C).

**RECOMMENDED DECISION**

That the assignment of rotating on-call schedules at the DGMC Joint Inpatient Mental Health Unit to VANCHCS psychiatrists and resulting ULP, alleging violations of 5 U.S.C §§ 7116(a) (1), (5) and (8) of the FSLMRS, bypass and failure to provide information and bargain prior to implementing a change in working conditions, involve issues concerning or arising out of professional conduct or competence (i.e., direct patient care) within the meaning of 38 U.S.C. § 7422(b)(1).

APPROVED DISAPPROVED



Eric K. Shinseki  
Secretary

8/29/2013

Date

<sup>8</sup> Executive Order 13522 also makes clear that discussions with employees and the Union prior to reaching management decisions concerning workplace matters should take place "to the fullest extent practicable."