

Department of Veterans Affairs (VA)
Title 38 Decision Paper
North Florida/South Georgia VA Hospital
Gainesville, Florida

FACTS

On September 25, 2015, the American Federation of Government Employees (AFGE), Local 2779 (Union), filed a step three grievance against the North Florida/South Georgia VA Hospital (Medical Center). Attachment G. The grievance alleged that the Medical Center “ha[d] changed the guidelines on the way they give [Special Advancement for Achievement (SAA)] awards to their” Optometrists, that the Medical Center Director was no longer following the recommendations of the Optometry Professional Standards Board (PSB), and that the new guidelines had not been approved, published, or communicated to employees. *Id.* The Union claimed that the Medical Center’s actions violated Article 16 of the 2011 Master Agreement between VA and AFGE and requested the following five remedies in the grievance:

- “1. Give the Optometrists the recommended awards (steps) that their Professional Standards Boards recommend for this past year. If the policy or guideline changes, then the agency will make sure all optometrists are given a copy of the new policy/guidelines prior to the year that they are being awarded . . . Until that time, the recommendations of the Optometrist Professional Standards Board will stand as they always have in the past.
2. All the [O]ptometrist[s] that had their awards held, while the agency decided on how they were going to change the guidelines to awards and promotion status, will be paid back from the time of their boarding . . .
3. If the agency is not going to consider recommendations of the Professional Optometrist Board, as they have always done in the past, then the agency will form a panel that will consist of [O]ptometrists, union representation, and the agency to come up with new award criteria and guidelines . . .
4. The Optometrists will be made whole and any other relief deemed appropriate. Until such time that the new guidelines are approved and distributed to the employees and the union, [t]he optometrist[s] will receive the steps that the Professional Optometry Board Recommended just as they always have in the past. The awards will be made retroactive so they do not lose a year of time between awards . . .
5. The agency must also comply with any rule, law, policy or regulation not mentioned within.”

Id.

On November 6, 2015, the Medical Center’s Chief of Staff (COS) provided an initial response to the Union’s grievance noting that the approving official’s decision is final

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with respect to a PSB action in accordance with VA Handbook 5005, part II, chapter 3, section C. Attachment E. The COS also noted that the Acting VAMC Director would review the PSB recommendations for the affected individuals. *Id.* On January 19, 2016, the Acting COS provided an "amended response" stating "it has been determined that the 2015 decisions from the Director stands. No additional steps will be given." Attachment D. On January 29, 2016, the Union invoked arbitration on the grievance. Attachment C.

On August 17, 2017, the Medical Center submitted a request for a 38 U.S.C. § 7422 determination. Attachment A. On September 20, 2017, the Union submitted its response to the Medical Center's request. Attachment N. In its response, the Union asserted that the Medical Center's request for a 38 U.S.C. § 7422 determination should be denied because the "Union's grievance-arbitration does not concern compensation" and "the Union here is merely challenging the Agency's failure to notify the union of the change in working conditions, and subsequent failure to bargain impact and implementation." *Id.*

AUTHORITY

The Secretary of Veterans Affairs has the 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). On October 18, 2017, 2015, the Secretary delegated this authority to the Under Secretary for Health. Attachment K.

ISSUE

Whether the Union's grievance concerning the Medical Center's unilateral change to the manner it gives SAA awards to Optometrists involves a matter or question concerning or arising under peer review and the adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b) and is thus excluded from collective bargaining.

DISCUSSION

38 U.S.C. § 7422 grants limited collective bargaining rights to employees appointed under title 38 of the United States Code (Title 38), and specifically excludes 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) and (b).

VA Handbook 5005, part II, chapter 3, section C, requires the establishment of PSBs to act on appointments, advancements, and probationary reviews of Title 38 employees, including Optometrists. Attachment L. PSBs provide professional peer review in such matters as eligibility for employment, suitability, appropriate grade levels for

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appointments and qualifications for advancement and to make recommendations based on their findings. *Id.* VA Handbook 5005, part II, chapter 3, section C, paragraph 7 also provides that the decision of the approving official for the PSB is final. *Id.*

VA Handbook 5017, part V, addresses special advancements and cash awards for Optometrists. Attachment M. VA Handbook 5017, part V, appendix B states: "If an optometrist meets the criteria specified in part V, paragraph 4, the employee may be recommended for advancement at the time of achievement." *Id.* VA Handbook 5017, part V, appendix B, identifies the SAA process for an Optometrist as follows:

"At the time of achievement, the employee may be recommended for advancement. Recommendations will be made to the Standards Board by the service chief or equivalent, Chief of Staff, or Associate Director as appropriate . . . the [] Standards Board will make specific recommendation as to the appropriate number of steps to be granted. The board action with supporting justification will be forwarded to the HRM office. The HRM office will forward the file through channels to the appropriate approving official . . . ***NOTE:** *If an optometrist meets criteria specified in part V, paragraph 4, the employee may be recommended for advancement at the time of achievement. Recommendations will be made to the VA Central Office Optometry Professional Standards Board through the facility HRM office by the chief of service or Chief of Staff as appropriate.*"

Id.

One of the functions of the PSB for Optometry is to make a recommendation to the approving official for the PSB as to the appropriate number of steps to be granted to each optometrist. *Id.* VA Handbook 5005, part II, chapter 3, section C, paragraph 5e states that "[n]ational boards make *recommendations* to the Under Secretary for Health or designee on appointments and advancements, and on probationary reviews of individuals appointed under 38 U.S.C. 7401(1)." Attachment E (emphasis added). VA Handbook 5017, part V, appendix A, clarifies who acts as the approving official in specific circumstances and states that a Facility Director acts as the approving official for advancements of optometrists unless the Network Director or Under Secretary for Health (or designee) acts as the appointing official. *Id.*; Attachment E.

The evidence submitted shows that the Medical Center acted in a manner consistent with VA policy in that the PSB for Optometry conducted the appropriate reviews and made specific recommendations to the approving official for the PSB (i.e., the Medical Center Director) who in turn made a final decision on those recommendations. Attachment L. In this case, the Medical Center Director did not disapprove the PSB for Optometry's recommendations, but rather, approved the PSB's recommendations to grant awards to the employees but modified the amount of steps to be given. Attachment H. Approval, or disapproval, of the PSB recommendations was well within

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the Medical Center Director's discretion pursuant VA Handbook 5017, part V, appendix B. Attachment M.

In its response to the 38 U.S.C. § 7422 determination request, the Union claims that its grievance concerns the Medical Center's failure to notify the Union of a change to the way it provided optometrists SAAs in violation of the Medical Center's duty to notify and bargain over procedures with the Union. Attachment N. However, while the Union's step 3 grievance references "new guidelines going around that have changed the amount of steps an Optometrist can obtain through a SAA award within one year," no specific information on the "new guidelines" was submitted with the grievance, the request for a 38 U.S.C. § 7422 decision, or the Union's response thereto.

The Union further claims that the Medical Center's failure to notify the Union of the change in policy deprived the Union of its opportunity to submit a demand to bargain on the impact and implementation of the policy. Attachment N. Again, because no specific information (e.g., a copy of the new guidelines or alleged policy change) on how the alleged policy change was inconsistent with VA Handbook 5005, or any Union proposals, were submitted with the request for a 38 U.S.C. § 7422 decision or the Union's response thereto, this decision cannot address those claims. *Id.* Based on the evidence submitted by the parties, it is clear that an approving official for a PSB "may" approve the "recommendation" of a PSB pursuant to VA Handbook 5005, part II, chapter 3, section C but there is no requirement to do so. Attachment L. In either case, the decision of an approving official with respect to the SAA is final. *Id.*

While the Union's response to the request for a 38 U.S.C. § 7422 decision claims that the grievance is focused on bargaining, neither the grievance nor the remedies requested within it address bargaining. Attachments G and N. The Union's requested remedies address the retroactive and prospective payment of SAAs to affected Optometrists, the required approval of PSB recommendations, the establishment of new award criteria and guidelines for Optometrists, and the creation of a panel, with "union representation", to develop the new award criteria and guidelines. Attachment G.

The requested remedies address not only the compensation of Optometrists but also the peer review process utilized by Optometry PSBs. An SSA is the equivalent of a step increase, which results in a salary increase, and the process set forth in VA policy for the approval of such SAAs includes peer review by the appropriate PSB. As such, matters involving a PSB recommendation on a SAA concern or arise under peer review and the establishment, determination or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b), and thus, are excluded from collective bargaining.

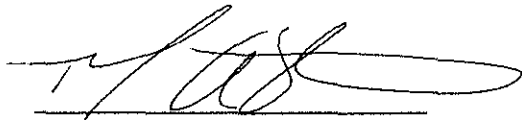
The Secretary has previously determined SAAs concern employee compensation and peer review and, as a result, are excluded from collective bargaining. In *VAMC Houston (June 10, 2016)*, an RN was recommended for a SAA award for obtaining a Nurse Certification. The RN received a cash award but did not receive a step increase.

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Attachment I. The Union filed a grievance stating that the RN was not properly advanced. *Id.* The Under Secretary for Health stated that, with regard to Title 38 special advancement and cash awards “[b]ased on VA policy, the entire process for consideration of a special advancement for achievement is discretionary” and “[t]he Medical Center exercised its discretion by choosing not to award a nurse a step increase for obtaining a new specialty certification.” *Id.* Further, the USH concluded that the Union’s grievance concerning a SAA 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.” *Id.*

DECISION

The Union’s September 25, 2015 grievance concerning the payment of SAAs to Optometrists involves a matter or question concerning or arising under peer review and the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b), and is thereby excluded from collective bargaining.



Richard A. Stone, M.D.
Executive in Charge
Veterans Health Administration

10/30/18
Date



DEPARTMENT OF VETERANS AFFAIRS
Under Secretary for Health
Washington DC 20420
October 30, 2018

Thomas Wisnieski, MPA, FACHE
Director
North Florida/South Georgia Veterans Health System
1601 S.W. Archer Road
Gainesville, FL 32608

Dear Mr. Wisnieski:

I am responding to your August 17, 2017, request for a 38 U.S.C. § 7422 decision regarding whether a grievance filed by the American Federation of Government Employees, Local 2779, that the Department of Veterans Affairs (VA), North Florida/South Georgia Veterans Health System unilaterally changed the way it gives Special Advancement Awards to optometrists involves a matter or question concerning or arising under peer review, and the adjustment of employee compensation as defined by 38 U.S.C. § 7422(c), and thus, is excluded from collective bargaining.

I have determined that the hospital's decision to advance their optometrists, as well as the number of steps to advance the Optometrist remains entirely within the discretion of the Medical Center, and is a matter or question or arising under peer review, and the adjustment of employee compensation as defined by 38 U.S.C. § 7422(c). Please review the enclosed paper for a complete explanation of my decision.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Stone", with a long horizontal flourish extending to the right.

Richard A. Stone, M.D.
Executive in Charge

Enclosure



DEPARTMENT OF VETERANS AFFAIRS
Under Secretary for Health
Washington DC 20420
October 30, 2018

Ms. April Fuller
Legal Rights Attorney
General Counsel's Office
AFGE, AFL-CIO

Dear Ms. Fuller:

I am responding to a request for a 38 U.S.C. § 7422 decision regarding whether a grievance that the Department of Veterans Affairs (VA) North Florida/South Georgia Veterans Health System unilaterally changed the way it gives Special Advancement Awards to optometrists involves a matter or question concerning or arising under peer review, and the adjustment of employee compensation as defined by 38 U.S.C. § 7422(c), and thus, is excluded from collective bargaining.

I have determined that the hospital's decision to advance their optometrists, as well as the number of steps to advance the Optometrist remains entirely within the discretion of the Medical Center, and is a matter or question or arising under peer review, and the adjustment of employee compensation as defined by 38 U.S.C. § 7422(c). Please review the enclosed paper for a complete explanation of my decision.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard A. Stone". The signature is fluid and cursive, with a long horizontal stroke at the end.

Richard A. Stone, M.D.
Executive in Charge

Enclosure