



NATIONAL VETERANS AFFAIRS COUNCIL

American Federation of Government Employees, Affiliated with the AFL-CIO

NATIONAL GRIEVANCE

NG-10/9/19

Date: October 9, 2019

To: Tracy Schulberg
Executive Director
Office of Labor-Management Relations
U.S. Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420
tracy.schulberg@va.gov
Sent via electronic mail only

From: Thomas Dargon, Jr., Staff Counsel, National Veterans Affairs Council (#53) (“NVAC”), American Federation of Government Employees, AFL-CIO (“AFGE”)

RE: National Grievance against the Department of Veterans Affairs for committing an unjustified personnel action and failing to comply with policy, contract, and federal law regarding the administration of annual leave for VA physicians

STATEMENT OF CHARGES

Pursuant to the provisions of Article 43, Section 11 of the Master Agreement Between the Department of Veterans Affairs and the American Federation of Government Employees (2011) (“MCBA”), American Federation of Government Employees/National Veterans Affairs Council (“the Union”) is filing this National Grievance against you and all other associated officials and/or individuals acting as agents on behalf of the Agency for committing an unjustified personnel action and failing to comply with policy, contract, and federal law regarding the administration of annual leave for VA physicians. To date, the VA has failed to remedy this violation, and as such, continues to violate the MCBA, VA policy, and federal law.

Specifically, VA violated Articles 2, 3, 35, 47, and 49 of the MCBA, 5 U.S.C. §7116(a), and any and all other relevant articles, laws, regulations, and past practices not herein specified.

STATEMENT OF THE CASE

Background

Historically, both the annual leave accrual rate and charge rate for full-time physicians, dentists, podiatrists, chiropractors, and optometrists appointed by the Department of Veterans Affairs (“the Agency”) under 38 U.S.C. §7401, §7405, or §7306 was “one day” per pay period and 26 days per calendar year.¹ Physicians are compensated based on a 24/7/365 schedule, meaning they must be

¹ For ease of reference, this group is collectively referred to as “physicians.”

available to work at any time, and most work far beyond the standard 40-hour workweek. Physicians are not entitled to additional compensation or premium pay for on-call duty, overtime work, or unscheduled hours of work. As a result, the Agency has long recruited and retained physicians based on a leave administration system where annual leave is accrued and charged in daily increments.² As patient care often requires, physicians regularly work alternative work schedules that include, for example, 10, 12, or 13-hour workdays. However, regardless of their schedule, full-time physicians accrue 26 days of annual leave per year, and when they use that leave, the Agency charges them in daily increments. This leave system acknowledges the demanding, irregular schedules worked by physicians and, by charging 1 day of annual leave used for 1 day of annual leave earned, it fairly credits physicians for their extraordinary contributions to the mission of the VA.

On or about August 15, 2017, the Agency notified the Union of its intention to revise VA Handbook 5011 (Hours of Duty/Leave) regarding variable work schedules and leave policy for physicians. During its briefing presentation to the Union, the Agency explained that it would reduce the “minimum charge” for physician annual leave from “one calendar day” to “one hour and multiples thereof.” Thus, the revision only concerned the increments of leave *use*. On July 26, 2018, the Agency implemented VA Handbook 5011/32 (“Change 32”), which included the revision reducing the minimum charge of physician annual leave to one hour. See Part III, Chapter 3, Section 4(b)(4)(a) at III-48. Following implementation, the Agency published a Human Resources Management Letter instructing the field not to comply with the requirements of Change 32. Upon information and belief, the Agency delayed implementation pending the completion of system enhancements in the VA Time and Attendance System (“VATAS”).

On August 28, 2019, the Office of Human Resources Management (“VA-OHRM”) published a bulletin entitled “Leave Conversion for Full-Time Title 38 Physicians, Dentists, Chiropractors, Podiatrists and Optometrists” that stated “[u]pon the conversion from daily to hourly accrual and usage, one day of annual leave will equal one 8 hour workday of annual leave.” It further stated that this leave conversion would “be effective on September 15, 2019.” Thus, this bulletin announced a change to leave *accrual*. In response, the Union immediately raised concerns to VHA senior leadership. The issue was discussed, at length, during a September 11, 2019 joint labor-management meeting in Washington, DC, where the Union explained that the proposed 8-hour conversion rate would penalize physicians working alternative work schedules and would result in the forfeiture of a large portion of earned annual leave balances. Jessica Bonjorni, Acting Assistant Deputy Under Secretary for Health for Workforce Services, stated that VHA was aware of this issue and that the Agency was working to address it prior to the September 15, 2019 conversion date. After this meeting, the Union sent two follow-up emails to Ms. Bonjorni, both of which were unanswered.

On or about September 15, 2019, the Agency converted physician leave balances from “days” to “hours” using 8-hour increments. Not only did this conversion reduce the prospective accrual of annual leave, but it also unjustifiably reduced existing leave balances. For example, for a physician working 10-hour shifts with 40 days of accrued annual leave, this conversion immediately reduced their annual leave balance from 400 hours, the amount the physician could previously use, to 320 hours.

² As of the filing of this Grievance, vacancy announcements on USAJobs still represent that physicians earn annual leave at the rate of “26 days per leave year.” In its August 2016 publication entitled “20 Reasons Doctors Like Working for the Veterans Health Administration,” which is advertised in each physician vacancy announcement, the Agency similarly represents that physicians receive “26 days of paid vacation” each year.

On September 24, 2019, VA-OHRM released a list of 82 frequently asked questions regarding the changes to physician leave policy. Select excerpts are included below.

- Q20. How do we post on a physician that works M-F 8am-4:30pm, but pulls call on the weekend? Do we post it just like normal call? And on call do we have to post the time they are on call or the time they were called in for patient care?
 - A20. Physicians are not entitled to on-call or any other type of premium pay, therefore on-call is not posted to VATAS.
- Q24. What if a physician works a 7-on-7-off tour, with each shift being 12 hours? This equals 84 hours per pay period.
 - A24. Although physicians are 24/7 employees and may have work responsibilities in excess of 80 hours per pay period, there are no VATAS tours that exceed 80 hours. Therefore, the employee's tour must be modified to reflect 80 hours.
- Q25. If a physician comes in on a day not scheduled or stays longer on a shift - it never gets put into time sheet?
 - A25. This is correct. Since physicians are considered 24/7 employees, any hours worked in excess of their scheduled tour are not recorded on the timesheet.
- Q35. If an employee works a 12-hour tour, is it correct that they would have to use 12 hours of leave to take the day off, although they only accrue 8 hours of leave in a pay period?
 - A35. This is correct. The 8 hours of annual leave accrual per pay period aligns with annual leave accrual for all other Title 38 employees.
- Q41. How can we justify docking a physician for taking an hour to see their child's graduation and then not pay them for the two to three hours beyond their tour which occurs regularly?
 - A41. Physicians are considered 24/7 employees and may be required to work late or be called back to work. This requirement has not changed. As federal employees, we must account for the entire day's work.
- Q48. What do you suggest we tell physicians who routinely currently come in at night and on the weekends, as this seems inherently unfair to physicians required to take call, particularly large amounts of call?
 - A48. Full-time physicians, dentists, podiatrists, chiropractors, and optometrists shall be continuously subject to call unless officially excused by proper authority. This requirement as to availability exists 24 hours per day, 7 days per week.

The FAQs show that the Agency does not accurately document the time and attendance records for physicians. Policy and government-wide standards published by the Government Accountability Office require federal agencies to maintain "complete, accurate, and valid" time and attendance records for civilian employees in federal agencies and require supervisors and timekeepers to verify that, to the best of their knowledge, each employee's time and attendance record is accurate. Likewise, VA Financial Policy requires the Agency to maintain "accurate and complete time and leave records." Instead, the Agency simply reports that each physician works 80 hours per week in VATAS, its official time and attendance system, even when this information is known by the Agency to be inaccurate. Guidance from VA-OHRM instructs timekeepers to post and verify inaccurate time records in VATAS.

The FAQs also demonstrate a complete disregard for the inherent unfairness arising from this policy change. Despite representations made to physicians, and despite the Union proactively raising the issue with VHA senior leadership prior to implementation, the Agency made no effort to mitigate the hardship for physicians working alternative work schedules. Instead, the Agency acknowledges that physicians working 12-hour shifts must now use 12 hours of annual leave, even though they only

accrue that leave at 8 hours per pay period, because that “aligns with annual leave accrual for all other Title 38 employees.” See Q35/A35. The Agency disregards the fact that physicians are not paid like “other Title 38 employees,” who may be entitled to overtime pay and premium pay, and it also punishes those physicians working extended, irregular, and unexpected shifts.

By implementing this policy change in a way that caused the unilateral forfeiture of earned annual leave for physicians, the Agency committed an unjustified personnel action. It also violated Article 35, Section 1(B) of the MCBA, which provides that physicians “accrue and use leave in full-day increments.” In refusing to notify and negotiate in good faith with the Union prior to initiating a change in conditions of employment for physicians, the Agency committed an unfair labor practice under 5 U.S.C. §7116(a)(1) and (a)(5). Additionally, Article 2 of the MCBA requires that the Agency comply with applicable federal statutes and regulations in the administration of matters covered by the MCBA. Therefore, in violating 5 U.S.C. §7116, as set forth above, the Agency also failed to comply with Article 2. Further, Article 3 encourages the parties to maintain a cooperative labor-management relationship that is based on mutual respect, open communication, consideration of each other’s views, and minimizing collective bargaining disputes. By failing to notify and negotiate with the Union prior to implementing this policy and causing the unilateral forfeiture of earned annual leave, the Agency renounced its commitments under Article 3 of the MCBA and necessitated further collective bargaining disputes. Finally, the Agency violated Article 47, Section 2, and Article 49, Section 4, which set forth the Parties’ responsibilities regarding mid-term bargaining at the national level.

Violation

By failing to fulfill its obligations, the VA violated, and continues to violate, the following:

- Article 2 of the MCBA: requiring the Agency to comply with federal law and regulations;
- Article 3 of the MCBA: requiring the Agency to maintain an effective, cooperative labor-management relationship with the Union;
- Article 35 of the MCBA: providing that physicians accrue and use leave in full-day increments;
- Articles 47 and 49 of the MCBA: requiring the Agency to comply with agreed-upon procedures for mid-term bargaining at the national level;
- GAO and VA policy: requiring the maintenance of accurate time and attendance records;
- 5 U.S.C. §7116(a)(1) and (a)(5): requiring the Agency to consult and negotiate in good faith with the Union;
- Any and all other relevant articles, laws, regulations, customs, and past practices not herein specified.

Remedy Requested

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

- To return to the *status quo ante*;
- To fully comply with its contractual obligations under Articles 2, 3, 35, 47, and 49 of the MCBA and its statutory obligations under 5 U.S.C. §7116(a);
- To make-whole any bargaining unit employee adversely affected by the Agency’s improper implementation, including back pay, interest, and attorney’s fees;
- To agree to any and all other remedies appropriate in this matter.

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, please contact the undersigned at AFGE Office of the General Counsel. The undersigned representative is designated to represent the Union in all matters related to the subject of this National Grievance.



Thomas Dargon, Jr.
Staff Counsel, National VA Council
AFGE, AFL-CIO
80 F Street, NW
Washington, DC 20001
Tel: 202-639-6424
Fax: 202-379-2928
thomas.dargon@afge.org

cc: Alma L. Lee, President, AFGE/NVAC
Mary-Jean Burke, Chairperson, Grievance and Arbitration Committee, AFGE/NVAC
Ibidun Roberts, Supervisory Attorney, AFGE/NVAC