



DEPARTMENT OF VETERANS AFFAIRS
Veterans Health Administration
Washington DC 20420

JUN 01 2007

In Reply Refer To:

Director, Central Arkansas Veterans Healthcare System
4300 West 7th Street
Little Rock, AR 72205

Attorney for AFGE Local 2054
P.O. Box 6564
North Little Rock, AR 72124

Dear Mr. [redacted] and Mr. [redacted]:

I am responding to the issue raised in your memorandum and response of December 7, 2006, and December 29, 2006, respectively, relating to the union's grievance over the entitlement of specialized skills pay for [redacted], RN.

Pursuant to delegated authority, I have decided on the basis of the enclosed decision paper that the issue presented is a matter concerning or arising out of the establishment, determination or adjustment of employee compensation and is therefore exempt from collective bargaining and the negotiated grievance procedure under 38 U.S.C. 7422(b).

Sincerely yours,

A handwritten signature in cursive script that reads "Michael J. Kussman".

Michael J. Kussman, MD, MS, MACP
Acting Under Secretary for Health

**Title 38 Decision Paper – Central Arkansas Veterans Healthcare System
VA 07-**

FACTS

On July 24, 2000, Director of the Central Arkansas Healthcare System (CAVHS or medical center) approved a one step salary rate increase for nurses in the emergency room (ER) who utilize certain specialized skills. *Attachment A*. The authority for the specialized skills rate is contained in VA Handbook 5007, Part III, Chapter 8, paragraph 2. *Attachment B*. Specialized skills are skills that are especially difficult or demanding. *Id.*

In December 2003, _____, RN, was reassigned from CAVHS' primary care clinic to the ER, where she has since worked as a triage nurse. *Attachment C*. While many of the ER nurses at CAVHS perform specialized skills, including performing phlebotomy and wound care, assisting physicians with surgical procedures, assisting with patient sedation, managing IV drips, and titrating and maintaining patients' hemodynamic stability, Ms. Tate does not perform these specialized skills. *Attachment D*. Instead, her duties include gathering and documenting vital signs, documenting chief complaints, completing the triage template, and arranging consults with other services within CAVHS. *Id.*

On May 31, 2006, the American Federation of Government Employees Local 2054 (AFGE or Union) filed a Step 2 grievance on behalf of Ms. _____ claiming that she was entitled to the same extra step of pay for specialized skills that the other ER nurses receive. *Attachment E*. The Union alleged that management violated Article 12, Sections 11 and 12, Article 16, Article 49 and Article 51 of the AFGE Master Agreement and any applicable law, regulation or article of the Master Agreement or supplemental agreement.¹ *Id.*

In a Step 2 grievance response dated June 30, 2006, _____, Associate Chief Nurse, Specialty, explained that even though Ms. Tate works in an area where specialized skills are designated, she does not utilize those skills because she functions as a clinic nurse. *Attachment C*. Ms. _____ further explained that the other nurses in the ER receive the specialized skills step because they spend at least 75% of their VA time utilizing those skills. *Id.* Ms. _____ also stated that the Master Agreement provisions cited by AFGE are not applicable to the grievance. *Id.* At the Step 3 meeting, the Union maintained that all nurses assigned to the ER Time & Leave code should receive the extra step. *Attachment G*.

On July 20, 2006, AFGE advanced the grievance to Step 3, alleging that all nurses working in the ER are authorized to receive an extra step for specialized skills but that "[a]n administrative error occurred [*sic*] causing RN _____ not to receive the 'Specialized

¹ Article 12 is titled "Details, Reassignments, and Temporary Promotions," Section 11 deals with local negotiations and Section 12 with rotations; Article 16 is "Employee Rights"; Article 49 is "Title 38 Advancement"; and Article 51 is Title 38 Nurse Pay/Survey." The Union did not identify a relationship between these references and management's refusal to pay the specialized skills step to Ms. _____, nor did it describe how management violated these provisions.

Skills Step' authorized by the Director for all Emergency Department RNs." *Attachment F*.

On November 17, 2006, _____, RN, Associate Director for Patient Care Services/Nurse Executive, responded to the grievance. *Attachment G*. In her response, Ms. _____ stated that Ms. _____ is not entitled to the higher salary rate because her position does not require her to utilize the same specialized skills as the other nurses in the ER. *Id.* Ms. _____ further stated that as a triage nurse, Ms. _____ performs duties that are more similar to those performed by clinic nurses than to the hands-on emergency patient care performed by ER nurses. *Id.* She also noted that AFGE failed to explain the claimed contract violations. *Id.*

AFGE invoked arbitration on November 22, 2006. *Attachment H*. In a memorandum to the Under Secretary for Health (USH) dated December 7, 2006, the medical center Director requested that the USH determine that the issue of Ms. _____ entitlement to the specialized skills step is outside the scope of collective bargaining and not subject to the negotiated grievance procedure pursuant to 38 U.S.C. 7422(b). *Attachment I*. On December 21, 2006, the Union was provided a copy of management's submission and given 10 days to submit documents to the USH in support of its position.

On December 29, 2006, the Union submitted a response to management's request for a determination by the USH. *Attachment J*. In its response, AFGE alleged that the decision not to provide Ms. _____ with the specialized skills step was based on discrimination because she is the only African-American nurse in the ER. *Id.* Moreover, the Union argued that the VA cannot use Title 38 as a shield "to use in the face of allegations of race discrimination." *Id.* Therefore, the union requested that the USH "resolve the issue as being one of race discrimination and subject to the negotiated grievance procedure." *Id.* The only substantive contract provisions it discussed were Article 16 concerning fair treatment of employees, and Article 17 concerning prohibited discrimination. *Id.*

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 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 over a registered nurse's entitlement to a higher rate of pay for specialized skills is excluded from collective bargaining as a matter or question that concerns or arises 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 Act of 1991, 38 U.S.C. 7422, granted collective bargaining rights to Title 38 employees in accordance with Title 5 provisions but specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence (i.e., direct patient care or clinical competence), peer review and employee compensation as determined by the USH.

Pursuant to 38 U.S.C. 7451(a)(4), the Secretary has prescribed regulations (contained in VA Handbook 5007, Part III, Chapter 8, paragraphs 2 and 3.) to implement higher rates of pay based on specialized skills. Paragraph 2.a. in the referenced handbook allows facility directors to “appoint or reappoint individuals to covered positions at any step of the grade for which they qualify if vacancies for such employees exist and such action is necessary to obtain their services. This action may only be taken to recruit employees with specialized skills, particularly specialized skills that are difficult or demanding.” In accordance with paragraph 2.b., “[w]hen an adjustment is made under subparagraph 2a, salary rates of onboard employees in assignments requiring the same specialized skills may be adjusted up to the same number of steps.”

On July 24, 2000, the CAVHS Director approved a request from the ER for higher pay rates based on specialized skills. Since that time, all RNs in the ER who perform duties requiring these specialized skills at least 75% of the time have been receiving the higher pay rates. These duties include providing emergency care to patients, managing IV drips, titrating and maintaining hemodynamic stability, performing phlebotomy and comprehensive wound care, and assisting doctors with procedures such as suturing and moderate sedation. As the triage nurse in the ER, Ms. [redacted] does not perform duties that require these specialized skills. Instead, she performs the initial triage of patients, including gathering and documenting patients’ vital signs, documenting patients’ chief complaints, completing the emergency department triage template, and determining patients’ urgency categories. VA Handbook 5007, Part III, Chapter 8, paragraph 2.b. clearly provides that the “...salary rates of onboard employees in assignments requiring the same specialized skills may be adjusted up to the same number of steps.” Because Ms. [redacted] the triage nurse in the ER and does not perform any duties that require her to utilize these specialized skills, she is not entitled to the higher rate of pay. This issue of entitlement to a higher rate of pay for specialized skills is directly related to the adjustment of employee compensation as established in 38 U.S.C. 7422, and is therefore not grievable.

In its December 29, 2006, response to the VAVHS Director’s request for a 38 U.S.C. 7422 determination, AFGE alleged that management’s failure to provide Ms. [redacted] with the higher pay rate was racially motivated because she is the only African-American nurse in the ER. If timely and properly raised, this allegation might be subject to consideration by the Equal Employment Opportunity Commission or another authorized tribunal. However, 38 U.S.C. 7422 precludes resolution of such allegations through the negotiated grievance procedure.

RECOMMENDED DECISION

That AFGE's grievance concerning the entitlement of _____ RN, to a higher rate of pay for specialized skills is excluded from collective bargaining as a matter or question that concerns or arises out of the establishment, determination or adjustment of employee compensation within the meaning of 38 U.S.C. 7422(b).

APPROVED X

DISAPPROVED _____

 Michael J. Kussman

Michael J. Kussman, M.D., MS, MACP
Acting Under Secretary for Health

 6/1/07

Date