



DEPARTMENT OF VETERANS AFFAIRS  
UNDER SECRETARY FOR HEALTH  
WASHINGTON DC 20420

MAY 19 2008

Wayne Pfeffer, MHSA, FACHE  
Director  
Louisville VAMC  
800 Zorn Avenue  
Louisville, KY 40206

Mark Roth  
General Counsel  
American Federation of Government Employees  
80 F Street, NW  
Washington, DC 20001

Dear Mr. Pfeffer and Mr. Roth:

I am responding to the issues raised in your memoranda of February 29, 2008, and March 31, 2008, respectively, concerning a grievance filed by the American Federation of Government Employees (AFGE) Local 1133 regarding overtime compensation for nurses in the Geriatric Extended Care (GEC) facility at the Louisville VAMC. Although the union also filed an Unfair Labor Practice Charge, the union has since withdrawn the charge, so it will not be addressed in this decision.

Pursuant to delegated authority, I have decided on the basis of the enclosed decision paper that the issue presented by the grievance is a matter concerning or arising out of the establishment, determination or adjustment of Title 38 employee compensation or professional conduct or competence (i.e. direct patient care and clinical competence) and is therefore excluded from collective bargaining and from the negotiated grievance procedure.

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- Louisville, KY  
VA 08-XX**

**FACTS:**

On February 23, 2007, the American Federation of Government Employees (AFGE), Local 1133, Louisville, KY filed a grievance alleging that employees assigned to the Geriatric Extended Care Facility (GEC) service worked “countless hours past their normal tour of duty” without compensation since 2006. The grievance alleged that GEC nurses routinely stayed after their tours to avoid adverse patient care outcomes and/or detriment to the nurses’ licensure, and that management’s failure to pay overtime for such service violated Article 16 of the VA-AFGE master agreement and “is also a violation of the ‘suffer and permit’ rule.” The requested remedy was “Overtime or Comp Time if GEC Nurses stay past their normal tour of Duty.” Exhibit 1.<sup>1</sup>

On March 20, 2008, Chief of Staff Marylee Rothschild, MD denied the grievance. Exhibit 3. Dr. Rothschild advised AFGE that there would not be a blanket approval for overtime and the need for overtime would continue to be evaluated on a case by case basis. On March 23, 2007, AFGE invoked arbitration. Exhibit 4.

On February 25, 2008, Dr. Lisa Vuocolo, Associate Chief of Staff, GEC, provided an affidavit stating that she has never ordered any RN in GEC to stay beyond his or her tour of duty without compensation. Exhibit 5. Furthermore, Dr. Vuocolo stated that whenever she observed someone staying past their normal tour of duty, she instructed them to go home. Dr. Vuocolo also stated that in an effort to assist RNs who have trouble completing their work during their normal tour of duty, she has streamlined some of the GEC processes to decrease time per consult, and has assigned the responsibility of scheduling physical therapy to other employees. Douglas B. Sloan, Administrative Assistant for GEC, also provided an affidavit in which he stated that he has never ordered any GEC RN to stay past his or her tour of duty, and has reminded the RNs on numerous occasions to not stay past their tour of duty. Exhibit 6. Both Mr. Sloan and Dr. Vuocolo also declared that they have told the GEC RNs that they must request overtime in advance, and that all of the overtime that had been authorized in advance had been paid.

On February 5, 2008, the union filed an Unfair Labor Practice (ULP) claiming that management treated the GEC employees differently after the grievance was filed. Exhibit 7. The union withdrew the ULP on March 31, 2008. Exhibit 8.

On February 8, 2008, management informed the union that it had requested a decision from the Under Secretary for Health (USH) on whether the issue raised in

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<sup>1</sup> A study of overtime in the GEC for fiscal years 2006 and 2007 showed that some GEC nurses received overtime pay during those years, while other GEC nurses did not. Exhibit 2.

the grievance was excluded from the negotiated grievance procedure under 38 U.S.C. § 7422(b), as a matter or question that concerns or arises out of professional conduct or competence, peer review or employee compensation. Exhibit 9.

On March 31, 2008, Mark Roth, General Counsel of AFGE, wrote a letter to the USH responding to management's request for a determination from the USH, and requesting that the USH determine that the grievance was not excluded from the grievance procedure under 38 U.S.C. § 7422(b). Exhibit 10. In his letter, Mr. Roth asserts that "basic pay" and "additional pay" are two different benefits and that the reference to compensation in 38 U.S.C. § 7422 only applies to the VA Secretary's authority to set basic pay for Title 38 employees in certain occupations, and not to set additional pay for nurses such as the overtime pay authority provided by 38 U.S.C. § 7453.

Mr. Roth further argues that the grievance does not concern an issue of compensation within the meaning of 38 U.S.C. § 7422, but rather whether the additional hours worked by nurses in the GEC were "officially ordered or approved." Mr. Roth contends that the nurses were performing duties which were an essential part of patient care and should be compensated accordingly. Finally, Mr. Roth argues that these duties must be considered to have been officially approved by management, because if the nurses had failed to complete the duties they would have been subject to discipline.

#### PROCEDURAL HISTORY

The Secretary has delegated to the USH the final authority in VA to decide whether a matter or question concerns or arises out of professional conduct or competence (direct patient care, clinical competence), peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b).

#### ISSUES:

1. Whether the Union's grievance regarding overtime compensation for nurses in the GEC at the Louisville VAMC involves 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 Union's grievance regarding overtime compensation for nurses in the GEC at the Louisville VAMC involves issues concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

## DISCUSSION:

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

The Union's legal arguments in this case, as set forth in both the grievance and Mr. Roth's letter to the USH, are essentially three-fold. First, the Union argues that the GEC nurses are entitled to overtime compensation under the "suffered and permitted" rule of the Fair Labor Standards Act (FLSA). (Exhibit 1, paragraph 2.) Second, the Union argues that the GEC nurses are entitled to overtime pay under 38 U.S.C. § 7453(e), which authorizes overtime pay for VA nurses who perform "officially ordered and approved" overtime service, because "staffing shortages ... resulted in increased patient loads [in the GEC]" and although management specifically told the nurses to leave at the end of their shifts, the nurses stayed late for fear that leaving might put the patients at risk. (Exhibit 10, pages 2 and 4.) Third, the 38 U.S.C. § 7422 exclusion relating to "the establishment, determination and adjustment of [Title 38] employee compensation," applies only to basic pay and not to "additional pay" such as the nurse overtime pay authorized by 38 U.S.C. § 7453(e). (Exhibit 10). Each of these arguments will be addressed in turn.

First, AFGE's argument that the GEC nurses are entitled to overtime compensation for "suffered and permitted" overtime work, misstates the law and VA regulations pertaining to compensation of VA nurses. The Secretary's authority to provide compensation (in addition to the rate of basic pay) to nurses is authorized under Title 38, Section 7453. Pursuant to 38 U.S.C. § 7453(e)(1), the Secretary has prescribed regulations in VA Handbook 5007/12, Part V, Chapter 2, paragraph 2, which provides that, "overtime is payable for service performed in excess of 40 hours in an administrative workweek, or in excess of 8 hours in a day, whichever is greater, at a rate of one and one-half times the employee's basic hourly rate of pay." 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.

Moreover, the FLSA restricts "suffered and permitted" overtime pay to employees who are FLSA-non-exempt, i.e., employees who are not employed in a "bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). Under the FLSA, registered nurses are professional employees, and as such are FLSA-exempt. See 29 CFR §§ 541.3, 541.301. Thus, even if FLSA did apply to VA nurses, they would be exempt employees. Further, under Title 38's pay authority, which applies to VA nurses, overtime service must be "officially ordered and approved" to be compensable. See 38 U.S.C. § 7453(e). Likewise, under Title 5's pay authorities, which apply to nurses in other Federal agencies, overtime service must also be "officially ordered and approved" to be compensable. 5 USC

§ 5542. “Officially ordered and approved” overtime is that overtime service that was ordered and approved in advance by a management official having authority to approve overtime compensation. See Doe v. U.S., 463 F.3d 1314 (Fed. Cir. 2006)(finding DOJ attorneys are not entitled to overtime under 5 USC § 5542 where overtime work was not “officially ordered and approved”). Thus, AFGE’s contention that its grievance should not be reviewed in the context of § 7422 because the grievance concerns whether the overtime the GEC nurses worked was officially ordered and approved, and does not concern the establishment, determination or adjustment of employee compensation specifically excluded from the collective bargaining process by § 7422 is immaterial. Whether the GEC nurses’ overtime was officially ordered and approved or not, the underlying substantive issue is the overtime the nurses seek and VA’s interpretation of § 7453(e)(1), which 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 outside the scope of collective bargaining

Second, AFGE’s argument that the GEC nurses are entitled to overtime pay because staffing shortages resulted in increased patient loads, which resulted in the nurses staying late for fear that leaving might put the patients at risk fails for the same reasons as those stated supra. The facts alleged by AFGE and management in this case establish that the GEC nurses who chose to stay past their tours were not performing “officially ordered and approved” overtime. Again, the underlying issue is one of overtime compensation and VA’s interpretation of § 7453(e)(1), which 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 outside the scope of collective bargaining.

Finally, the Union errs in interpreting the term “compensation” under 38 U.S.C. § 7422 to mean only basic pay. The compensation exclusion under § 7422 expressly applies to “any matter or question concerning or arising under ... the establishment, determination, or adjustment of employee compensation under [Title 38].” The Title 38 personnel statutes authorize the VA Secretary to establish, determine, or 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)). Had the drafters of 38 U.S.C. § 7422(b) intended to exclude from collective bargaining only basic pay, they would have used the term “basic pay” rather than the much broader phrase “establishment, determination, or adjustment of employee compensation . . .”

In several prior cases the USH has determined that overtime and other additional pay as 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 USH held that “the payment of night differential and weekend premium pay to OR [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.”<sup>2</sup> 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],’” and not whether VA’s reading of the premium pay statute under 38 U.S.C. § 7453 was the best possible reading of the statute. *AFGE Local 446 v. U.S. Dep’t of Veterans Affairs, et al.*, 475 F.3d 341, 344-346 (D.C. Cir. 2007).

Similarly, in *VAMC Buffalo, NY*, February 22, 2008, the USH 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. Accordingly, as long as VA’s interpretation of §7453(e)(1), which governs the Secretary’s authority to provide overtime compensation to its nurses, is reasonable, the court will not find the agency’s interpretation unreasonable or arbitrary and capricious.

RECOMMENDED DECISION:

1. That the Union’s grievance regarding overtime compensation for nurses in the GEC at the Louisville VAMC involves issues concerning or arising 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, MD, MS, MACP  
Under Secretary for Health

5/20/08  
Date

2. That the Union’s grievance regarding overtime compensation for nurses in the GEC at the Louisville VAMC involves issues concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

APPROVED  X

DISAPPROVED \_\_\_\_\_

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

5/20/08  
Date

<sup>2</sup> 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).