



DEPARTMENT OF VETERANS AFFAIRS
Under Secretary for Health
Washington DC 20420
NOV 02 2016

Mr. Donald J. White
Chief Steward
American Federation of Government Employees
Local 903
800 Hospital Drive
Columbia, MO 65201

Dear Mr. White:

I am responding to the June 6, 2016, request for a 38 U.S.C. § 7422 decision from the Director of the Harry S. Truman Memorial Veterans Hospital regarding AFGE Local 903's unfair labor practice charge that the Hospital refused to bargain over changes to administrative time for primary care physicians.

I have determined, on the basis of the enclosed decision paper, that the issues presented address matters or questions that concern or arise out of professional conduct or competence and are thus exempted from collective bargaining by 38 U.S.C. § 7422(b). Please review the enclosed Decision Paper for a more complete explanation of my decision.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Shulkin", with a long horizontal flourish extending to the right.

David J. Shulkin, M.D.

Enclosures



DEPARTMENT OF VETERANS AFFAIRS
Under Secretary for Health
Washington DC 20420

NOV 02 2016

Mr. David B. Isaacks
Director
Harry S. Truman Memorial Veterans Hospital
800 Hospital Drive
Columbia, MO 65201

Dear Mr. Isaacks:

I am responding to your June 6, 2016, request for a 38 U.S.C. § 7422 decision regarding AFGE Local 903's unfair labor practice charge that the Harry S. Truman Memorial Veterans Hospital refused to bargain over changes to administrative time for primary care physicians.

I have determined, on the basis of the enclosed decision paper, that the issues presented address matters or questions that concern or arise out of professional conduct or competence and are thus exempted from collective bargaining by 38 U.S.C. § 7422(b). Please review the enclosed Decision Paper for a more complete explanation of my decision.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Shulkin", with a long horizontal flourish extending to the right.

David J. Shulkin, M.D.

Enclosures

Title 38 Decision Paper
Department of Veterans Affairs (VA)
Harry S. Truman Memorial Veterans Hospital, Columbia, Missouri (Medical Center)

FACTS

On or about January 2016, the Director of the Harry S. Truman Memorial Veterans Hospital in Columbia, Missouri (Medical Center) tasked the Chiefs of Staff and Primary Care to "reassign administrative time for all Primary Care physicians and nurse practitioners to bookable appointments such as tele-health, tele-appointment, face-to-face direct patient care to include normal clinic, new patient, urgent care or phone clinic" in response to a loss of two full-time providers at the Medical Center. (Attachment 20). According to the Medical Center, administrative time is actually "clinical time" (i.e. non-bookable clinical time) during which a provider can "perform clinical tasks essential to direct patient care, which includes reviewing or writing patient notes, reviewing charts or records, reviewing View Alerts, returning patient telephone calls, and/or addressing any matters related to patient care." (*Id.*). The reassignment of administrative time impacts physician, physician assistants, and nurse practitioners, but does not impact registered nurses as they are not afforded administrative time. (*Id.*)

On February 3, 2016, the Primary Care Service Chief provided all Primary Care Service physicians an individualized email entitled "Admin time reduction" which for example stated "[A]s noted in the last All Team meeting. We've been directed to reduce admin time for all PCP schedules. Attached is a copy of your current matrix. Which of the following slots would you like converted and into what type of clinic would be your preference for each (Urgent, new pt, telephone clinic or group clinic etc). The Effective date will be the first week of March." (Attachment 2).

On February 5, 2016, the American Federation of Government Employees, Local 903 (Union) filed a demand to bargain with regard to "VA management unilateral cancelation [sic] of Administrative time for VA physicians." (Attachment 4).

On February 9, 2016, the Union submitted an information request in accordance with 5 U.S.C. § 7114(b) (4) of the Federal Service Labor-Management Relations Statute (Statute) to management at the Medical Center. (Attachment 5). The request sought a "copy of Directors notification to AFGE 903 of the proposed Change in Working Conditions of physicians (Administrative Time to Complete Paperwork proposed decrease by 50% from 8 hours to 4 hours)." (*Id.*)

The Union stated its particularized need for the requested information was "to determine if Management Officials/Supervisors have intentionally violated the Master Contract, laws, rules, and regulations set forth." (Attachment 5).

On February 9, 2016, the Medical Center attempted to reschedule the February 12, 2016 demand to bargain meeting for the afternoon. (Attachment 6).

On February 24, 2016, the Union stated that they "have had no response to my data request filed 2/9/2016" and inquired whether "there are no plans to implement a 'Change in Working Conditions' towards All Physicians at this facility in regards to Administrative time?" (Attachment 7). The Medical Center replied, "the data request and the demand to bargain conflict¹ and stated "[P]rior to providing the data we would like to discuss the demand to bargain. When are you available?" (*Id.*).

On March 1, 2016, the Union asked "what is exactly are the concerns of the Agency? It is my understanding that there is some confusion over the Data Request." (Attachment 8). The Medical Center again asked "when are you available to meet and discuss this matter?" (*Id.*).

On March 2, 2016, the Union stated, "[a]gain what is there to discuss? The data request was self-explanatory. If there is no plan to implement then just state that and we can move on." (Attachment 9). The Medical Center stated "there has been no changes to the number of hours for the physicians are granted for administrative time. I would like to meet face to face [to] so discuss the data." (Attachment 10).

On March 7, 2016, the Medical Center again attempted to arrange a meeting to discuss the data on March 11, 2016, yet the Union did not follow up. (Attachment 11).

On March 10, 2015, the Union filed an Unfair Labor Practice charge (ULP) with the Federal Labor Relations Authority (FLRA). (Attachment 12). The ULP asserted that "[O]n or about Tuesday, March 9th, 2016 at approximately 1115 hours, an unscheduled meeting took place in the facility Directors office" discussing "Management's Unilateral

¹ The Demand to Bargain filed by the Union on February 5, 2016 referenced a "VA management unilateral cancelation [sic] of Administrative time for VA physicians," yet the 5 U.S.C. §7114(b)(4) request of February 9, 2016 referenced the "Directors notification to AFGE 903 of the proposed Change in Working Conditions of physicians (Administrative Time to Complete Paperwork proposed decrease by 50% from 8 hours to 4 hours." (Attachment 4) (Attachment 5).

Cancelation [sic] of Administrative Time for VA Physicians." (*Id.*) The Union also asserted, "the Director stated this was a 7422 issue and Physicians should be treating patients in the open time slots that are available. Everyone present was in agreement that patient care comes first; however, proceeding with implementation of the changes in working conditions without bargaining is the primary issue." (*Id.*) Finally the Union asserted, "we informed the Director the implementation of the change to administrative times would result in a ULP and his response was the documentation shows doctors are not utilizing the given administrative time for its purpose; as an example Telehealth and return telephone calls to patients." (*Id.*)

On March 16, 2016, the Medical Center provided the Union "formal notification that the Agency is invoking 7422 on this physician administrative time based on the ULP received date [of] 3/10/2016." (Attachment 13). The Medical Center also provided the Union a response to their 5 U.S.C. § 7114(b)(4) request for a "copy of Directors notification to AFGE 903 of the proposed Change in Working Conditions of physicians (Administrative Time to Complete Paperwork proposed decrease by 50% from 8 hours to 4 hours)" by stating "this discussion on the physician administrative time began in January 2016 during the All team meeting where providers [were] given the option on how their administrative timeslot would be reallocated for patients with the implementation scheduled for the first week in March. The Chief of Primacy [sic] Care notified all providers via email directly to provide input into this new reallocation.... Below is an example of the email that was sent out to each provider. They were slightly different because they included each provider's current matrix and some had more admin time than others previously."² (*Id.*)

On June 6, 2016, the Medical Center formally requested a 38 U.S.C. §7422 decision. (Attachment 20). On the same day, the Union was notified that the Medical Center had requested a 38 U.S.C. § 7422 decision and asked them to submit any responses to the request within 20 calendar days. (Attachment 13). The Union did not submit a response to the issues raised in the VAMCs request for decision.

AUTHORITY

The Secretary has final authority to determine 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.

² The Union's 5 U.S.C. § 7114(b) (4) request specified a "copy of Directors notification to AFGE 903 of the proposed Change in Working Conditions of physicians (Administrative Time to Complete Paperwork proposed decrease by 50% from 8 hours to 4 hours)." (Attachment 12). Since, the Director did not provide a formal written notification to the Union regarding the change in Administrative Time, there was no information to provide to the Union besides a Sample Email notification sent to the providers requesting their input into the new reallocation of administrative time. (Attachment 13).

§ 7422(b). On August 23, 2015, the Secretary delegated his authority to the Under Secretary for Health. (Attachment 21).

ISSUE

Whether a ULP claiming that the Medical Center's decision to decrease administrative time for primary care physicians, physician assistants and nurse practitioners without bargaining with the Union 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 thus, 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 limited collective bargaining rights to Title 38 employees, and 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, or employee compensation, as determined by the Secretary.

VA policy requires that "proper care and treatment of patients" serve as "the primary consideration in scheduling tours of duty." (Attachment 22) (VA Handbook 5011, pt. II, ch. 1, ¶ 2b). "Duty schedules shall be established as appropriate and necessary for performance of services in the care and treatment of patients and other essential activities." (*Id.*) (VA Handbook 5011, pt. II, ch. 1, ¶ 2b). A VA Facility Director or his or her designee "has the authority to prescribe any tour of duty to ensure adequate professional care and treatment to the patient, consistent with these provisions." (Attachment 23) (VA Handbook 5011, pt. II, ch. 3, ¶ 2d). Facilities may also change their providers' administrative time schedules in response to "unusual circumstances" and when those changes are "in the best interests of the service." (*Id.*) (VA Handbook 5011, pt. II, ch. 3, ¶ 2b).

Together these VA policies recognize management's right and obligation to manage patient scheduling and provider tours of duty and assignments in a manner that ensures consistent access and timely and professional treatment of patients. (Attachment 23).

The Medical Center Director became concerned about the impact that the loss of two full-time providers would have on patient care. (Attachment 20). Since it was determined that Primary Care Service still had excess capacity to see additional patients during the providers administrative time which is actually "clinical time" (i.e. non-bookable clinical time), the Director tasked the Chiefs of Staff and Primary Care to

streamline “over-resourced areas” and reallocate “those resources to needed areas, [which] allowed the Service to be more efficient in meeting patient access, while ensuring providers maintain patient panel sizes that afforded them excess capacity.” (*Id.*). Prior to making the changes, providers were given a copy of their current matrix with the option of deciding which slots they would like converted and their preference for clinic type to include now converting regular clinic appointments to tele-appointments which had not been previously part of the practice.³ (Attachment 2)(Attachment 20).

On January 16, 2016, the Medical Center Primary Care Provider (PCP)/Available Patient (AP) capacity total was 43,540 and on April 7, 2016, the PCP/AP capacity total was 41,438. (Attachment 20 – Figure 1). After the decision was made to reallocate and decrease administrative time for Primary Care providers, the Medical Center's percentage of available capacity changed from one of the last within the Veterans Health Administration (VHA) to 104th out of 133rd within the VHA. (Attachment 3). Also, “Primary Care’s appointment availability increased for same day access avoiding Emergency Department/Urgent Care (ED/UC) visits while improving continuity of care emphasizing the PACT centric model.” (Attachment 20 – Figure 2). Therefore, consistent with VA policies, the Medical Center reallocated and decreased administrative time for Title 38 clinical staff in order to improve patient care and access.

Elimination, modification, or reduction of administrative time for Title 38 providers has been addressed a number of times in prior 38 U.S.C. § 7422 decisions. In 2013, the St. Cloud VA Health Care System ended the practice of allowing a half-day of administrative time following a primary or specialty medical provider’s return from scheduled annual leave. (Attachment 18) (VAMC St. Cloud (January 18, 2014)). The Secretary determined that the decision to schedule patients during administrative time was directly related to patient care, and was excluded from collective bargaining. (*Id.*). In VAMC Fargo, the Fargo VA Health Care System temporarily limited some medical providers’ eligibility for administrative time associated with their leave. The facility hoped to maximize available patient appointment times during the period between Memorial Day weekend and Labor Day weekend, the time frame when providers requested more leave than usual. (Attachment 19) (VAMC Fargo (September 17, 2013)). In VAMC Fargo, the Secretary determined that negotiations concerning the reduction in administrative time were excluded by 38 U.S.C. § 7422 because management “sufficiently established that the temporary change was implemented to improve patient access to care... when appointment wait times were high and patients were requesting provider changes because of poor access.” (*Id.*). Likewise, in VAMC Martinsburg, the Martinsburg VA Medical Center decided to schedule patient

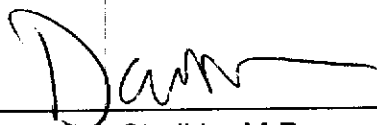
³ The amount of time each provider was asked to convert varied based upon whether they were part-time or full-time.

appointments during hours that had been previously set aside as administrative time in order to address patient care access issues. (Attachment 17) (VAMC Martinsburg (September 19, 2013)). The Secretary determined that the decision to schedule patients during time previously set aside for administrative time is directly related to patient care, and thus, excluded from collective bargaining. (*Id.*) In VAMC Asheville, in order to address "patients not being provided timely access to medical services at the facility" and "address the substantial wait times for patient appointment, the Medical Center adjusted the schedule of three bargaining unit psychiatrists. Under the adjusted schedules, each psychiatrist is expected to see up to two new patients per day." (Attachment 16) (VAMC Asheville (October 7, 2014)). The Secretary determined that "the Medical Center was under no obligation to negotiate either the substance or the impact and implementation of its decision to modify psychiatrists' schedules when its objective was to ensure timely patient access to medical care." (*Id.*) Therefore, the modified schedule without bargaining was found to be directly related to patient care, and thereby, excluded from collective bargaining.

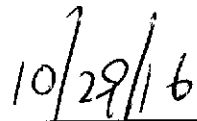
As illustrated by decisions cited above, the Secretary has repeatedly held that efforts to improve patient access to timely medical care by eliminating, modifying, or reducing administrative time are matters relating to direct patient care, a component of professional conduct or competence. The Medical Center determined that Primary Care Service had excess capacity to see additional payments in order to provide optimum patient care. As a result, the Medical Center instructed its clinical providers to reallocate and decrease administrative clinical time. That decision was clearly designed to ensure timely access to care, and as a result, is a matter or question that concerns or arises from direct patient care.

RECOMMENDED DECISION

That the ULP charge that the Medical Center failed to bargain over the decision to decrease administrative time for primary care physicians, physician assistants and nurse practitioners 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 is thereby excluded from collective bargaining.



David J. Shulkin, M.D.
Under Secretary for Health



Date