



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

DEC 16 2002

Medical Center Director
VA Medical Center
1201 N.W. 16th Street
Miami, Florida 33125

Dear _____

I am responding to the issue raised in your letter of November 12, 2001 concerning an unfair labor practice charge (ULP) filed by the National Federation of Government Employees (NFFE) union. The issue pertains to the determination of the amount of scarce medical specialty pay to be offered to primary care physicians at the Oakland Park Outpatient Clinic.

Pursuant to delegated authority, I have decided, on the basis of the enclosed paper, that the issue presented is a matter concerning or arising out of the establishment, determination or adjustment of employees compensation, and is thus exempted from collective bargaining by 38 U.S.C. 7422(b).

Please provide this decision to your Regional Counsel as soon as possible.

Sincerely yours,

A handwritten signature in cursive script, which appears to read "Robert H. Roswell", is written over a horizontal line.

Robert H. Roswell, M.D.

Enclosure

VA - 02 - 07

FACTS

In late February 2002, VAMC Miami management authorized the payment of a \$7,500 scarce medical specialty special pay component to the primary care physicians at the Oakland Park Outpatient Clinic (OPOPC).

In May 2002, the NFFE union local at the OPOPC filed a written request for information relating to the scarce medical specialty special pay authorization. Specifically, the union requested information pertaining to vacancy and turnover rates for physicians at both the OPOPC and the Miami VAMC over the past three years, alleging that this information was necessary to clarify a "discrepancy" between the amount of scarce specialty special pay authorized for OPOPC physicians and that authorized for primary care physicians at the Miami VAMC. (Attachment A)

The union has indicated that it intends to use the requested information to show disparate treatment or "inequity" in the authorization of scarce medical specialty pay between the primary care physicians at Miami, who are authorized \$15,000 in scarce specialty medical special pay, and the primary care physicians at OPOPC. (Attachment B) The union seeks the requested information to use as evidence in challenging the amount of scarce specialty pay authorized for OPOPC physicians, which challenge would likely take the form of a grievance or ULP filing. VAMC management has explained to the union that the implementation of special pay is a discretionary matter under VA policy as developed by the Under Secretary for Health (USH), and is based on prevailing labor market conditions and the employment situation at specific sites. (Attachment A)

It should be pointed out that the Oakland Park Outpatient Clinic is located approximately thirty-five miles away from the Miami VAMC. The American Federation of Government Employees union represents physicians at the Miami VAMC, while the OPOPC physicians are represented by NFFE. The OPOPC physicians expressed concern in or earlier than January 2002 that they were not being compensated fairly or equitably by comparison to physicians at other facilities, and sought and received clarification from the USH as to the bases upon which scarce specialty pay is awarded to practitioners at particular VA medical facilities. (Attachment C)

On June 17, 2002, the NFFE union local filed with the Federal Labor Relations Authority (FLRA) a ULP for failure on the behalf of Miami management to furnish the requested information to the union. (Attachment B) Following their review, the FLRA on September 30, 2002, issued a "Complaint and Notice of Hearing"

on the matter with the hearing date scheduled for December 12, 2002.
(Attachment D)

On August 25, 2002, the VA Regional Counsel office at Miami responded to the Complaint and Notice of Hearing. (Attachment E) The Regional Counsel subsequently also filed a motion on November 13, 2002 with the FLRA to postpone the Hearing indefinitely. (Attachment F)

On November 12, 2002, the Miami VAMC Director submitted a letter requesting a determination by the USH that the issue constitutes a matter concerning the establishment, determination or adjustment of employee compensation and is therefore outside the scope of collective bargaining pursuant to 38 U.S.C. 7422.
(Attachment G)

Pursuant to the Federal Service Labor Management Relations Statute, 5 U.S.C. 7114(b)(4), a union's right to information depends on whether there is an appropriate representational use to which the data might be put. In this case, the information requested concerns one of the factors (physician turnover) considered by VAMC management in the determination or adjustment of scarce specialty pay for OPOPC physicians. To the extent that such issue is outside the scope of collective bargaining under 38 U.S.C. 7422, there is no representational right of the union that relates to the requested information, and the failure of management to comply with the information request does not give rise to a ULP that is subject to the jurisdiction of FLRA. *Department of Veterans Affairs, Washington, DC and VA Medical Center, Amarillo, TX v. Federal Labor Relations Authority*, 1 F.3d 19 (D.C. Cir. 1993).

PROCEDURAL HISTORY

The Secretary has delegated to the USH the final authority in the VA to decide whether a matter or question concerns or arises out of the establishment, determination, or adjustment of employee compensation under Title 38. When labor and management disagree over such matters or questions, "The VA Partnership Council's Guide to Collective Bargaining and Joint Resolution of 38 U.S.C. 7422 Issues" provides a procedure for attempting resolution. If the parties are unable to resolve the dispute, the USH is asked to render a decision.

In accordance with the Guide, a call was held on November 21, 2002 with a VACO labor relations specialist and the President of the NFFE VA Council in an attempt to resolve the matter. The NFFE VA Council President stated he was aware of the specific case. He further indicated that he understands and appreciates the unique Title 38 aspects of the issue, but did not indicate he would intercede in the matter. He also stated that disparity in special pay authorizations is a growing problem and is having a negative effect on employee morale.

ISSUE

Whether a union information request for specific physician turnover data that would be utilized to challenge the calculation of scarce medical specialty special pay for primary care physicians at a particular facility is a matter concerning the establishment, determination or adjustment of employee compensation.

DISCUSSION

The Department of Veterans Affairs Labor Relations Improvement Act of 1991 granted limited collective bargaining rights to Title 38 employees, but specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional competence or conduct, peer review, and the establishment, determination, or adjustment of employee compensation as determined by the USH.

The issue of the authorization of a special pay component to physicians -- in this case, specifically, the authorization of a scarce medical specialty bonus -- is an issue that is left to the unfettered discretion of the VA Secretary and/or USH as provided by 38 U.S.C. sections 7431, 7432, 7433, 7437, 7438, 7439 and 7440.

The VA Secretary, in consultation with the USH, has promulgated regulations pertaining to the scarce specialty pay component of physicians' special pay. These regulations are contained in VA Handbook 5007, Part IX and Appendix IX-H.

In two previous cases, the USH has determined that issues concerning physicians' special pay are matters related to the establishment, determination or adjustment of employee compensation within the meaning of 38 U.S.C. 7422(b).

In a January 23, 2001 determination arising out of an issue at VAMC Biloxi, the USH ruled that the adjustment of a physician's special pay to appropriately reflect the amount of time he could be engaged in a scarce medical specialty concerns or arises out of a matter or question of the establishment, determination or adjustment of employee compensation under Title 38.

In a second case, dated May 6, 2002, involving an employee at VAMC Reno, the USH determined that a grievance regarding the reduction or elimination of a physician's scarce specialty pay resulting from reassigning duties without employing Reduction in Force procedures was also a matter or question arising out of the establishment, determination or adjustment of compensation under Title 38.

While allegations of disparate treatment in the authorization of physicians' special pay may be properly raised in an appropriate venue such as a complaint before

the EEOC, the calculation of scarce specialty pay at a particular facility is not subject to collective bargaining or to challenge through a negotiated grievance procedure, nor is VAMC management's calculation in this regard subject to review by officials from an outside agency, including FLRA. The Title 38 statutes and implementing VA regulations make clear that the matter of physicians' special pay, including scarce medical specialty pay, is a matter reserved to the USH.

RECOMMENDED DECISION

That the issues underlying the NFFE ULP over the Miami VAMC's failure to provide requested information pertaining to a decision to authorize a certain dollar amount of physician scarce medical specialty special pay at the OPOPC be deemed exempt from the collective bargaining process under 38 U.S.C. 7422(b) as matters concerning or arising out of the establishment, determination or adjustment of employee compensation under Title 38.

APPROVED ✓ DISAPPROVED _____



Robert H. Roswell, M.D.
Under Secretary for Health

12-16-02
Date