

**Department of
Veterans Affairs**

Memorandum

Date: February 19, 2015

VAOPGCPREC 1-2015

From: General Counsel (023)

Subj: Compensation of Fee-Basis Employees
VAIQ 7544712/GCL 44221

To: Deputy Assistant Secretary, Human Resources Management (05)

QUESTIONS PRESENTED:

1. May VA pay individuals appointed under 38 U.S.C. § 7405(a)(2) on a time basis either per hour or per annum?
2. If so, may these individuals be granted a full-time appointment under 38 U.S.C. §§ 7401(1) or 7401(3) concurrently with an appointment under 38 U.S.C. § 7405(a)(2) at the same facility without violating or compromising 5 U.S.C. § 5533 or Department conflict of interest regulations (38 CFR, part 0)?
3. If VA is able to appoint individuals under 38 U.S.C. § 7405(a)(2) and compensate these individuals on a time-basis, would such appointees, if retired annuitants, be subject to a salary offset under 5 U.S.C. §§ 8344 and 8468?

HELD:

1. VA may not pay individuals appointed under 38 U.S.C. § 7405(a)(2) on a time basis.
2. Since the answer to the first question is "no," it is unnecessary to respond to this question.
3. Since the answer to the first question is "no," it is unnecessary to respond to this question.

BACKGROUND:

1. On July 1, 2008, the Secretary of Veterans Affairs received a request from the Office of Special Counsel (OSC) to investigate an allegation regarding mismanagement of fee-basis appointments at the Portland, Oregon VA Medical Center (Portland VAMC). The Secretary referred the matter to the Office of

2.

Deputy Assistant Secretary, Human Resources Management (05)

Inspector General (OIG) for investigation. The complainant alleged that fee-basis appointments at the Portland VAMC were being inappropriately approved and managed. Specifically, the complaint alleged that nurses who had retired from the Federal Government were being re-hired on fee-basis appointments while continuing to receive their full retirement benefits. Further, the complainant alleged that fee-basis appointees were being paid on a time basis rather than per task or service.

2. OIG substantiated the allegations, concluding that the nurses should not have been paid on a time-basis when appointed pursuant to the fee-basis authority at 38 U.S.C. § 7405(a)(2). (See Enclosure 1). Since the retired VA nurses were paid for the time worked, their pay should have been reduced by the annuity received. To pay the nurses for time worked, OIG concluded the Portland VAMC should have hired them under different authority (e.g., as temporary full-time, part-time, or intermittent employees under 38 U.S.C. § 7405(a)(1)), which would have required a reduction in pay by the amount of the annuity received by the appointee. OIG sought an opinion from VA's Office of General Counsel (OGC) on whether VA's practice complied with the provisions in 5 U.S.C. §§ 8344 and 8468 with respect to reducing a re-employed annuitant's pay by the annuity received. OGC in turn requested an opinion from the Office of Personnel Management (OPM), which found that re-employed annuitants who are paid on a fee basis may continue to receive their full annuities without a reduction in salary as long as the annuitant's employment is not time based. (See Enclosures 2 and 3).

DISCUSSION:

3. Title 38 of the United States Code, § 7405(a)(2), allows VA to use fee-basis appointments to hire employees into certain positions listed in 38 U.S.C. § 7401(1) and (3), without regard to civil service or classification laws, rules, or regulations. To implement the provisions of 38 U.S.C. § 7405(a)(2), VA issued a policy in VA Handbook 5007, Part II, Appendix F, indicating that employees appointed on a fee basis are to be compensated based on the service provided, rather than on a time basis. This policy is reflective of the statutory scheme of 38 U.S.C. § 7405, which authorizes the Secretary, in subsection (a)(1), to employ persons in positions listed in 38 U.S.C. § 7401(1) and (3) on a temporary full-time or part-time basis, and in subsection (a)(2), to employ persons in positions listed in 38 U.S.C. § 7401(1) and (3) on a fee basis. By authorizing hiring for many of the same positions in two different paragraphs of subsection (a) of section 7405, Congress clearly recognized a distinction between persons compensated based on time (i.e., full time/part time) basis and those compensated on a per service (i.e., fee) basis. Payment of fee-basis employees based on time on duty would ignore this distinction and would be inconsistent with the statutory scheme.


3.

Deputy Assistant Secretary, Human Resources Management (05)

4. This distinction between time-basis compensation and fee-basis compensation is consistent with civil service regulations related to fee-basis appointments and with OPM's formal opinion in Enclosure 3 on offset of annuity payments. Though not applicable to appointments made pursuant to Title 38, 29 C.F.R. § 541.605 describes administrative and professional employees paid on a fee basis as employees being paid a sum for a single job regardless of the time required for its completion. The regulation specifically provides that, "[p]ayments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis." While not controlling for purposes of Title 38 employees, these regulations are instructive as to the recognized meaning of "fee basis" employment. OPM's opinion observed this same distinction between time-based and fee-basis employment in addressing the need to offset annuity payments against time-based but not fee-basis compensation.

5. There are many benefits to hiring retired annuitants under the fee-basis authority. For example, fee-basis hiring may serve as a recruiting tool allowing VA to hire retired annuitants without subjecting them to an offset of their annuity and may be used to avoid a lengthy waiver process from OPM to avoid the annuity off-set provision for annuitants hired under 38 U.S.C. § 7405(a)(1).¹ However, the policy of restricting fee-basis appointments to service or task-type work is consistent with the statute authorizing such hiring, regulations addressing the nature of fee-basis employment, and OPM guidance and should not be modified to allow for fee-basis compensation at a time-based rate.

6. Should you have any questions, please contact Christina Knott at (202) 697-2232.


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¹ Re-employed annuitants hired under Title 38 authority are subject to 5 U.S.C. §§ 8344 and 8468, which require that any pay received from reemployment with the Federal Government be reduced by the amount of retirement annuity received during the "period of actual employment". Agencies can seek a waiver from OPM of a re-employed annuitant's salary offset pursuant to 5 C.F.R. § 553.201 in the following circumstances: (1) emergency hiring need; (2) severe recruiting difficulty; (3) need to retain a particular individual uniquely qualified for a specific project; and (4) requests based on other unusual circumstances not rising to the level of an emergency.

However, in the case of fee-basis employment under 38 U.S.C. § 7405(a)(2), OPM opined that re-employed annuitants may continue to receive their full annuities without a reduction in salary as long as the annuitant's employment is not time based. 5 U.S.C. §§ 8344 and 8468 provide that the annuity allocable to the "period of actual employment" must be deducted from the annuitant's pay, but in fee or piece work, which are not time based, there is no "period of actual employment", and no offset is required.