



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

MAR 1 - 2 2007

Donna M. Schroeder
Director, Compensation and Classification Service
VA Office of Human Resources and Administration
810 Vermont Avenue, N.W.
Washington, DC 20420

Dear Ms. Schroeder:

I am responding to the issues raised in your memorandum of September 27, 2006, concerning a national grievance filed by AFGE-NVAC alleging that the Department failed to comply with the law and/or Article 53 of the VA-AFGE master collective bargaining agreement in implementing the Department of Veterans Affairs Health Care Personnel Enhancement Act of 2004, Public Law 108-445.

As is explained in the enclosed decision paper, the issues raised by the subject grievance concern or arise out of the establishment, determination, or adjustment of Title 38 compensation. As such, they are non-grievable under 38 U.S.C. § 7422(b).

Please provide a copy of this decision paper to the union at your earliest convenience.

Sincerely yours,

A handwritten signature in cursive script that reads "Michael J. Kussman".

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

Enclosure

Title 38 Decision Paper
AFGE National Grievance re: Compensation Panels
for Physicians and Dentists
VA – 07 – 01

On May 16, 2006, the American Federation of Government Employees/National VA Council (AFGE-NVAC or union) filed a national grievance alleging that the Department failed to comply with the law and/or Article 53 of the VA-AFGE master collective bargaining agreement (CBA) in implementing the physician and dentist pay provisions of the Department of Veterans Affairs Health Care Personnel Enhancement Act of 2004, Public Law 108-445 (the Act). *Attachment A*. More specifically, the grievance alleges that “[i]n June 2005, pursuant to [the Act], compensation panels began to meet, review data and formulate pay ranges for VA physicians and dentists, with an expected target date for implementation set tentatively for April 2006.” (Id., ¶ 2.) The grievance further alleges that “[m]any of the compensation panels were formed and conducted without adequate notice to the Union, or to clinicians who would have been eligible to serve on the panels. In some instances, clinicians were initially invited to serve on the panels but were not notified of the meeting dates. This failure to provide adequate notice or inclusion until the panels’ work was done completely eliminated the opportunity to provide input into the panel’s pay recommendations.” (Id., ¶ 6.) The union suggests that management has violated Article 53 of the CBA by failing to give serious consideration to the union’s recommendations for panel members (Id., ¶¶ 4-6) and has violated the Act by excluding eligible clinicians from compensation panels on the basis that it was “not practicable” to include them but not providing to the union any basis for that finding. (Id., ¶¶ 3, 7.) Finally, the union claims that “AFGE has repeatedly requested inclusion of the Union at the national and local levels, but was excluded from all key policymaking bodies and from most training activities.” (Id., ¶ 8.)

As a remedy, the union requested in the grievance that the Department “create new compensation panels [and ...] cease implementing any pay changes until the newly devised panels have completed the review process,” but that any pay increases be made retroactively. (Id., ¶ 9.) In addition, the union demanded that the newly convened panels be composed as follows:

- a. One-third of each panel’s membership should be comprised of non-management clinicians, after allowing the Local [union] to recommend members.
- b. A list of panel members and meeting dates should be provided to the local [union] in advance of meeting dates.
- c. Management shall provide a written explanation to the Local [union] for each [union] recommendation that was rejected.

- d. Any and all other action that [sic] should be taken to ensure that physicians and dentists are made whole.

(Id., ¶ 10.)

On June 23, 2006, Ron E. Cowles, then-Deputy Assistant Secretary for Labor Management Relations, responded to the union grievance. *Attachment B*. In his response, Mr. Cowles explained that the compensation panels responsible for formulating pay ranges for VA physicians and dentists establish, determine, and/or adjust compensation within the meaning of 38 U.S.C. § 7422(b), and that the issues raised in the grievance are therefore excluded from collective bargaining and from the negotiated grievance procedure. Mr. Cowles informed the union that management would be requesting a 38 U.S.C. § 7422(d) determination from the Under Secretary for Health (USH), but that before that request was made, he would like to meet with the Union to discuss the issues raised in the grievance and possible ways of resolving them.

The Union did not respond to Mr. Cowles' invitation to meet to discuss the issues raised in the grievance. Instead, the Union invoked arbitration. *Attachment C*.

By memorandum dated September 27, 2006, Donna Schroeder, the Director of VA's Compensation and Classification Service and a member of the steering committee responsible for implementing the Act, requested that the USH issue a determination whether the issues raised by the grievance are excluded from the negotiated grievance procedure by 38 U.S.C. §7422. *Attachment D*. The Union was afforded an opportunity to submit a response to Ms. Schroeder's 38 U.S.C. §7422 decision request (*Attachment E*) but did not do so.¹

ISSUES:

1. Whether the subject grievance involves any matter or question concerning or arising out of the establishment, determination, or adjustment of Title 38 employee compensation within the meaning of 38 U.S.C. §7422(b).
2. Whether the subject grievance involves any matter or question concerning or arising out of peer review within the meaning of 38 U.S.C. §7422(b).

¹ Ms. Schroeder notified William Wetmore, chairman of the union's grievance and arbitration committee, of her request for a 38 U.S.C. §7422 determination by memorandum dated September 27, 2006. A second copy of that memorandum was emailed to the union's counsel, Jacqueline Sims, on November 16, 2006. On December 6, 2006, Ms. Schroeder afforded Mr. Wetmore an extension of time to December 15, 2006, to submit the union's input, but the union submitted nothing within that time.

BACKGROUND:

1. The Act

The Act was enacted on December 3, 2004. Section 3 of the Act revised the physician and dentist pay authorities set out in Title 38, Chapter 74 to provide for three elements of pay – base pay, market pay, and performance pay – for each Veterans Health Administration (VHA) physician and dentist. (P.L. 108-445, § 3.) *Attachment F.*

More specifically, the Act amended 38 U.S.C. § 7431(c)(4)(A) and 7431(e)(1) to authorize the Secretary to establish pay ranges within which individual providers' market pay will be set. The Act further amended 38 U.S.C. § 7431(e)(1)(B) to authorize the Secretary to establish up to four tiers within each medical specialty or assignment, corresponding to responsibility levels, professional achievements or other facts relevant to the determination of market pay for an individual provider. The Act amended 38 U.S.C. § 7431(c)(4)(B) to authorize the Secretary to determine the annual amount of market pay payable to an individual physician or dentist based on the recommendation of a panel or board comprised, "to the extent practicable," of practicing clinicians who do not hold management positions at the facility at which the subject physician or dentist is employed. Finally, the Act amended 38 U.S.C. § 7433(a) to authorize the Secretary to prescribe regulations by which the new pay system will be implemented, taking into account the recommendations of the Under Secretary for Health (USH). In formulating such recommendations, the USH "shall request the views of representatives of labor organizations that are exclusive representatives of physicians and dentists of the Department and the views of representatives of professional organizations of physicians and dentists of the Department." (Public Law 108-445, § 3, codified at 38 U.S.C. § 7433(a)(2).)

2. The Act's Legislative History

Congress changed the statutory language used to describe the compensation panels several times as the Act worked its way through the legislative process. In the original version of the Act, the Administration proposed that VHA facilities simply be authorized to set individual providers' market pay "in accordance with regulations prescribed by the Secretary." S. 2484, 108th Cong., 2nd Sess., (as introduced in the Senate) (June 1, 2004), § 7431(b)(2). *Attachment G.* In that original Administration version, the Act did not specifically require that any recommending body participate in market pay determinations.

The Senate Veterans Affairs Committee (SVAC) revised the Administration's proposal in an amended bill that would have authorized the

Secretary to set market pay for individual providers based on “the recommendations of the Medical Professional Standards Board for the medical facility of the Department at which the physician or dentist is employed.” S. 2484, 108th Cong., 2nd Sess. (as reported in the Senate) (September 23, 2004), § 7431(c)(5)(A). *Attachment H*. Under this version of the bill, providers who were themselves members of Medical Professional Standards Boards would make pay recommendations for other providers, but could not recommend their own pay; Board members’ pay would be set pursuant to regulations prescribed by the Secretary. *Id.*, § 7431(c)(5)(B). This version further provided that Medical Professional Standards Boards making market pay recommendations “shall consist of at least three and not more than five persons, each of whom is either a physician or dentist [and n]ot less than a majority of [whom are] ... practicing clinicians in their professions.” *Id.*, § 7431(c)(5)(C).²

The bill underwent additional revisions prior to its enactment. The version to which the Senate agreed – which the Act’s sponsor, then-SVAC Chair Arlen Specter, termed “the Managers’ bill” – substituted the phrase “panel or board” for “Medical Professional Standards Board” and deleted the specific requirements that the panel or board be comprised of three to five physicians or dentists and that the majority of board members be practicing clinicians. S.2484, 108th Cong., 2nd Sess. (engrossed as agreed to or passed by the Senate) (October 5, 2004), § 7431(c)(4)(B)(i). *Attachment J*. Senator Specter explained these revisions to his Senate colleagues as follows:

The Managers’ bill would modify the reported bill’s requirement that VA consult local Medical Professional Standards Boards – PSBs – prior to making decisions concerning the pay of physicians and dentists. It would only be required that an appropriate panel of physicians or dentists, as applicable, be consulted The managers’ bill would also excise references to the required size of the board.

108 Cong. Rec. S10460, S10466 (*Attachment K*).

The final version of the Act thus requires that market pay recommendations emanate not from PSBs, but from “an appropriate panel or board composed of physicians or dentists, as applicable.” 38 U.S.C. § 7431(c)(4)(B)(i). The Act further provides that compensation panels “should, to the extent practicable, ... include... physicians or dentists (as applicable) who are practicing clinicians and who do not hold management positions in the medical facility of the Department at which the physician or dentist subject to the consultation is employed.” *Id.* (emphasis added). In this way the statutorily required compensation board or panel differs from the physician boards that VHA has historically convened as PSBs, which are comprised of service chiefs and Chiefs of Staff without any non-management representation. See VA

² This version of the Act is the subject of a Committee Report (S. Rep. No. 108-357) (*Attachment I*).

Handbook 5005, Pt. II, Ch. 3, ¶ 4.a; see also VHA Supplement to MP-5, Pt. II, Ch. 2, ¶ 2.20(e)(1) (Oct. 30, 1998). *Attachment P*.

3. The Department's Implementation Process

The Act required that VA physicians and dentists be paid under the new system beginning with the first pay period of 2006. To prepare for the conversion, the Department convened a steering committee in June 2005 to assist the Secretary in establishing the national pay ranges required by the Act. The steering committee was not a compensation panel convened pursuant to 38 U.S.C. § 7431(c)(4)(B), but rather a deliberative management committee formed to assist the Secretary in carrying out the work required by 38 U.S.C. § 7431(c)(4)(A) and 7431(e). Rather than determining any individual provider's market pay, the steering committee reviewed relevant third party physician and dentist salary data, compared that data to VHA physicians' and dentists' pay under the pre-Act pay system, and assisted the Secretary in establishing Department-wide pay ranges and tiers. *Attachment L*.

At or about the same time that the steering committee was convened, the USH provided draft implementing regulations to AFGE and VA's other unions and professional organizations representing physicians and dentists in accordance with 38 U.S.C. § 7433(a)(2). Those organizations, including AFGE, responded with comments on the draft regulations, and the USH considered those comments before making recommendations to the Secretary as required by the Act. *Attachment M*.

Later in 2005, the Department issued regulations in the Federal Register and in VA Handbook 5007, Part IX, to implement the Act. These regulations set out six pay tables covering various medical specialties and assignments. (See 70 Fed. Reg. 65980, 65981. *Attachment N*. Tables 1 through 4 established pay ranges for each of four tiers, which corresponded to different responsibility levels. *Id.* The regulations assigned staff physicians to Tier 1, with service chiefs, section chiefs and other supervisors or program managers assigned to Tier 2; Network-level program managers and other physicians having Network-level supervisory responsibilities within the specialty assigned to Tier 3; and providers having National program responsibilities or the equivalent assigned to Tier 4. *Id.*; see also VA Handbook 5007, Pt. IX, ¶ 9.c. (*Attachment O*).

With respect to the "panel[s] or board[s]" required by the Act, the regulations provided for the establishment of compensation panels to recommend the appropriate pay table, tier level and market pay amount for each provider. VA Handbook 5007, Pt. IX, ¶ 13.b. (*Attachment O*). The regulations required that compensation panels for providers assigned to Tier 1 on Pay Tables 1-4 include "at least one physician or dentist who holds a management position and, to the extent practicable, at least two physicians or

dentists who are practicing clinicians and who do not hold management positions at the facility at which the physician or dentist being considered is or will be employed.” *Id.* For providers assigned to Tier 2 and 3 on Pay Tables 1-4, the regulations required that panel members be in a tier equal to or higher than the tier for which the physician or dentist is being considered, and that physician panels be composed solely of physicians, while dentist panels will have at least two dentists.³ *Id.* For providers assigned to Tier 4 on Pay Tables 1-4 or to any Tier on Pay Tables 5-6, the regulations required that compensation panels be comprised of “at least three members in any combination of physicians and dentists paid from Tier 4 or Pay Tables 5 and 6.” *Id.*

The regulations set out in VA Handbook 5007 implemented the Act’s market pay provisions by, among other things, authorizing local compensation panels to make recommendations to facility Directors regarding appropriate levels of market pay for each provider. Consistent with the Act’s requirements, the regulations provide that “Compensation Panels recommend the appropriate pay table, tier level and market pay amount for individual physicians and dentists.” VA Handbook 5007, Part IX, paragraph 13.a.(1). The regulations treat compensation panels as a separate entity from PSBs and specifically require that compensation panels perform a separate pay-related review of appointment actions recommended by PSBs. *Id.* However, the compensation panel’s pay recommendations, like the PSB’s appointment and advancement recommendations, are based on a review of the provider’s experience and accomplishments by a body of the provider’s peers. Compare VA Handbook 5007, Part IX, paragraphs 9.d., 9.e, 13.a.(2), 13.b. (compensation panels) (*Attachment P*) with VA Handbook 5005, Part II, Chapter 3, Section C, paragraphs 5 and 6 (PSBs) (*Attachment Q*).

On January 8, 2006, all VHA facilities converted to the new physician and dentist pay system. Local compensation panels were convened thereafter to review individual providers’ pay and recommend market pay amounts as required by the Act, with each provider’s initial market pay review due to be completed in or around April 2006. Neither the Act nor the implementing regulations provide for union participation in the compensation panels or for union involvement in the selection of bargaining unit physicians or dentists to serve on local compensation panels⁴; however, the regulations do instruct

³ In this respect the Compensation Panels operate comparably to PSBs for many non-physician Title 38 and hybrid occupations, whose members must be “in a grade equal or higher than the grade for which the candidate is being considered.” (VA Handbook 5005, Pt. II, Ch. 3, ¶ 4.a.) Physician PSBs, however, are configured differently, as those boards include only senior service chiefs and Chiefs of Staff. Physician PSB membership has thus traditionally differed significantly from the compensation panel membership contemplated by the Act. (*Id.*, ¶ 5.a.; see also VHA Supplement to MP-5, Pt. II, Ch. 2, ¶ 2.20(e)(1) (Oct. 30, 1998). *Attachment R*.

⁴ The Act provides for union involvement only in connection with the Secretary’s prescription of implementing regulations, as discussed supra.

facilities to include, wherever practicable, at least two non-managerial clinicians on compensation panels convened to review market pay for Tier 1 providers on Pay Tables 1 through 4.

4. The VA-AFGE CBA

The current VA-AFGE CBA took effect in 1997. Nothing in the CBA deals directly with physician or dentist pay or with the Act. Among the CBA provisions that are arguably relevant to the union's grievance are the following:

Article 2 – Governing Laws and Regulations, Section 1 provides that “[i]n the administration of all matters covered by [the CBA,] officials and employees shall be governed by applicable Federal statutes.”

Article 42 – Grievance Procedure, Section 2.C. recites 38 U.S.C. § 7422 and acknowledges that the matters covered by that statute are excluded from the parties' negotiated grievance procedure.

Article 53 – Professional Standards Board, Section A provides that “[t]he Union may submit names of candidates for Professional Standards Boards (PSBs). Management will give serious consideration to appointing from the candidates recommended by the Union.”

Attachment S.

PROCEDURAL HISTORY:

The Department of Veterans Affairs Labor Relations Act of 1991, codified at 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 (i.e., direct patient care and clinical competence), peer review or employee compensation as determined by the USH. 38 U.S.C. §7422(d) reserves to the Secretary of Veterans Affairs 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). The Secretary has delegated this authority to the USH.

DISCUSSION:

At its core, the subject grievance alleges that the Department violated the CBA and/or the Act by excluding AFGE from activities undertaken to implement the Act at the national level and/or to convene and carry out the

work of compensation panels at the local level. As a remedy, the grievance requests that the Department “create new compensation panels [with input from the union and] ... cease implementing any pay changes until the newly devised panels have completed the review process.” Whether the grievance is precluded by 38 U.S.C. §7422 depends on whether the challenged management activities and/or the requested remedy concern or arise out of the establishment, determination or adjustment of Title 38 compensation and/or peer review within the meaning of 38 U.S.C. §7422(b).

As noted above, the Secretary convened a steering committee at the national level to assist in reviewing third-party salary survey data, compare that data to VA physicians’ and dentists’ pay under the prior pay system, and recommend national ranges of pay for providers in various assignments based on that data comparison. These activities were conducted pursuant to 38 U.S.C. §§ 7431(c)(4)(A) and (e)(1)(B). The former provision of the Act authorizes the Secretary to “determin[e] ... the amount of market pay for physicians or dentists.” The latter provision authorizes the Secretary to “establish up to four tiers of minimum and maximum amounts for [each medical] specialty or assignment and prescribe for each tier a minimum amount and a maximum amount that the Secretary determines appropriate for the professional responsibilities, professional achievements, and administrative duties of the physicians or dentists ... whose pay is set within that tier.” The plain language of these statutory authorities makes it clear that these activities involve the establishment, determination or adjustment of Title 38 employee compensation. Moreover, while Congress did afford AFGE and other unions and professional organizations representing VA physicians and dentists a role in providing views regarding the procedures established to implement the new pay system, that role did not involve the establishment of tiers or determination of appropriate pay ranges for each tier or assignment, but was limited to commenting on the regulations that the Secretary was to prescribe to implement the new pay system. See 38 U.S.C. § 7433(a)(2). Nothing in the language or history of the pay statute suggests that Congress intended the union’s prescribed role under 38 U.S.C. § 7433(a)(2) to vary or negate the bargaining and grievance exclusions provided by 38 U.S.C. §7422(b).

At the local level, the Department’s activities in convening compensation panels to recommend market pay for individual providers were undertaken pursuant to 38 U.S.C. § 7431(c)(4)(B)(i), which provides that “in determining the amount of market pay for a particular physician or dentist ..., and in determining a tier (if any) to apply to a physician or dentist ... the Secretary shall consult with and consider the recommendations of an appropriate panel or board composed of physicians or dentists (as applicable).” The compensation panels, once convened, made market pay recommendations pursuant to 38 U.S.C. § 7431(c)(5), which provides that “the determination of the amount of market pay of a physician or dentist shall take into account” six enumerated factors to be considered by the panels. Moreover, after the compensation panels have made

initial market pay recommendations for all physicians and dentists within their jurisdiction, the panels will be called upon to conduct biennial reviews under 38 U.S.C. § 7431(c)(6), which requires the Secretary to re-evaluate individual providers' market pay "not less often than once every 24 months" and to adjust the amount of market pay, if appropriate, based on that evaluation. The plain language of these statutory authorities indicates that the compensation panels' activities involve the establishment, determination or adjustment of Title 38 employee compensation.

The remedy requested in the grievance would halt the Department's ongoing efforts to determine market pay for individual providers at the local level. The remedy would further require the establishment of new local compensation panels, with input from the local union, to review and adjust the market pay determinations made by the prior panels. The remedy clearly involves the establishment, determination or adjustment of Title 38 employee compensation within the meaning of 38 U.S.C. §7422(b). In addition, the requested remedy would invalidate the peer review-based recommendations that local compensation panels have made regarding individual providers' market pay amounts in accordance with 38 U.S.C. §7431(c)(5) and VA Handbook 5007, Part IX, paragraphs 9.e., 9.f., and 13. For that reason, the grievance involves a matter or question concerning or arising out of peer review within the meaning of 38 U.S.C. §7422(b).

The union alleges in the grievance that local compensation panels were convened in violation of Article 53 of the VA-AFGE Master Collective Bargaining Agreement (MCBA), which provides that "[t]he Union may submit names of candidates for Professional Standards Boards (PSBs) [and that] Management will give serious consideration to appointing from the candidates recommended by the union." This allegation is misplaced. As is discussed above, the local compensation panels convened pursuant to 38 U.S.C. § 7431(c)(4)(B) are not Professional Standards Boards as that term was understood and applied by the Department and the union when the MCBA was negotiated in 1997. Instead, the compensation panels formed to implement the new physician and dentist pay statute were convened specifically to make recommendations to the Secretary (or his designee at the local level) regarding "the determination of the [tier assignment and/or] amount of the market pay for a particular physician or dentist" under 38 U.S.C. § 7431(c)(4)(B) and regarding the periodic reevaluation and adjustment of such market pay under 38 U.S.C. § 7431(c)(6). Nothing in Article 53 or any other section of the MCBA affords the union a right to evade 38 U.S.C. § 7422 by grieving the compensation panels' market pay determinations or requesting, as AFGE has done in the instant grievance, that new panels be convened, with union-recommended members, to review and re-determine all providers' market pay amounts.

Moreover, Article 53 must be read in light of other provisions of the MCBA, including Article 2, Section 1, which in general terms acknowledges the

applicability of Federal statutes such as 38 U.S.C. §7422, and Article 42, Section 2.C., which specifically acknowledges that matters covered by 38 U.S.C. §7422(b) are excluded from the parties' negotiated grievance procedure. Taken together with these other provisions, Article 53 cannot be read to afford the union the right to grieve issues that are plainly excluded from the negotiated grievance procedure.

This decision is consistent with prior USH 38 U.S.C. §7422(d) determinations relating to peer review processes, including VAMC Jackson, MS (August 27, 1992), and the establishment, determination or adjustment of employee compensation, including VAMC Miami, FL (December 11, 2003) (locality pay for registered nurses), VAMC Miami, FL (December 16, 2002) (physician specialty pay), and VAMC Milwaukee, WI (April 28, 1992) (overtime compensation and locality pay for registered nurses).

DECISION:

The subject grievance involves matters and questions concerning or arising out of the establishment, determination, or adjustment of Title 38 employee compensation.

APPROVED X DISAPPROVED _____

The subject grievance involves matters and questions concerning or arising out of peer review.

APPROVED X DISAPPROVED _____

Date: 3/5/02

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