

**Title 38 Decision Paper
Department of Veterans Affairs (VA)
St. Cloud VA Health Care System**

FACTS

On June 25, 2013, the Primary and Specialty Medicine Service Line Director (PSM Director) at the St. Cloud VA Health Care System (Medical Center) e-mailed the Title 38 medical providers in PSM and the American Federation of Government Employees Local 390 (AFGE or Union) informing them that he intended to make certain changes "in order to help us have better access for our patients."¹ (Exhibit 1). The PSM Director explained that due to the worst patient access numbers in the Veterans Integrated Service Network (VISN), he was going to, among other changes, end the practice of allowing a half day of administrative time following a PSM provider's return from scheduled annual leave.² (*Id.*).

That same day, management discussed the proposed changes with the Union. (Exhibit 2).

On July 2, 2013, the Medical Center met with the Union a second time to discuss the changes. (Exhibit 2). That same day, AFGE filed a demand to bargain, stating that it wished to bargain over the proposed change from the existing practice, which it described as "The past practice of allowing a half day and or 1 full day of scheduled administrative time following the utilization of annual leave by a Primary Care Provider." (Exhibit 3). In response, management stated that the change dealt with Title 38 providers and direct patient care, and it was not going to negotiate over the change with the Union. (Exhibit 4). The Union responded that it should still be afforded the opportunity to engage in impact bargaining. (Exhibit 5).

On July 3, 2013, management e-mailed the Union, reiterating its position that the matter concerned Title 38 employees and direct patient care. (Exhibit 6). The e-mail further outlined the various discussions between management and the Union concerning the issue, invited the Union to clarify what it wished to discuss, and offered to schedule another meeting between management and the Union. (*Id.*). AFGE responded by e-mail complaining that management's notification of the proposed change did not comply with the requirements of the parties' Master Agreement and stated the Union's belief that the change had already been implemented. (Exhibit 7). The parties continued to discuss the matter in back and forth e-mails. (Exhibit 2).

On July 19, 2013, management e-mailed PSM providers notifying them that, because access for patients had improved, the Medical Center would now allow 2 hours of administrative time to providers for every 5 consecutive days of leave taken. (Exhibit 8).

¹ The previous day, the Union was notified by phone of the proposed change. (Exhibit 2).

² The PSM Director also proposed holding PACT meetings every other week instead of weekly, and scheduling new patients across all providers. (Exhibit 1).

On July 24, 2013, AFGE filed an unfair labor practice (ULP) charge with the Federal Labor Relations Authority (FLRA). The charge stated that the Union was denied an opportunity to bargain the impact and implementation of the reduction in administrative time for PSM providers. (Exhibit 9).

On August 13, 2013, management filed its response to the ULP with the FLRA. (Exhibit 10).

On August 15 and 28, 2013, management contacted the Union in an effort to discuss and resolve the dispute about the negotiability of the change. The Union did not respond to either request. (Exhibit 11).

On October 1, 2013, the Medical Center Director submitted a formal request for a 38 U.S.C. § 7422 determination.³ (Exhibit 2). The Union did not submit a response to the issues raised in the Medical Center's request for determination.

AUTHORITY

The Secretary has the 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 a ULP charge that the Medical Center failed to negotiate reductions of administrative time for Title 38 primary care providers following their return from annual leave involves a matter or question concerning or arising out of the professional conduct or competence (direct patient care or clinical 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, 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, or employee compensation, as determined by the Secretary.

"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

³ The request for determination is dated September 13, 2013, and is signed by the Medical Center Director and signed and "approved" by the Network Director. (Exhibit 2). On September 13, 2013, the Medical Center forwarded a copy of the request to the local AFGE President. (Exhibit 12).

treatment of patients and other essential activities.” VA Handbook 5011, Part II, Chapter 1, Section (2)(b).

VA Handbook 5011 provides for the establishment of hours of work and tours of duty for VHA medical professionals while optimizing patient treatment and access. 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, Chapter 3, Section (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, Chapter 3, Section (2)(d). 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.

The PSM Director became concerned as the number of patients waiting more than 14 days for an appointment increased from 203 patients in April 2013 to 546 patients in June 2013. (Exhibit 13). By the middle of June 2013, the Medical Center had the worst patient access percentage in the VISN.⁴ (Exhibit 1). In order to address the patient access problem, the Director implemented several changes. Among those changes was a decision to eliminate the practice of allowing Title 38 PSM providers a half day of administrative time upon their return from scheduled leave.⁵ (Exhibit 1). During the previously allotted administrative time, PSM providers were not scheduled to see patients. The Director determined that, combined with other initiatives, eliminating the administrative time would be an effective approach to increasing patient access. (*Id.*).

Elimination or reduction of administrative time for Title 38 providers has been addressed a number of times in previous 38 U.S.C. § 7422 decisions. In a recent decision, the Fargo VA Medical Center (VAMC) 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. VAMC Fargo (September 17, 2013). (Exhibit 14). 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.*). A similar issue was raised in VAMC Martinsburg (September 19, 2013). (Exhibit 15). Management in Martinsburg weighed a number of options to reduce patient waiting times in its primary care clinic. Management decided that the best option was to temporarily schedule patients during Thursday afternoons, a time slot previously

⁴ Within VISN 23, the VA Midwest Health Care Network, Fargo, had the lowest percentage of patients waiting longer than 14 days – .15 percent; St. Cloud had the highest percentage – 1.57 percent. (Exhibit 1).

⁵ The Director revisited his decision less than a month later, allowing PSM providers 2 hours of administrative time for every 5 consecutive days of leave. (Exhibit 8).

earmarked for “administrative duties associated with management of the panels and staff training.” (*Id.*). The Secretary, after reviewing the facts and circumstances, concluded as follows:

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

As illustrated by the above-described decisions, efforts to increase patient access to timely medical care is a matter relating to direct patient care, a component of professional conduct or competence. As such, management’s decision to limit administrative time at the Medical Center is excluded from bargaining by application of 38 U.S.C. § 7422.⁶

RECOMMENDED DECISION

The demand to bargain and subsequent ULP charge that the Medical Center failed to negotiate reductions of administrative time for Title 38 primary care providers following their return from annual leave involves a matter or question concerning or arising out of the professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) and is thus excluded from collective bargaining.

APPROVED/DISAPPROVED



Eric K. Shinseki
Secretary of Veterans Affairs

1/18/2014

Date

⁶ Although the Union characterized its ULP charge as a refusal to bargain the “impact and implementation” of the change, bargaining over either the substance or the impact of the Medical Center’s decision to eliminate administrative time is excluded under 38 U.S.C. § 7422. VAMC Northern California (August 29, 2013): “When an issue, such as assignment of psychiatrists to on-call duty at another facility, is determined to be a matter excluded by application of 38 U.S.C. § 7422, any proposals concerning or arising out of the excluded matter are similarly excluded from bargaining.” (Exhibit 16, p. 11).