



DEPARTMENT OF VETERANS AFFAIRS  
Under Secretary for Health  
Washington DC 20420

June 10, 2016

Doris Barnes  
President  
AFGE Local 1633  
Michael E. DeBakey VA Medical Center  
2002 Holcombe Boulevard  
Houston, TX 77030

Dear Ms. Barnes:

I am responding to the request for a 38 U.S.C. § 7422 determination from the Director of the Michael E. DeBakey VA Medical Center, Houston, Texas, regarding AFGE Local 1633's Step III grievance opposing the Medical Center's decision not to award a nurse a special advancement for achievement.

I have determined that the issue presented addresses matters or questions that concern or arise out of peer review or the establishment, determination, or adjustment of employee compensation and are thus exempted from collective bargaining by 38 U.S.C. § 7422(b). Please review the enclosed Decision Paper for a more complete explanation of my decision.

Sincerely,

A handwritten signature in black ink that reads "David J. Shulkin, M.D." with a stylized flourish at the end.

David J. Shulkin, M.D.

Enclosures

Title 38 Decision Paper  
Department of Veterans Affairs (VA)  
Michael E. DeBakey VA Medical Center, Houston, Texas

**FACTS**

On May 21, 2014, a registered nurse (nurse) at the Michael E. DeBakey VA Medical Center, Houston, Texas (Medical Center), was recommended "for a special advancement for Achievement and Certification for successfully obtaining a Nurse Executive Certification." (Exhibit 1)

On September 24, 2014, believing that she was entitled to both a step increase and a cash award based on the recommendation, the nurse emailed her manager and inquired why she had not received a step increase or a cash award for obtaining her specialty certification. (Exhibit 2) In response to her email, the Medical Center advised the nurse that cash awards of \$2,000.00 would be awarded to registered nurses for "first certifications," but no step increases would be provided for certifications "effective this now [sic] and until further notice." (Exhibit 3) (Exhibit 4)

Additionally, the Chair of the Nurse Professional Standards Board (NPSB) at the Medical Center issued a memorandum to the nurse, notifying her that she was to receive a "Special Advancement and Certification Cash Award of \$2,000.00" for "demonstrating exceptional skills and achievement" and "making substantial contributions to the continued operation and growth of the organization." (Exhibit 5)

On November 4, 2014, the American Federation of Government Employees, Local 1633 (Union), filed a grievance against the Medical Center. (Exhibit 6) The grievance alleged that the nurse was not appropriately advanced and did not timely receive a cash award in violation of VA policy. *Id.* As remedies, the Union requested, in part, that the Medical Center comply with VA policy, the nurse be made "whole," and the Medical Center "[c]ompensate the employee with a cash and step increase award in a reasonable amount of time from May 21, 2014" which was the date the recommendation was originally submitted by the nurse's manager. *Id.*

On November 14, 2014, the Medical Center denied the Union's grievance, stating that the matter was non-grievable because it concerned a "matter or question concerning or arising out of establishment, determination, or adjustment of employee compensation under 38 U.S.C. 7422." (Exhibit 7) On November 25, 2014, the Union invoked arbitration on the grievance. (Exhibit 8)

On August 25, 2015, the Medical Center submitted a request for a 38 U.S.C. § 7422 determination. (Exhibit 9) Additionally, the Medical Center requested a postponement of the hearing, pending a determination by the Secretary that the disputed matter was or was not grievable under 38 U.S.C. § 7422. (Exhibit 10) The arbitrator agreed to postpone the arbitration. *Id.*

On September 14, 2015, the Union submitted a response to the Medical Center's request for determination. (Exhibit 10)

## **AUTHORITY**

The Secretary of the Department of Veterans Affairs has the final authority to decide whether a matter or question concerns or arises out of professional conduct or competence, peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b).<sup>1</sup>

## **ISSUE**

Whether the Union's grievance concerning a special advancement for achievement and cash award for a Title 38 employee who completed a specialty certification is a matter or question that concerns or arises out of peer review or the establishment, determination, or adjustment of employee compensation.

## **DISCUSSION**

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

The Union's grievance alleges that the Medical Center failed to follow VA policy when it considered a nurse for a special advancement and cash award. (Exhibit 6) VA Handbook 5017, Part V, provides that a registered nurse "may be advanced within the grade from one to five steps on the basis of professional achievement," including, for example, "certification by the appropriate national certifying body." (Exhibit 12 at Section 4(b)(1)) Based on the national policy provision, the nurse was qualified to receive a step increase after obtaining her new certification as a Nurse Executive. However, the decision to advance the nurse, as well as the number of steps to advance her, remains entirely within the discretion of the Medical Center as evidenced by the policy's use of the word "may" to describe the discretion given to the facility for awarding special advances and cash awards.

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<sup>1</sup> The authority to issue final 38 U.S.C. § 7422 determinations was delegated by the VA Secretary to the Under Secretary for Health on August 23, 2015. Exhibit 11.

The policy describes the process for local consideration of a Title 38 special advancement and cash award. First, the initial recommendation is submitted to the facility's NPSB by the appropriate management official. (Exhibit 12 at Appendix B) Following its review, the NPSB forwards its specific recommendation, with supporting justification, to human resources, after which the recommendation is submitted to the Medical Center Director for review and approval. *Id.* Based on VA policy, the entire process for consideration of a special advancement for achievement is discretionary.

There is no indication that the Medical Center forwarded the May 21, 2014, recommendation to the Medical Center's NPSB, or that the NPSB reviewed the nurse's accomplishments to determine whether or not she was entitled to a special advancement. Notwithstanding the foregoing or the nurse manager's initial recommendation, ultimately it was up to Medical Center management to determine whether to award the nurse with a step increase. The Medical Center chose otherwise, and decided to recognize the nurse's achievements by presenting her with a cash award. While the Union may feel the Medical Center's decision is unwarranted, it is not a violation of VA policy to choose not to approve a special advancement.

Indeed, the Union was aware that the Medical Center was unlikely to approve special advancements for Medical Center nurses. On June 23, 2014, management met with the Union and the Chairs of the Medical Center's Professional Standards Boards, and informed the group that the Medical Center had exceeded its funding ceiling "and could no longer support the advancing of steps and paying cash" for nurses' professional achievements. (Exhibit 9)

In addition to the complaint concerning the failure to award the nurse a step increase, the Union's grievance alleges that the nurse was not timely paid a cash award for becoming certified as a Nurse Executive. (Exhibit 6) VA policy specifies that a Medical Center "must grant a cash award of up to \$2,000 to covered employees who become certified while on VA rolls in a specialty related to the accomplishment of VA's health care mission." (Exhibit 12 at Section 8(b)(1)) Each facility is required to "establish written policies for granting cash awards for certification," including establishing local criteria for determining the amount of an award within the established range. *Id.* at Section 8(b)(2). Award amounts are based on the locally-developed criteria, and may also take into consideration recommendations from the facility's NPSB and Medical Center management. *Id.* VA policy further provides, "Cash awards for certification should be made within a reasonable time after the employee presents a copy of the certificate to the appropriate facility official." *Id.* at Section 8(b)(3).

While a special advancement is entirely discretionary, a cash award for a nurse specialty certification is not. *Id.* at Section 8(b)(1). Although the Medical Center waited 4 months to pay the nurse the maximum \$2,000.00 award for her specialty certification, given the circumstances, the Medical Center's actions do not violate VA policy. In accordance with VA policy, while a Medical Center "should" award a nurse within a reasonable time after the nurse obtains a new specialty certification, there are situations that may justify postponement. Here, the Medical Center was facing a budget shortfall and the nurse was advised "to be patient" until additional funds became available.

(Exhibit 10) (Exhibit 6) Ultimately, the nurse was awarded the maximum allowable cash award. (Exhibit 5)

38 U.S.C. § 7422 excludes from the parties negotiated grievance procedure any matter or question that concerns or arises out of peer review or the establishment, determination, or adjustment of employee compensation. The Union's grievance addresses two issues, the Medical Center's determination not to award a nurse a special advancement and the timeliness of a cash award related to obtaining a new specialty nurse certification. (Exhibit 6) Both issues relate to employee compensation. A cash award is obviously a component of an employee's compensation. And a special advancement means, in this instance, a step increase, with the accompanying increase in salary. In addition, because a special advancement may not, consistent with national VA policy, be approved without a favorable recommendation from the Medical Center's NPSB, the decision not to award the nurse a special advancement is also a matter that concerns peer review.<sup>2</sup> (Exhibit 12 at Appendix B)

## CONCLUSION

The Medical Center exercised its discretion by choosing not to award a nurse a step increase for obtaining a new specialty certification. At the same time, the Medical Center awarded the nurse a cash award of \$2,000.00, the maximum amount allowed, for obtaining her new certification. I find that the Medical Center complied with applicable VA policy in reaching its decisions, and I conclude that both its decisions are excluded from the parties negotiated grievance procedure by 38 U.S.C. § 7422.

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<sup>2</sup> A Professional Standards Board (PSB), by definition, engages in peer review. VA Handbook 5005 sets out the composition of the Department's PSBs. (Exhibit 13)