DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

DEC 20 2007

Wanda Mims, MBA
Director (00)
VAMC Hampton
100 Emancipation Drive
Hampton, VA 23667

Sheila Elliott, Pharm.D., MBA
Vice-President, AFGE Local 2328
PO Box 3168
Hampton, VA 23663

Dear Ms. Mims and Ms. Elliott:

I am responding to your correspondence of October 18, 2006, May 21, 2007, January 12, 2007 and June 15, 2007, concerning a grievance filed by AFGE, Local 2328, over management's implementation of a 45-day (amended to 30-day) notice requirement prior to cancellation of scheduled clinics in the Primary Care Service Line.

Pursuant to delegated authority, I have determined, on the basis of the enclosed decision paper, that the issue presented is a matter concerning or arising out of professional competence or conduct and is exempted from collective bargaining by 38 USC § 7422(b).

Please provide this decision to your Regional Counsel as soon as possible.

Sincerely yours,

Michael J. Kussman

Michael J. Kussman, MD, MS, MACP
Under Secretary for Health

Enclosure

Title 38 Decision Paper – VAMC Hampton, Virginia
VA-07-03

FACTS:

This matter arises out of a grievance filed by the American Federation of Government Employees (AFGE), Local 2328, alleging that management at the VA Medical Center (VAMC) in Hampton, Virginia, violated Article 32, Time & Leave, of the VA/AFGE Master Agreement by requiring providers of the Primary Care Service Line (PCSL) to give at least 45-day notice prior to cancelling a scheduled clinic.

On August 22, 2005, the VAMC issued a Medical Center Memorandum (MCM), Memorandum 11-48 entitled, Management of Scheduled Appointment Cancellations and No Shows. (Attachment A)

On March 3, 2006, AFGE submitted a "Cease & Desist, Demand to Bargain" on the policy. (Attachment B) That same day, AFGE filed a Step I grievance alleging that employees in the PCSL had been denied leave because they did not request leave with advance notice of 45 or more days. (Attachment C) In the Step I grievance, the union referred to MCM 11-48, Paragraph 5b, which states:

> "...A minimum **45-day** notice will be given prior to elective cancellation of a scheduled clinic date/time. Requests for elective cancellations sooner than 45 days prior to the clinic session will generally not be approved except in extenuating circumstances." (Attachment C, ¶ 2)

As a remedy, the union requested that management abide by Article 32 of the Master Agreement and eliminate the 45-day notice requirement. (Attachment C, ¶ 4)

On March 9, 2006, management submitted its response to the union's Step I grievance. (Attachment D) Management stated that no requests for leave had been denied in the PCSL. (Attachment D, ¶ 2) Management further explained that:

> "...Prior to cancelling a clinic, all alternatives need to be considered such as alternative coverage, overbooks or scheduling during administrative times, keeping in mind patient care is the first priority and takes precedence over administrative time. Requests to cancel a clinic must be submitted in writing by the provider and accompanied by appropriate justification. When Providers request annual leave under 45 days, they are asked input as to how to handle any scheduled patients. If none is provided or specific directions are not given, PCSL administrative staff either have team cover as able and/or reschedule according to policy guidance. Patients are also called to ask their preference as many wish to

see their own provider and thus be rescheduled, whereas others prefer or have a need to be seen the day of their scheduled appointment." (Attachment D, ¶ 3)

On March 16, 2006, the union advanced the grievance to Step II. (Attachment E) On April 18, 2006, the union further advanced the grievance to Step III. (Attachment F) As part of its allegations, the union added that management was further violating the Master Agreement by implementing "cumbersome" Leave Request Procedures. (Attachment F, ¶ 2)

On April 25, 2006, management responded to the Step III grievance. (Attachment G) Management denied the grievance and provided the following explanation for its decision:

> "The providers directly care for patients and have scheduled patients at least 30 days and up to 45 days in advance, in the interest of patient care it has been the practice to ask providers to minimize cancellation of their patients and take into consideration when requesting leave, their patient schedules. That being said, it is recognized, that providers have need for sick leave, emergency leave and short notice leave for important personal and family matters. Leave has RARELY been denied in the PCSL. It has only been denied when there is a critical staffing shortage or an employee does not have enough leave to cover the request (then they are provided with alternative options). Sick leave is never denied. Providers have been requested to give as much notice as possible, preferably 45 days. If this is not possible, and leave is needed, then they are asked for a rescheduling plan for their scheduled patients according to the MCM 11-48." (Attachment G, ¶ 3)
>
> "The leave request requirements are to ensure proper communication to the Chief, timekeeper and PCSL management team.... Requests under 2 weeks must be expedited and a phone call is requested so that we may better serve our staff and patients. " (Attachment G, ¶ 4)

On May 25, 2006, management submitted a follow-up decision to the union's Step III grievance. (Attachment H) In the follow-up decision, management reconsidered the grievance and decided to sustain it in part. (Attachment H, ¶ VI) Specifically, management agreed to "...eliminate the 45-day notice requirement for employee leave approval...." (Attachment H, ¶ V.A) Management further agreed to the following language:

> "B. Employees will request leave in accordance with VA policies and the Master Agreement. Management will render timely decisions on leave requests. In accordance with the Time and Leave policies and the Master Agreement, employees will request leave within a reasonable time period in advance. Leave must be approved prior to the taking of such leave and leave will be granted based on staffing needs." (Attachment H, ¶ V.B)

On May 26, 2006, AFGE responded to management's reconsideration of the grievance decision. (Attachment I) The union agreed in part to management's proposals and submitted additional proposals. Management responded thereto on June 14, 2006. (Attachment J) The parties did not reach an agreement.

On October 18, 2006, the Medical Center Interim Director submitted a request to the Under Secretary for Health (USH) for a determination that the issue grieved was outside the scope of collective bargaining and not subject to the negotiated grievance procedure, pursuant to 38 U.S.C. § 7422. (Attachment K) The Interim Director specifically argued that "[c]ancellation of clinic does not equate with, nor necessarily mean denial of leave. Providers have been encouraged to give as much notice as possible when requesting leave to avoid having to reschedule or reassign patients. Providers are not denied leave under 45 or even 30 days. However, they are required to review their scheduled patients and provide direction for their care i.e., whether they are to be rescheduled and when, or seen by another provider the same day." (Attachment K, ¶ 7)

The union submitted its response to management's request on January 12, 2007. (Attachment L) In the response, AFGE alleged that its comments on MCM 11-48 were not considered and the policy was implemented without its concurrence or the proper negotiations. (Attachment L, ¶ 3) In addition, the union alleged that it invoked arbitration because its "...prime request to eliminate the imposed minimal 45-day notice was neither removed from policy nor corrected by the Service Chiefs of the Medical, Surgical, Primary Care or Psychiatry Services in staff meetings or minutes, etc." (Attachment L, ¶ 5) Further, the union alleged that the policy violated OPM regulations, applicable statutes and the Master Agreement by stating that "leave will be granted based on staffing needs" without adding a statement about employees' rights to "accrue and use sick leave". (Attachment L, ¶ 6) The union also delineated some of its proposed changes to the policy. (Attachment L, ¶ 6) Finally, the union argued that the "issue grieved and negotiations attempt is within the scope of collective bargaining and subject to the negotiated grievance procedure." (Attachment L, ¶ 9)

On May 21, 2007, the Medical Center Director submitted a supplement to management's original request for a decision by the USH. (Attachment M) The Director stated that every medical center but one in VISN 6 has a time frame within which clinicians must give advanced notice of annual leave requests. (Attachment M, ¶ 1) In addition, the Director specifically explained that she decided "not to delete the requirement of advanced notice, although [she would] require only 30 days advanced notice rather than the 45 days previously in the MCM." (Attachment M, ¶ 4) The Director further explained that she was "convinced that this 30 days is the minimally accepted notice enabling our veterans to receive care, and yet allowing the providers to stay within the community standard of care." (Attachment M, ¶ 4)

The union submitted its counter to management's supplement on June 15, 2007. (Attachment N) The union made the following argument in support of its position against a 7422 decision by the USH:

"Whether we are looking at 30 days or 45 days, the substance of the matter remains the same. Specifically, we believe that any time-frame provided by management is contrary to OPM Regulations and our DVA-AFGE Master Agreement and is opposed by AFGE....Again, management has not provided information that patient care is an issue." (Attachment N, ¶ 3)

PROCEDURAL HISTORY

The Secretary has delegated to the USH the authority to determine whether a matter or question concerns or arises out of professional conduct or competence (direct patient care, clinical competence), peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b).

ISSUE

Whether the grievance over the requirement in MCM 11-48 that providers provide a minimum of 45-day (amended to 30-day) notice prior to elective cancellation of a scheduled clinic date/time for leave scheduling involves an issue of professional conduct or competence (direct patient care) within the meaning of 38 U.S.C. § 7422(b).

DISCUSSION

The Department of Veterans Affairs Labor Relations Act of 1991, 38 U.S.C. § 7422, granted collective bargaining rights to Title 38 employees in accordance with Title 5 provisions, but specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence, peer review, and employee compensation as determined by the USH.

Pursuant to 38 U.S.C. § 7421(a), the Secretary has prescribed regulations contained in VA Directive/Handbook 5011, Part III, Chapter 3, to implement the Title 38 leave program. The policy establishes that "[t]he proper care and treatment of patients shall be the primary consideration in granting leave." (VA Directive/Handbook 5011, Pt. III, Ch. 3, *Supra*, ¶2a) The Secretary has also promulgated regulations relating to appointment scheduling and maximum appointment waiting times for veteran patients. These regulations are found in VHA Directive 2006-055, *VHA Outpatient Scheduling Process and Procedures.*[1]

---

[1] VHA Directive 2006-055, Attachment G, *Business Rules for Handling No-Shows, Patient Cancellations and Clinic Cancellations,* states in relevant part:

3. Clinic cancellations, particularly with short notice, are to be avoided whenever possible. Such action may prolong wait times for patient care services, are disruptive to patients and their families, and create additional work for the provider and support staff. Frequent clinic cancellations and appointment rescheduling contribute to patients being lost to follow-up, decreased patient satisfaction, and increased numbers of no-shows.

...

6. Requests to cancel a clinic must be submitted in writing within time frames specified in local facility or Veterans Integrated Service Network (VISN) policy accompanied by: an appropriate justification, provisions made to ensure effective implementation of a patient notification, and a rescheduling plan. (VHA Directive 2006-055, ¶ 3; 6)

The subject grievance alleges that management violated the Master Agreement by requiring employees in the PCSL to give at least 45-day notice prior to cancelling a scheduled clinic for employee leave purposes. In the follow-up response to the Step II grievance, management decided that it would "eliminate the 45-day notice requirement for employee leave" but after the parties failed to reach agreement on the minimum amount of days that should be required for a clinic cancellation, management submitted the instant 7422 decision request. Management originally claimed that the 45-day requirement was outside the scope of collective bargaining and not subject to the negotiated grievance procedure. Thereafter, management noted that almost every medical center in VISN 6 has a time frame within which clinicians must give advanced notice of annual leave requests and the Director decided to reduce the advance notice requirement to 30 days.

MCM 11-48 concerns the management of scheduled appointment cancellations and no shows. The USH previously has determined that matters related to patient scheduling, including cancellation and rescheduling, involve professional conduct or competence (direct patient care) within the meaning of 38 U.S.C. § 7422 (b). See VA Northern Indiana Health Care System, December 17, 2004; Wilmington VA Medical Center, December 4, 2001. As MCM 11-48 establishes the Medical Center's patient scheduling policy and procedures for appointment cancellations and no shows, it is non-negotiable under 38 U.S.C. § 7422(b)[2].

The union also alleges that its demand to bargain on the MCM 11-48 is negotiable since it will not have an adverse impact on patient care. Since there is no information on whether the union filed a negotiability appeal, a grievance, or an unfair labor practice, the issue is not ripe for a decision and this decision will not address the merits of the union's argument.

For the above stated reasons, the grievance filed by the union alleging that the 45-day (amended to 30-day) notice requirement prior to cancellation of scheduled clinics in the PCSL violates Article 32 of the Master Agreement, is covered by the 38 U.S.C. § 7422(b) exclusions and is not grievable.

---

[2] To the extent that the Medical Center is using the 30-day notice requirement for elective clinic cancellations to restrict providers' right to request annual leave with less than 30 days notice, such a restriction affects providers' working conditions. Attachment C. While a medical center may restrict or establish procedures for providers' use of annual leave when specific patient care needs have been identified, such restrictions and/or procedures are not covered by the 38 U.S.C. § 7422(b) when the direct impact on patient care has not been identified. Here, it is not clear how a 30-day notice requirement for employee leave scheduling directly impacts patient care at the Medical Center. While the Director asserted that she was convinced that 30 days was the minimally acceptable notice that would enable veterans to receive care while allowing providers to stay within the community standard of care, management's 7422 decision request failed to identify any specific patient care concerns behind the 30-day requirement.

RECOMMENDED DECISION

That the grievance over MCM 11-48's requirement that providers provide a minimum of 45-day (amended to 30-day) notice prior to elective cancellation of a scheduled patient clinic date/time is covered by the 38 U.S.C. § 7422(b) exclusions and therefore not grievable.

APPROVED X DISAPPROVED _____

Michael J. Kussman 12/20/07

Michael J. Kussman, MD, MS, MACP Date
~~Acting~~ Under Secretary for Health