DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

MAR 0 5 2001

James A. Christian
Director (00)
VA Medical Center
1100 Tunnel Road
Asheville, NC 28805

Dear Mr. Christian:

I am responding to the issues raised in your October 13, 2000, letter concerning an unfair labor practice charge (ULP) filed by the local unit of the American Federation of Government Employees. The issue pertains to your failure to implement an arbitrator's decision to award night differential and weekend premium pay to OR nurses for periods of overtime work.

Under 38 USC 7422, any matter affecting nurses hired pursuant to Title 38 concerning or arising out of professional conduct or competence, peer review, or the establishment, determination or adjustment of employee compensation is outside the scope of collective bargaining and is not subject to review by any other agency. The law authorizes the Secretary, or designee, to make the determination of any question arising under its provision. The Secretary has delegated to my office the authority to make any such determinations, which are not subject to administrative review under the law.

Title 38 USC 7453(b) and (c) and VA's implementing regulations govern entitlement to additional pay for night differential and weekend premium pay respectively for nurses. These statutory provisions authorize night/weekend pay only in situations in which an employee has a tour of duty falling within those times. Similarly, VA's implementing regulations authorize night/weekend pay only for such situations. The regulations specifically limit this premium pay to times falling within the nurses' regular work schedule or tour of duty, which do not include periods of overtime work. Article 51, on which the arbitrator based her decision, merely summarizes 38 USC 7453(b) and (c) and cannot legally change the statutory requirements.

Acting pursuant to the authority in 38 USC 7422(d), I have determined that this arbitrator's decision and subsequent ULP concerns the establishment, determination, or adjustment of employee compensation. The enclosed decision paper includes a full discussion of the basis for this decision.

Accordingly, the issues raised in this matter are outside the scope of collective bargaining under sections 7421(a) and 7422(d) of title 38, U.S. Code.

Sincerely,

Tom Landers for

Thomas L. Garthwaite, M.D.

Enclosure

Title 38 Decision Paper – VAMC Asheville, North Carolina

FACTS

On February 1, 1999, American Federation of Government Employees (AFGE) filed a grievance on behalf of the Operating Room Nurses of VAMC Asheville, North Carolina, claiming entitlement to premium pay. More specifically, the Union complained that the Medical Center failed to pay the Operating Room Registered Nurses night differential when called in to work overtime during the hours of 6 p.m. and 6 a.m., and weekend pay differential when called in to work overtime on Saturday or Sunday. The periods of work at issue in the grievance were outside the nurses' regular work schedule or tour of duty.

The matter went to arbitration on November 8, 1999, and the arbitrator's award issued on December 29, 1999. The arbitrator's award granted the union's request for payment of night differential and weekend pay for OR nurses for these instances. (See Attachment A.) In so ruling, the arbitrator found that management violated the parties' collective bargaining agreement.

Management then filed an exception to the arbitrator's award, which was denied by the Federal Labor Relations Authority (FLRA) as being untimely. Management refused to comply with the award stating that this is a matter to be decided by the Secretary and is not itself subject to collective bargaining (38 USC 7422). (See Attachment B.) The union then filed an unfair labor practice charge. FLRA then issued a Complaint and Notice of Hearing charging the agency with failure to comply with the arbitrator's award. (See Attachment C.) Management again contended that it could not implement the award since it appears to conflict with statutory law and cannot be implemented prior to a decision by the Secretary.

Both parties point to the VA/AFGE Master Agreement, Article 51 – Title 38 Nurse Pay, Section 3, which defines premium pay. (See Attachment D.) This section summarizes and makes reference to 38 USC 7453(b), (c), and (e)(1). These provisions relate to Premium Pay for evening, weekend and overtime. VA's implementing regulations can be found in MP-5, Part II, Chapter 3 and 7. The parties are not in disagreement as to the relevant legal citations, policies and contract provisions but to their interpretations.

Management contends that 38 USC 7453 limits entitlement to weekend and night differential pay to nurses who have a tour of duty that falls within the established weekend or night hours. (See Attachment E.) Conversely, AFGE contends that an OR nurse is entitled to night differential pay or weekend pay anytime they work between 6 p.m. and 6 a.m. or midnight Friday thru midnight Sunday regardless of when their normal tour of duty occurs. In this instance the nurses regularly scheduled tours of duty are Monday through Friday,

6:00 a.m. to 4:30 p.m. The arbitrator asserts in her decision that management violated the agreement and OR nurses have two tours of duty – their daytime tour and all others (i.e., when they work overtime); therefore, the arbitrator ordered payment of night differential and weekend pay. At VAMC Asheville there is no established night tour or weekend tour of duty for OR nurses.

In response to the ULP complaint, management has replied that the issue is one which falls under 38 USC 7422(b)(3) – the "establishment, determination, or adjustment of employee compensation under this title." Management points out that under 38 USC 7453 (b), (c), and (e)(1), the employees in question are not entitled to night differential pay or weekend premium pay, only to on-call pay, overtime pay and holiday pay as applicable. Since the matter involves the establishment, determination or adjustment of title 38 pay, it is not subject to collective bargaining and a third party such as FLRA may not review it. Accordingly, FLRA has no jurisdiction to review the ULP.

In accordance with July 31, 2000, guidance from the Acting Under Secretary for Health, the VA Medical Center Partnership Council discussed the pay issue at their meeting on October 11, 2000. (See Attachment F.) The parties could not resolve the issue and the union declined to participate in submitting a joint request to the Under Secretary. Further, AFGE at the national level declined to participate in any attempt to resolve the matter and requested a decision based on the record.

DISCUSSION

Title 38 USC 7453(b) governs additional pay for nurses for performing service on a tour of duty, any part of which is within the period commencing at 6 postmeridian and ending at 6 antemeridian.

Title 38 USC 7453(c) governs additional pay for nurses performing service on a tour of duty, any part of which is within the period commencing at midnight Friday and ending at midnight Sunday.

Both provisions and issues in this instance clearly authorize the pay differentials only when the time worked is included in a "tour of duty."

VA's implementing pay regulations similarly authorize the premium pay differentials only when the time worked is included in a "tour of duty." MP-5, Part II, chapter 3, paragraph 4g. In this regard, the regulations clearly state that nurses' regular pay is for their basic workweek (or tour of duty), including any authorized premium pay. Id. at paragraph 4f. The regulations also clearly state that nurses' overtime pay is for work outside their normal basic workweek. Id. at paragraph 4g(4). VA's title 38 regulations provide that nurses' basic workweek is their normal 40-hour work schedule (or tour of duty). MP-5, Part II, chapter 7, paragraph 4b, 5b.

In the situation at Asheville VAMC, upon which the arbitrator ruled, the nurses in the OR were clearly not on a regularly scheduled tour of duty; instead they were working overtime outside their regular tours. Accordingly, the arbitrator's award not only concerns or arises out of the establishment, determination or adjustment of title 38 pay, it is inconsistent with the provisions of 38 USC.

ISSUE

Whether the arbitrator's award concerns or arises out of the establishment, determination or adjustment of title 38 pay, and violates the provisions of 38 USC 7453(b) and (c).

RECOMMENDATION

It is recommended that the Under Secretary for Health determine that the arbitrator's ruling concerns or arises out of the establishment, determination or adjustment of title 38 pay, and is contrary to 38 USC 7453(b) and (c). The nurses in question were called in to work overtime and were not working on a regularly scheduled tour of duty as the law and VA's implementing regulations stipulate.

DECISION

Under the authority in 38 U.S.C. 7422(d), I find ~~I do not find:~~

that the arbitrator's decision and subsequent ULP concerns the establishment, determination, or adjustment of employee compensation.

Under the authority in 38 U.S.C. 7422(d), I find ~~I do not find:~~

that the payment of night differential and weekend premium pay to OR nurses for periods of overtime work concerns or arises out of a matter or question of the establishment, determination, or adjustment of employee compensation under title 38.

Tom Sanders for
Thomas L. Garthwaite, M.D.
Under Secretary for Health

3/05/01
Date