

**Title 38 Decision Paper  
Department of Veterans Affairs (VA)  
Martinsburg VA Medical Center (VAMC)**

**FACTS**

On or about October 1, 2010, the Martinsburg, West Virginia, Veterans Affairs Medical Center (VAMC) began implementation of the Patient Aligned Care Teams (PACT, originally called Patient-Centered Medical Home). (Attachment A). The intent of the PACT initiative was to increase “access, coordination, communication, and continuity of care.” (Attachment B). As part of this initiative, VHA tracks “3<sup>rd</sup> Next Available” appointment statistics, which is a measurement used by both VA and non-VA health care providers in order to track access to care. This statistic measures the average wait time in days until the next third open appointment slot in a primary care clinic. By August 2011, VAMC leadership determined that the VAMC continued to exceed the VHA average for “3<sup>rd</sup> Next Available” appointments. (Attachment A). VHA averaged 15.7 days while Martinsburg averaged 23.8 days. (*Id.*). The resultant strain on the clinics was causing a backlog of patients and negatively affecting the VAMC’s ability to deliver timely patient care as measured against VHA-wide averages. (*Id.*).

In August 2011, VAMC representatives attended a PACT Leadership Conference and learned of available options to “tackle the patient care access issue.” VAMC leadership considered several options to address the appointment wait time issue, including extended clinic hours, scheduling patients during daily “Huddle Time,” and scheduling patients during Thursday afternoons. (Attachment A). Thursday afternoons had been “earmarked for administrative duties associated with management of the panels and staff training.” (*Id.*). During an August 30, 2011, meeting, VAMC leadership agreed that scheduling patients on Thursday afternoons for a 90-day period was the most effective solution. (*Id.*).

In response to the VAMC’s decision to schedule patients during administrative time, on September 23, 2011, the National Federation of Federal Employees (NFFE) filed an unfair labor practice charge (ULP) with the Federal Labor Relations Authority (FLRA). (Attachment C). According to the FLRA, NFFE withdrew its ULP on September 21, 2012, and the FLRA closed its case on that date. However, National Nurses United (NNU) filed a ULP regarding the VAMC’s decision to schedule patients during administrative time on October 20, 2011, and that ULP is still pending. (Attachment D).

In its ULP, NNU noted that the VAMC informed NNU of its 90-day scheduling plan on September 6, 2011. (Attachment D). On September 9, 2011, NNU requested that the VAMC “cease and desist” with implementation of the plan until impact and implementation bargaining was completed. (*Id.*). According to NNU, such bargaining did not occur and constitutes a failure to negotiate in good faith, a violation of 5 United States Code (U.S.C.) § 7116(a)(5) and (8). (*Id.*). The VAMC asserts, on the other

hand, that it was not required to negotiate the 90-day scheduling plan because the matter was excluded from collective bargaining under 38 U.S.C. § 7422(b). (Attachment A).

The 90-day effort to decrease patient wait times began on September 22, 2011, and concluded on December 22, 2011. (Attachment A). During this period, the primary care staff scheduled patients during all Thursday afternoons, except the third Thursday of the month, which remained administrative time. (*Id.*). By scheduling patients on Thursday afternoons, the primary care clinic opened four patient slots on each provider panel. (*Id.*). At the conclusion of the 90-day period, the VAMC had improved its “3<sup>rd</sup> Next Available” average to 16.97 days, representing a 30 percent decrease in patient wait time. (*Id.*). Following the end of the 90-day period, staff ceased scheduling patients during Thursday afternoons. (*Id.*).

In response to the ULPs, on January 9, 2012, the VAMC Director submitted a request that the Secretary<sup>1</sup> determine that the issues raised in the ULPs are exempt from collective bargaining under 38 U.S.C. § 7422(b). (Attachment A). NNU provided no response to the request for a § 7422 determination.

## **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. § 7422(b).

## **ISSUE**

Whether the VAMC's decision to schedule patient appointments during hours previously set aside as administrative time is a matter of professional conduct or competence (direct patient care or clinical competence) within the meaning of 38 U.S.C. § 7422(b) and thus exempted from collective bargaining.

## **DISCUSSION**

The Department of Veterans Affairs Labor Relations Act of 1991, 38 U.S.C § 7422, granted collective bargaining rights to title 38 employees, but specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence (direct patient care or clinical competence), peer review, and employee compensation as determined by the Secretary.

The number of available patient appointments and wait time for appointments are fundamental to establishing the level of patient care provided by the Department. As summarized in the request for a 7422 determination, the VAMC's decision to schedule patients during administrative time was based on the need to increase patient access to

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<sup>1</sup> The VAMC's request is addressed to the Under Secretary for Health, but the Secretary currently retains the authority to issue decisions regarding 38 U.S.C. § 7422(b).

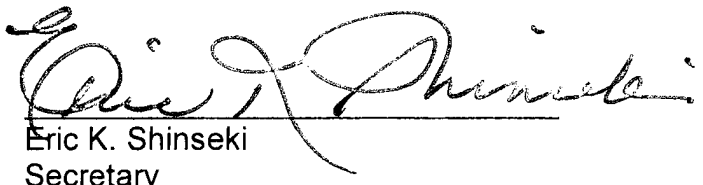
care by reducing wait time for appointments. (Attachment A). Accordingly, management's decision to schedule patients during administrative time concerns professional conduct or competence (direct patient care or clinical competence) and is excluded from collective bargaining under 38 U.S.C § 7422(b).

In several prior decisions, the Department has determined that matters involving patient scheduling, staffing, and panel size arise out of direct patient care and are thus excluded from collective bargaining. For example, in 2011, the Fargo VA Health Care System temporarily assigned two physicians to provide coverage for a clinic experiencing a staffing shortage. (*Fargo VA Health Care System*, December 17, 2012). NFFE filed a ULP, arguing that the reassignment amounted to a violation of the Federal Labor-Management Relations statute and the NFFE-VA collective bargaining agreement. (*Id.*). The Secretary determined that the decision to reassign two physicians in order to better address patient care needs is directly related to patient care and thus excluded from collective bargaining. (*Id.*). In 2008, NFFE filed a ULP after management amended physicians' tours of duty in order to reduce patient wait times and to provide for weekend rounds in the VAMC. (*Spokane VAMC*, July 7, 2008). The Under Secretary for health (USH) determined that this change in tours of duty was based upon direct patient care needs and thus not negotiable. (*Id.*). In 2004, after a physician went on sick leave, management reassigned that physician's patients to another physician; some of those patients were scheduled during the physician's administrative time. (*VA Northern Indiana HCS*, December 17, 2004). The American Federation of Government Employees (AFGE) filed a grievance, alleging that scheduling patients during administrative time violated a Memorandum of Understanding between AFGE and the facility. (*Id.*). The USH determined that the decision to schedule patients during administrative time "clearly involve[d] issues of direct patient care" and was thus excluded from collective bargaining. (*Id.*). Also in 2004, AFGE filed a ULP in response to a VAMC's decision to temporarily assign primary care providers to the Urgent Care Unit. (*VAMC Charleston*, May 27, 2005). In part, AFGE objected to these assignments because they interfered with primary care providers' administrative time. (*Id.*). The USH determined that the issue of assigning physicians to another clinic arose from direct patient care and was therefore excluded from collective bargaining. (*Id.*). In 2002, management of the Dayton VAMC required each staff radiologist to work one weekend every month because no radiologist was available to read x-rays over the weekend when all radiologists worked Monday-Friday tours. (*Dayton VAMC*, January 16, 2004). AFGE filed a ULP in response to this decision. (*Id.*). The USH determined that this issue was excluded from collective bargaining because it arose from the need to provide direct patient care during weekends. (*Id.*).

**RECOMMENDED DECISION**

That management's decision to schedule patients during time previously set aside for administrative time involves issues of professional conduct or competence (direct patient care or clinical competence) within the meaning of 38 U.S.C. § 7422(b) and is thus excluded from collective bargaining.

APPROVED / DISAPPROVED

  
Eric K. Shinseki  
Secretary

9/19/2013  
Date