

Title 38 Decision Paper
VA Medical Center, Hampton, Virginia

I. FACTS

On September 16, 2008, [redacted] Chief of Surgery, VA Medical Center, Hampton, Virginia (Agency or Hampton VAMC), submitted a memorandum of recommendation for advancement of [redacted] Physician Assistant, Surgical Service, from Grade 12, Step 10, to Chief Grade (Grade 13). (Exhibit 1).

On January 22, 2009, [redacted] submitted another memorandum of recommendation to the Acting Medical Center Director for advancement of [redacted] (Exhibit 2). In addition to his memorandum, [redacted] attached a list of requirements for the Chief Grade position, and a description of how [redacted] satisfied each of the requirements.¹ In his recommendation, [redacted] stated that, "Since there are no Chief Grade (GS-13) Physician Assistants at this facility, we have been informed that an outside PSB will be required." Id.

A five-member Professional Standards Board reviewed [redacted] request and [redacted] qualifications, and on June 3, 2009, recommended her promotion to Physician Assistant, Grade 13. (Exhibit 3). [redacted], Acting Medical Center Director, approved [redacted] promotion to Grade 13 on June 8, 2009. (Exhibit 4). [redacted] promotion to GS-13, Step 6, became effective on June 21, 2009, the beginning of the next pay period following approval. (Exhibit 5).

On August 4, 2009, the American Federation of Government Employees, Local 2328, Hampton, Virginia (AFGE or Union), filed a Step 2 grievance with the subject line, "Request for Back Pay – [redacted] to." (Exhibit 6). In its grievance, AFGE stated that [redacted] has been working at the Chief Grade level for at least six (6) years." To resolve the grievance, AFGE requested the following remedies:

"a. In accordance with VA Handbook 5005/17, Part III, Chapter 4, Section 7, 'Promotion recommendations and actions that are administratively delayed beyond the time limits specified in paragraphs 5 and 6 above will be made retroactive,' retroactive promotion and pay (back pay) to cover [redacted] since 2003 the last 6 years;

¹ In the supporting attachment, Dr. [redacted] overstated [redacted] professional experience, suggesting that she had been working as a full-time Physician Assistant for "9 years and 9 months." (Exhibit 18). Based on the employment application she submitted to the Agency, [redacted] to began her first full-time position as a Physician Assistant in March 2000 with the Capital Region Orthopedics Group. Id. She worked there until January 2001. In June 2001, she began working as a Surgical Physician Assistant for St. Clare's Hospital, and continued in that position until she was hired by the Department of Veterans Affairs. Id. Assuming the accuracy of the dates supplied by [redacted], at the time [redacted] submitted his recommendation in January 2009, [redacted] had been working full-time as a Physician Assistant for approximately eight years and five months.

b. Attorneys fees paid for adjudicating this grievance beyond the Step III level.”
Id.

On September 24, 2009, D [redacted], Chief of Staff, Hampton VAMC, denied the Step 2 grievance. (Exhibit 7). [redacted] stated, in part, that retroactive promotion was inappropriate because [redacted] to had not, until recently, obtained the necessary professional capabilities for Chief Grade, which are characterized by progressively more responsible leadership assignments in clinical, administrative, educational and/or research areas. Id. Citing the Qualification Standard for Physician Assistants, [redacted] emphasized that these abilities are normally demonstrated “after approximately eight (8) years of practice as a PA.” Id.² While denying the grievance, [redacted] also conveyed his “appreciation for [redacted]’s leadership and dedication in coordination of orthopedic services at Hampton VA Medical Center.” Id.

On October 26, 2009, AFGE filed its Step 3 grievance. (Exhibit 9). In the grievance, AFGE reiterated its request that [redacted] receive “back pay for the period between the initial request [for promotion] and the normal processing time for these matters” and “retroactive promotion and pay (back pay) to cover [redacted] since 2003 the last six years.” Id. AFGE based its grievance primarily on a claim that the Department did not treat [redacted] situation in accordance with Agency policy, specifically VA Handbook 5005/17, Part III, Chapter 4, Section B, Paragraph 5. In support of its position, the Union quoted the Handbook, stating that the Board action was “to be prepared and submitted, along with all relevant information to the Professional Standards Board for considerations within 30 days,” and “In no case will the promotion be effected later than the first day of the first full pay period commencing 120 days after the employee’s anniversary date.” Id.

On December 8, 2009, AFGE invoked arbitration on its grievance, and stated that it had not received the Department’s Step 3 response in a timely manner. (Exhibit 10).

On December 14, 2009, Associate Director [redacted] issued the Department’s Step 3 grievance response. (Exhibit 11). [redacted] denied the grievance, explaining that the Professional Standards Board met in early June, the Medical Director approved its recommendations, and [redacted] was promoted on the earliest possible effective date. [redacted] further stated that the matter was not grievable because it “involves the establishment, determination, and adjustment of compensation for health care workers as outlined in [38] USC 7422.” Id.

In early February 2010, AFGE requested a panel of arbitrators from the Federal Mediation and Conciliation Service. On November 18, 2010, AFGE’s attorney contacted the Hampton VAMC’s representative in order to strike arbitrators. On February 23, 2011, the parties agreed to hold the matter in abeyance, pending a

² See also Exhibit 8, Physician Assistant Qualification Standard, VA Handbook 5005, Part II, Appendix G8.

38 U.S.C. § 7422 determination. The parties have not yet selected an arbitrator or otherwise submitted this matter to arbitration. (Exhibit 12).

The parties attempted to resolve the dispute during the summer of 2011. The Department offered to settle the grievance by making [redacted] GS-13 promotion retroactive to December 16, 2008, 3 months after the September 16, 2008, recommendation for advancement forwarded by Dr. [redacted]. (Exhibit 13). Although the parties were unable to come to agreement, the Department decided to retroactively promote Ms. [redacted] consistent with its settlement offer. As explained by the Hampton VAMC Medical Director, [redacted], she did so "due to the fact that there was an unnecessary – although understandable – delay in processing Ms. [redacted] promotion from its initial submission in September 2008 to her promotion in June 2009 . . ." (Exhibit 12).

The Hampton VAMC submitted its request for a 38 U.S.C. § 7422 determination on July 20, 2011. (Exhibit 12). In its conclusion, the facility stated, "We believe that the issue grieved, including the union's requested relief, is outside the scope of collective bargaining and not subject to the negotiated grievance procedure. Moreover, we believe that the Union's suggested relief conflicts with the VA's regulations, including VA Handbook 5005/17, Part III, Chapter 4, and the statutes enabling promotions for Physician Assistants, 38 U.S.C. § 7451 and 38 U.S.C. § 7452." *Id.*

On October 28, 2011, the Union submitted its response to the Hampton VAMC's request for a 38 U.S.C. § 7422 determination. (Exhibit 14). The Union argued that its grievance was not precluded by application of 38 U.S.C. § 7422 because the grievance "concerns management's failure to follow its own guidelines on the timing of promotions for Title 38 employees." *Id.* AFGE asserted that, "pursuant to the guidelines set forth in VA Handbook 5005/17, Chapter 4, Section 7, Ms. [redacted] should have been promoted to the Chief Grade at an earlier date . . . January 2007."³ *Id.* Citing VAMC Connecticut (August 1, 2008), the Union stated that the VA has recognized that a union grievance alleging that the VA has failed to follow its own regulations in calculating a Title 38 employee's entitlement to a higher rate of pay does not concern employee compensation. As explained by AFGE, "Because the Union is merely seeking to have the VA comply with the guidelines set forth in VA Handbook 5005/17 regarding the effective date of promotions, the grievance concerning Ms. [redacted] promotion does not concern employee compensation and should be allowed to proceed." *Id.*

II. TITLE 38 U.S.C. § 7422 AUTHORITY

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

³ The 2007 date is substantially different from the remedy requested in the Union's Step 3 grievance -- retroactive promotion and back pay for Ms. [redacted] to 2003. (Exhibit 9) (emphasis added).

III. ISSUE

Whether a grievance concerning the retroactive promotion of a Physician Assistant in the Hampton VAMC Surgical Service involves an issue concerning or arising out of the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b).

IV. DISCUSSION

The Department of Veterans Affairs Labor Relations Improvement Act of 1991 granted collective bargaining rights to Title 38 employees but specifically excluded 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.

The Union's argument that Ms. [redacted] requested retroactive promotion is not excluded from the grievance process by application of 38 U.S.C. § 7422(b) is two-fold. First, the Union states that the Agency's failure to follow its own regulations regarding compensation is grievable. Second, it states that the Agency has failed to follow its regulations, specifically the guidelines set forth in VA Handbook 5005/17, Part III, Chapter 4, Paragraph 7, regarding the effective date of promotions. Assuming the Union is correct in its first contention, the question becomes whether the Agency did indeed fail to follow its own Handbook provisions when considering and processing Ms. [redacted] promotion.⁴

Part III of VA Handbook 5005 includes Chapter 4, which provides promotion criteria for both full Title 38 employees, like Ms. [redacted],⁵ and Hybrid Title 38 employees (Hybrids), like Psychologists, Physical Therapists, and Pharmacists. (Exhibit 16). Chapter 4 is divided into two major sections, Section A, which applies exclusively to full Title 38 employees, and Section B, which applies exclusively to Hybrid employees.⁶ *Id.*

The complaints in the Union's grievance and argument all relate to Handbook 5005, Part III, Chapter 4, Section B, which applies exclusively to Hybrid Title 38 employees. That is, the Union bases its argument on an inapplicable Agency policy. Although Ms. [redacted], as a Physician Assistant, is a full Title 38 employee, the Union has suggested that the Agency is bound by promotion provisions in Handbook 5005 that relate exclusively to Hybrids.

⁴ In December 2010, the Agency signed the "Joint 38 U.S.C. § 7422 Workgroup Recommendations As Revised and Approved by the Secretary of the Department of Veterans Affairs." (Decision Document) (Exhibit 15). The Decision Document states in part: "Not following established VA policy regarding payment of compensation to which [an] employee is entitled is grievable, including appropriate remedy as determined by the Secretary." *Id.*

⁵ 38 U.S.C. § 7401(1) includes "Physicians, dentists, podiatrists, chiropractors, optometrists, registered nurses, physician assistants, and expanded-function dental auxiliaries."

⁶ Chapter 4, Section A, is titled, "Promotion or Change in Assignment and Internal Placement of Title 38 Employees." Exhibit 16, III-41. Chapter 4, Section B, is titled, "Promotion and Internal Placement of Hybrid Title 38 Employees." *Id.* at III-57.

Chapter 4, Section B – Applicable to Hybrid Employees Only

For example, in support of its claim that the Handbook requires a retroactive promotion in certain circumstances, the Union quotes from Paragraph 7(a)(1) of Chapter 4, Section B, which states in part, "Promotion recommendations and actions that are administratively delayed beyond the time limits specified in paragraphs 5 and 6 above will be made retroactive." (Exhibit 6).⁷ While this provision may support the Union's argument if the grievant had been a Hybrid employee, it is wholly inapplicable to Ms.⁸

The Union made the same mistake in its Step 3 grievance filing, stating that a promotion action is "to be prepared and submitted, along with all relevant information to the Professional Standards Board for consideration within 30 days," and "In no case will the promotion be effected later than the first day of the first full pay period commencing 120 days after the employee's anniversary date."⁹ (Exhibit 9). The quoted provisions are found in Paragraph 5(d)(2) of Chapter 4, Section B, which again, applies exclusively to Hybrid employees. (Exhibit 16, III-59).

Chapter 4, Section A – Applicable to Full Title 38 Employees Only

The promotion standards applicable to Title 38 Physician Assistants like Ms. Barbuto include none of the language cited in the Union's grievance or Letter Response. Chapter 4, Section A, Paragraph (1)(c), sets out the primary standard for promotion of Physician Assistants and other full Title 38 employees:

To meet the criteria for promotion the individual must meet the criteria for the next higher grade level in the applicable VA qualification standard. A review of the individual's total record must show evidence that the contribution to VA medical service is of sufficient value to warrant promotion. Potential for continuously greater contributions is also a prerequisite. Reviews and recommendations of professional standards boards will be sufficient to ensure that promotion is fully merited and not recommended based on meeting administrative requirements alone. The individual's total record and professional stature will be carefully evaluated and supported by documentary evidence as necessary.

(Exhibit 16, III-41).

Chapter 4, Section A, Paragraph 4(a), further states that eligibility for promotion "shall be based upon fully meeting prescribed administrative requirements," while Paragraph

⁷ See also Exhibit 16, III-62.

⁸ No such language regarding administrative delay is set out in the policy applicable to Title 38 Physician Assistants, VA Handbook 5005, Part III, Chapter 4, Section A. See Exhibit 16.

⁹ No similar deadlines are set out in the Handbook policy applicable to Physician Assistants. See Exhibit 16.

4(e) describes administrative requirements as including a "current proficiency requirement of satisfactory or higher," and "the experience and education requirements in the appropriate VA Qualification Standards." *Id.* at III-42, 43 (emphasis added).

Promotion Under the Physician Assistant Qualification Standard

Promotion standards for full Title 38 employees, then, require review of, and compliance with, the appropriate Qualification Standard for the position. Referring to the Physician Assistant Qualification Standard, the Hampton VAMC Chief of Staff explained in his Step 2 grievance response that promotion to Chief Grade necessitates "professional practice demonstrated through progressive leadership assignments in clinical, administrative, and/or research areas" and, quoting from the Qualification Standard, such abilities can be demonstrated "after approximately 8 years of practice as a PA." (Exhibit 7); (Exhibit 8, II-G8-5).

In its Step 3 grievance, the Union sought "retroactive promotion and pay (back pay) to cover _____ since 2003, the last six years." (Exhibit 9). Based on her VA employment application, Ms. _____ began her first full-time job as a Physician Assistant in March 2000. (Exhibit 18). She was hired by the Agency on May 4, 2003. (Exhibit 19). Essentially, the Union is contending that Ms. _____ was entitled to be promoted to the Chief Grade level at approximately the same time she was first hired by the Agency, when her overall experience as a Physician Assistant totaled less than three and one-half years.

Originally, Ms. _____ was promoted to Chief Grade on June 21, 2009.¹⁰ (Exhibit 5). Following the filing of the Union's grievance, the Agency concluded that, because the promotion was unnecessarily delayed, it was appropriate to backdate the promotion approximately six months to December 20, 2008. (Exhibit 12).¹¹ The period from the first date that Ms. _____ began working as a full-time Physician Assistant to the date of her Chief Grade promotion is about eight years and nine months.¹² In accordance with the Physician Assistant Qualification Standard, the necessary leadership abilities to be considered for the Chief Grade position are normally not demonstrated until after approximately eight years of practice as a Physician Assistant. (Exhibit 8, II-G8-5).

The promotion decision made by the Hampton VAMC is consistent with the applicable Qualification Standard – "approximately 8 years" of experience as a Physician Assistant. The Union's grievance remedy, a retroactive promotion to 2003, a date when Ms. _____ had considerably less than four years total professional experience, would be wholly inconsistent with the experience requirements set out in the Qualification

¹⁰ In July 2011, Ms. _____ was retroactively promoted to Chief Grade, Step 6, effective December 20, 2008. (Exhibit 20). On May 8, 2011, she was promoted to Chief Grade, Step 8. (Exhibit 21).

¹¹ In the Director's Request for a 38 U.S.C. § 7422 Determination, the Agency made the same mistake as the Union, assuming that the Hybrid employee deadlines in VA Handbook 5005/17 also apply to Physician Assistant promotions. (Exhibit 12, page 3, n. 2).

¹² Ms. _____ total full-time experience as a Physician Assistant may be somewhat less. She reported a lapse of employment of four or five months (January 2001 to June 2001) in her 2003 Agency employment application. See Exhibit 18.

Standard. Granting the requested remedy would be at odds with the correctly identified promotion standards for Title 38 Physician Assistants found in Handbook 5005, Part III, Chapter 4, Section A.

The Union does not cite to regulations or policy that the Agency has failed to follow. The only citation the Union provides is guidelines set forth in VA Handbook 5005/17, Part III, Chapter 4, Paragraph 7, regarding the effective date of promotions. However, such guidelines, as explained above, are not applicable to Title 38 Physician Assistants like Ms. [redacted]. Even if such guidelines were applicable to Ms. [redacted], the promotion to Chief Grade is a determination made by a Professional Standards Board. As such, this matter would also be excluded from the negotiated grievance procedure as it is a matter or question concerning or arising out of peer review under 38 U.S.C. § 7422.

Because the Union has not identified a policy or regulation violated by the Hampton VAMC, I conclude that the request for retroactive promotion is a matter concerning the establishment, determination, or adjustment of a Title 38 employee's compensation and is precluded from the negotiated grievance procedure by 38 U.S.C. § 7422(b). This outcome is supported by an earlier 38 U.S.C. § 7422 decision, VAMC Connecticut (August 1, 2008), which states that, in the absence of a failure by the Agency to follow its governing policy and regulations, "a decision by a Medical Center to adjust an employee's compensation pursuant to applicable VA policy or regulation concerns or arises out of the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b)."¹³ (Exhibit 22).

V. RECOMMENDED DECISION

The Grievance regarding a retroactive promotion for Ms. [redacted], Physician Assistant, Surgical Service, in the Hampton 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

DISAPPROVED


Eric K. Shinseki
Secretary of Veterans Affairs

8/14/2013
Date

¹³ Both parties cited VAMC Connecticut to support their arguments. The Union correctly contends that VAMC Connecticut stands for the proposition that a violation of a national Agency policy may act to remove a compensation dispute from the ambit of 38 U.S.C. § 7422. However, the extent of appropriate compensation, i.e., a remedy or award, is a decision exclusively within the province of, and reserved to, the VA Secretary. (Exhibit 22).