

**Title 38 Decision Paper
Department of Veterans Affairs (VA)
Central Alabama Veterans Health Care System (CAVHCS)**

FACTS

In 2009, VA engaged an outside contractor to establish and provide adjustments to existing nurse locality specialty pay schedules and Title 38 special rate schedules; the changes became effective on June 5, 2010. (Attachment 1) Incident to that effort, VA managers reviewed their listings of nurses assigned to various specialty pay schedules. (Attachment 1) That review uncovered nurses who were assigned to inappropriate specialty pay schedules based on actual duties performed. (Attachment 1) In CAVHCS, five nurses who performed outpatient duties, but who were being paid at the higher inpatient rate, were identified as being on an inappropriate specialty pay schedule. (Attachment 1) It appears that the nurses were erroneously placed on the inpatient specialty pay schedule when they were hired but they had always performed outpatient duties. (Attachment 1-A) In an effort to ameliorate the effects of this proposed specialty pay schedule change, CAVHCS Management offered each of the affected nurses a position that entailed performing inpatient duties, which would allow them to remain on the inpatient specialty pay schedule and not suffer a reduction in compensation. (Attachment 1) Each affected nurse was advised that if she declined the offer of placement, her pay "would be adjusted due to placement on the outpatient nurse schedule". The Agency further waived its right to recoup overpayments to the affected nurses. (Attachment 1-C) However, all of the nurses declined reassignment. (Attachment 1-C)

On October 21, 2010, the American Federation of Government Employees (AFGE) Local #110 filed a Step 2 grievance¹ over CAVHCS Management's decision to change the nurses' specialty pay schedules, specifically identifying ". . . the negative impact that has occurred to (5) five registered nurses (sic) initial salaries . . . These (5) five registered nurse salaries were reduced without written justification to the bargaining unit employees and AFGE Local #110."² As a remedy, AFGE sought to have the nurses' salaries restored to the levels established at the time of their initial appointment and to have any lost pay "retroactively restored". (Attachment 1-A)

On November 18, 2010, CAVHCS Management requested a group grievance Step 2 meeting with AFGE Local #110. (Attachment 1-B) However, the meeting was cancelled pursuant to AFGE Local #110's request so the impacted nurses could be

¹ A copy of a Step 1 grievance was not submitted with the request for a 38 U.S.C. § 7422 decision.

² The Step 2 grievance also referenced information that "was requested regarding salary scales of the impacted RNs (sic), and the salary scale of inpatient and outpatient nurses [which t]o this current date, AFGE Local #110 has not received...." (Attachment 1-A) However, neither the parties' subsequent correspondence concerning the grievance, nor CAVHCS' request for a 38 U.S.C. § 7422 decision, mention the information request. Therefore, it is not addressed herein.

present. (Attachment 1-B)

On May 5, 2011, CAVHCS Management denied the Step 2 grievance citing CAVHCS Management's previous offers of placement to the affected nurses and receipt and processing of the nurses' debt waiver requests.³ CAVHCS Management renewed its offer to allow the affected nurses to remain on the current inpatient nurse specialty pay schedule (N004) or to continue performing outpatient duties and have their pay adjusted to reflect their current grade and step on the outpatient nurse schedule (N001). (Attachment 1-C)

On May 11, 2011, AFGE Local #110 filed a Step 3 grievance, which reiterated its grievance concerning the nurses being "negatively impacted by the reduction in their initial starting salaries." (Attachment 1-D)

On August 11, 2011, CAVHCS Management denied the Step 3 grievance, noting Management's continued attempts to offer the affected nurses' inpatient positions where their pay would have met or exceeded their initial hire salary and its waiver of the affected nurses' debt due to overpayment. (Attachment 1-E)

On August 25, 2011, AFGE Local #110 invoked arbitration. (Attachment 1-F) The Union's memorandum stated that it did not concur "with the decision made by management to address the errors made by the Agency regarding the five (5) impacted employees. [The Union] concluded that the decisions made by [M]anagement were not appropriate and did not comply with recruitment standards presented to the [nurses] at the time of the recruitment process." (Attachment 1-F)

In December 2011, a VA attorney advised the Second Vice President of AFGE Local #110 and the Arbitrator that he believed that the issue raised in the grievance concerned the establishment or adjustment of compensation and could be considered excludable from collective bargaining under 38 U.S.C. § 7422(b). (Attachment 1-G)

On March 28, 2012 the Interim Director, CAVHCS, requested a 38 U.S.C. § 7422 decision from the VA Secretary concerning the matter. (Attachment 1) CAVHCS Management emailed the 38 U.S.C. § 7422 request to the AFGE Local #110 President on March 29, 2012, and the AFGE Local #110 President read the email on April 2, 2012. (Attachments 2 and 3) AFGE Local #110 did not submit a position paper to the VA Secretary concerning the matter.

PROCEDURAL HISTORY

Authority is vested in the Secretary to determine whether a matter or question concerns or arises out of professional conduct or competence (i.e., direct patient care or clinical

³ While the Step 2 decision finds that the grievance was untimely filed, this decision does not address the parties' respective arguments concerning the timeliness of the parties' grievance meetings or submissions.

competence), peer review, or the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b).

ISSUE

Whether the Union's grievance challenging CAVHCS Management's decision to place five nurses on a different specialty pay schedule in order to align their pay with their actual assigned outpatient duties, or to offer the nurses voluntary reassignments to inpatient positions, is a matter concerning or arising 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, codified at 38 U.S.C. § 7422, granted collective bargaining rights to Title 38 employees in accordance with Chapter 71 of Title 5, 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 or clinical competence), peer review and the establishment, determination, or adjustment of employee compensation as determined by the VA Secretary.

Pursuant to 38 U.S.C. § 7421(a), the VA Secretary has prescribed regulations contained in VA Directive and Handbook 5007 concerning the pay administration of Title 38 medical professionals, including registered nurses appointed under 38 U.S.C. § 7401(1). With respect to determining nurse initial rates of pay upon appointment, these regulations provide:

“Personnel employed under 38 U.S.C...7401(1) shall be compensated in accordance with salary tables established by the Secretary for each occupation and salary grade for which a range of rates is established under 38 U.S.C. 7404.”
VA Handbook 5007/28, Part II, Ch. 2, Para. 1(a)(1).

VA utilizes a Locality Pay System (LPS) for full-time, part-time, and intermittent nurses. VA Handbook 5007/28, Part X, Ch. 1, Para. 1. Under the LPS, Facility Directors are responsible for determining and adjusting nurse rates of pay to enable their VA health care facilities to remain competitive in nurse recruitment and retention. VA Handbook 5007/28, Part X, Ch. 1, Para. 1. Under the LPS, a Facility Director may create a nurse specialty pay schedule subject to the following limitations:

“7. SPECIALTY SCHEDULES. 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. These specialty areas include but are not limited to operating room nurse, nurse practitioner, critical care nurse, administrative nurse, clinical nurse specialist, and head nurse...An individual shall only be placed on a

specialty schedule if that specialty is their primary role.” VA Handbook 5007/28, Part X, Ch. 1, Para. 7.

Part B (1) of the Joint 38 U.S.C. § 7422 Workgroup Recommendations as Revised and Approved by the Secretary of the Department of Veterans Affairs (Secretary’s Decision Document) also recognizes that “Pay scales are set by the agency, outside of collective bargaining and arbitration.” (Attachment 4)

After a VA audit in 2009, CAVHCS Management discovered that five nurses were inappropriately assigned to an inpatient nurse specialty pay schedule (004) even though they were performing outpatient duties and should have been on the outpatient nurse specialty pay schedule (001). (Attachment 1) Since placement on the outpatient nurse specialty pay schedule would lower the nurses’ rate of pay, CAVHCS Management offered the nurses the option to transfer to open positions in which they could perform inpatient duties and retain their current rate of pay or be transferred to the appropriate outpatient nurse specialty schedule. (Attachments 1, 1-C and 1-E) However, all of the nurses declined reassignment. (Attachment 1-C) CAVHCS Management also agreed to waive recoupment of the overpayments.⁴ (Attachments 1 and 1-E)

The Union’s grievance does not directly challenge CAVHCS Management’s offers of placement into alternative positions, but focused instead on the “negative impact” of the specialty pay schedule change on the nurses. (Attachment 1-A) The Union does not dispute the existence or applicability of differing specialty pay schedules and rates of pay for nurses who perform inpatient versus outpatient duties. (Attachment 1-A) Rather, the Union’s grievance squarely challenges the reduction in pay, which it claims was taken without “written justification” and in violation of “recruitment standards”. (Attachments 1-A and 1-F) The Union does not cite to any violation of a specific Agency regulation, handbook, policy, or other legal authority in support of its assertions.⁵ Rather, it challenges the equity of Management’s action and requests equitable remedies, i.e., restoration of salaries to “original” levels and retroactive “restoration” of lost pay (i.e., back pay).⁶ However, this determination does not turn on whether the CAVHCS Management decision was unfair or supported by preponderant evidence.

CAVHCS Management’s decision to change or adjust the specialty pay schedules of the five affected nurses in order to properly align their pay rates with the outpatient duties they perform directly implicates the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b)(3). The Title 38

⁴ While Management initially believed it could approve continuation of pay (i.e., pay retention) at the inpatient nurse schedule rate, it ultimately determined that pay retention was not an appropriate option in the case of an administrative error. VA Handbook 5007, Part III, Ch. 6, Para 5 (pay retention may be authorized based on a management-initiated action).

⁵ While CAVHCS Management’s placement of the affected nurses on an incorrect pay schedule was clearly an error, the change to the nurses’ specialty pay schedule was in compliance with the LPS requirements in VA Handbook 5007.

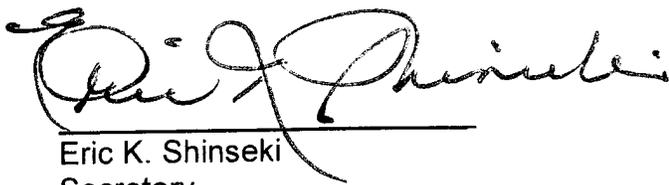
⁶ Management’s offers of placement to inpatient positions and waivers of debt appear to have been attempts to ameliorate the adverse impact on the affected nurses.

personnel statutes authorize the Secretary to establish, determine, or adjust all aspects of Title 38 employee compensation, including basic pay under 38 U.S.C. §§ 7451(3)(B) and additional pay pursuant to 38 U.S.C. § 7453(j). And, VA's Title 38 pay regulations specifically provide that nurses may only be on a specialty pay schedule "if that specialty is their primary role." Since it appears to be undisputed that the nurses were performing outpatient duties, the facility was obliged to correct the error, remove the nurses from the inpatient specialty pay schedule, and place them on the specialty pay schedule that corresponds with their primary duties. In a number of prior 38 U.S.C. § 7422 decisions, Title 38 medical professionals' eligibility for, or entitlement to, various forms of pay has been consistently found to concern or arise from establishment, determination, or adjustment of employee compensation, and thus excluded from collective bargaining. See, e.g., *Miami, December 2002* (determination of amount of scarce medical specialty pay); *Reno, May 2002* (elimination of scarce specialty pay resulting from reassigning of duties concerned compensation); *Biloxi, January 2001* (adjustment of special pay to reflect time actually spent on specialty concerned employee compensation).

RECOMMENDED DECISION

The issues underlying the grievance over CAVHCS Management's decision to place five registered nurses on a different specialty pay schedule in order to properly align their pay with their assigned outpatient duties, or to offer them voluntary reassignments to inpatient positions, be deemed exempt from collective bargaining and any grievance procedures under 38 U.S.C. § 7422(b) as matters concerning or arising out of the establishment, determination, or adjustment of employee compensation within the meaning of Title 38.

APPROVED / DISAPPROVED


Eric K. Shinseki
Secretary

9/10/2013
Date