



DEPARTMENT OF VETERANS AFFAIRS  
Veterans Health Administration  
Washington DC 20420

AUG 01 2008

Roger Johnson  
Director  
VA Medical Center  
VA Connecticut Healthcare System  
950 Campbell Ave.  
West Haven, CT 06516

In Reply Refer To:

Karin T. Thompson, APRN, BC  
American Federation of Government Employees  
Local 2138  
950 Campbell Avenue, Bldg. 6, Room 127  
West Haven, CT 06516

Dear Mr. Johnson and Ms. Thompson:

I am responding to the issue raised in your memoranda of March 11, 2008, and March 21, 2008, respectively, concerning the grievance filed by AFGE Local 2138 regarding the leave and pay status of RN.

Pursuant to delegated authority, I have decided on the basis of the enclosed decision paper that that the issue underlying the union's grievance, concerning whether the VA CHS allegedly failed to comply with VA regulations and policy when it reviewed and corrected the OWCP and leave status of RN, is not a matter concerning or arising out of the establishment, determination or adjustment of employee compensation under Title 38. I have also decided that the union's requested remedy, that RN, receive back pay with interest, 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).

Sincerely yours,

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

Enclosure

**Title 38 Decision Paper**  
**VAMC West Haven, CT**  
**VA 08-0\_**

On September 21, 2007, the American Federation of Government Employees (AFGE or union), Local 2138, at the VA Connecticut Healthcare System (VA CT HCS or VAMC) filed a Step 2 Grievance on behalf of \_\_\_\_\_, RN, alleging that Nurse \_\_\_\_\_ had not received proper compensation since 2001. (Attachment A) Specifically the union claimed that Nurse \_\_\_\_\_ did not receive timely within grade increases and that the delays were related to her Worker's Compensation (OWCP) status. *Id.* ¶ 2 The union claimed that "time covered by OWCP was not counted and appears to have been viewed as [leave without pay] LWOP". *Id.* Furthermore, the union claimed that the Payroll Office corrected errors for March 2007 but failed to correct the preceding years. *Id.* ¶ 3

The union requested the following remedies:

Payroll will provide the Union with specific computation of pay due, including all monetary losses from said losses, starting March 2001 to present.

The employee will receive all compensation of back pay due with interest.

The Agency will compensate the Union for costs incurred from settlement of this case.

*Id.* ¶ 4

On October 4, 2007, the Chief Financial Officer (CFO) at the VA CT HCS, responded to the Step 2 grievance. (Attachment B) The CFO denied the grievance and specifically stated that he had reviewed the employee's leave and pay status and had determined that any errors that had existed had been corrected and the employee had received all compensation owed. *Id.* ¶ 3

On October 17, 2007, the union elevated the grievance to Step 3. (Attachment C) The union indicated that even though management claimed "all the errors [had] been corrected...there are no clear indications of specific corrections on the 58 pages of material received at the hearing." *Id.* ¶ 2

Management responded to the Step 3 grievance on November 13, 2007. (Attachment D) In its response, management claimed that an audit of the employee's payroll records was conducted and it was determined that the employee received all step increases and appropriate back pay. *Id.* ¶ 3 The grievance was denied.

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## Title 38 Decision Paper

On December 21, 2007, the union invoked arbitration. (Attachment E). On the same date, Charles A. Lee, Labor Relations Specialists at the VAMC, e-mailed Karin Thomson, the union President, requesting evidence that the employee was underpaid. (Attachment F) The parties' submissions in this matter do not indicate whether the union ever provided the requested evidence to management.

By memorandum dated March 11, 2008, the Director of the VA CT HCS requested that the Under Secretary for Health (USH) determine that the union's grievance involved issues concerning or arising out of the establishment, determination, or adjustment of employee compensation under 38 U.S.C. § 7422. (Attachment G) In his memorandum, the Director explained that the VAMC was "forced to submit the item for exclusion per 38 U.S.C. § 7422" because of the broad discretion allowed an arbitrator in defining the issue to be arbitrated *Id.* ¶ 2

On March 21, 2008, the union submitted an opposition to management's request for a 38 U.S.C. § 7422 decision by the USH. (Attachment H) The union argued that the issue is a "simple matter of correct payment for work done by the employee according to the Agency regulations, not the 'establishment, determination, or adjustment of employee compensation under [38 U.S.C. § 7422]." The union further explained that the employee was coded half time as LWOP while working full time and suggested that the mistake resulted in a delay in the within grade increase due every two years. *Id.* ¶ 2

### 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 a grievance over the leave and payment status of \_\_\_\_\_, RN, is a matter or question concerning or arising out of the establishment, determination, or adjustment of employee compensation under 38 U.S.C. § 7422.

### 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.

38 U.S.C. § 7403(c) provides that advancements within grade may be made in increments "of the minimum rate of basic pay of the grade in accordance with regulations prescribed by the Secretary." VA Handbook 5007, Part III, Chapter 5 discusses periodic step increases (PSI)<sup>1</sup> and states that PSIs may be granted to any nurse who is receiving less than the maximum of his or her grade. VA Handbook 5007, Part III, Chapter 5, ¶ 1 (a). In order to be eligible for a PSI, a nurse's work must be at an acceptable level of competence and the nurse cannot have received an "equivalent increase" in compensation during the period in consideration. VA Handbook 5007, Part III, Chapter 5, ¶ 1 (b). Minimum waiting periods for a PSI apply, which depend on a nurse's grade, level, and step.<sup>2</sup>

At Step 2, the union questioned whether management properly recorded the OWCP and leave status of Nurse [redacted] and whether management's alleged failure to correctly record Nurse [redacted] status caused a delay in her within-grade increases and compensation. In its denial of the Step 2 grievance, management noted that any errors in Nurse [redacted] status had been corrected. Thereafter, the union elevated the grievance to Step 3 and stated that the corrections were not clearly discernable from the materials management provided to the union. Although management's denial of the union's Step 3 grievance included an audit of the employee's payroll regarding PSIs since 2001 and stated that Nurse [redacted] had received all PSIs and appropriate back pay, the union still questioned whether Nurse [redacted] OWCP and leave status had been corrected and were in compliance with VA regulations. Therefore, the union invoked arbitration, requesting back pay for Nurse [redacted] "delayed within grade increases". (Attachment D, ¶ 3; Attachment E)

The union grievance alleges that management failed to comply with VA regulations and policy when it reviewed and corrected the OWCP and leave status of Nurse [redacted]. Generally, a decision by a Medical Center to adjust an employee's compensation pursuant to applicable VA policy or regulation concerns or arises out the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b). (See, e.g., Asheville (8/22/05)). However, 38 U.S.C. § 7422 exclusions do not apply when a union alleges that a Medical Center failed to follow its governing policy and regulations when establishing, determining or adjusting the compensation of employees described in 38 U.S.C. § 7421(b). (See, e.g., Richmond (7/19/04)). Therefore, the union may grieve the issue of whether VA complied with VA regulations and policy when it reviewed and adjusted Nurse [redacted] pay status and PSIs.

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<sup>1</sup> Under Title 38, registered nurses are eligible for periodic step increases and not "within grade increases", which are available to Title 5 employees.

<sup>2</sup> The parties' submissions did not identify Nurse [redacted] grade, level, or step.

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Title 38 Decision Paper

The union's grievance also alleged that Nurse \_\_\_\_\_ is entitled to back pay with interest<sup>3</sup> if she was inappropriately compensated. For the above-stated reasons. Such a remedy concerns or arises out the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b) and is therefore exempt from collective bargaining. However, if the arbitrator determines that the VAMC failed to follow applicable compensation regulations and VA policy when it conducted the review and adjustment of Nurse \_\_\_\_\_ compensation, the VAMC will be obliged to grant Nurse \_\_\_\_\_ retroactive relief.<sup>4</sup>

RECOMMENDED DECISION

That the issue underlying the union's grievance, concerning whether the VA CHS allegedly failed to comply with VA regulations and policy when it reviewed and corrected the OWCP and leave status of \_\_\_\_\_ RN, is not a matter concerning or arising out of the establishment, determination or adjustment of employee compensation under Title 38.

APPROVED \_\_\_\_\_  \_\_\_\_\_ DISAPPROVED \_\_\_\_\_

RECOMMENDED DECISION

That the union's requested remedy, that \_\_\_\_\_, RN receive back pay with interest, is excluded from collective bargaining as a matter or question that concerns or arises out of professional conduct or competence and peer review within the meaning of 38 U.S.C. § 7422(b).

APPROVED \_\_\_\_\_  \_\_\_\_\_ DISAPPROVED \_\_\_\_\_

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

**AUG 01 2008**  
\_\_\_\_\_  
Date

<sup>3</sup> Although the union requested compensation for union "costs incurred from settlement of this case" at Step 2 and Step 3, the union's "Request for 38 USC 7422 (b) Determination" did not. Therefore, the remedy will not be addressed in this decision.

<sup>4</sup> While an arbitrator may order a VAMC to "comply with applicable law and regulation" where a VAMC fails to comply with its applicable regulations and policy, a remedy that specifically requires the adjustment in the compensation of NP and CNS compensation would concern or arise out of the establishment, determination or adjustment of employee compensation under 38 U.S.C. § 7422.