



DEPARTMENT OF VETERANS AFFAIRS
DEPUTY ASSISTANT SECRETARY FOR
HUMAN RESOURCES MANAGEMENT
WASHINGTON DC 20420

MAR 04 2004

Ms. Jacqueline M. Sims
Staff Counsel, AFGE-NVAC
80 F Street, N.W.
Washington, DC 20001

Dear Ms. Sims:

The Secretary has asked that I respond to your letter of January 30, 2004, regarding AFGE's National Grievance over VA's non-inclusion of certain Title 5 VHA occupations in the Saturday premium pay authorization of Public Law 108-170.

I must begin with an important point of clarification. Please be aware that PL 108-170's expansion of the Secretary's hybrid appointment authority under 38 USC § 7401(3) – the "expanded list of occupations" to which you refer in your letter – applies only to those occupations listed in Section 301 of the Public Law, entitled "Modification of Authorities on Appointment and Promotion of Personnel in the Veterans Health Administration." That provision -- which expands the scope of the Secretary's hybrid appointment authority under 38 USC § 7401(3) -- is separate and distinct from Section 303, "Additional Pay For Saturday Tours Of Duty For Additional Health Care Workers In the Veterans Health Administration," which amends 38 USC § 7454 to authorize Saturday premium pay for Title 5 health care workers within VHA. While both the new hybrids listed on the expanded list of occupations and VHA's Title 5 health care workers are entitled to Saturday premium pay under PL 108-170, their respective entitlements fall under different provisions of the Public Law (and under different subsections of 38 USC § 7454 as amended by the Public Law.)¹ Thus, it is not accurate to suggest, as you do in your letter, that PL 108-170 requires the inclusion of VHA's Title 5 health care workers in "the expanded list of occupations" newly treatable as hybrids under 38 USC § 7401(3). Entitlement to Saturday premium pay and eligibility for hybrid appointment and promotion are two different issues and need to be assessed as such.

Having made that clarification, I would like to explain to you how VA has determined which Title 5 VHA employees are properly subject to the new Saturday premium pay law. As you know, PL 108-170 amends 38 USC § 7454 to provide that "[e]mployees appointed under section 7408 of this title shall be entitled to additional pay on the same basis as provided for nurses in section 7453(c) of this title." 38 USC § 7408 is not an appointment authority, however; it merely authorizes VHA to appoint civil service employees under Title 5 civil service procedures.² Because 38 USC § 7408 is not an appointment authority, the

¹Hybrid employees, including those on the expanded list of occupations, are entitled to Saturday premium pay pursuant to 38 USC § 7454(b)(2). VHA's Title 5 health care workers are entitled to Saturday premium pay under the newly-enacted 38 USC 7454(b)(3).

²38 USC § 7408(a) provides that the Secretary may appoint "under civil service laws, rules, and regulations [i.e. Title 5 rather than Title 38], such additional employees ... as may be necessary to carry out the provisions of this chapter." 38 USC § 7408(b), an enhanced compensation authority, permits the Secretary to pay non-Title 38 VHA employees "providing direct patient-care services or services incident to direct patient-care services at a rate of pay above the minimum rate of the appropriate grade."

Ms. Jacqueline M. Sims

provision of PL 108-170 amending 38 USC § 7454 to extend Saturday premium pay to employees appointed under 38 USC § 7408 is ambiguous. Because PL 108-170's amendment of 38 USC § 7454 is ambiguous, we must look to legislative history and other relevant materials to discern what Congress intended in enacting it.

Guidance as to Congress' intent in amending 38 USC § 7454 may be found in the section title used to introduce the relevant provision of PL 108-170. Although section titles in public laws do not become part of the statute, titles may help to elucidate intent where the statutory language itself is ambiguous. Here, the relevant provision of PL 108-170 was entitled "Section 303. Additional Pay For Saturday Tours Of Duty For Additional *Health Care Workers* In the Veterans Health Administration." This title strongly suggests that Congress intended PL 108-170 to expand Saturday premium pay to VHA's non-Title 38 *health care workers*, not to every employee in VHA.³

Congress used similar terminology in the title of 38 USC § 7454, which is "Physician Assistants And Other *Health Care Professionals: Additional Pay*." It is therefore only logical to presume that Congress intended PL 108-170's amendment of section 7454 to extend Saturday premium pay to Title 5 *health care professionals*. Moreover, section 7454 falls under Subchapter IV of Title 38, entitled "Pay for Nurses and Other *Health-Care Personnel*," which further suggests that Congress intended PL 108-170, section 303, to extend Saturday premium pay only to Title 5 *health care personnel*.

Some other provisions of Title 38 use terminology similar to the title of section 303 in PL 108-170. For example, 38 USC § 7455(a)(2)(B)(i) authorizes increases in the rates of basic pay for "Health-care personnel who—

- (i) are employed in the Administration (other than administrative, clerical, and physical plant maintenance and protective services employees);
- (ii) are paid under the General Schedule pursuant to section 5332 of Title 5;
- (iii) are determined by the Secretary to be providing either direct patient-care services or services incident to direct patient-care services; and
- (iv) would not otherwise be available to provide medical care and treatment for veterans."

This provision, like section 7454, is contained within the subchapter of Title 38 that is entitled "Pay for Nurses and Other Health-Care Personnel." Subsection 7455(2)(B)(i) thus clarifies whom Congress did and did not consider to be "health care personnel."

³ This interpretation is consistent with the limited authority of the Senate Veterans Affairs Committee (SVAC), which introduced the bill (S. 1156) that became Public Law 108-170. William T. Cahill, the SVAC's Health Policy Counsel, has confirmed to VHA and to VA's Office of Congressional Affairs that any legislation mandating Saturday premium pay for all Title 5 employees, including those outside of the health care arena, would require action by the Governmental Affairs Committee, not the SVAC. Mr. Cahill could not comment on the intent or desire of the House Veterans' Affairs Committee (which proposed sec. 303 in conference), but he did state that the SVAC is aware that its authority to enact personnel-related legislation applies only to VHA health care occupations -- those positions involved in direct patient care or providing services incident to patient care.

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To qualify as "health care personnel" for purposes of an increased rate of basic pay under 38 USC § 7455, an employee must be "providing either direct patient care services or services incident to direct patient care services," and must *not* be an administrative, clerical, and physical plant maintenance or protective services employee. The employee must also be paid under the General Schedule pursuant to 5 USC § 5332.⁴ The health-care personnel who are eligible for increased pay under 38 USC 7455 are also eligible for on-call pay under 38 USC § 7457.

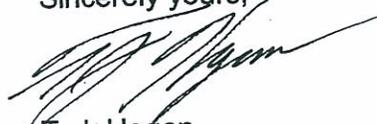
VA has long interpreted these authorities, as well as 38 USC § 7408(b), to apply to those Title 5 VHA employees who provide direct patient care services or services incident to direct patient care services, and Congress is aware of VA's interpretation. Given the title of the subject provision of PL 108-170 – "Additional Pay For Saturday Tours Of Duty For Additional Health Care Workers In the Veterans Health Administration" – it is logical to assume that Congress intended the additional pay authorized by the amended section 7454 to apply to the same categories of employees as the additional pay authorized by sections 7455 and 7457.

Based on this analysis, and consistent with its long-standing practice under 38 USC §§ 7408(b), 7455 and 7457, VA has interpreted PL 108-170's amendment of 38 USC § 7454 to apply only to those Title 5 VHA employees who provide direct patient care services or services incident to direct patient care services. Those employees are in the occupations listed on the enclosed sheet. The employees within these occupations who work Saturdays (as well as the newly converted hybrids identified in section 301 of PL 108-170) began receiving Saturday premium pay in their paychecks for the first pay period of 2004, which were disbursed on or about 1/30/04. The newly converted hybrids will receive Saturday pay for the period of 12/6/03 through 1/10/04 at a later date. This delay is a result of the need to make additional changes to the PAID system. We anticipate it will be accomplished within 60 days of the date of this letter.

I hope that this clarification and analysis are helpful to you. If you have any questions regarding the matters discussed in this letter, please contact Donna Schroeder at (202) 273-9810.

I invite you to provide any additional comments you may wish to offer prior to my rendering a final decision on the grievance.

Sincerely yours,



T. J. Hogan

Enclosure

⁴Federal Wage System/"blue collar" employees such as food service workers have their own separate premium pay statute in Title 5, and have never been included in any Title 38 pay authorities.

**VHA HEALTH CARE OCCUPATIONS ELIGIBLE FOR SATURDAY PREMIUM PAY
UNDER SECTION 303 OF PUBLIC LAW 108-170**

Series	Title	Series	Title
0060	Chaplain	0647	Diagnostic Radiologic Technologist
0101	Social Science	0648	Therapeutic Radiologic Technologist
0102	Social Science Aid and Technician	0649	Medical Instrument Technician
0180	Psychology	0651	Respiratory Therapist (Title 5)
0181	Psychology Aid and Technician	0660	Pharmacist
0184	Sociology	0661	Pharmacy Technician
0185	Social Work	0664	Restoration Technician
0186	Social Services Aid and Assistant	0665	Speech Pathologist and Audiologist
0187	Social Services	0667	Orthotist and Prosthotist
0188	Recreation Specialist	0669	Medical Records Administration
0189	Recreation Aid and Assistant	0670	Health System Administration
0334	Computer Specialist* (DHCP Operations Only)	0671	Health System Specialist
0401	General Biological Science	0672	Prosthetic Representative
0403	Microbiology	0673	Hospital Housekeeping Management
0404	Biological Science Technician	0675	Medical Records Technician
0405	Pharmacology	0679	Medical Support Assistant
0413	Physiology	0681	Dental Assistant
0415	Toxicology	0682	Dental Hygienist
0601	General Health Science	0683	Dental Laboratory Aid and Technician
0620	Licensed Practical/Vocational Nurse	0690	Industrial Hygienist
0621	Nursing Assistant	0698	Environmental Health Aid and Technician
0622	Medical Supply Aid and Technician	0699	Student Nurse Technician (Title code 63 only)
0625	Autopsy Assistant	0701	Veterinary Medical Science
0630	Dietitian and Nutrition	0704	Animal Health Technician
0631	Occupational Therapist	0802	Biomedical Engineering Technician
0633	Physical Therapist	0858	Biomedical Engineering
0635	Corrective Therapist	1020	Medical Illustrator
0636	Rehabilitation Therapy Assistant	1060	Photographer (Medical)
0637	Manual Arts Therapist	1301	General Physical Science
0638	Recreation/Creative Arts Therapist	1306	Health Physics
0639	Education Therapist	1310	Physics
0640	Health Aid and Technician	1311	Physical Science Technician
0642	Nuclear Medicine Technician	1320	Chemistry
0644	Medical Technologist	1725	Public Health Educator
0645	Medical Technician	1910	Quality Assurance
0646	Pathology Technician	2210	Computer Specialist* (DHCP Operations Only)

*Only VHA computer specialists responsible for the ongoing operation of the Decentralized Hospital Computer Program (DHCP) are eligible for Saturday pay. Other computer specialists are ineligible.

**AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO**

John Gage
National President

Jim Davis
National Secretary-Treasurer

Andrea E. Brooks
National Vice President for
Women and Fair Practices

7m/C-53/137671v1

March 19, 2004

By Facsimile and Regular Mail

T.J. Hogan
Deputy Assistant Secretary for
Human Resources Management
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

**Rc: Response to March 4, 2004 Letter Regarding
the AFGE-NVAC National Grievance**

Dear Mr. Hogan:

Per my conversations with Ms Donna Schroeder, on March 5 and 12, 2004, the American Federation of Government Employees, National VA Council (AFGE-NVAC) is responding to your March 4, 2004 letter and providing additional comments prior to you rendering a final decision on National Grievance filed on January 30, 2004. Initially, AFGE-NVAC notes that it continues to maintain its position that the Department of Veterans Affairs (VA) is too narrowly interpreting Public Law (P.L.) 108-170 to exclude erroneously many Title 5 VHA employees from receiving Saturday Premium Pay.

In your letter, you provided your clarification of PL 108-170. It is AFGE-NVAC's understanding that P.L. 108-170, enacted in December 2003, contained two Saturday premium pay provisions. One provision expanded the list of current hybrid Title 38-Title 5 employees. As a result audiologists, speech pathologists, and audiologist-speech pathologists, biomedical engineers, dietitians, medical instrument technicians, medical records administrators or specialists, medical records technicians, medical and dental technologists, nuclear medicine technologists, occupational therapy assistants, kinesiotherapists, orthotist-prosthetists, pharmacy technicians, physical therapy assistants, prosthetic representatives, psychologists, diagnostic radiologic technicians, therapeutic radiologic technicians, and social workers are now guaranteed Saturday Premium Pay in addition to the Sunday premium pay they all ready received.

In P.L. 108-170 Congress also provided Saturday Premium pay to all other non-hybrid health care workers at the VA. However, the AFGE-NVAC contends that VA is narrowly interpreting the law to exclude many employees who work on Saturdays and provide key hospital services to veterans. AFGE-NVAC's position is that VA's interpretation of the law is unfair, arbitrary and wrong, and that there is nothing in P.L. 108-170 that justifies VA's exclusion of any Title 5 VHA employee who work on Saturdays and provide essential hospital services to the nation's veterans.

In your letter, you stated that "PL 108-170 amends 38 USC § 7454 to provide that "[e]mployees appointed under section 7408 of this title shall be entitled to additional pay on the same basis as provided for nurses in section 7453(c) of this title." You further stated that "38 USC § 7408 is not an appointment authority, however; it merely authorizes VHA to appoint civil service employees under Title 5 civil service procedures."¹ (*Emphasis added*). Thereafter, you continued your analysis of section 7408 by relating that "[b]ecause 38 USC 7408 is not an appointment authority, the provision of PL 108-170 amending 38 USC § 7454 to extend Saturday premium pay to employees appointed under 38 USC 7408 § is ambiguous."

It is important to note that the exact language of 38 U.S.C. § 7408, entitled "*Appointment of additional employees*" reads as follows:

- (a) There *shall* be appointed by the Secretary under civil service laws, rules, and regulations, such additional employees, other than those provided in section 7306 and paragraphs (1) and (3) of section 7401 of this title and those specified in sections 7405 and 7406 of this title, as may be necessary to carry out the provisions of this chapter; (*emphasis added*) and
- (b) The Secretary, after considering an individual's existing pay, higher or unique qualifications, or the special needs of the Department, may appoint the individual to a position in the Administration providing direct patient-care services or services incident to direct patient-services at a rate of pay above the minimum rate of the appropriate grade. (*See Attachment 1*).

A clear reading of subsection (a) of 38 U.S.C. § 7408 reveals the mandatory appointment authority of the Secretary, i.e., "[t]here *shall* be appointed by the Secretary under civil service laws, rules, and regulations, such additional employees" (*Emphasis added*). Therefore, your statement that "38 U.S.C. § 7408 is not an appointment authority, however, it merely authorizes VHA to appoint civil service employees under Title 5 civil service procedures" is contradictory and unsupported.

Your interpretation and recitation of the wording of 38 U.S.C. § 7408 in your supporting footnote number 2 is also contradictory and misleading as you have incorrectly related that the Secretary's appointment authority is discretionary. In that footnote, you related that "38 USC § 7408(a) provides that the Secretary "*may*" appoint "under civil service laws, rules and regulations . . ." (*Emphasis added*). As noted above, pursuant to subsection (a) of 38 U.S.C. § 7408, "[t]here *shall* be appointed by the

¹ There is no authority or reference cited for this conclusory statement.

Secretary under civil service laws, rules, and regulations, such additional employees . . .” (*Emphasis added*). (*See Attachment 1*). Your substitution of the mandatory language of this statute with the discretionary language you have inserted underscores the error of your labored interpretation and analysis of this statute and P.L. 108-170.

In your letter, you have also stated that “[g]uidance as to Congress’ intent in amending 38 USC § 7454 may be found in the section title used to introduce the relevant provision of PL 108-170.” As you have noted, this section is entitled *Additional Pay For Saturday Tours of Duty for Additional Health Care Workers in the Veterans Health Administration*. You stated that “[a]lthough section titles in public laws do not become part of the statute, titles may help to elucidate intent where the statutory language itself is ambiguous.” Interestingly, if you apply this theory to 38 U.S.C. § 7408 entitled “*Appointment of additional employees*”, then, it is therefore “only logical to presume that Congress intended” this section as an appointment authority.

While you have unilaterally determined that section 303 of P.L. 108-170 amending 38 U.S.C. § 7454 is ambiguous (which AFGE-NVAC finds is not the case) and that the Congressional intent may be found in its title, you have not provided any contradictory rationale for Congress’ insertion of the language in the section that “[e]mployees appointed under 7408 of this title shall be entitled to additional pay on the same basis as provided for nurses in section 7453(c) of this title.”

It is AFGE-NVAC’s position that the language in section 303 of P.L. 108-170 is clear and that a reading of its plain language reveals that all Title 5 VHA employees who work on Saturdays are eligible for Saturday Premium Pay. *See Evangelical Lutheran Church in America v. Immigration and Naturalization Service and United States Department of Justice*, 288 F. Supp.2d 32, 41 (D.C.C. 2003). (The title of a statute or statutory section generally cannot be used to constrict a statute’s plain language); *see also Holland v. Williams Mountain Coal Co.*, 256 F.3d 819, 822 (D.C.Cir. 2001) (noting that courts are reluctant to give “great weight to statutory headings”); *Nat’l Ctr. For Mfg. Sciences v. Dep’t of Def.*, 199 F.3d 507, 511 (D.C.Cir. 2000) (“[t]he plain meaning of a statute cannot be limited by its title”).

Further, your determination that “*it is logical to assume* that Congress intended the additional pay authorized by the amending section 7454 to apply to the same categories of employees as the additional pay authorized by sections 7455 and 7457” is unsupported. (*Emphasis added*). In this regard, it is also important to note, that when Congress introduced the “VA Medical Workforce Enhancement Act of 2003” (HR 1951) in May 2003 (which predated P.L. 108-170), it stated that its intent was “[t]o amend title 38, United States Code, to improve patient care and working conditions at the Veterans Health Administration of the Department of Veterans Affairs.” One of the pertinent findings of the 108th Congress was stated as follows:

The lack of allied health care workers and *hospital support staff* on the weekends hurts direct patient care. Without support staff, nurses are forced to devote less time on direct patient care in order to transport patients, clean the wards, and perform other duties typically done by nursing assistants, housekeepers, and other ancillary staff. *Providing a premium pay for regular weekend shifts will help*

maintain adequate levels of support staff on the weekends. (Section 2(a)(14). (Emphasis added).

In its list of "VHA Health Care Occupations Eligible for Saturday Premium Pay Under Section 303 of Public Law 108-170", VA has listed some Title 5 VHA occupations of employees who provide direct patient care services and some Title 5 VHA occupations of employees who provide services incident to direct patient care services. Pursuant to 5 U.S.C. § 5371, the Office of Personnel Management ("OPM") has the authority to apply provisions of chapter 74 of Title 38 (including 34 U.S.C. 7453(c) on Saturday premium pay for RNs) to any General Schedule employee in a "position which involves health care responsibilities." (*Emphasis added*). The term "health care" is defined in 5 U.S.C. § 5371(a) as "direct patient-care services or services incident to direct patient-care services." Therefore, employees eligible for Saturday premium pay under current OPM authority need not be direct patient caregivers. Moreover, they do not have to be exclusively performing services incidental to direct patient-care. The current threshold for Saturday premium pay eligibility requires that the position involve either direct patient-care responsibilities or responsibilities incident to direct patient-care services.

It is AFGE's position that all employees who work in the Veterans Health Administration medical centers, clinics, nursing homes and domiciliaries would meet the threshold of being in a position that involves either direct patient-care services responsibilities or services incidental to direct-patient care services. In P.L. 108-170, Congress also provided Saturday Premium Pay to some non-hybrid health care workers at the VA. However, the VA is narrowly interpreting the law to exclude many employees who work on Saturdays and provide key hospital services to patients. VA's interpretation of the law is unfair, arbitrary and wrong.

In this regard, VA has interpreted the law to provide Saturday premium pay to its hospital housekeeping managers; however, the hospital housekeeping and custodial staff who actually perform infection control by cleaning patient rooms and wards have been unfairly excluded. Unlike custodial staff in other federal agencies, these employees regularly and routinely are responsible for cleaning up and collecting biohazard waste. The responsibilities of these employees are essential to maintaining a safe environment for patient care and are considered in the hospital reviews conducted by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) and OSHA. Because of their infection control responsibilities these employees perform duties that are not only incidental to direct patient care services but also essential to safe patient care.

Further, AFGE-NVAC notes that the VA dietitians will receive Saturday Premium Pay but not food service workers who prepare and deliver meals to hospitalized veterans and make the final check to ensure that any therapeutic dietary restrictions are being followed. Food service workers also ensure that the correct veteran receives the proper meal as determined by the VA physicians and dietitians. This requires specific orientation to different diets (e.g. diabetic, low-calorie, low-sodium, soft food/clear liquids, or full regular diet), coding, and monitoring of veterans and directly affects the care of the veteran.

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Additionally, the VA has interpreted the law to deny hospital employees who maintain and calibrate radiographic diagnostic and treatment units, cardiac defibrillators, and other medical equipment from receiving Saturday Premium Pay but not the workers who operate the equipment. The VA has also interpreted the law to provide Saturday Premium Pay to VA chaplains, medical illustrators and photographers and other VHA employees who do not provide direct patient care, but not to the engineering and operating plant staff whose work ensures that VA hospitals facilities are functioning and operational for the comfort and safety of hospitalized veterans.

Also, VA has not included VA Police Officers in the list of eligible occupations for Saturday Premium Pay. However, VA Police Officers are routinely involved in services incident to direct-patient care. They are the VA staff called upon by physicians and nurses to subdue or restrain addicted or psychiatric patients who become disruptive, threatening or violent. In addition, VA police officers are regularly called upon to help locate Alzheimer or dementia patients who wander off from the wards, thereby providing for the direct care and safety of the veteran. While the above-mentioned examples are by no means exhaustive of the Title 5 VHA employees who should receive Saturday Premium Pay under P.L. 108-170, they do provide a compelling rationale and basis for the inclusion of these employees under the new Saturday Premium Pay law.

Therefore, based on this analysis, and consistent with the language in P.L. 108-170's amendment of 38 U.S.C. § 7454 which authorized additional pay for VHA employees who work on Saturdays (as well as the newly converted hybrids listed in section 301 of P.L. 108-170), AFGE-NVAC maintains that VA has improperly excluded many Title 5 VHA employees who work on Saturdays in occupations providing services directly or incident to direct patient care services from the list of eligible occupations for Saturday Premium Pay under P.L. 108-170. This disparity in treatment and improper exclusion of many Title 5 VHA occupations is highlighted by the fact that VA has included many Title 5 VHA occupations on its list, i.e., "Hospital Housekeeping Management" and "Chaplains" who are not direct "healthcare workers" by VA's own interpretation, but provide services "incident to direct patient care services" as do other Title 5 VHA employees who were improperly excluded.

Moreover, in addition to improving patient care and maintaining safe staffing levels, providing Saturday Premium Pay to all Title 5 VHA employees who work on Saturdays would be fair and equitable. Many private hospitals offer premium pay for weekend tours-of-duty as an incentive and compensation for individuals to work these shifts. AFGE-NVAC contends that it is totally contradictory and discriminatory for VA to provide Saturday Premium Pay for some Title 5 VHA employees, i.e., housekeeping managers, without providing the same benefits to the Title 5 VHA employees who work beside them and support them in meeting veterans' medical needs.

As a remedy, AFGE-NVAC request that Secretary Principi, and any other associated VA officials, include all Title 5 VHA employees who work on Saturdays in the VHA Health Care list of occupations eligible for Saturday Premium Pay under Section 303 of Public Law 108-170. Additionally, all of those VHA employees who are eligible for Saturday Premium Pay as a result of this National Grievance and who have

worked on Saturdays, since President Bush signed P.L. 108-70 on December 6, 2003, should retroactively be paid for those days worked.

If you have any questions regarding this National Grievance, please feel free to contact me at 202-639-6524.

Sincerely,


Jacqueline M. Sims
Staff Counsel, AFGE-NVAC

- cc: John Gage, President, AFGE
- Alma L. Lee, President, AFGE-NVAC
- Mark Roth, General Counsel, AFGE
- Ron Cowles, Associate Deputy for Labor Management Relations
- E. Doggett

ATTACHMENT 1

From the U.S. Code Online via GPO Access
[wais.access.gpo.gov]
[Laws in effect as of January 23, 2000]
[Document not affected by Public Laws enacted between
January 23, 2000 and December 4, 2001]
[CITE: 38USC7408]

TITLE 38--VETERANS' BENEFITS

PART V--BOARDS, ADMINISTRATIONS, AND SERVICES

CHAPTER 74--VETERANS HEALTH ADMINISTRATION--PERSONNEL

SUBCHAPTER I--APPOINTMENTS

Sec. 7408. Appointment of additional employees

(a) There shall be appointed by the Secretary under civil service laws, rules, and regulations, such additional employees, other than those provided in section 7306 and paragraphs (1) and (3) of section 7401 of this title and those specified in sections 7405 and 7406 of this title, as may be necessary to carry out the provisions of this chapter.

(b) The Secretary, after considering an individual's existing pay, higher or unique qualifications, or the special needs of the Department, may appoint the individual to a position in the Administration providing direct patient-care services or services incident to direct patient-services at a rate of pay above the minimum rate of the appropriate grade.

(Added Pub. L. 102-40, title IV, Sec. 401(b)(2), May 7, 1991, 105 Stat. 229; amended Pub. L. 103-446, title XII, Sec. 1201(e)(21), Nov. 2, 1994, 108 Stat. 4696.)

References in Text

The civil service laws, referred to in subsec. (a), are set forth in Title 5, Government Organization and Employees. See, particularly section 3301 et seq. of Title 5.

Prior Provisions

Provisions similar to those in this section were contained in section 4111 of this title prior to the repeal of that section as part of the complete revision of chapter 73 of this title by Pub. L. 102-40.

Amendments

1994--Subsec. (a). Pub. L. 103-446 substituted ``civil service'' for ``civil-service''.

Section Referred to in Other Sections

This section is referred to in section 7405 of this title.

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Sec. 7408. - Appointment of additional employees

(a)

There shall be appointed by the Secretary under civil service laws, rules, and regulations, such additional employees, other than those provided in section 7306 and paragraphs (1) and (3) of section [7401](#) of this title and those specified in sections [7405](#) and [7406](#) of this title, as may be necessary to carry out the provisions of this chapter.

(b)

The Secretary, after considering an individual's existing pay, higher or unique qualifications, or the special needs of the Department, may appoint the individual to a position in the Administration providing direct patient-care services or services incident to direct patient-services at a rate of pay above the minimum rate of the appropriate grade

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DEPARTMENT OF VETERANS AFFAIRS
DEPUTY ASSISTANT SECRETARY FOR
HUMAN RESOURCES MANAGEMENT
WASHINGTON DC 20420

APR 02 2004

Ms. Jacqueline M. Sims
Staff Counsel, AFGE-NVAC
80 F Street, N.W.
Washington, DC 20001

Dear Ms. Sims:

Thank you for your letter of March 19, 2004, regarding the National Grievance filed on January 30, 2004, over VA's interpretation of the Saturday premium pay authorization in Section 303 of Public Law 108-170. Having considered the matters addressed in your letter, I am now prepared to render a final decision on this grievance pursuant to the authority delegated to me by the Secretary.

As I noted in my letter of March 4, 2004, the Saturday premium pay provision of PL 108-170, which amended 38 U.S.C. § 7454, must be read in the context of that statute and of the rest of the Title 38 statutory scheme. Section 7454, entitled "Physician assistants and other health care professionals: additional pay," sits within a subchapter entitled "Pay for Nurses and Other Health Care Personnel." (Emphasis added.) The adjoining provision, 38 U.S.C. § 7455, authorizes the Secretary to increase the basic pay of "health care personnel," whom that statute defines as VHA employees who provide "either direct patient-care services or services incident to direct patient-care services." 38 U.S.C. § 7455(a)(2)(B) (emphasis added).¹ That same definition is incorporated by reference into 38 U.S.C. § 7457(b)(1), which makes Title 38 on-call pay available to Title 5 health care workers. To interpret the newly amended 38 U.S.C. § 7454(b) more broadly, as you propose, to include non-health care employees such as food service workers, operating plant staff, and VA Police Officers is simply inconsistent with the statutory scheme in which that provision sits.

Nor is your broad interpretation of the Saturday premium pay provision of PL 108-170 consistent with related provisions of Title 5. You note in your letter that 5 U.S.C. § 5371 authorizes the Office of Personnel Management (OPM) to extend some aspects of Title 38 compensation to Title 5 employees. That authority, however, applies only to General Schedule (GS) employees who have health care responsibilities, not to employees in the Federal Wage System (FWS) such as food service workers, equipment maintenance workers, and operating plant staff.² Moreover, § 5371 defines "health care" as "direct patient-care services or services incident to direct patient-care services." 5 U.S.C. § 5371(a). OPM has implemented its authority under § 5371 by entering into delegation agreements with DOD, HHS, DOJ, and VA; consistent with the statute, each agreement limits the application of Title 38 premium pay to GS employees

¹ As I noted in my March 4 letter, 38 U.S.C. § 7455(a)(2)(B)(i) and (ii) further limit the definition of "health care personnel" to specifically exclude administrative, clerical, and physical plant maintenance and protective services employees, as well as employees paid under the Federal Wage System. These limitations are incorporated by reference into 38 U.S.C. § 7457(b)(1).

² Subsection 5371(c) limits the application of OPM's authority under section 5371 to "any employee holding a position to which chapter 51 [5 U.S.C. §§ 5101 et seq.] applies." Chapter 51 does not apply to Federal Wage Service employees. Compare 5 U.S.C. § 5102(c)(7) with 5 U.S.C. § 5342(a)(2).

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Ms. Jacqueline M. Sims

performing direct patient-care services or services incident to direct patient-care services. See OPM Handbook on Human Resources Flexibilities and Authorities in the Federal Government, Part II, Section F.5. (<http://www.opm.gov/omsoe/hr-flex/>). Given these facts, your insistence that the new law applies to FWS as well as GS employees, and to occupations not providing patient care or patient-care-incident services, conflicts with existing precedent under both Title 5 and Title 38.

In your letter you make specific reference to several occupations that you believe should be paid Saturday premium pay under the new law. First, you state that the food service workers who prepare and deliver meals to hospitalized veterans should earn the same Saturday premium pay as dietitians. Food service workers, as FWS employees, are excluded from Title 38 compensation under 38 U.S.C. §§ 7455 and 7457, and from OPM's 5 U.S.C. § 5371 delegation authority as well; for that reason, we do not believe that Congress intended these workers to be covered by the newly amended 38 U.S.C. § 7454. Next, you state that equipment maintenance workers and engineering and operating plant staff should be included in the new law. These employees, like food service workers, are all FWS employees, subject to the same exclusions in other Title 38 provisions. Moreover, physical plant maintenance workers in both the GS and FWS systems are specifically excluded from the coverage of 38 U.S.C. § 7455 by subsection 7455(a)(2)(B)(i) and, by extension, from § 7457. Finally, you argue that VA Police Officers provide patient-care-related services and should receive Saturday premium pay under the new law. However, VA police are specifically excluded from the definition of "health care personnel" in 38 U.S.C. § 7455(a)(2)(B); police officers are eligible for some aspects of Title 38 compensation, but under a different statutory authority than those who provide patient care services or services incident to patient care. See 38 U.S.C. § 7455(a)(2)(C). Because all of the occupations you refer to are specifically excluded from the coverage of other Title 38 compensation authorities, we do not believe that they are eligible for the new Saturday premium pay.

Based on this analysis, as well as that provided in my letter of March 4, 2004, I must deny the subject grievance.

Sincerely yours,



T. J. Hogan