

NATIONAL GRIEVANCE
NG-6/30/2015

DATE: June 30, 2015

TO: Larry Bennett
For the Deputy Assistant Secretary
Office of Labor-Management Relations (LMR)
Department of Veterans Affairs

FROM: Gregory J. Meditz, Staff Attorney, National Veterans Affairs Council, American Federation of Government Employees, AFL-CIO

SUBJECT: **National Grievance in the matter of the Department of Veterans Affairs failure to comply with 5 C.F.R. Part 339 and Master Agreement Articles 19 and 57 concerning VA Handbook 5019 requirement to sign an authorization to release medical records.**

STATEMENT OF CHARGES

Pursuant to the provisions of Article 43, Section 11 of the Master Agreement between the Department of Veterans Affairs (VA) and the American Federation of Government Employees (AFGE) (2011) (Master Agreement), the American Federation of Government Employees/National Veterans Affairs Council (Union) is filing this national grievance against the VA and all other associated VA officials and/or individuals acting as agents on behalf of the VA for violations as it relates to its failure to comply with 5 C.F.R. Part 339, and Articles 19 and 57 of the Master Agreement concerning the release of personal medical records. This grievance is timely because it is a continuing violation that has been submitted within the mutually agreed to grievance deadline by the parties under the Master Agreement.

Specifically, on or about March 27, 2015, the VA, by and through its representatives and/or agents, promulgated a revision to VA Handbook 5019, Employee Occupational Health Service, to require employees participating in special physical examinations, formerly known as fitness-for-duty examinations, to sign an authorization to release medical information under threat of disciplinary action, including removal from service.

In doing so, the VA has violated the following provisions:

- (1) 5 C.F.R. Part 339
- (2) Master Agreement Article 19;
- (3) Master Agreement Article 57; and
- (4) any and all other relevant articles, laws, regulations, customs and past practices not herein specified.

STATEMENT OF THE CASE

I. Background

Under the authorities of 5 U.S.C. §§ 339, 3301, and 5112; 5 C.F.R. Part 339 prescribes government-wide regulations regarding medical qualification determinations. Subpart C – Medical Examinations of the regulation authorizes agencies to conduct medical examinations of employees subject to compliance to other laws and regulations. The regulation provides a specific set of instances under which an agency is permitted to conduct an examination, the procedures for doing so, and instructions for how to keep the results of the examinations. While the Agency is permitted under specific circumstances to conduct special physical examinations, no part of the regulation authorizes an Agency to require any release of employee medical information beyond the results of the special physical examination.

The Master Agreement, in consistency with the regulations, echoes the requirements of the applicable regulations. Article 19 of the Master Agreement applies to Title 5 and Title 38 Hybrid employees whereas Article 57 applies to Title 38 employees. Both sections permit the use of a fitness-for-duty (special physical) examinations however, neither Article permits the VA to require disclosure of medical information beyond the results of a special physical examination.

On or about March 27, 2015, the VA promulgated a revision to VA Handbook 5019, “Employee Occupational Health Service.” Exhibit A. The new language added to Part II, Paragraph 5 of the Handbook follows:

Employees must sign an authorization to release information form prior to undergoing any directed or special physical examination and made aware that results of the examination may be shared with leadership or others with a need to know in an effort to continue the mission of the Department. Failure of the employee to submit to a directed or special examination or to sign the authorization form may result in disciplinary action, including removal from employment from the Department.

The Union takes issue with this newly promulgated language.

II. Violation

On or about March 27, 2015, the VA unilaterally promulgated a revision to VA Handbook 5019 containing an illegal provision which exceeds the permissions granted to the VA under 5 C.F.R. Part 339 and agreed to under the Master Agreement. The aforementioned language vaguely and ambiguously requires employees subjected to a special physical examination to authorize the release of medical information under threat of discipline. The new language makes no reference to the medical information being required of the employee leaving open the opportunity for overreach beyond the permitting regulation and abuse of the examined employee.

III. Remedy Requested

The Union asks that to remedy the above situation, the VA agrees to the following:

- (1) To cease and desist from enforcing the new language in VA Handbook 5019, Part II, Paragraph 5;
- (2) To destroy all medical data that may have been illegally released by AFGE bargaining unit employees or their agents and obtained by the VA;
- (3) To refrain from disciplining any employee who failed to comply with the March 27, 2015 update to Part II, Paragraph 5 of the VA Handbook 5019 regarding the release of medical records or health information associated with a special physical examination.
- (4) To agree to any and all other remedies appropriate in this matter.

IV. Time Frame and Contact

This is a National Grievance and the time frame for resolution of this matter is not waived until the matter is resolved or settled. If you have any questions regarding this National Grievance, please contact me at 202-639-6424.



Gregory J. Meditz
Staff Attorney
National VA Council

cc: Alma L. Lee, President, AFGE/NVAC
Mary-Jean Burke, Chair, Grievance and Arbitration Committee, AFGE/NVAC
James Alsup, Managing Attorney, AFGE/NVAC

EMPLOYEE OCCUPATIONAL HEALTH SERVICE

1. **REASON FOR ISSUE:** To reissue Department of Veterans Affairs (VA) policy regarding the Employee Occupational Health Service.
2. **SUMMARY OF CONTENTS/MAJOR CHANGES:** This directive sets forth human resources policies regarding the Employee Occupational Health Service. No substantive changes have been made to the previous directive.
3. **RESPONSIBLE OFFICE:** The Worklife and Benefits Service (058), Office of the Deputy Assistant Secretary for Human Resources Management.
4. **RELATED HANDBOOK:** VA Handbook 5019, Employee Occupational Health Service.
5. **RESCISSIONS:** VA Directive 5019, Occupational Health Services, dated April 15, 2002.

CERTIFIED BY:

**BY DIRECTION OF THE SECRETARY
OF VETERANS AFFAIRS:**

/s/Stephen W. Warren
Executive in Charge and Chief Information Officer
Office of Information and Technology

/s/Gina S. Farrisee
Assistant Secretary for
Human Resources and Administration

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EMPLOYEE OCCUPATIONAL HEALTH SERVICE

1. PURPOSE. This directive contains policy on the Employee Occupational Health Service of the Department of Veterans Affairs (VA), the use of physical standards boards for Title 38 and hybrid employees and the availability of the Employee Assistance Program (EAP) for all employees.

2. POLICY. It is VA policy to ensure that all selected applicants and employed personnel are physically, cognitively and emotionally fit to perform the duties of the position to which assigned. It is also the policy of VA to assist employees through the EAP for biopsychosocial issues which affect employee performance and/or conduct as well as problems related to alcohol or drug abuse.

3. RESPONSIBILITIES. Statements of responsibility for the various programs contained within this directive may be found in each of the separate parts of VA Handbook 5019.

4. REFERENCES

- a. OPM Employee Health Services Handbook;
- b. OPM Operating Manual 339-31, Reviewing and Acting on Medical Information;
- c. OPM Operating Manual on Qualification Standards for General Schedule Positions;
- d. Privacy Act, 5 U.S.C. 552a;
- e. VA Directive 5810, Managing Workers Compensation Cases;
- f. X-118 C – OPM Job Qualifications System for Trades and Labor Occupations;
- g. 5 CFR, parts 300, 307, 332, 333, 335, 337, 338, 339, 353 and 930;
- h. 5 U.S.C. 7901;
- i. 5 U.S.C., chapters 11, 21, 23, 31, 33, 35 and 51;
- j. 29 CFR 1613.704;
- k. 38 U.S.C., chapters 73 and 74;
- l. 38 U.S.C. 611(b);
- m. 45 CFR, parts 160 and 164.

EMPLOYEE OCCUPATIONAL HEALTH SERVICE

1. REASON FOR ISSUE: To reissue Department of Veterans Affairs (VA) procedures regarding the Employee Occupational Health Service.

2. SUMMARY OF CONTENTS/MAJOR CHANGES: This handbook sets forth human resources procedures regarding the Employee Occupational Health Service. Significant changes include:

- a. Adds tobacco cessation program information and procedures.
- b. Clarifies physical examination requirements for firefighters.
- c. Establishes procedures regarding the role of Employee Occupational Health providers in the management of work-related injuries and illnesses.
- d. Establishes a requirement that employees must sign a qualifying "Authorization to Release Medical Records or Health Information" form prior to undergoing a directed or special examination. Failure to sign the authorization constitutes refusal of a directed or special examination and may result in disciplinary action, including removal from employment.

3. RESPONSIBLE OFFICE: The Worklife and Benefits Service (058), Office of the Deputy Assistant Secretary for Human Resources Management.

4. RELATED DIRECTIVE: VA Directive 5019, Employee Occupational Health Service.

5. RESCISSIONS: VA Handbook 5019, Occupational Health Services, dated April 15, 2002; VA Handbook 5019/1, Occupational Health Services, dated June 16, 2004; VA Handbook 5019/2, Occupational Health Services, dated October 26, 2005; VA Handbook 5019/3, Occupational Health Services, dated October 12, 2007; VA Handbook 5019/4, Occupational Health Services, dated March 11, 2009; and, VA Handbook 5019/5, Occupational Health Services, dated January 23, 2015.

CERTIFIED BY:

**BY DIRECTION OF THE SECRETARY
OF VETERANS AFFAIRS:**

/s/Stephen W. Warren
Executive in Charge and Chief Information Officer
Office of Information and Technology

/s/Gina S. Farrisee
Assistant Secretary for
Human Resources and Administration

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EMPLOYEE OCCUPATIONAL HEALTH SERVICE

CONTENTS

- PART I. GENERAL**
- PART II. EXAMINATIONS AND EVALUATIONS**
- PART III. PHYSICAL STANDARDS BOARD**
- PART IV. HEALTH MAINTENANCE PROGRAMS, EXAMINATIONS, AND VACCINATIONS**
- PART V. RECORDS AND FORMS**
- PART VI. MANAGEMENT OF WORK-RELATED INJURIES AND ILLNESSES**
- PART VII. DOMESTIC VIOLENCE, SEXUAL ASSAULT, AND STALKING IN THE
WORKPLACE**
- PART VIII. EMPLOYEE ASSISTANCE PROGRAM**

EMPLOYEE OCCUPATIONAL HEALTH SERVICE

PART II. EXAMINATIONS AND EVALUATIONS

CONTENTS

PARAGRAPH	PAGE
1. <u>PURPOSE OF MEDICAL, PSYCHIATRIC, AND PSYCHOLOGICAL EXAMINATIONS</u>	II-1
2. <u>CONDUCT OF THE EXAMINATION AND EVALUATIONS</u>	II-1
3. <u>PRE-PLACEMENT PHYSICAL EXAMINATIONS AND EVALUATIONS</u>	II-2
4. <u>ANNUAL HEALTH PROMOTION EVALUATIONS</u>	II-3
5. <u>SPECIAL PHYSICAL EXAMINATIONS</u>	II-4
6. <u>TRAVEL FOR MEDICAL EXAMINATIONS</u>	II-6
7. <u>MEDICAL ACTION ON REPORTS OF EXAMINATIONS AND EVALUATIONS</u>	II-7
APPENDICES	PAGE
II-A. <u>MEDICAL CONDITIONS AND CRITERIA COVERING MEDICAL EVALUATIONS FOR MOTOR VEHICLE OPERATORS, POLICE, FIRE FIGHTERS, AND BOILER PLANT OPERATORS</u>	II-A-1
II-B. <u>COMPARISON OF MEDICAL REQUIREMENTS FOR FIREFIGHTERS – OPM VS NFPA</u>	II-B-1

c. **Screening Tests.** As part of the health promotion evaluation, each employee may be offered screening tests which are consistent with current A and B recommendations of the US Preventive Services Task Force and the CDC community guide on preventive services. Although screening tests are encouraged as part of a comprehensive health promotion program, they may be offered independently.

d. **Place of Evaluation.** Employees who request VA to conduct a health promotion evaluation will normally be examined or tested at their duty station.

5. SPECIAL PHYSICAL EXAMINATIONS

a. **General.** Special physical examinations may be authorized by the Secretary, Administration and Staff Office Heads, or designees, or facility directors for employees identified in appendix A under their jurisdiction. A special examination and employee authorization to release the ensuing reports are considered conditions of employment. A directed or special physical examination may be required to solve questions of physical, cognitive or emotional ability to perform the essential duties of a position satisfactorily. An examination may also be necessary to determine physical, cognitive and emotional fitness to resume duty after illness. A special physical examination may only be ordered or offered when the inquiry is job-related and consistent with business necessity. An employee may not be subjected to a special physical examination for the purpose of solely ruling out a medical reason for misconduct, performance issues, or other behavior. Employees must sign an authorization to release information form prior to undergoing any directed or special physical examination and made aware that results of the examination may be shared with leadership or others with a need to know in an effort to continue the mission of the Department. Failure of the employee to submit to a directed or special physical examination or to sign the authorization form may result in disciplinary action, including removal from employment with the Department.

NOTE: According to 29 CFR 1630 in order to establish that an examination is "job related" and "consistent with business necessity" there must be a reasonable belief, based on objective medical evidence, that the employee's ability to perform essential job functions will be impaired by a medical condition, or there is a reasonable belief, based on objective medical evidence, that the employee poses a threat due to a medical condition.

b. **Special Physical Examination to Determine Fitness-for-Duty.** A fitness-for-duty examination is a medical examination that may be ordered or offered to determine an employee's ability to perform assigned duties. Fitness-for-duty examinations must be ordered or offered in writing in accordance with subparagraph f below. Fitness-for-duty examinations may only be ordered or offered when there is a direct question about an employee's ability to perform assigned duties.

(1) **Agency Ordered Fitness-for-Duty Examinations.** An employee may be ordered to undergo a special physical examination to determine fitness-for-duty only when the employee occupies a position with established medical standards or physical requirements and there is a direct question about the employee's ability to continue to meet the established medical standards or physical requirements of the position.

(2) **Agency Offered Fitness-for-Duty Examinations.** A fitness for duty examination may be offered to any employee when additional information is needed to make an informed management