THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON
March 21, 2013

Thomas C. Smith III
Director
Central Texas Veterans Health Care System
Department of Veterans Affairs
1901 South 1st Street
Temple, TX 76504

Dear Mr. Smith:

I am responding to the issues raised in your memorandum of February 8, 2012, concerning an Arbitrator's Award and subsequent Federal Labor Relations Authority decision involving overtime compensation and a proficiency report for Title 38 employees working at the medical center.

Pursuant to delegated authority, I have determined on the basis of the enclosed decision paper that the issues presented are matters concerning or arising out of the establishment, determination, or adjustment of employee compensation and professional conduct or competence within the meaning of 38 United States Code § 7422(b).

Please provide this decision to your Regional Counsel as soon as possible.

Sincerely,

Eric K. Shinseki

Enclosures

THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON
March 21, 2013

Joseph D. Ybarra
Legal Rights Attorney for District 10
American Federation of
Government Employees
6800 Park Ten Boulevard, Suite 296
San Antonio, TX 78213

Dear Mr. Ybarra:

I am responding to the issues raised in your memorandum of February 8, 2012, concerning an Arbitrator's Award and subsequent Federal Labor Relations Authority decision involving overtime compensation and a proficiency report for Title 38 employees working at the medical center.

Pursuant to delegated authority, I have determined on the basis of the enclosed decision paper that the issues presented are matters concerning or arising out of the establishment, determination, or adjustment of employee compensation and professional conduct or competence within the meaning of 38 United States Code § 7422(b).

Sincerely,

Eric K. Shinseki

Enclosures

Title 38 Decision Paper
Central Texas Veterans Health Care System, Temple TX

I. FACTS

On March 12, 2010, the American Federation of Government Employees, Local 2109, Temple, Texas (AFGE or Union), filed a Step 2 grievance against management at the Central Texas Veterans Health Care System (Temple Department of Veterans Affairs Medical Center (VAMC)). In its grievance, the Union alleged that Title 38 hourly employees at the Temple VAMC Medical Service routinely worked past their normal tour of duty without appropriate compensation. (Exhibit 1). The Union also claimed that Medical Service management discouraged employees from accurately recording their hours worked and from requesting overtime. As a result, employees regularly worked beyond their normal tour of duty without compensation. The Union further claimed that on at least three occasions, its investigation revealed that certain Nurse Practitioners and Physicians worked beyond their tours of duty in the Medical Service without being compensated.

The Union alleged violations of Article 16, §§ 1, 2, 3, and 9, and Article 20, § 4 of the 1997 VA-AFGE Master Agreement (Agreement).[1] The Union further alleged violations of the Temple VAMC's Local Policy Memorandum 05-013-07, Hours and Tours of Duty, and, without specification, other applicable Articles of the Agreement, laws, and regulations. The Union requested a number of remedies, including payment of appropriate overtime or compensatory time to Medical Service employees impacted by the grievance.

On April 9, 2010, Acting Associate Chief of Staff for Medical Service, Dr. denied the Step 2 grievance. (Exhibit 2). Dr. stated in his response that he disagreed with the Union's assertion that management knowingly had employees work past their scheduled tour of duty without proper compensation. He further stated that by law Physicians are not eligible for overtime. In response to the Union's assertion that the Associate Director for Nursing Service discouraged employees from reporting overtime hours worked, Dr explained that the Associate Director for Nursing Service has no leave approving authority over Medical Service staff, and the Medical Service employees do not report to her.

The grievance was advanced to Step 3, where it was denied by Associate Director for Resources. (Exhibit 3). In his response, stated that the Medical Service complied with all relevant requirements concerning compensation of hourly employees and approved overtime or compensatory time when appropriate and properly requested by employees. also stated that management had no knowledge of any instances where Medical Service staff worked beyond their scheduled

[1] All references to the Master Agreement are to the 1997 Agreement. The parties signed a new Master Agreement in 2011, approximately one year after this grievance was filed.

tour of duty and were not appropriately compensated. On May 7, 2010, the Union invoked arbitration. (Exhibit 4).

On October 19, 2010, Ed W. Bankston held an arbitration hearing at the Temple VAMC. The parties were unable to agree on a joint statement of the issue. Arbitrator Bankston framed the issue as follows: "Whether the Agency has violated the Agreement with respect to non-payment of overtime to Title 38 employees? If so, what is the appropriate remedy?" (Exhibit 5).

At arbitration and in post-hearing briefs, the parties argued their respective positions. There is no transcript of the hearing. The Union called three Medical Service employees in support of its case: two Nurse Practitioners, , and and one Physician Assistant, The Union argued that the Agency violated the Agreement when it failed to properly compensate the three identified employees for work they performed beyond their tour of duty. The Union claimed that the Medical Service knew or should have known that their Title 38 employees worked significant amounts of overtime and the Agency "suffered and permitted" their employees to work overtime for the benefit of the Agency without properly compensating them. The Union further claimed that the Agency interfered with employee efforts to document their overtime and, as a result, failed to comply with Articles 20 and 33 of the parties' Agreement, the Fair Labor Standards Act (FLSA), and VA Handbook 5007. The Union also argued that the Agency created an environment where Title 38 employees feared retaliation for claiming overtime. The Union requested that the Arbitrator compel the Agency to properly compensate the Medical Service Title 38 hourly employees for their overtime at the average of 3,009 minutes a month for 36 months for the Agency's willful violation of the Title 38 overtime statutes and the FLSA. The Union also requested liquidated damages pursuant to provisions of the FLSA. (Exhibit 5).

The Agency presented evidence that properly requested overtime compensation was paid on a regular basis to Medical Service employees and was never improperly denied. Agency witnesses stated that, with respect to Nurse Practitioners and , records show that they were appropriately compensated when they properly requested overtime. With respect to Physician Assistant , the Agency testified that overtime requests were generally approved. The Agency insisted that the three Medical Service employees testifying at the hearing had, in the past, all received numerous hours of compensatory time or overtime. In addition, the Agency denied that facility employees were discouraged from claiming overtime and denied any reprisal towards those employees who requested overtime. (Exhibit 5).

On February 14, 2011, Arbitrator Bankston sustained the Union's grievance. (Exhibit 5). The Arbitrator concluded that the Agency failed to properly compensate Medical Service employees for their overtime work, and failed to maintain appropriate overtime records. The Arbitrator also found that the Agency "committed acts of reprisal and retaliation" against and Arbitrator Bankston ordered a number of remedies. He awarded each Title 38 hourly employee in Medical Service "an amount,

plus interest, to be paid for 50.25 hours at overtime rates for each month worked in the [Medical Service] for up to 36 months due to the Agency's willful violations of FLSA." In addition, he ordered the Agency to pay "an amount equal to the unpaid back wages as liquidated damages." The Arbitrator retained "jurisdiction over the award for purposes of interpretation, implementation, clarification, or such other purpose as requested by the parties." (Exhibit 5).

On March 15, 2011, the Agency filed exceptions to the Arbitrator's Decision with the Federal Labor Relations Authority (FLRA). (Exhibit 6). The Agency advanced a number of exceptions.[2] The Agency argued that the Arbitrator's decision was contrary to law because it hinged on the Arbitrator's improper conclusion that FLSA requirements apply to Title 38 employees.[3] The Agency asserted that Title 38 employees, like Nurse Practitioners and Physician Assistants, are exempt from coverage under the FLSA because they are "professionals," as defined by 5 C.F.R. § 551.207, and treating them as nonexempt FLSA employees is clearly error.[4]

On March 28, 2011, the Union filed an opposition to the Agency's exceptions to the Arbitrator's award. (Exhibit 9). The Union argued in part that the Agency's exception claiming that the award was contrary to law should be dismissed because the "professional employee" exemption under FLSA could have been, but was not, presented to the Arbitrator.

On March 29, 2011, the Arbitrator issued a Clarification of Award. (Exhibit 10). In the Clarification, the Arbitrator ordered that proficiency report be purged of her manager's statement that "she needs to work further on her time management skills."

On August 31, 2011, the FLRA rendered its decision on the Agency's exceptions to the Arbitrator's award. (Exhibit 11). In its decision, the FLRA dismissed the Agency's exceptions in part, and denied the exceptions in part. The FLRA determined that its "regulations bar the Agency's exceptions contending that the award is contrary to law and regulations" since the FLRA will not consider any arguments or evidence that could

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[2] The Agency argued that the Arbitrator's award was incomplete, ambiguous, or contradictory, which made implementation impossible. The Agency also maintained that the Arbitrator was biased and that the Arbitrator exceeded his authority.

[3] Although the Arbitrator never stated outright that his decision was based on violations of the FLSA, a number of statements in the Arbitrator's Decision and portions of the remedies ordered lead to that conclusion. In his primary award to Medical Service employees, the Arbitrator justified the award on the basis of the Agency's purported "willful violations of FLSA." In addition, the Arbitrator ordered payment of liquidated damages, a prominent feature of the FLSA. 29 U.S.C. § 216(b) provides that a covered employee who works over 40 hours per week and is not paid overtime compensation is entitled to the unpaid compensation "and an additional amount as liquidated damages." (See also Exhibit 7, pp. 12-13).

[4] In addition, in its post-hearing brief, the Agency suggested that Title 38 employees are not covered at all by FLSA because FLSA is inconsistent with the Agency's Title 38 overtime provisions and thus inapplicable to Title 38 employees. (Exhibit 8).

have been, but were not, presented to the Arbitrator.[5] The FLRA also determined that the Arbitrator's award "is not deficient on the basis that it is incomplete, ambiguous, or contradictory as to make implementation impossible." The FLRA further concluded that the "Arbitrator was not biased" and that he "did not exceed his authority to make the award deficient." (Exhibit 11).

On January 20, 2012, the Union filed an Unfair Labor Practice charge (ULP) with the FLRA seeking enforcement of the Arbitrator's award, and claiming that "no part of the award has been implemented." More specifically, the Union claimed "the Agency has failed to implement the Arbitrator's award in a timely manner; ignored correspondence and failed to respond to or furnish information requested of the Agency by AFGE Local 2109."

On February 8, 2012, the Director of the Temple VAMC submitted a request for a determination from the VA Secretary concerning whether the Arbitrator's award and subsequent "Clarification of Award" are non-grievable because they involve issues arising out of professional conduct or competence and the establishment, determination, or adjustment of employee compensation under 38 U.S.C. § 7422(b). (Exhibit 12).

On March 9, 2012, the Union was notified that management had requested a 38 U.S.C. § 7422 determination from the Secretary and was given the opportunity to provide its input to the Secretary through the Agency's Office of Labor Management Relations (LMR).

On April 13, 2012, the Union wrote a letter to the Secretary responding to the Agency's request for a 38 U.S.C. § 7422 determination. In its letter, the Union requested that the Secretary determine that the matters addressed in the Arbitration award are not excluded from arbitration by 38 U.S.C. § 7422. The Union contended that a close reading of the relevant statutory language demonstrates that the FLSA overtime provisions are applicable to Title 38 employees. In addition, the Union argued that the manager's statement in proficiency report concerning her time management skills does not concern professional conduct or competence and is not precluded from arbitration by 38 U.S.C. § 7422.

On May 16, 2012, the FLRA issued a Complaint and Notice of Hearing concerning the ULP charge filed by the Union, in which the Union complained that the Agency failed to comply with the Arbitrator's award. The hearing date was set for August 8, 2012.

On May 24, 2012, the Agency filed a "Motion to Abate Pending 38 U.S.C. § 7422 Determination," requesting a postponement of the scheduled hearing. On June 1, 2012, the Union filed its objection to the Agency's Motion. On June 19, 2012, the FLRA issued an order postponing the hearing for a period of three months.

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[5] The Agency contended that the issue was raised at the arbitration hearing, pointing to statements in a Union exhibit accepted at hearing concerning the inapplicability of FLSA to Title 38 employees. (Exhibit 8).

II. TITLE 38 U.S.C. § 7422 AUTHORITY

The Secretary has the final authority in the Agency 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).

III. ISSUES

1. Whether the Arbitrator's Decision and Award and subsequent FLRA decision regarding overtime compensation for Nurses and Physician Assistants in the Temple VAMC Medical Service involve issues concerning or arising out of the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b).

2. Whether the Arbitrator's Clarification of Award and subsequent FLRA decision regarding a statement in proficiency report concerning her time management skills involve issues concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

IV. DISCUSSION

The Department of Veterans Affairs Labor Relations Improvement Act of 1991 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. 38 U.S.C. § 7422

A. ISSUE 1 – NURSE AND PHYSICIAN ASSISTANT OVERTIME

The Union has primarily argued that Title 38 employees, Nurses and Physician Assistants, are entitled to overtime compensation when the Agency "suffers and permits" the employees to work beyond their normal tour of duty.[6] This is essentially the same claim raised by the Union and addressed by the Under Secretary for Health in an earlier § 7422 decision, VAMC Louisville (May 19, 2008).[7] In that case, the Union claimed that nurses assigned to a Geriatric Extended Care Facility in Louisville, Kentucky, worked "countless hours past their normal tour of duty" without compensation. The Union argued that management's failure to pay overtime for such services violated the parties' Agreement and also violated the "suffer and permit" rule.

[6] "Specifically, the Union contends that the [Medical Service] knew or should have known that their Title 38 employees worked significant amounts of overtime when the Agency suffered and permitted their employees to work overtime for the benefit of the Agency without properly compensating them." (Exhibit 7, p. 1).

[7] Until recently, the VA Secretary delegated the authority to decide § 7422 issues to the Under Secretary for Health. Currently, § 7422 Decisions are rendered by the VA Secretary.

In VAMC Louisville, the underlying substantive issue was overtime compensation for Nurses and Physician Assistants, which, the Under Secretary for Health concluded, is a matter concerning the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b), and is therefore non-grievable and non-arbitrable.

Here, the Union asserts that the FLSA is not inconsistent with the application of Title 38 pay provisions and, as a result, the grievance should not be precluded by § 7422(b). In its response to the Agency's request for a § 7422 determination, the Union first claims that "there is no provision in Title 38 which grants the Secretary the authority to set overtime pay rates for Title 38 employees." Notwithstanding the Union's claim, additional pay for nurses, including overtime pay, is explicitly set out in 38 U.S.C. § 7453(e)(1).[8]

In VAMC Louisville, the Union argued that the term "compensation" in § 7422(b) means

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[8] VAMC Louisville further stated that, "Compensation for 'suffered and permitted' overtime is not authorized by Title 38's nurse pay statute but only by the FLSA, which does not apply to VA nurses. *Title 38 nurse pay is governed solely by Title 38's nurse pay provisions.*" Id. at 3 (emphasis added). The decision referenced 38 U.S.C. § 7453(e)(1), which provides that entitlement to overtime by nurses hinges on "performing officially ordered or approved hours of service." FLSA "suffer and permit" provision applies only to FLSA non-exempt employees, and nurses are considered exempt employees under the "professional employee" exemption. See 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.301. Thus, even if FLSA did apply to VA nurses, they would still be exempt employees, and the "suffer and permit" overtime rule would not apply.

The Union also errs when it asserts that the FLSA does not fall within the meaning of 38 U.S.C. § 7425(b). That provision states, "Notwithstanding any other provision of law, no provision of title 5 or any other law pertaining to the civil service system which is inconsistent with any provision of section 7306 of this title or [Chapter 74 of Title 38] shall be considered to supersede, override, or otherwise modify such provision of that section or this chapter except to the extent that such provision of title 5 or of such other law specifically provides, by specific reference to a provision of this chapter, or such provision to be superseded, overridden, or otherwise modified." The Union maintains that the FLSA is neither a "provision of Title 5" nor a "law pertaining to a civil service system," but rather a universally applicable employment law.

The Union further misstates the scope of the applicable Title 38 provisions. The Secretary is vested with the sole authority to "prescribe by regulation the hours and conditions of employment and leaves of absence" of Title 38 employees. 38 U.S.C. § 7421(a). Congress has, through its promulgation of various statutory provisions, authorized the Secretary to comprehensively address pay for Title 38 employees. The Secretary is authorized to establish, determine, and adjust all aspects of compensation, including basic pay (See, e.g., 38 U.S.C. § 7451(3)(B)), additional pay (See, e.g., 38 U.S.C. § 7453(j)), and bonus pay (See, e.g., 38 U.S.C. § 7458). If one were to apply the FLSA's "suffer or permit" standard to Nurses and other Title 38 employees, it would override or otherwise modify the Title 38 statutory overtime standard of "officially ordered or approved." While the FLSA is not a Title 5 enactment, if it is considered a universally applicable employment law, as urged by the Union, it certainly applies to the federal civil service system. By its terms, 38 U.S.C. § 7425 is not limited to laws applying *exclusively* to civil service employees. Because application of its overtime standard is wholly inconsistent with Title 38, Chapter 74, FLSA requirements may not supersede, override, or modify the Secretary's overtime standards for Nurses and Physician Assistants.

basic pay only, not additional pay. In prior decisions, the Under Secretary for Health has determined that overtime and other additional pay authorized by 38 U.S.C. § 7453 is compensation within the meaning of 38 U.S.C. § 7422. For example, in VAMC Asheville (March 5, 2001), the Under Secretary for Health held that "the payment of night differential and weekend premium pay to [operating room] nurses for periods of overtime work concerns or arises out of a matter or question of the establishment, determination, or adjustment of employee compensation under title 38." On appeal, the Circuit Court in Asheville answered affirmatively the question of whether it was reasonable for the VA to determine that the dispute over the nurses' pay for night and weekend work concerns or arises out of the establishment, determination, or adjustment of employee compensation under Title 38. AFGE Local 446 v. Department of Veterans Affairs, et al., 475 F.3d 341, 344-346 (D.C. Cir. 2007).

Similarly, in VAMC Buffalo, New York (February 22, 2008), the Under Secretary for Health held that a management decision to provide one type of additional pay (overtime) versus another type of additional pay (Saturday premium pay) was an issue concerning or arising out of the establishment, determination, or adjustment of Title 38 employee compensation.

Here, again, the Union asserts that the Agency has agreed to allow (without invoking § 7422) Union grievances concerning a failure to follow the Agency's own policies on compensation.[9] In December 2010, the Agency signed the "Joint 38 U.S.C. § 7422 Workgroup Recommendations As Revised and Approved by the Secretary of the Department of Veterans Affairs" (Decision Document). The Decision Document states in part: "Not following established VA policy regarding payment of compensation to which [an] employee is entitled is grievable, including appropriate remedy as determined by the Secretary." (Exhibit 14). The Union does not explain in its Objections which policy it is relying on to support its claim. Presumably, the Union is relying on the Temple VAMC's Local Memorandum on Hours and Tours of Duty, 05-013-07, as that policy is the only one mentioned in its grievance. The portion of the Local Memorandum highlighted in the Union's grievance states, "any work performed by a nonexempt employee (before or after the established shift hours or during the prescribed lunch period) for the benefit of the VA, whether requested or not, constitutes hours of work if management knows or has reason to believe, it is being performed." This is essentially a restatement of the FLSA's "suffered or permitted" standard, which, as explained earlier, conflicts with Title 38 and is inapplicable to Title 38 Nurses and Physician Assistants. Also, as discussed earlier, the local policy statement applies exclusively to nonexempt employees, a category that excludes the Title 38 Nurses and Physician Assistants involved in the grievance. Additionally, Section 6(b)(4) of the Decision Document applies only to national compensation policies.[10] It references those policies that have been reviewed and promulgated by the Agency at the national

[9] This contention appears for the first time in the Union's objections to the Agency's motion to postpone the originally scheduled August 8, 2012, FLRA hearing.
[10] It should be noted, however, that failure to comply with national agency policy is not subject to the 7422 process or 38 USC §7422 exclusions.

level and incorporated in Agency Directives and Handbooks.[11]

B. ISSUE 2 – STATEMENT IN PROFICIENCY REPORT

Two weeks after the Agency filed its exceptions to the Arbitrator's Decision and Award, the Arbitrator issued what he termed a "Clarification of Award," in which he clarified a portion of his original award.[12] In the Clarification, the Arbitrator explained that a statement in proficiency report should be purged by the Agency. The statement in question was included in proficiency report for the period covering February 8, 2009 to February 9, 2010. In the Comments section of the proficiency report, the approving official, stated that "needs to work further on her time management skills."[13]

In several previous § 7422 decisions, the Under Secretary for Health has reviewed similar issues. In VAMC Ann Arbor (September 26, 2008), the Under Secretary reviewed a complaint concerning statements in a proficiency report for an MICU registered nurse. The report described the nurse's interpersonal relationships and customer service with co-workers and patient families as "neither becoming of a Ann Arbor Healthcare System (VAAAHS) employee nor upholding the VAAAHS customer service philosophy and gold service . . . ." As a result, the nurse was rated an overall "low satisfactory" on her proficiency report. The Under Secretary for Health concluded that the statement in question involved the substance of the nurse's proficiency report and was excluded from the grievance process by § 7422.[14] Other past decisions have yielded identical results.

In VAMC Fort Wayne (May 19, 2008), the Under Secretary for Health found that the Union's grievance remedies, that the employee be given a fair and accurate proficiency report and that certain remarks be removed from the proficiency report, "involve the employee's substantive proficiency rating and are therefore non-grievable . . . ."[15]

Similarly, an Under Secretary for Health decision involving negative comments supporting a physician's proficiency rating that included criticism relating to the physician's insufficient documentation of patient visits, ineffective leadership, and strained relationships with hospital staff was found by the USH to be non-grievable. VAMC Washington DC (January 6, 2006).

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[11] Even if otherwise applicable, the recommendations in the Decision Document were not intended to apply retroactively. The Union's grievance was dated March 12, 2010, well before the parties signed the Decision Document.

[12] In the original Arbitration Award, Arbitrator Bankston ordered the Agency to purge from "any and all employment records" a January 8, 2010, Memorandum of Expectations issued to (Exhibit 5, p. 34).

[13] overall proficiency rating was a "High Satisfactory."

[14] "The USH has consistently found that substantive ratings in proficiency reports, irrespective of the details of the report, necessarily involve issues of professional conduct and competence within the meaning of 38 U.S.C. § 7422(b)."

[15] The Under Secretary for Health stated generally that previous decisions "have long held that proficiency reports are non-grievable when they involve the substantive rating of an employee or clearly constitute an assessment of a provider's patient care duties."

In VAMC Manchester (September 9, 1992), the Under Secretary for Health found that "the proficiency rating system is the vehicle for evaluation of a nurse's professional competence and conduct." As such, and in accordance with the consistent line of previous 7422 determinations, substantive management statements within a proficiency report that evaluate or criticize a nurse's performance are precluded from the grievance procedure by application of § 7422.

V. RECOMMENDED DECISION

1. That the Arbitrator's Decision and Award and subsequent FLRA decision regarding overtime compensation for Nurses and Physician Assistants in the Temple VAMC Medical Service involve issues concerning or arising out of the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b).[16]

APPROVED ____ DISAPPROVED ____

2. That the Arbitrator's Clarification of Award and subsequent FLRA decision regarding a statement in proficiency report concerning her time management skills involve issues concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

APPROVED ____ DISAPPROVED ____

Eric K. Shinseki
Secretary of Veterans Affairs

3/21/2013
Date

[16] Temple VAMC is ordered to review all of its overtime records and requests to document both the approval and disapproval of overtime requests in order to insure accurate timecards for Title 38 employees in accordance with VA Handbook 5007 and 38 U.S.C. 7453. If there is any overtime work that has not been properly compensated in accordance with VA Handbook 5007 and 38 U.S.C. 7453, it shall be paid to the affected employees.