

Ami Pendergrass
6/11/2010

NATIONAL GRIEVANCE
NG-06/11/2010

Date: June 11, 2010

To: Leslie Wiggins
Deputy Assistant Secretary,
Labor – Management Relations
Department of Veterans Affairs
1575 I Street, NW, Suite 250
Washington, D.C. 20420

From: Ami Pendergrass, Attorney, National Veterans Affairs Council (#53) (NVAC), American Federation of Government Employees (AFGE), AFL-CIO.

Subject: National Grievance in the matter of the Department of Veterans Affairs (VA)'s failure to provide notice of the specific goals and performance objectives concerning physicians' and dentists' performance pay and the unlawful enforcement of group-specific goals and performance objectives for the determination of individual achievement in performance pay in violation of the various agreements, statutes, regulations, and past practice/customs, as set forth below.

STATEMENT OF CHARGES

Pursuant to the provisions of Article 42, Section 11 of the Master Agreement Between the Department of Veterans Affairs and the American Federation of Government Employees (1997) (MCBA), AFGE/NVAC (Union) is filing this national grievance against you and all other associated officials and/or individuals acting as agents on behalf of the VA for violations as it relates to VA's failure to provide notice regarding performance pay and its unlawful enforcement of group-specific goals and criteria for determination of individual achievement for purposes of performance pay evaluation. Specifically, on a continuous and on-going basis, the VA, by and through its representatives and/or agents, has:

- (1) At multiple facilities, failed to provide notice and/or failed to provide timely notice to physicians and dentists of the specific goals and performance objectives necessary for achievement of performance pay as required by 38 U.S.C. §7431 and VA Handbook 5007/32;
- (2) At multiple facilities, unlawfully set and enforced group-specific goals and performance objective for the determination of individual achievement in performance pay in violation of 38 U.S.C. §7431 and VA Handbook 5007/32.

In doing so, the VA has violated the following provisions:

- (1) 38 U.S.C. § 7431;
- (2) VA Handbook 5007/32;
- (3) Any and all other relevant articles, laws, regulations, customs and past practices not herein specified.

STATEMENT OF THE CASE:

I. Background

President George Bush signed into law the Health Care Personnel Enhancement Act of 2004, which established a pay system of three separate elements for VA physicians and dentists: base, market, and performance pay. 38 U.S.C. §7421 provides authority to the Secretary “notwithstanding any law, Executive order or regulation . . . [to] prescribe by regulation the hours and conditions of employment . . . of employees appointed under any provision of this chapter in positions in the Veterans Health Administration.” (38 U.S.C. §7421(a)). This provision includes physicians and dentist as those employees affected by the Secretary’s authority in 38 U.S.C. § 7421. (38 U.S.C. § 7421(b)).

The Secretary’s authority to set conditions regarding the pay of physicians and dentist are subject to the provisions of 38 U.S.C. § 7431. Section 7431 sets forth the criteria in establishing the three elements of pay: base, market, and performance. Section 7431(d) establishes criteria for performance pay which is pay “paid to a physician or dentist on the basis of the physician’s or dentist’s achievement of specific goals and performance objectives prescribed by the Secretary.” (38 U.S.C. §7431(d)(2)). The amount of performance pay is determined for each year is set in accordance with regulations set by the Secretary and may not exceed the lower of either \$15,000 or 7.5 percent of the sum of the base pay plus market pay payable to each physician or dentist. (38 U.S.C. § 7431(d)(5)). This amount is variably and determinate based on “individual achievement or attainment of the goals or objectives applicable to the physician or dentist.” (38 U.S.C. §7431(d)(4)). In order for individual physicians or dentists to maximize their performance pay, the Secretary is required to provide each physician or dentist notice of the specific goals or objectives that are measured in determining eligibility. (38 U.S.C. §7431(d)(3)).

The specific criteria set forth in Section 7431(d) are implemented in VA Handbook 5007/32, which acknowledges the VA’s obligation to provide notice to physicians and dentists of the specific goals and objectives that will be measured for performance pay and that such notice will be provided “within 90 days of the beginning of each fiscal year.” (VA Handbook 5007/12, Part IX, Para. 12(d)). The specific goals and performance objectives are designed to determine an amount which accurately reflects a physician’s or dentist’s “degree of execution and individual achievement of specified goals and objectives” and this individual achievement is analyzed and documented on VA Form 10-432, which serves as the basis for determining the appropriate amount payable. (VA Handbook 5007/12, Part IX, Para. 12(b) and (f)). Examples of the types of goals and objectives that may be established locally are enumerated in VA Handbook 5007/12, Part IX, Para. 12(e) and each category of measurement represent the types of individual

achievement that can be measured to determine an appropriate amount of award for those who perform successfully or higher.

II. Violation

On an ongoing and continuous basis, multiple VA Veteran Health Administration (VA/VHA) sites have failed to either provide proper notice or to provide timely notice of specific goals and performance objectives to physicians and dentists for the achievement of performance pay as required by Section 7431 and VA Handbook 5007/32. This requirement is clear on its face and requires no further legal analysis.

Multiple VA/VHA sites have also unlawfully set and enforced group-specific goals and performance objectives for physicians and dentists as a measure of individual achievement for purposes of performance pay. The language of both Section 7431 and sections of VA Handbook 5007/32 make clear that specific goals and performance objectives are to be individually attainable, meaning that the achievements measured to determine success, and hence, eligibility and the amount of performance pay, is linked to each physician's and dentist's **individual** achievement of such objectives. In multiple VA/VHA facilities, physicians and dentists are not only measured by individual standards, such as research achievements or completion of medical documentation, which is permissible, but are also measured by facility-wide criteria such as SHEP scores, MC3b and CUSS reports and other forms of group measurements. These measurements, which consider the ratings of the performance of a facility and not individual physicians or dentists, cannot be individually tracked to any one employee nor can any single non-supervisory employee control the variables which influence the outcomes of these forms of group ratings. These measurements would be most appropriate for a supervisor or senior executive, who, as part of their job description, is required to manage personnel and processes in a way that would affect a facilities' performance; no individual physician or dentist has the ability or authority to control anything but his or her own performance. This would be in line with Congress' choice of the words "individual achievement", which is also reflected in the VA's own procedures for evaluation.

III. Remedy Requested

The Union asks that to remedy the above situation, the VA agrees to the following:

- (1) To provide to all affected employees notice of the specific goals and performance objectives measured for performance pay for FY 2009 and going forward within 60 days of the beginning of the evaluation period;
- (2) To cease and desist inclusion of the use of any group-specific goals and performance criteria for the purposes of determining performance pay;
- (3) To make whole any and all affected employees whose performance pay was affected by the inclusion of such group-specific goals and performance criteria;

- (4) To post a jointly drafted notice for all employees, in the appropriate conspicuous places, an outline of the violations noted above and the steps that the VA will take to remedy its actions.

IV. Time Frame and Contact

This is a National Grievance and the time frame for resolution of this matter is not waived until the matter is resolved or settled. If you have any questions regarding this National Grievance, please feel free to contact me at (202) 306-3664.



Ami Pendergrass
Attorney
AFGE/NVAC

Cc: Alma L. Lee, President, AFGE/NVAC
William Wetmore, Chairperson, Grievance and Arbitration Committee, AFGE/NVAC