

**Title 38 Decision Paper
Department of Veterans Affairs (VA)
Office of Human Resources Management**

FACTS

In 2010, Congress enacted Public Law 111-163, the "Caregivers and Veterans Omnibus Health Services Act of 2010" (Caregivers Act). One portion of the Caregivers Act increased salary caps for all registered nurses in the Department of Veterans Affairs (Department or Agency).¹ In addition to the general increase for all registered nurses, the Caregivers Act included a special provision that allowed the Department to set a separate higher pay cap for Certified Registered Nurse Anesthetists (CRNA).² The referenced provisions in the Caregivers Act, which amended 38 United States Code (U.S.C.) § 7451(c)(2), now read:

The maximum rate of basic pay for any grade for a covered position may not exceed the maximum rate of basic pay established for positions in level IV of the Executive Schedule under section 5316 of title 5. The maximum rate of basic pay for a grade for the position of certified registered nurse anesthetist pursuant to an adjustment under subsection (d) may exceed the maximum rate otherwise provided in the preceding sentence.

The statutory change increased the maximum rate of basic pay (pay cap) for all registered nurses from Executive Schedule Level V (EL-V), which is currently \$145,700, to Executive Schedule Level IV (EL-IV), which is currently \$155,500.³ In addition, the Department, relying on the discretionary authority provided in the Caregivers Act, increased the CRNA pay cap to Executive Schedule Level I (EL-I), which is currently \$199,700.⁴

On July 13, 2012, the American Federation of Government Employees/National Veterans Affairs Council (Union or AFGE) filed a national grievance against the Department concerning pay cap increases and associated compensation of CRNAs. (Exhibit 3). In its grievance, AFGE claimed that the Department:

- (1) Failed to compensate CRNAs at the current higher rate of pay based on the increased statutory pay cap;
- (2) Failed to provide retroactive pay compensation back to May 5, 2010 to CRNAs at the current higher rate of pay; and

¹ Public Law 111-163, § 601(g)

² Public Law 111-163, § 601(h)

³ RATES OF BASIC PAY FOR THE EXECUTIVE SCHEDULE (EX)

| | |
|-----------|------------|
| Level I | \$ 199,700 |
| Level II | 179,700 |
| Level III | 165,300 |
| Level IV | 155,500 |
| Level V | 145,700 |

⁴ The increase in the CRNA pay cap was approved on March 7, 2012, and included in Update 42 of VA Handbook 5007, Part VII, Chapter 3. Exhibit 2.

(3) Failed to correct employee records to reflect higher rate of pay effective September 2010.

(Id.).

The Department responded to the Union grievance on August 30, 2012. In its response, the Department explained that it initially increased the pay cap for CRNAs to \$155,500 and made the increase retroactive to May 5, 2010, the date the Caregivers Act was enacted. (Exhibit 4). In addition, after increasing the discretionary CRNA pay cap to \$199,700, the Department adjusted salaries for impacted CRNAs, effective the first day of the pay period following approval of the \$199,700 discretionary pay cap.

(Id.).

On September 21, 2012, the Union contacted the Department's Office of Labor-Management Relations. The Union contended that the Department had not met with the Union prior to issuing the Department's grievance response. The Union claimed that the grievance response addressed an issue not contained in the grievance and requested a meeting to discuss and perhaps resolve the matter prior to invoking arbitration. (Exhibit 5).

On September 26, 2012, AFGE invoked arbitration. (Exhibit 6).

On October 4, 2012, the parties held a phone conference to discuss the grievance. The Union asserted that the Department was incorrectly applying the new CRNA pay provisions in the Caregivers Act and provided a list of facilities at which the pay provisions were misapplied. (Exhibit 5).

On October 24, 2012, the parties held a second phone conference to discuss the Union facility list. *(Id.)*. Prior to the discussion, the Department forwarded to the Union CRNA pay schedules from two facilities, West Los Angeles and Jackson, Mississippi, to demonstrate pay adjustments for impacted CRNAs under the new Caregivers Act provisions. *(Id.)*.

During November 2012, the parties continued to discuss their disagreement through e-mail exchanges. *(Id.)*. On November 13, 2012, AFGE provided a mock pay schedule titled "Lowest Schedule Allowed" that, according to the Union, correctly demonstrated application of the Caregivers Act new pay cap to CRNAs. *(Id., Exhibit 7)*.

On December 17, 2012, the Department notified the Union that the grievance involved title 38 compensation and was excluded from the negotiated grievance procedure by application of 38 U.S.C. § 7422. (Exhibit 8).

AFGE requested a panel of arbitrators and, on February 20, 2013, the parties selected an arbitrator. (Exhibit 9). On February 27, 2013, the Union agreed to stay the arbitration pending a 38 U.S.C. § 7422 determination by the Secretary. (Exhibit 10).

On April 5, 2013, the parties held a final phone conference to discuss the matter but could not reach a resolution. (Exhibit 5).

On July 17, 2013, _____, Ph.D., Acting Deputy Assistant Secretary for Human Resources Management, submitted a request for a 38 U.S.C. § 7422 determination to the Secretary. (Exhibit 11).

On August 7, 2013, the Union submitted its response to the Department's request for determination. (Exhibit 12).

AUTHORITY

The Secretary has the final authority to determine 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 concerning the Department's application of new pay caps in the Caregivers Act to pay schedules for CRNAs is a matter or question 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 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 statutory requirements for setting pay for registered nurses in the Department are set out in 38 U.S.C. § 7451. The Locality Pay System (LPS) was established under VA Nurse Pay Act of 1990 and became effective April 7, 1991. LPS covers all VA registered nurses and CRNAs and ensures pay rates at VA facilities are competitive with local non-VA health care facilities for recruitment and retention. (38 U.S.C. § 7451(a)(1)⁵, Exhibit 22).

The Department must maintain five grade levels (Nurse I-Nurse V), divided into equal increments or "steps." (38 U.S.C. § 7451(b)). For each grade level, the maximum rate of basic pay is generally 133 percent of the minimum rate of basic pay for the grade.⁶ (38 U.S.C. § 7451(c)(1)). The Caregivers Act authorized the Agency to increase its

⁵ 38 U.S.C. § 7451 (a)(1) It is the purpose of this section to ensure, by a means providing increased responsibility and authority to directors of Department health-care facilities, that the rates of basic pay for health-care personnel positions described in paragraph (2) in each Department health-care facility (including the rates of basic pay of personnel employed in such positions on a part-time basis) are sufficient for that facility to be competitive, on the basis of pay and other employee benefits, with non-Department health-care facilities in the same labor-market area in the recruitment and retention of qualified personnel for those positions.

⁶ The Secretary is authorized by statute to increase the maximum rate of pay to 175 per cent of the minimum rate of pay in "order to recruit and retain a sufficient number of high-quality health-care personnel." 38 U.S.C. § 7451(c)(1).

maximum rate of basic pay, or pay cap, for all registered nurses to Level IV of the Executive Schedule, currently \$155,500. (38 U.S.C. § 7451(c)(2)). Through regulation, the Department further increased the pay cap for CRNAs to Level I of the Executive Schedule, currently \$199,700.⁷ (Exhibit 2).

The Union's grievance and subsequent discussions and e-mails between the Union and the Department suggest that the underlying Union complaint relates to the appropriate adjustment of local pay schedules for CRNAs under the new pay cap provisions in the Caregivers Act.

AFGE appears to believe that changes in the pay cap are mandatory for every facility, in the sense that every local pay schedule for CRNAs, must include within the schedule the highest amount authorized by the Caregivers Act. That position, however, is at odds with the actual impact of the Caregivers Act changes; AFGE confuses the authorization to increase maximum pay, when appropriate, with a mandate to increase maximum pay to a specified level in every instance.

Minimum and maximum rates of basic pay for CRNAs vary considerably from one facility to another. Adjustments of minimum rates for each grade are based primarily on salary surveys.⁸ Although the basic requirements are set out in 38 U.S.C. § 7451(d), the Department has created comprehensive regulations that explain in detail the rate-setting and adjustment process. (Exhibit 21). Facility Directors are tasked with setting and adjusting pay for registered nurses to ensure that the facility's salaries are competitive with registered nurse salaries at local non-VA health care facilities. (*Id.*). Depending in large part on the widely variable minimum rates of basic pay at local facilities, the Caregivers Act pay changes affect CRNA salaries to varying degrees at different locations. During discussions with the Union, the Department attempted to explain the local differences by comparing nurse pay schedules from two substantially different VA facilities -- West Los Angeles and Jackson, Mississippi. (Exhibit 5).

West Los Angeles is a relatively high-cost area with commensurately high salary levels for health care professionals. Before the pay cap increase, a Grade 1, Step 1 CRNA at West Los Angeles was paid \$113,856, and the pay cap of \$145,700 was reached at the Grade 1, Step 11 level. (Exhibit 13(a)). Following the statutory pay cap increase to \$155,500, the new pay cap amount is now reached at Grade 2, Step 10.⁹ (Exhibit 13(b)). As a result of the Caregivers Act, every West Los Angeles CRNA at the Grade 1, Step 11 level or above received a salary increase, and every CRNA at the Grade 2, Step 10 or above, was now capped at the new rate, \$155,500.¹⁰ (*Id.*). Although the minimum rates of basic pay (starting salaries) remained the same for every grade level in West Los Angeles, maximum rates were adjusted based on the new pay cap.

⁷ The Union's grievance is focused on the statutory increase in the maximum rate of basic pay to \$155,500, not the subsequent administrative increase for CRNAs to \$199,700.

⁸ "The facility Director will set the beginning rate for each grade and level at an amount deemed competitive with the available salary survey data." VA Handbook 5007, Part X, Chapter 3, § 2(a)(2).

⁹ Grade 1 for CRNAs was deleted from the pay schedules as a result of the implementation of VA Handbook 5007 on March 7, 2012, which was after the union's grievance was filed. No CRNAs are currently employed at Grade 1.

¹⁰ Relying on the Department's discretionary authority to further increase maximum basic rates of pay for CRNAs, the current pay schedule in West Los Angeles is capped at \$199,700 for CRNAs at Grade 5, Step 10, and above. Exhibit 13(c).

Because of the lower starting salaries in Jackson, Mississippi, the results of the new statutory pay cap for CRNAs at that facility were considerably different than West Los Angeles. Before the salary cap increase, a Grade 1, Step 1 CRNA at Jackson was paid \$94,407 and the pay cap of \$145,700 was reached at the Grade 4, Step 8 level. (Exhibit 14(a)). Following the statutory pay cap increase to \$155,500, the new pay cap amount is now reached at Grade 4, Step 11. (Exhibit 14(b)). Every CRNA in Jackson at the Grade 4, Step 8 level or above, received a salary increase, and every CRNA at the Grade 4, Step 11 or above, was now capped at the new rate, \$155,500. Although starting salaries remained the same for every grade level in Jackson, maximum rates were adjusted based on the new pay cap.

The CRNA pay schedules at the two facilities, West Los Angeles and Jackson, Mississippi, demonstrate that substantial differences in CRNA starting salaries resulted in fewer lower-graded Jackson CRNAs benefiting from the pay cap increase. Where all West Los Angeles CRNAs at Grade 1, Step 11 or above, received a pay increase, only those Jackson CRNAs in Grade 4, Step 8 positions or above, benefited from the statutory change. In some lower cost, lower salary areas, the pay cap increase impacted very few or no CRNAs. In Clarksburg, West Virginia, for example, the maximum rate of basic pay for a Grade 5, Step 12 CRNA (the highest paid CRNA position) prior to the Caregivers Act pay cap increase was below the previous pay cap of \$145,700. (Exhibit 15(a)). As a result, the pay schedule in Clarksburg remained the same, and no Clarksburg CRNA saw a salary increase following the statutory pay cap increase. (Exhibit 15(b)). Only by comparing and scrutinizing local pay schedules before and after the change can one determine the extent to which local CRNAs benefited from the pay cap increase.

The Union supplied a mock schedule that it contends "is the lowest possible schedule allowed by the changes in the Caregiver Act." (Exhibit 7, Exhibit 16). In the mock schedule, the new CRNA pay cap amount, \$155,500, is reached at the Grade 3, Step 12 level. (Exhibit 7). According to AFGE, its "grievance argues that areas with schedules below what is listed in the [mock schedule], such as Jackson, MS, were required to be increased to these amounts to comply with the law." (Exhibit 16). Based on the Union's mock schedule, the Union has concluded that the Caregivers Act requires every local pay schedule to reflect the pay cap increase to \$155,500, regardless of the local starting salaries. The Union listed several facilities where the pay cap was, in its view, improperly incorporated into local pay schedules. (Exhibit 17). Additionally, in the Union's response to the Department's request for a determination, it argues the Secretary has no authority to review this case because the grievance is not related to collective bargaining. (Exhibit 12). The Union argues that "under §7422(b), the right to engage in collective bargaining may not cover any matter or question concerning professional conduct or competence, peer review, or the establishment, determination, or adjustment of Title 38 compensation. Here the Union's grievance does not implicate any right to engage in collective bargaining." The Union, however, fails to reference the entire language in 38 U.S.C. §7422(b), which also states, "[s]uch collective bargaining (and any grievance procedure provided under the collective bargaining agreement)...may not cover, or have any applicability to, any matter or

question concerning or arising out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation..." (Emphasis Added). As stated above, the grievance filed by the Union is related to the "the establishment, determination, or adjustment of compensation." (38 U.S.C. § 7422(b)).

The Union's response also points to statements in 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) to support its position that its grievance is not precluded by application of 38 U.S.C. § 7422. (Exhibit 12). The Union relies on the following two provisions: "The VA's failure to follow its own regulations and policies is not excluded by 7422," and "Not following established VA policy regarding compensation to which employee is entitled is grievable, including appropriate remedy as determined by the Secretary." (Exhibit 20, Secretary's Decision Document, §§ A(2) and B(4)). Neither of those two cited provisions, however, is applicable to the circumstances in this case because there has been no failure to follow VA compensation policies and regulations in this regard. We also find no basis of support for the Union's claim that the Department's application of the Caregivers Act is at odds with the Secretary's Decision Document.

The Department has appropriately incorporated the statutory pay cap increase to the maximum amount that registered nurses may be paid. There is no evidence that any facility misapplied the Department's policies or regulations when adjusting its local CRNA pay schedules. The pay cap increase is not an across-the-board pay increase. Nor does it impact CRNAs in the same manner at every facility. Its impact on individual employees is widely variable, depending upon the starting salaries (or minimum rates of basic pay) for CRNAs at a given location. In some facilities, many CRNA pay grades were impacted; in others, none or very few were impacted. There is simply no requirement that the new pay cap amount, currently \$155,500 for registered nurses and \$199,700 for CRNAs, be included in every local pay schedule. While the Caregivers Act authorized the Agency to increase its maximum rate of basic pay for CRNAs, it did not require the Agency to include the new, higher amount in every instance and at every facility.

Section B(1) of the Secretary's Decision Document states that pay schedules may not be challenged through arbitration, and the Union has not demonstrated that the Department's failed to follow its own compensation policies or regulations.¹¹ As a result, I conclude that the Union's grievance is a matter or question concerning or arising out of the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b) and is excluded from the parties' negotiated grievance procedure.


¹¹ Section B(4) of the Secretary's Decision Document means that a violation of a national Agency policy may act to remove an otherwise excluded compensation issue 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.

RECOMMENDED DECISION

The grievance concerning the Department's application of the Caregivers Act to pay schedules for CRNAs is a matter or question concerning or arising out of the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b) and is not subject to collective bargaining and may not be reviewed by any other Agency.

APPROVED  _____

DISAPPROVED _____


Eric K. Shinseki
Secretary of Veterans Affairs

1/31/2014
Date