

71 FLRA No. 217

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VA MEDICAL CENTER
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

0-AR-5572

DECISION

November 23, 2020

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

Decision by Member Abbott for the Authority

I. Statement of the Case

In this case, we hold 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).

Arbitrator Jerome A. Diekemper found that the Agency violated the parties’ collective-bargaining agreement (CBA) and other Agency directives by scheduling the grievants to work on weekends and in excess of forty-hours per week. For the reasons discussed below, we find that the grievance is non-arbitrable. We set aside the award.

II. Background and Arbitrator’s Award

The grievants are physicians – Title 38 health care professionals under the U.S. Code, subject to unique federal employee rules and requirements – at one of the Agency’s hospitals. The grievants work a regular forty-hour workweek but are required to perform rounds (“rounding” duties) typically two weekend days per month. When the physicians are performing rounding duties, they primarily visit and assess patients

and order any necessary tests, treatments, or medications, which can take one to six hours.

In 2014, the Agency revised its policy regarding the basic workweek for full-time physicians in order to cover extended service hours during evenings and weekends. The policy is set out in VA Handbook 5011/27 and defined the basic workweek for full-time physicians as 40 hours, from Sunday through Saturday. Article 35, Section 20 (Article 35) of the parties’ CBA authorizes hospital directors to approve absences for “rest and relaxation.”¹

In 2017, the Union filed a grievance alleging that the Agency was violating the CBA and VA Handbook 5011/27 by scheduling physicians to work on weekends in excess of forty hours per week. The Union requested that the Agency cease scheduling physicians for more than forty hours per week and provide retroactive “rest and relaxation” for those periods of time when the grievants worked more than forty hours during any given week. The parties failed to resolve the matter and the Union invoked arbitration.

In his award dated November 13, 2019, the Arbitrator framed the issue as follows:

Did the Agency violate the CBA and any associated guidance and/or directives in scheduling Title 38 physicians to perform patient rounding on Saturdays and/or Sundays during weeks they were also scheduled for their regular 40-hour tours of duty? If so, what is the appropriate remedy?²

¹ Award at 12-13.

² *Id.* at 5. The issue statement that the parties jointly agreed to at the hearing was as follows:

Did John J. Pershing VA Medical Center (the Agency) unilaterally interpret the provisions of the Master Collective Bargaining Agreement and VA as well as the VHA Handbooks and Directives and applicable Federal Laws? In doing so, did the Agency implement an unwritten practice and/or policy related to “provider roundings” which directly impacted bargaining unit physicians without first providing proper notice to the exclusive representative, the American Federation of Government Employees (AFGE) Local 2338 (the Union) which violated the Master Collective Bargaining Agreement? If so, what shall the remedy be?

Exceptions, Attach. 4, Joint Ex. 15 Agreed Upon Issue Statement.

The Agency argued that because the grievance concerns compensation and direct patient care, the grievance is not arbitrable because those matters are excluded from the grievance procedure by 38 U.S.C. § 7422. As relevant here, § 7422 excludes from the negotiated grievance procedure any “matter or question” concerning either “professional conduct or competence,” including patient care, or “employee compensation.”³

The Arbitrator agreed that rounding duties involve “physician-patient care” because those duties require the physicians to enter the hospital and examine patients.⁴ However, he also found that the CBA does not describe “rest and relaxation” as pay or compensation. According to the Arbitrator, the parties “would not have negotiated a section to provide for rest and relaxation if that topic was taboo and prohibited by federal statute.”⁵ Therefore, he concluded that rest and relaxation does not involve pay or compensation and that the grievance is not barred by § 7422.

The Arbitrator sustained the grievance, concluding that the Agency violated the CBA and VA Handbook 5011/27 by scheduling weekend rounding outside of the basic forty-hour workweek. The Arbitrator ordered the Agency “to include weekend rounding assignments in the basic 40-hour workweek by scheduling a two-hour workday for each shift of weekend rounding” and to adjust one of the other workdays to be six hours.⁶ He also ordered the Agency to provide the grievants retroactive rest and relaxation time.

The Agency filed exceptions to the award on December 12, 2019. The Union filed an opposition to the Agency’s exceptions on January 14, 2020.

III. Analysis and Conclusion: The award is contrary to law because the grievance is not substantively arbitrable.

The Agency argues that the award is contrary to 38 U.S.C. § 7422⁷ because the grievance concerns professional conduct or competence and affects compensation.⁸ Specifically, the Agency contends that the award impacts direct patient care by requiring the Agency to adjust scheduling and to authorize rest and relaxation time, which interferes with the Agency’s ability to schedule the grievants to provide direct patient care.⁹ The Agency also argues that the award affects compensation by forcing the Agency to provide paid rest and relaxation time off.¹⁰

Under § 7422(b), “matter[s] or question[s] concerning or arising out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation” are specifically excluded from collective bargaining and coverage by a negotiated grievance procedure for certain medical professionals, including physicians.¹¹ The term “professional conduct or competence” means, in part, direct patient care.¹² Whether a matter or question falls within one of these specified areas “shall be decided by the Secretary [of the VA] and is not itself subject to collective bargaining and may not be reviewed by any other agency.”¹³

The issue in this case, as framed by the parties and the Arbitrator, concerns when the physicians are scheduled to provide direct patient care.¹⁴ The Arbitrator found that weekend rounding “involves physician patient care work” – “see[ing] and examin[ing] patients.”¹⁵ While focusing on whether “rest and relaxation” involves “pay or compensation” under § 7422,¹⁶ the Arbitrator failed to analyze whether § 7422 bars the grievance because scheduling weekend rounding involves direct patient care. But his factual findings support the conclusion that this case clearly concerns a matter of professional conduct or competence within the meaning of § 7422(b).¹⁷ Furthermore, the Secretary of the VA has repeatedly found that the Agency’s ability to control the work schedules of Title 38 professionals is a matter involving professional conduct or competence because it implicates the Agency’s ability to provide direct patient

Fed. BOP, Fed. Corr. Inst., Tallahassee, Fla., 71 FLRA 622, 623 (2020) (Member DuBester concurring) (citing *NAIL, Local 5*, 70 FLRA 550, 552 (2018) (Member DuBester concurring)). In reviewing de novo, the Authority assesses whether an arbitrator’s legal conclusions are consistent with the relevant legal standards. *Id.* Under this standard, the Authority defers to the arbitrator’s underlying factual findings unless the excepting party establishes that they are nonfacts. *Id.* (citing *AFGE, Local 2338*, 71 FLRA 343, 344 (2019)).

⁸ Exceptions at 5.

⁹ *Id.*

¹⁰ *Id.*

¹¹ 38 U.S.C. § 7422(b).

¹² *Id.* § 7422(c)(1).

¹³ *Id.* § 7422(d).

¹⁴ See Award at 3 (citing the grievance which alleges that the Agency violated the CBA by “scheduling providers to work more than forty (40) hours per week” and that it “has scheduled providers to work on weekends”); *Id.* at 3-4 (the Arbitrator stated that “the Union was really grieving the continuing practice of many years of scheduling bargaining unit physicians to perform patient ‘rounding’ on weekends”).

¹⁵ *Id.* at 9.

¹⁶ *Id.* at 21.

¹⁷ See, e.g., *id.* at 9 (finding that in order to perform weekend rounding duties, “[t]he physician had to actually go to the hospital to see and examine patients”).

³ 38 U.S.C. § 7422.

⁴ Award at 9.

⁵ *Id.* at 21.

⁶ *Id.* at 23.

⁷ When an exception involves an award’s consistency with law, the Authority reviews any question of law de novo. *U.S. DOJ,*

care.¹⁸ Consequently, the grievance is excluded from the negotiated grievance procedure pursuant to § 7422(b).

We set aside the award.¹⁹

IV. Decision

We grant the Agency's contrary-to-law exception and set aside the award.

¹⁸ See U.S. Dep't of VA, *Title 38 Decision Paper- Richard L. Roudebush VA Med. Ctr.* (May 29, 2013), https://www.va.gov/LMR/docs/7422_Indianapolis_VAMC_5_29_13.pdf (finding that a grievance concerning the Agency scheduling nurses to work a specific shift to ensure proper patient coverage was a matter or question concerning professional conduct or competence within the meaning of § 7422(b)); U.S. Dep't of VA, *Title 38 Decision Paper- VA Northern Cal. Health Care Sys.* (August 29, 2013), https://www.va.gov/LMR/docs/7422_VANorthernCaliforniaHC_S_8_29_13.pdf (finding that the assignment of a rotating on-call schedule for psychiatrists involved direct patient care within the meaning of § 7422(b)); U.S. Dep't of VA, *Title 38 Decision Paper- VAMC Dayton, Ohio* (January 16, 2004), https://www.va.gov/lmr/docs/38USC7422/2004/1-16-04_Dayton.pdf (finding that the decision to change the tours of duty of radiologists to provide weekend coverage involved issues concerning professional conduct or competence within the meaning of § 7422(b)). See also *U.S. Dep't of VA, John J. Pershing VA Med. Ctr.*, 71 FLRA 769(a), 769(c) n.12 (2020) (Member DuBester dissenting) (discussing 38 U.S.C. § 7422 and looking to numerous U.S. Dep't of VA § 7422 determinations and stating that “[t]he VA’s website specifically states that these determinations are provided so that parties may ‘benefit from a general understanding of the statutory limitations on Title 38 employees’” (citing VA Office of Labor-Management Relations (LMR), 38 § 7422 Determinations, (last updated Oct. 30, 2019), <https://www.va.gov/LMR/38USC7422.asp>)). We find these determinations – which all involve scheduling, the same as the grievance here – instructive as to § 7422’s clear limitations.

¹⁹ The Agency also argues that the award is contrary to management’s right to assign work, that the Arbitrator exceeded his authority, and that the award is “contradictory to” the parties’ CBA. Exceptions at 6-11. However, because we grant the Agency’s first contrary-to-law exception, we find it unnecessary to address the Agency’s remaining arguments. See *U.S. DOL, Office of Workman’s Comp. Programs*, 71 FLRA 726, 727 n.18 (2020) (Member DuBester concurring) (granting the Agency’s nonfact exception and finding it unnecessary to address the Agency’s remaining arguments); *SSA, Office of Hearings Operations*, 71 FLRA 642, 643 n.15 (2020) (Member DuBester dissenting) (granting the Agency’s contrary-to-law exception and not reaching the remaining arguments).

Member DuBester, dissenting:

I disagree with the majority’s conclusion that the award is contrary to 38 U.S.C. § 7422. The plain language of this provision establishes that only the Secretary of the Department of Veterans Affairs (the Secretary) can determine that a matter is excluded from collective bargaining or the parties’ negotiated grievance procedure under § 7422. And here, the record contains no determination from the Secretary that the issues raised in the Union’s grievance concern “matters of . . . professional conduct or competence” within the meaning of § 7422(b).

The Arbitrator found that Article 55 of the parties’ agreement “define[s] and describe[s] the elements of physician pay and compensation.”¹ But he also found that “[n]owhere in Article 55 is the concept of [r]est and [r]elaxation described as pay or a form of compensation.”² Instead, the parties’ agreement contains a separate provision authorizing “facility directors or the professional person acting for them” to approve rest and relaxation periods for physicians “required to serve long hours in the care and treatment of patients.”³ Referencing this provision, the Arbitrator concluded that the parties “would not have negotiated a section to provide for rest and relaxation if that topic was taboo and prohibited by federal statute.”⁴ He therefore determined that the Union’s grievance was not barred by § 7422(b).

The majority, however, finds that because the grievance involves the question of “when” physicians provide patient care, it “clearly concerns a matter of professional conduct or competence within the meaning of § 7422(b).”⁵ And on this basis, it concludes that the grievance is excluded from the parties’ negotiated grievance procedure.

As I have previously noted, § 7422(d) specifically states that the “‘issue of whether a question concerns or arises out of’ one of the subjects listed in § 7422(b) ‘shall be decided by the Secretary [of Veterans Affairs] and is not itself subject to collective bargaining and may not be reviewed by any other agency.’”⁶ Consistent with the plain language of this provision, the Authority has correctly held – in a decision the majority recently indicated “will no longer be

¹ Award at 21.

² *Id.*

³ *Id.* at 13 (quoting Art. 35, § 20 of the parties’ agreement).

⁴ *Id.* at 21.

⁵ Majority at 4.

⁶ *U.S. Dep't of VA, John J. Pershing VA Med. Ctr.*, 71 FLRA 769(a), 770(a) (2020) (Dissenting Opinion of Member DuBester) (quoting 38 U.S.C. § 7422(d)).

followed”⁷ – that “the Secretary has ‘exclusive authority’ to make such determinations and that the Secretary’s determination is not reviewable by the Authority.”⁸

It is undisputed that the Agency did not obtain a determination by the Secretary that the Union’s grievance was excluded by § 7422(b). Indeed, the Arbitrator specifically noted that the Agency had “decided to not pursue” a § 7422 determination with respect to the grievance.⁹

Nevertheless, the majority, relying upon prior determinations issued by the Secretary in other matters, concludes that the Arbitrator’s award is excluded from the parties’ grievance procedure because “the Secretary of the VA has repeatedly found that the Agency’s ability to control the work schedules of Title 38 professionals is a matter involving professional conduct or competence.”¹⁰ But the majority’s reliance on these prior determinations is misplaced. Notably, not one of the determinations cited by the majority involves rest and relaxation periods for physicians. Nor does the majority cite any rationale or governing authority for applying these determinations to the instant grievance.

In sum, I disagree that the Secretary has determined that the Union’s grievance is excluded from the parties’ grievance procedure pursuant to § 7422. I would therefore deny the Agency’s contrary-to-law exception, and address its remaining arguments.

⁷ *Id.* at 770 n.12.

⁸ *AFGE, Local 2145*, 61 FLRA 571, 575 (2006) (quoting *Veterans Admin., Long Beach, Cal.*, 48 FLRA 970, 975 (1993)); see also *AFGE, AFL-CIO, Local 2152 v. Principi*, 464 F.3d 1049, 1059 (9th Cir. 2006) (holding that the Secretary has the “sole authority to determine whether a § 7422(b) exemption applies to a grievance”). Even the Agency argues in its exceptions that the Arbitrator exceeded his authority because he made a § 7422(b) determination, “the authority of which is limited to the Secretary of the Department of Veterans Affairs.” Exceptions at 7.

⁹ Award at 21.

¹⁰ Majority at 4.