



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

SEP 02 2008

Wanda Mims, MBA
Director
100 Emancipation Drive
Hampton, VA 23667

Neil C. Booney
Booney & Allenberg, P.C.
HayGood Office Building
4652-A Haygood Road
Virginia Beach, VA 23455

Dear Ms. Mims and Mr. Booney:

I am responding to the issues raised in your memoranda of March 12 and 13, 2008, respectively, concerning the union's grievance relating to the creation of separate pay scales for Nurse Practitioners and Clinical Nurse Specialists based upon salary survey data, and retroactive pay for Nurse Practitioners and Clinical Nurse Specialists once the separate pay scale is established.

Pursuant to delegated authority, I have decided on the basis of the enclosed paper that the union's grievance concerning the HVAMC's alleged failure to follow VA policy when establishing pay scales for Nurse Practitioners and Clinical Nurse Specialists is not a matter concerning or arising out of the establishment, determination or adjustment of employee compensation under Title 38; and, that the issue of whether the HVAMC's failure to establish separate specialty schedules for Nurse Practitioners and Clinical Nurse Specialists constituted an administrative error is not covered by 38 U.S.C. 7422(b) exclusions.

Sincerely yours,

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

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

Enclosure

cc: Ms. Debra Corbin

Title 38 Decision Paper
VA Medical Center, Hampton, VA

VA-08-0

FACTS:

On July 12, 2007, AFGE Local 2328 (union) filed a Step III grievance alleging violations to Article 51 of the VA/AFGE Master Agreement, 38 U.S.C. § 7451, and VA Regulations. (Attachment A) The union further alleged that the Advanced Practice Nurse Locality Pay Schedule used at the Hampton VAMC (HVAMC) violates the Nurse Locality Pay Regulations since Nurse Practitioners (NP) and Clinical Nurse Specialists (CNS) perform different duties and should not be on the same schedule. (Attachment A, ¶ 2) The union requested the following remedies:

- AFGE request (sic) formation of separate Pay Scales for NP & CNS based upon salary survey data;
- AFGE request (sic) that when data for local labor market [LLM] is not available, that the LLM be expanded to allow for capture of data in accordance with VA LPS [locality pay survey] regulations; and
- AFGE request (sic) attorney fees and any remedy available under the law.

Attachment A, ¶ 4

On July 27, 2007, management at the HVAMC responded to the grievance by stating that it is the HVAMC's decision to establish a separate specialty schedule for CNS and Advanced Practice Nurses (APN) (Attachment B) In addition, management informed the union that if data for the local labor market (LLM) is not available, the LLM will be expanded to allow for the entire capture of data.

On August 3, 2007, the union submitted a grievance memorandum asking for clarification of management's decision to establish a separate specialty schedule for CNS and APN, and a timeline for completion of the nurse locality pay process. (Attachment C)

On August 28, 2007, management submitted its response to the union and clarified that it would have two different specialty schedules, one for CNS and another for NP. (Attachment D) Management stated that the surveys would be completed by September 28, 2007, contingent upon the necessary information being available.

On September 28, 2007, the union submitted a memorandum invoking arbitration. (Attachment E)

On February 27, 2008, management at the HVAMC met with the union to discuss the grievance.¹ During the meeting, management “advised the union that it was seeking to purchase third party salary survey information to determine if a salary increase was indicated for Nurse Practitioners at the Hampton VAMC. The Hampton VAMC also advised the union that once all data had been gathered the Director of the Hampton VAMC would be briefed for final approval of any salary adjustments.”²

On March 10, 2008, Timothy M. O’Boyle, Winston-Salem Regional Counsel attorney, informed the union and its attorneys that the HVAMC would be requesting a determination by the Under Secretary for Health (USH) that the issue grieved be determined to be excluded from collective bargaining pursuant to 38 U.S.C. § 7422(b). (Attachment F)

On March 11, 2008, an arbitration hearing was held on the above-referenced issue.³ The arbitrator was advised that management at the HVAMC would be requesting a determination by the USH that the matter grieved is outside the scope of collective bargaining pursuant to 38 U.S.C. § 7422. Management asked the arbitrator to stay the proceedings pending the issuance of a decision by the USH. The arbitrator agreed to not render a decision until the final USH decision is filed but heard brief arguments from both the union and management about jurisdiction and the merits of the case.

On March 12, 2008, the Director of HVMAC submitted a request to the USH that the above-referenced issue is a matter concerning or arising out of the establishment, determination or adjustment of employees compensation, and is thus exempted from collective bargaining by 38 U.S.C. § 7422(b). (Attachment G)

On March 13, 2008, the union submitted its position paper to the USH. (Attachment H) In its document, the union argued that despite the HVAMC’s “acknowledgement that it is required to establish separate schedules [between NP and CNS], it has not done so.” (Attachment H, page 2) The union’s position paper clarifies that the grievance merely requires the agency to set up separate schedules and after the separate schedules are set up, if the schedule indicates that a NP have been underpaid, “then pursuant to Article 51 of Section 2B of the Master Agreement, the nurse practitioners be retroactively compensated from the time when the VAMC should have set up the separate schedule.”

PROCEDURAL HISTORY:

The Secretary has delegated to the Under Secretary for Health (USH) the final authority in the VA to determine whether a matter or question concerns or arises out of the establishment, determination, or adjustment of employee compensation under Title 38.

¹ This information is based on the HVAMC’s request for a determination by the USH that the grievance filed by the union is covered by the exclusions in 38 U.S.C. § 7422. Attachment G, ¶ 9.

² Id.

³ See Attachment G, ¶ 11.

ISSUE:

Whether the issues underlying the union's grievance, relating to the union's request for the HVAMC to establish a separate pay scale for Nurse Practitioners and Clinical Nurse Specialists; request to expand the local labor market when such data is not available; and, retroactive pay for NP and CNS once the separate pay scale is established are exempt from the collective bargaining process under 38 U.S.C. 7422(b) as matters concerning or arising out of the establishment, determination or adjustment of employee compensation under Title 38.

DISCUSSION:

The Department of Veterans Affairs Labor Relations Improvement Act of 1991, codified in 38 U.S.C. § 7422, granted limited collective bargaining rights to Title 38 employees, but specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional competence or conduct, peer review, and the establishment, determination, or adjustment of employee compensation as determined by the USH.

The procedures by which VA officials adjust Title 38 nurses' pay are set forth in 38 U.S.C. § 7451 and in VA regulations implementing the statutory authorities. Section 7451 authorizes directors of VA health care facilities to adjust nurses' basic pay as needed to remain competitive with the salaries offered by non-VA health care facilities in the same market area. Where there is no current Bureau of Labor Statistics (BLS) survey of nurse salaries in the area, the statute provides that "the director of that facility shall conduct a survey in accordance with this subparagraph and shall adjust the amount of the minimum rate of basic pay for grades in that covered position at that facility based upon that survey. To the extent practicable, the director shall use third-party industry wage surveys to meet the requirements of the preceding sentence." 38 U.S.C. §7451 (d)(3)(B).

The VA Secretary has promulgated regulations pertaining to nurse salary surveys in VA Handbook 5007, Part X. Those regulations generally provide that if a "facility Director determines that a significant pay-related staffing problem exists or is likely to exist for any grade of a covered occupation or specialty, the Director must conduct a salary survey or use a BLS or other third-party industry salary survey to determine whether a rate adjustment is necessary to remain competitive with the rates of compensation for corresponding positions, if such a survey has not been conducted within 120 days." VA Handbook 5007, Part X, Chapter 1, paragraph 4(b)(1). More specifically, the regulations provide that "when BLS data are not available [for a facility's labor market area] or [are] not current, the Director shall, to the extent practicable, use other third-party wage surveys" to determine whether an adjustment to nurse pay is warranted. VA Handbook 5007, Part X, Chapter 1, paragraph 4(d). If a third-party survey is used, the regulations require that the survey include a number of specific types of salary data; reflect salary data for a labor market area that "includes the county in

which the covered employees will be assigned and is representative of the location of competing establishments;" report data that is easily equated to the VA nurse grade levels; and include enough participant facilities to provide a statistically valid sample." VA Handbook 5007, Part X, Chapter 1, paragraph 4.d.(1)-(6).

In addition, VA Handbook 5007, Part X, Chapter 1, paragraph 7 provides that "a separate salary schedule may be established for any nurse category, by conducting a survey of pay rates for the corresponding specialty in the LLMA [local labor market area]." Human Resources Management Letter (HRML) No. 05-95-15 was developed to "provide guidance on establishing specialty schedules for advanced practice nurses (nurse practitioners and clinical nurse specialists) under the Locality Pay System (LPS)." (Attachment I) Specifically, the HRML provides that "[i]n situations where the roles of nurse practitioners and clinical nurse specialists are clearly different at a VA facility, the Director may establish separate schedules for either or both specialties, but may not combine them on one scale...."

The union requested that the HVAMC form separate pay scales for NP and CNS based on salary survey information. Generally, a Medical Center's decision to adjust the specialty schedule compensation of 38 U.S.C. § 7401(1) providers concerns or arises out of the establishment, determination or adjustment of employee compensation under 38 U.S.C. § 7422. See, e.g., Miami (12/11/03). However, the union based its request on specific allegations that the APN Locality Pay Schedule currently used by the HVAMC violated the Nurse Locality Pay Regulations and that NP and CNS should not be on the same schedule when their duties differ. Where, as here, a union alleges that a Medical Center failed to follow its own policy and regulations when establishing, determining or adjusting the compensation of 38 U.S.C. § 7401(1) providers, 38 U.S.C. § 7422 does not apply. See, e.g., Richmond (7/19/04). Therefore, the union may grieve the issue of whether the HVAMC failed to follow its own policy and regulations when it established the salary schedules of NP and CNS.⁴

The union additionally requested that when data for a LLM is not available, that the LLM be expanded to allow for capture of data in accordance with VA LPS regulation. As management agreed to the union's request within the grievance process and the union did not address that particular issue in its March 13, 2008, position paper, we will not address that issue here.

The union further requested that once a separate schedule is arranged, that "nurse practitioners be retroactively compensated from the time when the VAMC should have set up the separate schedule . . . and retroactively correct the delay

⁴ Based on the grievance response submitted by management, it appears that the HVAMC Director determined to establish a separate specialty schedule for CNS and NP in response to the union's grievance, which would render the HVAMC's alleged non-compliance with VA regulations moot. However, any adjustment to the compensation of NP and CNS based on a finding that the HVAMC potentially failed to follow its own policy and/or regulations would concern or arise out of the establishment, determination or adjustment of employee compensation under 38 U.S.C § 7422 and cannot be granted as an arbitration remedy.

due to the Hampton VAMC's administrative error." Generally, a remedy that requires the adjustment of 38 U.S.C. § 7401(1) employee compensation is exempt from collective bargaining under 38 U.S.C. § 7422. See, e.g., VA Maryland Healthcare System (5/19/08). However, the issue of whether the HVAMC committed an administrative error by failing to establish separate specialty schedules for NP and CNS, which resulted in them being incorrectly compensated, may be grieved. If the arbitrator determines that such an administrative error occurred, the HVAMC will be obliged to follow the procedures in VA Handbook 5007 and grant retroactive relief to the affected CNS and NP in accordance with applicable law and regulation.⁵

The union also requested "attorney fees and any remedy available under the law." Since attorney fees were not discussed in the union's March 13, 2008, position paper, we will not address that issue here.

RECOMMENDED DECISION

That the issue underlying the union's grievance, concerning the HVAMC's alleged failure to follow VA policy when establishing pay scales for Nurse Practitioners and Clinical Nurse Specialists, is not a matter concerning or arising out of the establishment, determination or adjustment of employee compensation under Title 38 because the union alleged that the HVAMC failed to follow its own policy and regulations when establishing, determining, or adjusting the compensation of the Nurse Practitioners and Clinical Nurse Specialists.

APPROVED X DISAPPROVED _____

That the issue underlying the union's grievance, concerning whether the HVAMC's failure to establish separate specialty schedules for Nurse Practitioners and Clinical Nurse Specialists constituted an administrative error, is not covered by 38 U.S.C. § 7422(b) exclusions.

APPROVED X DISAPPROVED _____

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

9/2/08
Date

⁵ While an arbitrator may order a VAMC to "comply with applicable law and regulation" in cases of administrative error, a remedy that specifically requires the adjustment in the compensation of NP and CNS compensation will concern or arise out of the establishment, determination or adjustment of employee compensation under 38 U.S.C. § 7422.