Title 38 Decision Paper
Department of Veterans Affairs (VA)
Fargo VA Health Care System

FACTS

This matter arises out of two unfair labor practice (ULP) charges filed with the Federal Labor Relations Authority (FLRA) by the National Federation of Federal Employees, Local # 225 (NFFE) on June 27, 2011. (Attachments 2-E and 2-F).

For an indeterminate period of time, medical providers[1] at the Fargo VA Health Care System (FHCS) and the Grand Forks, North Dakota Community Based Outreach Clinic (CBOC) who requested and received approval to take annual leave were allotted a period of administrative (or so-called contingency) time preceding and following their approved leave. (Attachment 2). During this administrative time, providers were excused from seeing patients and could complete notes, charting, etc. (Attachments 2 and 2-E).

Faced with a "higher than normal percentage of leave taken between Memorial Holiday Weekend and Labor Day Weekend," FHCS management deemed it necessary to temporarily limit or eliminate some medical providers' eligibility for administrative time associated with their leave in order to maximize available patient appointment times during a period when the providers were requesting more leave than normal. (Attachments 2 and 2-C). In addition, FHCS management opened up some of the administrative time that had previously been blocked for two physicians at the Grand Forks, North Dakota CBOC so patients could be scheduled and seen during that time. (Attachment 2). FHCS management indicated that the CBOC providers' administrative time had been "purportedly [blocked] to accommodate same day/urgent care cases, but that time was not being utilized for that purpose."[2] (Attachment 2).

In its 38 United States Code (U.S.C.) § 7422 request for determination, FHCS asserts that the practice of allowing physicians to take administrative time before and after leave has made "it more challenging to schedule patients in accordance with the Secretary's Directive relating to appointment scheduling and maximum waiting times for [V]eteran patients" and that the "practice contributes to the Fargo VA's problem to [sic] provide timely access" to patients. (Attachment 2). FHCS points to several reasons – the fact that "the Fargo VA HCS has recorded the highest

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[1] , M.D., and , M.D., are identified by name in the FHCS' 38 U.S.C. § 7422 request for determination as the two Grand Forks, North Dakota CBOC physicians whose administrative time was released. While the request asserts that the "medical providers permitted to take [administrative] time were physicians and other independent medical providers who work in outpatient clinics" who "are all Title 38 employees," it is unclear which "other independent medical providers" were impacted by the change and whether those employees are described in 38 U.S.C. § 7401. Therefore, this decision only addresses the policy change concerning FHCS and Grand Forks, North Dakota CBOC physicians' administrative time.

[2] FHCS asserts that 5 to 6 hours per week of extra clinic slots were blocked for same day/urgent access and those slots were not being used for that purpose 90 percent of the time. (Attachment 2).

access measurement of any facility in VISN 23," that the Grand Forks CBOC had "19 patients on the extended wait list and new patients [were being] booked into August," that management received five or six "requests for a change of providers to leave Grand Forks due to access issues," and that the Grand Forks, North Dakota CBOC had time limitations on clinic appointment times that were more restrictive than the limitations set by other CBOCs and the Fargo VA Medical Center – to support its contention that the providers' use of administrative time was negatively impacting patient care. (Attachment 2). In addition, FHCS asserts that although the Grand Forks, North Dakota CBOC providers were under-paneled by 40 percent, the CBOC patients were still not seeing their primary care physicians the majority of the time. (Attachment 2). On the other hand, NFFE asserts that there was no "compelling need" for the change and that FHCS management made the change in order to "enhance 'timeliness' and assist upper management in meeting their performance goals and receive a bonus." (Attachment 2-F).

Prior to changing the administrative time policy, FHCS management and NFFE exchanged proposals concerning provider eligibility for, and administration of, administrative time. (Attachment 2). FHCS management submitted two proposals, titled "Physician and Physician Assistant Leave Request" and "Provider Surrogate Assignments and Contingency Time" for NFFE's consideration on February 1, 2011. (Attachments 2-A and 2-B). However, the parties were unable to come to an agreement, and NFFE requested the assistance of the Federal Mediation and Conciliation Service on May 9, 2011.[3] (Attachments 2 and 2-E).

Thereafter, on May 25, 2011, FHCS management notified primary care providers that their administrative time needed to be limited, or in some cases eliminated, in order to increase providers' availability for clinic and appointment times. (Attachments 2 and 2-C). FHCS management indicated that providers' administrative time would be limited to "one day regardless of the duration of the leave before and after a leave is taken," that "[t]his may change in the future", and that "[if] leave is less than five days, then no administration [sic] time is given." (Attachment 2-C).

On June 21, 2011, FHCS management advised NFFE that it was withdrawing its two proposals but that it would present a more comprehensive proposal at a later date.[4] (Attachment 2).

On June 24, 2011, FHCS management advised two Grand Forks, North Dakota CBOC physicians that CBOC staff had been directed to book patients during periods previously set aside as their administrative time in order to "provide more timely service to new patients and to reduce the wait list." (Attachment 2-D). FHCS management cited several reasons for the change, including the fact that "Fargo

[3] FHCS' 38 U.S.C. § 7422 request for determination suggests that NFFE "abruptly declared an impasse." (Attachment 2). In its ULP charges, NFFE asserts that FHCS "notified FMCS that its services were not needed and informed the Union of its Withdrawal" but then implemented parts of its proposals anyway. (Attachment 2-E).

[4] The administrative record does not indicate that such a proposal was ever presented.

and the CBOCs have the highest access measurement which is directly correlative with patients on the extended wait lists" and that FHCS management had received "5 or 6 recent change of provider requests to leave Grand Forks CBOC for the sole reason of poor access." (Attachment 2-D).

On June 27, 2011, NFFE filed two ULP charges against FHCS. (Attachments 2-E and 2-F). In the first charge, CA-CA-11-0504, NFFE alleged that FHCS management violated 5 U.S.C. § 7116 (a)(1) and (5) of the Federal Service Labor-Management Relations Statute (FSLMRS) by unilaterally withdrawing two Standard Operating Proposals for leave requests and administrative time over which the parties were bargaining and at impasse. (Attachment 2-E). In addition, NFFE asserted that even though FHCS advised NFFE that it was withdrawing its proposals and notified FMCS that its services were not required, FHCS misrepresented its position and implemented parts of the proposals anyway. (Attachment 2-E). Further, NFFE alleged that FHCS unilaterally modified Title 38 Primary Care Providers' work days and administrative time without "first proposing and affording [NFFE] an opportunity to negotiate appropriate arrangements." (Attachment 2-E). As a result of FHCS' alleged bad faith bargaining and failure to negotiate over changes in working conditions, NFFE requested that the FLRA compel FHCS to return the administrative time to the Primary Care providers and to order FHCS back to the bargaining table. (Attachment 2-E).

In the second charge, CA-CA-11-0505, NFFE alleged that FHCS management "unilaterally [,] and without a proposal," changed and then notified employees in Primary Care of a change to the current FHCS administrative time policy without meeting its bargaining obligations under the FSLMRS. (Attachment 2-F). The charge also disputed FHCS management's assertion that the change in working conditions would help Veterans. (Attachment 2-F).

On July 18, 2011, FHCS responded to the ULP charges and requested that the FLRA stay the ULP proceedings pending a determination on a 38 U.S.C. § 7422 request concerning the ULP charges. (Attachment 3).

On July 27, 2011, FHCS management sent NFFE a copy of the FHCS 38 U.S.C. § 7422 request for determination and advised NFFE that it was free to submit its views concerning the 38 U.S.C. § 7422 request through VA's Office of Labor Management Relations.[5] (Attachment 4).

By a memo dated August 2, 2011, the FHCS Medical Center Director submitted a request for a 38 U.S.C. § 7422 determination by the Secretary of Veterans Affairs through the Veterans Integrated Service Network (VISN) 23 Network Director. (Attachment 2). After it was discovered that the original request was not forwarded to VA Central Office for review and processing, the Medical Center Director resubmitted the request to the VISN 23 Network Director via a Memo of Transmittal dated October 4, 2012. (Attachment 1).

[5] The administrative record does not indicate that NFFE submitted a position paper on the matter.

PROCEDURAL HISTORY

The Department of Veterans Affairs Labor Relations Improvement Act of 1991 granted collective bargaining rights to Title 38 employees in accordance with Chapter 71 of Title 5, but specifically excluded from collective bargaining, matters or questions concerning or arising out of professional conduct or competence (direct patient care or clinical competence), peer review, or the establishment, determination, or adjustment of employee compensation as determined by the Secretary or his designee. 38 U.S.C. § 7422.

ISSUE

Whether NFFE's ULP charges and requested remedies involve issues that concern or arise out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

DISCUSSION

Pursuant to 38 U.S.C. § 7421(a), the Secretary of Veterans Affairs has prescribed regulations contained in VA Handbook 5011 concerning the hours of leave and duty of Title 38 medical providers, including physicians appointed under 38 U.S.C. § 7401(1). With respect to work schedules, VA Handbook 5011 provides in pertinent part:

"In Veterans Health Administration (VHA), the proper care and treatment of patients shall be the primary consideration in scheduling tours of duty .... Duty schedules shall be established as appropriate and necessary for performance of services in the care and treatment of patients and other essential activities." VA Handbook 5011, Part II, Ch. 1, Sec. (2)(b).

With respect to official duty, VA Handbook 5011 provides in pertinent part:

"**[Administrative and Non-Duty Days and Days Off.]** 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." Full-time VA Central Office and 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...and optometrists or the days off for nurses, nurse anesthetists, PAs and EFDAs. Unusual circumstances may make it necessary, however, for the Under Secretary for Health, chief consultants, or facility directors, as appropriate, to alter these provisions for specific individuals or groups of individuals in the best interests of the service." VA Handbook 5011, Part II, Ch. 3, Sec. (2)(b).
....

"**[Patient Care Requirements.]** 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, Ch. 3, Sec. (2)(d).

In addition, VHA Directive 2006-055[6] establishes VHA's Outpatient Scheduling processes and procedures and provides in pertinent part:

> **2. BACKGROUND**
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> b. VHA is mandated to provide priority care for non-emergent outpatient medical services for any condition of a service-connected (SC) veteran rated 50 percent or greater or for a veteran's SC disability. VHA's goal is to have no waits or delays and to create appointments that meet the patient's needs in order to provide quality care when veterans want and need it. In every instance, VHA must provide clinically-appropriate care to every enrolled veteran. Through the use of performance measures and monitors, VHA monitors wait times within primary care and certain outpatient specialty clinics. VHA also surveys new and established patients to determine if they received an appointment when they wanted one. Acceptable levels of performance are established each year in VHA's performance plan. VHA Directive 2006-055 (October 11, 2006).

VA Handbook 5011 and VHA Directive 2006-055 provide for the establishment of hours of work and tours of duty for VHA medical professionals with a view to optimizing patient treatment and access. While recognizing the need for some administrative time, VA Handbook 5011 also provides for alteration of administrative time in response to unusual circumstances where a change is warranted "in the best interests of the service." VA Handbook 5011, Part II, Ch. 3, Sec. (2)(b). VA Handbook 5011 also provides that a Facility Director or designee may ". . . prescribe any tour of duty to ensure adequate professional care and treatment to the patient, consistent with these provisions." VA Handbook 5011, Part II, Ch. 3, Sec. (2)(d). *See also* VA Handbook 5005, Part IV, Ch. 3, Sec. A & B. Read together, these regulations 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.

In its 38 U.S.C. § 7422 request for determination, FHCS management asserts that its decision to adjust medical providers' administrative time was driven by a need to improve patient access to medical services during a temporary period of short staffing. (Attachments 2 and 2-C). In communications to FHCS staff concerning the administrative time policy change, FHCS management advised that the change was designed to provide "[V]eterans with access to the care they need and deserve." (Attachment 2-C). In addition, FHCS management explained that a high number of patients on the extended wait list for appointments; the Grand Forks, North Dakota

[6] Although VHA Directive 2006-055 expired on October 31, 2011, it was current VA policy at the time the at-issue ULP charges were filed and FHCS submitted its initial 38 U.S.C. § 7422 request.

CBOC's receipt of multiple change of provider requests due to poor access; and underutilization of the administrative time for same day/urgent cases were the impetus for temporarily unblocking administrative time for the two Grand Forks, North Dakota CBOC physicians. (Attachments 2, 2-C, and 2-D). The Medical Center Director's 38 U.S.C. § 7422 request for determination also reiterates that the decision to curtail providers' administrative time was due to increased waiting times and an attempt to comply with the Secretarial Directive regarding appointment scheduling.[7] (Attachment 2). Therefore, FHCS management's change to the administrative time policy for medical providers at FHCS and Grand Forks, North Dakota CBOC is a matter that concerns or arises out of professional conduct or competence, specifically direct patient care, under 38 U.S.C. §§ 7422(b)(1) and (c)(2).

FHCS management concedes that limiting administrative time to 1 day before and after leave in excess of 5 days, and eliminating administrative time altogether for leave of 5 or fewer days, "represent[s] a reduction in the amount of administrative time authorized to providers in the past." (Attachment 2, page 2). And, although FHCS management initially submitted to the bargaining process, the parties had not completed bargaining over the proposed changes to the administrative time policy when FHCS withdrew its proposals and announced the policy change to the impacted medical providers.[8] (Attachments 2 and 2-E). The inherent argument in both of NFFE's ULP charges is that FHCS management violated the FSLMRS when it failed to complete the bargaining process that was underway, but not yet concluded, and failed to provide notice to NFFE and allow NFFE to propose procedures or appropriate arrangements under 5 U.S.C. § 7106(b)(2),(3) for medical providers affected by the policy change and change in past practice prior to implementation of the new policy. (Attachments 2-E and 2-F). However, the focus of this determination is whether the ULP charges raise issues that concern or arise out of a collective bargaining exclusion set forth in 38 U.S.C. § 7422(b) (e.g., professional conduct or competence). Since they do, FHCS management had no obligation to comply with the collective bargaining provisions of the FSLMRS or to engage in impact and implementation bargaining with respect to the change. 38 U.S.C. § 7422(b) (collective bargaining "may not cover, or have any applicability to, any matter or question concerning or arising out of" professional conduct or competence). 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 supports this contention. SEC-VA Decision Document, Preamble ("Nothing in this means 7422 is being expanded to appropriate arrangements and procedures (impact and implementation).") (Attachment 5).

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[7] Although one ULP characterizes FHCS management's curtailment of administrative time as an effort to "meet arbitrary performance measures of Managers," management has sufficiently established that the temporary change was implemented to improve patient access to care by the at-issue physicians when appointment wait times were high and patients were requesting provider changes because of poor access. (Attachments 2-E, 2-C, and 2-D).

[8] While a facility may raise 38 U.S.C. § 7422 at any time, FHCS management's voluntary submission, and subsequent withdrawal, of its bargaining proposals complicated its position concerning negotiability. (Attachment 2). Going forward, FHCS management should clarify when it is engaging in "pre-decisional involvement" or "good faith dialogue" over matters that it believes may concern or arise out of 38 U.S.C. § 7422(b), as opposed to "bargaining."

In a prior case involving similar circumstances, the Under Secretary for Health determined that a grievance alleging that a VA medical center was "bound by collective bargaining to prioritize physicians' previously scheduled administrative and training activities over patient care needs" necessarily involved issues of direct patient care and was excluded from the grievance process by operation of 38 U.S.C. § 7422. *VA Northern Indiana HCS, December 2004.* Additionally, changes in Title 38 professionals' schedules in order to meet patient care needs have consistently been found to involve issues of professional conduct or competence (direct patient care). *See, e.g., Spokane VAMC, July 2008; Alaska VAHCS, August 2005; Palo Alto VAHCS, October 2005; Northampton VAMC, February 2005; and Charleston VAMC, May 2005.*

RECOMMENDED DECISION

That the ULP charges and requested remedies raise issues that concern or arise out of professional conduct or competence (direct patient care) within the meaning of 38 U.S.C. § 7422(b) and are thereby excluded from collective bargaining.

APPROVED/DISAPPROVED

Eric K. Shinseki
Secretary

9/17/2013
Date