



DEPARTMENT OF VETERANS AFFAIRS
Veterans Health Administration
Washington DC 20420

FEB 22 2008

In Reply Refer To:

Michael S. Finegan
Director
Buffalo VAMC
Western New York Healthcare System
3495 Bailey Avenue
Buffalo, NY 14215

Ronald S. James
Labor Specialist
United American Nurses, AFL-CIO
8515 Georgia Avenue, Suite 400
Silver Spring, MD 20910

Dear Mr. Finegan and Mr. James:

I am responding to the issues raised in your correspondence dated August 14, 2007 and September 4, 2007, concerning a grievance filed by the UAN, Local 41, over management's decision to deny three nurse practitioners Saturday premium pay for Saturday work at a Community Based Outpatient Clinic having no established Saturday tour of duty.

Pursuant to delegated authority, I have determined, on the basis of the enclosed decision paper, that the issue presented is a matter or question that concerns or arises out of the establishment, determination or adjustment of employee compensation within the meaning of 38 U.S.C. 7422(b).

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

Sincerely yours,

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

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

Enclosure

Title 38 Decision Paper – VA Medical Center, Buffalo, New York

FACTS

In an attempt to reduce a backlog of work at the Olean Community Based Outpatient Clinic (CBOC), management at the VA Medical Center, Buffalo, New York (VAMC) asked for volunteers to see patients at the CBOC on Saturdays. Three nurse practitioners were selected and worked the following Saturdays at the CBOC: June 3, 2006; June 24, 2006; July 8, 2006; July 22, 2006; December 16, 2006; February 3, 2007; March 3, 2007; and March 31, 2007. (Attachment A) The regular tour of duty for two of the nurse practitioners is 7:30 AM to 4:00 PM, Monday through Friday and the regular tour of duty for the third nurse practitioner is 8:00 AM to 4:30 PM, Monday through Friday. The CBOC is generally open Monday through Friday and has no established Saturday tour of duty. All three of the employees who volunteered to work the Saturdays identified above were paid overtime for the extra work or given compensatory time in lieu of overtime.

On March 9, 2007, the United American Nurses (UAN) filed a grievance alleging that management violated 38 U.S.C. § 7453(c) and VA Handbook 5007/6, Part V, Chapter 6, paragraph 1.b. by failing to pay the three nurse practitioners Saturday premium pay in addition to the overtime pay they received for working on the Saturdays. (Attachment B) The language in 38 U.S.C. § 7453(c) provides:

A nurse performing service on a tour of duty, any part of which is within the period commencing at midnight Friday and ending at midnight Sunday, shall receive additional pay for each hour of service on such tour at a rate equal to 25 percent of such nurse's hourly rate of basic pay.

Likewise, VA Handbook 5007/6, Part V, Chapter 6, paragraph 1.b. provides:

A nurse ... who performs service on a tour, any part of which is between midnight Friday and midnight Sunday, shall receive premium pay for each hour of service on such tour. Premium pay for service under this subparagraph is equal to 25 percent of the employee's basic hourly rate of pay....

In a memorandum dated March 19, 2007, Sherrie Krzeminski, Program Director, Primary Care, denied the grievance. (Attachment C) Ms. Krzeminski stated that the cited regulations require a nurse to perform work on an established tour of duty in order to be eligible for the premium pay. The CBOC does not have established tours of duty on the weekend because patients are normally seen Monday through Friday. Since the work the grievants performed on Saturdays was outside an established tour of duty, Ms. Krzeminski explained, they were not entitled to Saturday premium pay.

Management summarily denied the grievance at Step 2 on March 30, 2007, upon which UAN advanced it to Step 3 on April 9, 2007.¹ Dr. Avery Ellis, Chief of Staff, responded to the Step 3 grievance on July 6, 2007. (Attachment D) Dr. Ellis explained that the regulations require the work to be performed on a tour of duty in order for the employees to be eligible for the Saturday premium pay, and that the Office of Human Resources Management in VA Central Office had clarified that “[a] tour of duty is considered to be an established tour.” (Attachment D, paragraph 3.) Dr. Ellis thus refuted UAN’s position “that the regulations do not state service on an ‘established’ tour of duty.”

UAN invoked arbitration in a letter dated July 30, 2007. The parties subsequently agreed to postpone selection of an arbitrator pending the decision of the USH. (Attachment E)

In a memorandum to the Under Secretary for Health (USH) dated August 14, 2007, the VAMC Director requested a determination that the issue of entitlement to Saturday premium pay be excluded from collective bargaining under 38 U.S.C. 7422(b). (Attachment F) On August 14, 2007, management gave the union a copy of its submission along with notification that the union could respond to the USH with its input. However, management did not tell UAN until August 22, 2007, that the deadline for the response was 10 days from August 14. (Attachment G) Upon request, UAN was granted an extension to September 4, 2007, to provide its input. (Attachment H)

PROCEDURAL HISTORY

The Secretary has delegated to the Under Secretary for Health (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 a grievance over three nurse practitioners’ entitlement to Saturday premium pay for Saturday work at a CBOC having no established Saturday tour of duty is excluded from collective bargaining as a matter or question that concerns or arises out of the establishment, determination or adjustment 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 healthcare 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

¹ The grievance was advanced to Steps 2 and 3 on the same form that was used to file at Step 1. (Refer to Attachment B.) Management also denied the Step 2 grievance on this form by indicating, “grievance denied – Handbook followed.”

patient care or clinical competence), peer review and employee competence as determined by the USH.

Pursuant to 38 U.S.C. § 7451(a)(4), the Secretary has prescribed regulations (contained in VA Handbook 5007/6, Part V, Chapter 6, paragraph 1) to implement certain forms of premium pay for Title 38 employees. Paragraph 1.b. provides 25% premium pay for “[a] nurse ... who performs service on a tour, any part of which is between midnight Friday and midnight Sunday” In the instant case, three nurse practitioners volunteered to work several Saturdays to help reduce a backlog at the Olean CBOC. The employees were paid at the overtime rate in accordance with 38 U.S.C. § 7453(e) and VA Handbook 5007/12, Part V, Chapter 2, but did not receive the 25% Saturday premium pay described in 38 U.S.C. § 7453(c) and related VA regulations. UAN filed a grievance alleging that the nurses were entitled to Saturday premium pay pursuant to VA Handbook 5007/6 and 38 U.S.C. § 7453.

The VA Handbook and 38 U.S.C. § 7453 authorize Saturday premium pay only when the time worked is included in a “tour of duty.” A normal tour of duty within the 40-hour basic workweek consists of the employee’s scheduled five 8-hour days, exclusive of the meal period. VA Handbook 5011/2, Part II, Chapter 3. Since the CBOC does not have established weekend tours of duty, the nurse practitioners who volunteered to work the specified Saturdays to reduce the patient backlog were not performing service on a regularly scheduled tour of duty. Rather, they were working overtime outside their regular tours, which entitled them to overtime pay under 38 U.S.C. § 7453(e), but not to Saturday premium pay under 38 U.S.C. § 7453(c). Accordingly, the grievance concerns or arises out of the establishment, determination or adjustment of employee compensation and is inconsistent with 38 U.S.C. 7453 and VA Handbook 5007/6.

This case presents precisely the same issue that the USH decided in an earlier 38 U.S.C. § 7422 decision, i.e., *VAMC Asheville, March 5, 2001*.² (Attachment I) In the *Asheville* case, the union filed a grievance when management failed to pay weekend premium pay to operating room nurses who were called in to work overtime on Saturday and Sunday. The periods of work were outside the nurses’ scheduled tour of duty. Therefore, the USH concluded that the issue was a matter outside the scope of the collective bargaining agreement pursuant to 38 U.S.C. § 7422(d), because the payment of premium pay to operating room nurses for periods of overtime work outside their established tours concerns or arises out of a matter or question of the establishment, determination, or adjustment of employee compensation under title 38.

In its response, the Union asserts that VA is contractually barred by not asserting § 7422 by the third step. In addition, it asserts it is not challenging the establishment, determination or adjustment of compensation, but only VA’s failure to follow the VA statute and regulations on compensation. The Court of Appeals in *VAMC Asheville* upheld the FLRA’s ruling that VA could raise § 7422 at any time because it is jurisdictional. The union relies on some amorphous language in the Court’s opinion that there may be a time when VA cannot assert jurisdiction, and this is the time because of the contract. However, we are dealing with jurisdiction here and it can be raised at any

² The decision of the USH was upheld by the Federal Labor Relations Authority in *U.S. Dep’t of Veterans Affairs (Asheville) and AFGE, Local 446*, 57 FLRA 681 (2002) and by the U.S. Court of Appeals for the District of Columbia in *AFGE Local 446 v. U.S. Dep’t of Veterans Affairs, et al.*, 475 F.3d 341 (D.C. Cir. 2007).

time. We note, the AFGE contract in *Asheville* had the same type of provision as we have in this case. As to § 7453 and regulations, *Asheville* further determined that the matter did concern compensation and that VA's interpretation of § 7453 was reasonable.

Moreover, the UAN Master Agreement, Article 2, Governing Laws and Regulations, provides that the entire agreement, including work assignments, is subject to the provisions of 38 U.S.C. § 7422.

RECOMMENDED DECISION

That the grievance over three nurse practitioners' entitlement to Saturday premium pay for Saturday work at a CBOC having no established Saturday tour of duty is excluded from collective bargaining as a matter or question that concerns or arises out of the establishment, determination or adjustment of employee compensation within the meaning of 38 U.S.C. 7422(b).

APPROVED X

DISAPPROVED _____

Michael J. Kussman

Michael J. Kussman, M.D., MS, MACP
~~Acting~~ Under Secretary for Health

2/22/08

Date