



THE SECRETARY OF VETERANS AFFAIRS  
WASHINGTON

May 29, 2013

Ms. Ann R. Brown, FACHE  
Director  
Martinsburg VA Medical Center  
510 Butler Avenue  
Martinsburg, WV 25405

Dear Ms. Brown:

I am responding to the issue raised in your March 9, 2011, memorandum concerning the National Federation of Federal Employees unfair labor practice (ULP) charge over management's decision regarding superior performance award amounts for title 38 employees for the end of fiscal year 2010 rating period.

This decision has taken far too long to reach the parties. Going forward, I have provided clear instruction that the process by which decisions concerning the applicability of 38 United States Code (U.S.C.) § 7422 are reviewed and recommended will be governed by strict timeframes. Training on this process was included as part of the joint labor-management 7422 training and was presented over the last 18 months. Additional training will be available online to all union and management officials. Future 7422 decisions will be provided in a much more timely manner.

I have decided on the basis of the enclosed decision paper that the issue presented by this ULP, as it pertains to title 38 employees, is a matter or question concerning or arising out of the establishment, determination, or adjustment of employee compensation under 38 U.S.C. § 7422(b) and is thus excluded from collective bargaining.

Sincerely,

A handwritten signature in blue ink, which appears to read "Eric K. Shinseki", is written over the typed name.

Eric K. Shinseki

Enclosure



THE SECRETARY OF VETERANS AFFAIRS  
WASHINGTON

May 29, 2013

Ms. Janice V. Perry  
President  
NFFE-IAM LL1798  
510 Butler Avenue  
Martinsburg, WV 25405

Dear Ms. Perry:

I am responding to the issue raised in your memoranda of March 9, 2011, and March 15, 2011, respectively, concerning the National Federation of Federal Employees unfair labor practice (ULP) charge over management's decision regarding superior performance award amounts for title 38 employees for the end of fiscal year 2010 rating period.

This decision has taken far too long to reach the parties. Going forward, I have provided clear instruction that the process by which decisions concerning the applicability of 38 United States Code (U.S.C.) § 7422 are reviewed and recommended will be governed by strict timeframes. Training on this process was included as part of the joint labor-management 7422 training and was presented over the last 18 months. Additional training will be available online to all union and management officials. Future 7422 decisions will be provided in a much more timely manner.

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Eric K. Shinseki

Enclosure

## Title 38 Decision Paper

### Department of Veterans Affairs (VA) Martinsburg VA Medical Center (VAMC)

#### FACTS:

By memorandum dated July 2, 2010, the Director, Martinsburg VAMC advised the President of the National Federation of Federal Employees (NFFE or Union), that "the [superior] performance award amount for [a] performance rating of "fully successful" is revised to reflect no award." The Director further specified that employees who received an "excellent" rating would receive \$1,000 and employees who received an "outstanding" rating would receive \$1,500. (Attachment A)

On July 8, 2010, the Union requested to negotiate over the amounts delineated in the VAMC's "end of year performance award proposal." Specifically, the Union proposed that "all VAMC employees with fully successful ratings be given award money for fiscal year 2010 in the amount of \$500." (Attachment B)

The Martinsburg VAMC and the Union attempted to negotiate this issue in October and November of 2010. This effort included meeting with a Federal Mediation and Conciliation Service mediator. However, the mediation was not successful and both parties agreed that they were at an impasse. On November 22, 2010, the Union requested assistance from the Federal Service Impasses Panel (FSIP). (Appendix C)

On or about December 7, 2010, the Director ordered payment of all superior performance awards to include bargaining unit employees represented by NFFE. (Appendix D)

On December 10, 2010, the Union filed an unfair labor practice (ULP) charge, alleging that the Martinsburg VAMC violated 5 United States Code (U.S.C.) §§ 7116(a)(5), (6), and (8) by failing to bargain in good faith and cooperate in impasse procedures when it implemented its change in superior performance award amounts. (Appendix E)

On January 25, 2011, the FSIP acknowledged the Union's request to withdraw its request for FSIP assistance, as the Union chose to proceed with a ULP. (Appendix F) In its ULP, the Union demanded that employees rated "excellent" receive a \$1,500 award and that employees rated "outstanding" receive a \$2,000 award. Thus, the Union demanded to bargain regarding all superior performance award amounts.

By memorandum dated March 9, 2011, the Martinsburg VAMC Director requested a determination regarding whether "performance awards for title 38 and hybrid employees is a matter identified as non-negotiable pursuant to 38 U.S.C. 7422." (Attachment D)

On February 6, 2012, the Martinsburg VAMC Director amended this request by clarifying that she sought a 7422 determination regarding only the title 38 employees.<sup>1</sup> (Attachment H)

On March 15, 2011, the Union submitted an opposition paper to the Martinsburg VAMC's request for a 38 U.S.C. § 7422 decision. (Attachment G) The Union argued that VA policy mandates that employees achieving "fully successful" ratings receive superior performance awards. To support its position, the Union cited to, among other documents, VA Directive and Handbook 5017 and the 2010 Decision Document regarding Joint 38 U.S.C. § 7422 Recommendations. Specifically, the Union noted that VA Handbook 5017 provides that "title 38 employees who are covered by VA's proficiency report system may be considered for a superior performance award if a rating of satisfactory or higher is achieved." The Union also referenced the Secretary's 38 U.S.C. § 7422 Decision Document ("Decision Document"), which states that "VA's failure to follow its own regulations and policies is not excluded by 7422" and "[n]ot following established VA policy regarding payment of compensation to which employee is entitled is grievable, including appropriate remedy as determined by the Secretary." In essence, the Union argued that VA policy requires the Martinsburg VAMC to grant superior performance awards to employees who are deemed "fully successful," and that the Martinsburg VAMC's failure to follow such policy prevents the matters raised in the ULP from being excluded by 38 U.S.C. § 7422(b). The Union also repeated its demand that award amounts for "excellent" and "outstanding" employees be increased.

#### PROCEDURAL HISTORY:

The Secretary has final authority to decide whether a matter or question concerns or arises out of professional conduct or competence (i.e., direct patient care or clinical competence), peer review or employee compensation within the meaning of 38 U.S.C. § 7422(b).

#### ISSUE:

Whether the Union's ULP concerning superior performance award amounts for title 38 employees is a matter or question concerning or arising out of the establishment, determination, or adjustment of employee compensation under 38 U.S.C. § 7422(b).

#### DISCUSSION:

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, and employee compensation. 38 U.S.C. §§ 7422(a), (b). Whether an issue is excluded from collective bargaining

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<sup>1</sup> These employees are physicians, dentists, podiatrists, chiropractors, optometrists, registered nurses, physician assistants, and expanded-duty dental auxiliaries. 38 U.S.C. § 7401(1)

under § 7422(b) “shall be decided by the Secretary” and is a decision that “is not itself subject to collective bargaining and may not be reviewed by any other agency.” *Id.* § 7422(d).

Pursuant to 38 U.S.C. § 7421(a), the Secretary is authorized to prescribe by regulation the hours and “conditions of employment” and leaves of absence of title 38 medical professionals. This authority includes the granting of superior performance awards to title 38 employees (*see* Vet. Aff. Op. Gen. Counsl. Adv. 8-2009 (“Consequently, “conditions of employment” can reasonably be interpreted to encompass performance awards and therefore the Secretary has authority to prescribe by regulation conditions under which title 38 employees may receive performance awards based on ratings of records.”)) The Secretary exercised this authority through regulations promulgated in VA Directive and Handbook 5017.

The primary issue is whether superior performance awards constitute “compensation” under 38 U.S.C. § 7422(b). Previous 7422 decisions regarding compensation have concluded that issues concerning night differential (*Asheville VAMC* (March 5, 2001)), physician and dentist market pay (*AFGE National Grievance* (March 2, 2007)), overtime pay (*Louisville VAMC* (May 19, 2008)), step increases (*Ann Arbor Healthcare System* (Sep. 26, 2008)), and weekend premium pay (*Little Rock VAMC* (Nov. 27, 2001)) are excluded from collective bargaining under § 7422(b)’s “compensation” exclusion. The Agency has not previously considered whether superior performance awards are “compensation” under § 7422(b). There is nothing in the legislative history of § 7422(b) that explains Congress’s definition of “compensation.” However, an analysis of title 38 and title 5 authorities reveals that superior performance awards are a form of compensation, as both VA and the Office of Personnel Management (OPM) have promulgated regulations that define “compensation” to include performance awards. VA regulations at VA Handbook 5007, Part VII, Chapter 2 mandate that the title 5 “annual aggregate limitation on compensation” applies to all VA title 5 employees and certain title 38 employees, while the handbook also implements an annual aggregate limitation on compensation for VA physicians, dentists, pharmacist executives, and certified registered nurse anesthetists. VA Handbook 5007, Part VII, Chapter 2 mandates that the Agency include “incentive awards and performance-based cash awards” when calculating annual aggregate compensation for all employees. Additionally, OPM includes “incentive awards and performance-based cash awards” in its definition of “aggregate compensation.” 5 Code of Federal Regulations (C.F.R.) § 530.202. At 5 C.F.R. § 530.203, it is prohibited for senior executives to “receive any allowance, differential, bonus, award, or other similar cash payment under title 5, U.S.C., in any calendar year which, in combination with the employee’s basic pay, would cause the employee’s aggregate compensation to exceed the rate of pay for level I of the Executive Schedule.” Additional title 5 regulations similarly include awards as part of compensation at 5 C.F.R. §§ 451.304(c) and 430.405(h)(3). Accordingly, superior performance awards constitute “compensation” under 38 U.S.C. § 7422(b) and the Martinsburg VAMC’s decision regarding superior performance awards amounts for title 38 employees is excluded from collective bargaining.

The Union, however, argues that VA policy requires the Martinsburg VAMC grant superior performance awards to employees who achieve a “fully successful” rating. The Union further argues that because the Martinsburg VAMC’s decision not to grant superior performance awards to “fully successful” employees is contrary to VA policy, the Decision Document prohibits the Agency from citing 38 U.S.C. § 7422(b) as the basis for excluding this issue from collective bargaining, grievances, or ULPs. VA policy is clear, however, that the Agency is under no obligation to grant superior performance awards to any employee. VA Directive 5017, Paragraph 2.b. states that “the [Agency] shall provide the **opportunity** for full-time, part-time and intermittent [title 38 employees] to be **considered** for a Superior Performance Award as authorized by 38 U.S.C. 7421(a).” (emphasis added) VA Handbook 5017, Part I, Paragraph 2.e. defines a Superior Performance Award as an award that “**may be granted** to an employee at the conclusion of the performance rating cycle based on his/her rating of record.” (emphasis added) This permissive language is repeated in VA Handbook 5017, Part III, Paragraph 2.a.(1) (all employees are “eligible” to receive superior performance awards), Paragraph 2.a.(2) (“Superior performance awards are not required, but may be granted to [VA employees covered by the performance appraisal system] ... if a rating of fully successful/satisfactory or higher is achieved.”), and Paragraph 2.a.(3) (“Title 38 employees who are covered by VA’s proficiency report system may be considered for a superior performance award if a rating of satisfactory or higher is achieved.”) It is clear from this permissive language that VA policy does not require the granting of any superior performance awards. Thus, the Union’s argument that the Martinsburg VAMC violated VA policy by failing to grant superior performance awards to “fully successful” employees is without merit.

The Union also cites the Decision Document, in particular referencing the provision stating that “VA’s failure to follow its own regulations and policies is not excluded by 7422.”<sup>2</sup> The Union is presumably interpreting this provision to mean that if the Union asserts that the Agency failed to follow its own regulations or policies, the Secretary cannot determine that the issue is excluded by 38 U.S.C. § 7422(b). This interpretation is incorrect. Rather, the meaning of this provision is that if the Secretary determines that a facility failed to follow VA regulations or VA or facility policy, the Secretary cannot then determine that the issue at hand is excluded by 38 U.S.C. § 7422(b). The Union cannot override the congressionally-mandated 7422 exclusions merely by asserting that the Agency failed to follow its own regulations or policies. Adhering to the Union’s apparent interpretation of this Decision Document provision would strip 38 U.S.C. § 7422(b) of any meaning, as the Union could always assert, even in the absence of sufficient evidence, that the Agency violated its own regulations or policies. Because the facility did not violate VA policy when it determined that “fully successful” employees would not receive superior performance awards, the Decision Document provision cited

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<sup>2</sup> The Union’s citation to the Decision Document provision stating that “[n]ot following established VA policy regarding payment of compensation to which employee is entitled is grievable, including appropriate remedy as determined by the Secretary” is irrelevant here, as the facility did not violate VA policy.



by the Union does not prevent the Agency from determining that a 7422 exclusion applies.<sup>3</sup>

In its position paper the Union also cites to the following authorities: 5 U.S.C. §§ 7106(b)(1),<sup>4</sup> 7116(a)(1) and (5),<sup>5</sup> and 7114(c);<sup>6</sup> Human Resources Management Letter (HRML) 05-08-12; and VHA Physician and Dentists Performance pay Frequently Asked Questions (FAQ) developed by the Office of Human Resources Management (OHRM). However, none of these citations support the Union's argument. The Union's argument concerning the cited title 5 provisions is unclear, but the Union apparently referenced the title 5 provisions in an effort to argue that the Martinsburg VAMC improperly refused to bargain.<sup>7</sup> However, it is beyond dispute that there is no duty to bargain if the subject falls within the exceptions of 38 U.S.C. § 7422(b). Furthermore, none of the cited statutes stand for the proposition that agencies are required to bargain over pay. The Union cited to the HRML in support of its argument that "refusing [physicians and dentists] performance pay for fully successful impacts their retirement and is paramount to a reduction in pay." The Union confuses the issue at hand—superior performance awards—with a separate element of physician and dentist pay under 38 U.S.C. § 7431—performance pay. Finally, the Union cited to OHRM FAQs in support of its statement that "performance pay cannot be Zero for title 38." Again, the Union apparently is confusing superior performance awards with performance pay. Performance pay is not at issue and the OHRM FAQs and the HRML do not address superior performance awards.

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<sup>3</sup> Had the Union correctly argued that the Agency failed to follow its own regulations or policies, the Agency's 7422 decision would state that the Agency would not invoke 38 U.S.C. § 7422.

<sup>4</sup> "Nothing in this section shall preclude any agency and any labor organization from negotiating, at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work." 5 U.S.C. § 7106(b)(1).

<sup>5</sup> "For the purpose of this chapter, it shall be an unfair labor practice for an agency to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter" or "to refuse to consult or negotiate in good faith with a labor organization as required by this chapter[.]" 5 U.S.C. § 7116(a)(1), (5).

<sup>6</sup> The Union actually cited to 5 U.S.C. § 7144(c). However, that statute does not exist. Based upon the Union's reference to agency head review, we believe that the Union intended to refer to section 7114(c), which concerns agency head review of any agreement between an agency and a union.

<sup>7</sup> The Union's position paper argues: "5 USC 7106(b)(1) Bargaining Permissive Subjects, the agency head may not subsequently disprove that provision under §7144(c) [sic] simply because it relates to §7106(b)(1) matter [sic] that the agency has failed and refused to negotiate in good faith with the Union in violation of 5 U.S.C. 7116(a)(1) and (5)." (Attachment G)

RECOMMENDED DECISION

That the ULP filed by the Union regarding management's decision regarding superior performance award amounts for title 38 employees concerns or arises out the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b).

APPROVED/DISAPPROVED

  
Eric K. Shinseki  
Secretary

5/29/2013  
Date