



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

MAR 15 2005

Director, Harry S. Truman Memorial Veterans Hospital
800 Hospital Drive
Columbia, MO 65201-5297

Dear

I am responding to the issue raised in your memorandum of December 7, 2004, concerning a grievance filed by the American Federation of Government Employees, Local 903, regarding reductions in Dr. [redacted] scarce specialty pay.

Pursuant to delegated authority, I have decided on the basis of the enclosed decision paper, that the issue presented is a matter concerning or arising out of the establishment, determination, or adjustment of employee compensation and thus exempted from collective bargaining under 38 U.S.C. § 7422(b).

Please provide a copy of the decision paper to your Regional Counsel as soon as possible.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Jonathan B. Perlin".

Jonathan B. Perlin, MD, PhD, MSHA, FACP
Acting Under Secretary for Health

**Title 38 Decision Paper – VAMC Columbia, Missouri
VA 05-02**

FACTS

M.D. is a primary care physician and president of the American Federation of Government Employees, Local 903 ("AFGE or Union") at the Harry S. Truman Memorial Veterans Affairs Hospital in Columbia, Missouri ("HSTMVH or Management"). In September 1997, Dr. _____ was authorized 50% official time to exercise his duties as Union President. To account for Dr. _____ reduced amount of time tending to direct patient care issues, management prorated the amount of scarce specialty pay he received, to 50% of the amount authorized for his position.

On October 6, 1997, AFGE filed an Unfair Labor Practice charge alleging that Management's reduction of Dr. _____ scarce specialty pay was based on his serving as union president. On March 13, 1998, the Denver Regional Director of the Federal Labor Relations Authority ("FLRA") dismissed the charge, concluding that it had no jurisdiction to hear matters of physician compensation pursuant to the exclusions in 38 U.S.C. 7422 (b). *Attachment A.* On May 4, 1998, the union appealed the dismissal to the FLRA General Counsel ("GC"). *Attachment B.* On September 30, 1998, the GC granted the appeal and remanded the case to the FLRA region for further investigation on the issue. *Attachment C.* The FLRA Regional Director dismissed the charge on July 28, 2000. *Attachment D.* The decision states the following:

"...While it may be true that the Director of HSTMVH has discretion to pay you specialty pay for the time spent on official time, he has interpreted the regulations governing the payments of specialty pay for PCP to mean that pay is owed for the time spent on clinical direct patient care duties.... The Agency has provided evidence that it follows a consistent policy in awarding specialty pay, and has also provided a legitimate reason for the reduction to your specialty pay. In my view, there is no evidence that the Agency's justification is pretextual or illegally motivated."

The union once again appealed the Regional Director's decision. *Attachment E.* The appeal was dismissed by the FLRA on January 26, 2001. *Attachment F.*

On September 29, 2004, AFGE filed a 3rd step grievance alleging that Dr. _____ scarce specialty pay was reduced from \$10,000 to \$5,000 based on his use of official time. *Attachment G.* The grievance included an allegation of disparate treatment, claiming that another union official's scarce specialty pay was never adjusted to account for the time he spent on official time. As a remedy, AFGE requested that 1) Dr. _____ be reimbursed all of his scarce specialty pay reductions from 1997 to the present, including any pay that accrues

between the date of the grievance and when the case is settled or arbitrated; 2) all accrued interest from the withholding of Dr. scarce specialty pay "to in part make him whole"; and 3) full payment of scarce specialty from the date of the grievance forward.

On October 29, 2004, AFGE sent a second memorandum to the HSTMVH Medical Center Director alleging that "[p]er the Master Agreement—the agency is in default as to the time lines under level 3 grievance procedures." *Attachment H*. The union requested that the issue being grieved be found in favor of the grievant and the requested remedy be granted.

In response to both the grievance and the October memorandum, the medical center Director, , sent a memorandum to the union asserting that "the VA is not in default on this grievance". *Attachment I*. Mr. memorandum explained that he had notified the Union in writing on October 8, 2004 stating that he could not meet with the Union to discuss the grievance until late October because of an impending JCAHO visit. *Attachment J*. Mr. further explained that he and the facility's HR manager had explained the need to delay the grievance meeting to the Union President during an October 14, 2004 Labor Management meeting, and that the President at that time consented to the delayed response. Additionally, the Director stated that it would not be possible to respond to the grievance until a determination was made as to whether the issue could go to arbitration. Mr. informed AFGE that management was preparing a request to the Under Secretary for Health (USH) to determine if the matter is excluded from the negotiated grievance procedure because it concerns or arises out of the establishment, determination or adjustment of employee compensation under 38 U.S.C. 7422.

On December 7, 2004, the Medical Center Director submitted a memorandum to the USH requesting that the issue of Dr. scarce specialty pay be determined to be outside the scope of bargaining pursuant to 38 U.S.C. 7422(b). *Attachment K*. On that same date, a memorandum was sent to the Union President notifying them of the request for a USH determination and informing them that they could send their comments to the USH via the Central Office Labor Management Relations Office. *Attachment L*. The Union submitted no information to the USH relative to the Director's request.

PROCEDURAL HISTORY

The Secretary has delegated to the USH the final authority in the VA 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 grievance over the reduction in Dr. _____ scarce specialty pay is a matter or question that concerns or arises out of employee compensation within the meaning of 38 U.S.C. 7422(b).

DISCUSSION

The Department of Veterans Affairs Labor Relations Act of 1991, 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 or clinical competence), peer review and employee compensation as determined by the USH.

38 U.S.C. 7431(a) empowers the Secretary to provide special pay for physicians and to prescribe regulations to carry out the special pay provisions. 38 U.S.C. 7433 authorizes special pay for full time physicians. Subsection 7433(b)(3)(B) states that "[f]or service by a physician who serves only a portion of a year in a medical specialty for which special pay is paid under subparagraph (A), the annual rate shall be calculated on the basis of the proportion of time served in the specialty for which the special pay is paid."

VA regulations in VA Handbook 5007, Part IX, Appendix H, paragraphs 2.a. and b. provide the following:

- a. Staff physicians and dentists who spend all of their VHA time assigned to a specialty area in direct patient care may receive up to 100 percent of scarce specialty pay (subject to pro-ration for part-time employment).
- b. For physicians and dentists who spend a portion of their time in a scarce specialty, and a portion of their time in a medical specialty which is not designated as a scarce specialty, the actual amount of scarce specialty pay shall be determined by the percentage of time the individual works in the scarce specialty in direct patient care.

Paragraph 3(b) specifies the positions that have been designated as scarce medical specialties based on nationwide recruitment and retention difficulties. For Primary Care Physicians the section specifically states the following:

Primary care represents the basic level of patient care. It consists of the delivery of acute and chronic care for medical, psychiatric and social conditions, delivery of preventive health interventions, patient and care giver education, referral for specialty care when indicated, and the overall management and coordination of care for an individual. It is differentiated

from specialty care, which generally focuses on care for one organ system or procedure. The actual amount of pay for this component shall be determined by the percentage of time the individual works in direct patient primary care services. To receive 100 percent of this component, a physician must work full-time in the specialty.

In the instant case, the medical center Director explained that the "HSTMVH has consistently prorated the amount of scarce specialty pay paid to its physicians to correspond to the amount of time those physicians spent in direct patient care. Because most physicians spent approximately eight hours per week performing administrative non-direct patient care duties, most physicians, including Dr. [redacted] received 80% of the scarce specialty pay authorized for their positions. Beginning in September 1997, Dr. [redacted] scarce specialty pay was prorated at 50% of the authorized amount, because he spent 50% of his duty time on administrative non-patient care matters, i.e., representational activities for AFGE Local 903. Dr. [redacted] specialty pay was never reduced, it was prorated from the beginning based on his representational time with AFGE." Dr. [redacted] is involved in direct patient care 50% of the workweek and the remainder of the time he spends on official time as president of the local union. The HSTMVH Director was required by statute and VA regulations to adjust Dr. [redacted] scarce specialty pay to reflect the percentage of time he spends on patient care activities, which is 50%. The issue of scarce specialty pay is directly related to the adjustment of employee compensation, as established in 38 U.S.C. 7422, and is therefore non-negotiable and non-grievable.

The union argues in its grievance that Dr. [redacted] has suffered from disparate treatment in the reduction of his scarce specialty rate. It asserts that another union official's scarce specialty rate was never "reduced or encumbered due to his union activities and his use of Official Time." Management acknowledged the allegation and confirmed that Dr. [redacted] "scarce specialty pay was not reduced," but explained that this "was an oversight." In any event, the fact that the facility may have erroneously failed to prorate another provider's special pay, in contravention of applicable regulations, does not render those regulations inapplicable to Dr. [redacted]

While an employee might properly raise an allegation of disparate treatment in the adjustment of scarce specialty pay in another context, such adjustment is not subject to collective bargaining, to challenge through a negotiated grievance procedure, or review by the FLRA. Where a matter is subject to one of the 38 USC 7422(b) bargaining exclusions, allegations of disparate treatment, discrimination, or other animus do not operate to negate the statutory exclusion. Compare AFGE Local 3306 v. FLRA, 2 F.3d 6 (2d Cir. 1993) (holding 38 USC 7422 precludes FLRA action on ULP alleging that peer review procedures leading to removal of union official constituted disparate treatment motivated by anti-union animus) with Ward v. Brown, 22 F.3d 516 (2d Cir. 1993) (in action for review of same union official's removal under the Administrative Procedure Act,

vacating removal as arbitrary and capricious based on showing of disparate treatment).

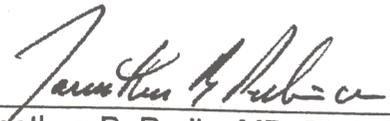
In previous cases involving the adjustment of scarce specialty pay, the USH has determined that such issue concerns or arises out of a matter or question concerning the establishment, determination or adjustment of employee compensation under 38 U.S.C. 7422(b). See VAMC Biloxi, January 23, 2001 and VAMC Reno, May 6, 2002.

RECOMMENDED DECISION

That AFGE's grievance over the reduction of Dr. _____ scarce specialty pay is a matter or question that concerns or arises out of employee compensation within the meaning of 38 U.S.C. 7422(b).

APPROVED _____

DISAPPROVED _____


Jonathan B. Perlin, MD, PhD, MSHA, FACP
Acting Under Secretary for Health

4-15-05
Date