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7S/00360217

NATIONAL GRIEVANCE

NG-07/07/2016

Date: July 7, 2016

To: Larry Bennett
Director, Labor-Management Relations
Office of Labor-Management Relations
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420
larry.bennett3@va.gov
Sent via electronic mail

From: Shalonda Miller, Staff Counsel, National Veterans Affairs Council (#53) (NVAC),
American Federation of Government Employees, AFL-CIO ("AFGE")

Subject: **National Grievance in the matter of the Department of Veterans Affairs for 1) failing to comply with the June 30, 2015 Settlement Agreement concerning VA Handbook 5019 and the release of personal medical records; and 2) failing to follow the Master Agreement and its own policies regarding the use of psychological examinations for police officer applicants and incumbents**

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 Department of Veterans Affairs ("Agency") officials and/or individuals acting as agents on behalf of the Agency, for violations as it relates to its 1) failure to comply with the June 30, 2015 Settlement Agreement concerning VA Handbook 5019 and the release of personal medical records; and 2) failure to follow the MCBA and its own policies regarding the use of psychological examinations for police officer applicants and incumbents.



Specifically, on or about June 7, 2016, the Agency, by and through its representatives and/or agents, proposed changes to VA Handbook 5019, "Employee Occupational Health Service," which required an employee to sign a release for access to their personal medical record and threatened discipline, up to and including removal, for refusal to sign the release.

In addition, changes promulgated to Appendix A of 5019 required a two-part psychological evaluation of certain bargaining unit employees consisting of a structured interview and a standardized, objective psychological test.

This promulgated language exceeds the permissions granted to the Agency under federal law and circumvents its own polices.

STATEMENT OF THE CASE

I. Background

On or about June 7, 2016, the Agency, 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 to sign an authorization to release personal medical information under threat of disciplinary action, including removal from service. The language set forth by the Agency is identical to that promulgated in March 2015, which was the subject of a National Grievance filed on June 30, 2015 and thereafter resolved by way of a Settlement Agreement between the parties, effective as of February 4, 2016. (attached hereto as "Exhibit A")

The promulgated language added to VA Handbook 5019, Part II, Paragraph 5 is as follows:

a. Annual Examinations. Employees may not refuse to participate in the annual examination. Prior to undergoing the annual examination, the employee must sign an authorization to release information form and be made aware that results of the examination may be shared with Human Resources Management or others with a need to know. Failure to participate in the annual examination or to sign the authorization form may result in disciplinary action, including removal from employment with the Department.

However, the Settlement Agreement 1) proscribed access to an employee's personal medical record, unless voluntarily provided by the employee; 2) prohibited the use of information obtained in a personal medical record from being the basis of discipline against an employee; 3) and required the Agency to rescind any proposed or effected discipline imposed on an employee solely for failure to authorize the disclosure of his/her personal medical record. The

Agreement further required the Agency to issue guidance to management to clarify the terms of the settlement.

Paragraph G of the Settlement Agreement further provides that “[e]ither party may bring a claim in the form of a grievance arising by reason of breach of any term of [the] Agreement.” The Agency has not only breached the Settlement Agreement by promulgating identical language constrained therein; it also failed to issue necessary guidance to prevent such action from occurring.

Secondly, on or about June 7, 2016, the Agency, by and through its representatives and/or agents, promulgated a change to Appendix A of VA Handbook 5019, entitled “Medical Conditions And Criteria Covering Medical Evaluations For Motor Vehicle Operators, Firefighters, Police Officers, And Boiler Plant Operators.” Paragraph 3, “Police Officers,” provides:

d.(2) Psychological Evaluation. At a minimum, the psychological evaluation shall consist of a structured interview and standardized, objective psychological testing. Typically, at least two psychological tests will be administered. (Emphasis Added.)

VA Handbook 0730, “Security and Law Enforcement,” limits the reach of the Agency with regard to psychological testing of police officers. Specifically, Appendix A of 0730, “Specific Medical Standards for VA Police Officer Applicants and Incumbents,” Paragraph 6, provides, in relevant part:

6. Psychological Testing. Standardized psychological testing may be used only after reason to question the applicant/officer’s suitability has arisen. If, during the psychological assessment, the psychologist/psychiatrist has an articulable reason to doubt that the officer is capable of performing the duties of a police officer, the psychologist/psychiatrist should make a formal recommendation for psychological testing to the Employee Health physician.

II. Violation

The Agency’s promulgated changes to VA Handbook 5019 have violated the following laws and provisions:

- (1) The February 4, 2016 Settlement Agreement concerning VA Handbook 5019, which prohibits the Agency from requiring employees to disclose personal medical information and requiring the Agency to provide guidance to management regarding the implementation of the agreement;
- (2) 5 C.F.R. Part 339, which prescribes government-wide regulations regarding medical qualification determinations;

- (3) Article 2 of the MCBA, which requires the Agency to comply with federal statutes and the Master Agreement;
- (4) Article 19 of the MCBA, which sets forth the procedures for fitness for duty examinations as applied to Title 5 and Title 38 Hybrid employees;
- (5) Article 57 of the MCBA, which sets forth the procedures for fitness for duty examinations as applied to Title 38 employees; and
- (6) and any and all other relevant articles, laws, regulations, customs, and past practices not herein specified.

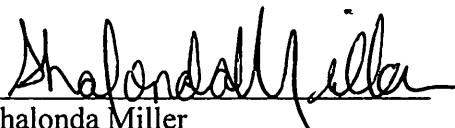
III. Remedy Requested

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

- (1) To cease and desist from enforcing the promulgated language in Part II, Paragraph 5 and Appendix A, Paragraph 3(d)(2) of VA Handbook 5019;
- (2) To comply with the February 6, 2016 Settlement Agreement regarding changes to Handbook 5019 and to execute the enforcement procedures contained therein;
- (3) To destroy all medical data that may have been illegally obtained by the Agency from bargaining unit employees or their agents; and
- (4) To agree to any and all other remedies appropriate in this manner.

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.


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cc: Alma L. Lee, President, AFGE/NVAC
Mary-Jean Burke, Chairperson, Grievance and Arbitration Committee, AFGE/NVAC
Cathie McQuiston, Deputy General Counsel, AFGE/NVAC

Exhibit A

SETTLEMENT AGREEMENT

NG-6/30/2015

Concerning VA Handbook 5019 (March 27, 2015) – Special Physical Examinations

The National Veterans Affairs Council, American Federation of Government Employees (Union) and the Department of Veterans Affairs (VA) (collectively referred to as the “Parties”) hereby agree to settle all disputes arising out of the Union’s national grievance dated June 30, 2015, regarding the VA’s compliance with its policy and Government regulations on authorization to release medical records for directed or special physical examinations, in accordance with the following terms and conditions:

I. Terms of the Settlement

- A. By execution of this settlement agreement (hereafter referred to as the “Agreement”), the Union voluntarily withdraws its national grievance dated June 30, 2015, and waives any and all actions, claims, complaints, grievances, appeals, or proceedings of whatever nature, arising from the allegations contained in the national grievance, with the exception of any grievances that may arise by reason of breach of any term of this Agreement. The Union agrees to promptly provide any document or take other action necessary to effectuate the withdrawal or dismissal of its national grievance.
- B. VA will issue guidance to management about VA Handbook 5019, part II, paragraph 5, clarifying the following issues:
1. employees must complete and sign VA form 10-5345, prior to undergoing a directed or special physical examination. On VA form 10-5345, employees must authorize that the results of those examination can be shared with VA leadership or others with a need to know in an effort to continue the mission of VA;
 2. apart from the results of a directed or special physical examination, VA cannot require that employees provide copies of their own personal health information for directed or special physical examinations. Employees may voluntarily provide personal health information from their health care provider(s);
 3. apart from the results of a directed or special physical examination, VA cannot use any employee personal health information, unless voluntarily provided by the employee, in any disciplinary or performance-based action against the employee for the reasons addressed in VA Handbook 5019, part II, paragraph 5;


4. if, prior to the issuance of the guidance discussed in this Agreement, VA proposed, commenced or effected, disciplinary action against an employee solely based on the employee's failure to authorize the disclosure of the employee's personal health information (apart from the results of a directed or special physical examination) during a directed or special physical examination, VA will rescind the discipline. If discipline was effected, VA will take corrective action for the affected individual;
 5. subject to Government regulations, VA policy, and Veterans Health Administration policy, VA will securely destroy any personal health information that was obtained from employees, when that information was not obtained in accordance with VA and Veterans Health Administration policy, including VA Handbook 5019, part II, paragraph 5; and
 6. employees who wish to obtain health information from their own Employee Medical File can complete VA form 10-5345a.
- C. VA agrees to uphold all laws protecting the privacy of VA patient and employee health care information.

II. Stipulations

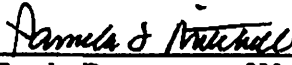
The Parties stipulate that:

- A. They have entered into this Agreement freely and voluntarily.
- B. This Agreement does not constitute an admission of guilt, fault, or wrongdoing by either party.
- C. The obligations of the Parties constitute consideration sufficient to render this Agreement enforceable by either party.
- D. This Agreement shall not serve as precedent for resolving any other complaints, grievances, appeals, or actions that may be filed.
- E. This Agreement constitutes the entire understanding between the parties regarding the resolution and settlement of the national grievance, and there are no other terms or commitments, verbal or written, regarding the settlement of the national grievance.
- F. Either party may submit the Agreement as evidence of withdrawal of the national grievance or as evidence of the Union's waiver of any and all actions, claims, complaints, grievances, appeals or proceedings of whatever nature arising from the allegations contained in the national grievance.
- G. Either party may bring a claim in the form of a grievance arising by reason of breach of any term of this Agreement.

H. This Agreement may only be modified in writing by the Parties listed below or their representatives:



For the Union
Gregory J. Meditz
Staff Attorney



For the Department of Veterans Affairs (VA)
Pamela S. Mitchell
Deputy Assistant Secretary
Office of Human Resources Management
VA Office of Human Resources and Administration

1/5/2016
Date

4 Feb 2016
Date