

1/23/01

Title 38 Decision Paper – VAMC Biloxi

FACTS

M.D. is a full-time staff physician with the VA Medical Center, Biloxi, Mississippi, who has board certifications in internal medicine, intensive care, pulmonary medicine, and Advance Cardiac Life Support. On March 19, 1999, the American Federation of Government Employees, Local 1045 (AFGE) gave the medical center notice that _____ would be the Executive Vice President of Local 1045 and that he would be performing union business 50% of his regular duty time. On September 17, 1999, the Chief of Staff notified _____ that effective October 4, 1999, he would be reassigned from an 8:00 a.m. to 4:30 p.m. tour in Extended Care Service to a 12:00 noon to 8:30 p.m. tour in the emergency room. On or about September 20, 1999, the Chief, Human Resources Management Service notified _____ that the scarce specialty pay component of his special pay would be reduced by 50% because half of his regular duty time was devoted to union activities.

AFGE filed an unfair labor practice charge (ULP) with the Federal Labor Relations Authority (FLRA) alleging that _____ was reassigned and his special pay reduced in retaliation for his union activities. Management asserted that _____ was reassigned because of workload requirements and his unique qualifications. His scarce specialty pay was reduced as required by law to reflect the proportion of time he spent performing patient care duties in his specialty. On August 25, 2000, the FLRA issued a Complaint and Notice of Hearing charging the agency with taking the actions against _____ because of his activities on behalf of the union.

In response to the ULP, the agency alleged that the VA has sole, exclusive and unfettered authority to reassign _____, change his tour of duty and reduce his special pay since these matters involve professional conduct or competence and compensation. Moreover, such authority is not subject to collective bargaining and may not be reviewed by a third party. In the opinion of the agency, therefore, the FLRA, has no jurisdiction to review the ULP.

The Secretary delegated to the Under Secretary for Health the final authority in the VA to decide whether disputes arise out of a matter or question of professional conduct or competence or relate to the establishment, determination, or adjustment of employee compensation. When a dispute is submitted to the Under Secretary for Health for a decision, "The VA Partnership Council's Guide to Collective Bargaining and Joint Resolution of 38 U.S.C. 7422 Issues" sets forth a procedure for labor and management to attempt resolution through involvement of the local and national partnership councils. If the parties are unable to resolve the dispute, the Under Secretary for Health is asked to render a decision.

DISCUSSION

Title 38 U.S.C. 7431(a) empowers the Secretary to provide special pay for physicians and to prescribe regulations to carry out the subchapter. Section 7433(b)(3) authorizes scarce specialty special pay. The annual rate for scarce specialty special pay is limited to "the proportion of time served in the specialty." 38 U.S.C. 7433(B)(3)(B). VA regulations in MP-5, Part II, Chapter 3, Appendix F, paragraph 2.b. provide that for physicians who spend a portion of their time in a scarce specialty, and a portion of their time in a medical specialty which is not designated as a scarce specialty, the actual amount of scarce specialty pay shall be determined by the percentage of time the physician works in the scarce specialty. Furthermore, for primary care (which is the basis of ~~scarce specialty special pay~~), paragraph 3d of the regulations provides, "To receive 100 percent of the component, a physician must work full-time in the specialty." The VA was required by statute and regulations to make the adjustment reducing by 50% the scarce medical specialty component of ~~physician special pay~~ to reflect the percentage of time he was spending on patient care activities. The reduction in ~~special pay~~ clearly was a "matter or question concerning or arising out of ... the establishment, determination, or adjustment of employee compensation" under section 7422.

RECOMMENDATIONS

It is recommended that the Under Secretary for Health determine that ~~reassignment and change in tour of duty, which were for patient care reasons, arise out of professional competence or conduct under 38 U.S.C. 7422, and are outside the scope of collective bargaining.~~

It is recommended that the Under Secretary for Health determine that the reduction in special pay of ~~was required by 38 U.S.C. 7432(c)(3), which authorizes the Secretary to adjust special pay as necessary to reflect any changes in the status of a physician and is outside the scope of collective bargaining.~~

In a memorandum dated May 12, 2000, the Director of the VAMC Biloxi requested that the Under Secretary for Health make a determination as to whether the issues fall within the scope of 38 U.S.C. 7422. On November 8, 2000, the parties were unable to resolve their dispute during a conference call with representatives from the national AFGE and the Office of Labor-Management Relations in Central Office.

ISSUE

Whether the VA has sole, exclusive and unfettered authority to reassign from Extended Care Service to the emergency room and to change his tour pursuant to 38 U.S.C. 7421(a) and 7422.

DISCUSSION

Under 38 U.S.C. 7422, any matter affecting physicians hired pursuant to Title 38 concerning or arising out of professional conduct or competence, peer review, or the establishment, determination or adjustment of employee compensation is outside the scope of collective bargaining and is not subject to review by any other agency. The law authorizes the Secretary, or delegatee, to make the determination of any question arising under its provisions. The Secretary has delegated to my office the authority to make any such determinations, which are not subject to administrative review under the law.

The Secretary has prescribed regulations, VHA Handbook 5111, pursuant to 38 U.S.C. 7421(a), to implement assignments, staff adjustments and furloughs. Management determined that staffing changes were necessary in the emergency room for reasons of direct patient care and clinical competence: to decrease patient waiting times and improve customer service and to best utilize the clinical competencies of [redacted] was uniquely qualified because he has board certifications in internal medicine, intensive care and pulmonary medicine and a certification in Advance Cardiac Life Support. Based on all of these factors, the VAMC assigned [redacted] to the emergency room because he was the most qualified physician to meet the patient care needs of the medical center. Clearly, this reassignment was a "matter or question concerning or arising out of ... professional conduct or competence" under section 7422.

ISSUE

Whether the VA has sole, exclusive and unfettered authority over the adjustment made to the scarce medical specialty component of special pay pursuant to 38 U.S.C. 7421(a), 7422, and 7431-7438.

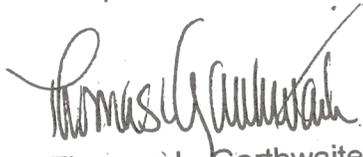
DECISION

Under the authority in 38 U.S.C. 7422(d), I find/~~do not find~~:

that reassignment from Extended Care Service to the emergency room and the change in his tour of duty concern or arise out of a matter or question of professional conduct or competence.

Under the authority in 38 U.S.C. 7422(d), I find/~~do not find~~:

that the adjustment to the scarce medical specialty component of special pay to appropriately reflect the amount of time he could be engaged in the scarce medical specialty concerns or arises out of a matter or question of the establishment, determination, or adjustment of employee compensation under Title 38.



Thomas L. Garthwaite, M.D.
Under Secretary for Health

1/23/2001
Date