



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

AUG 22 2005

Director, VA Medical Center
1100 Tunnel Road
Asheville, North Carolina 28805

Dear Mr.

I am responding to the issue raised in your April 19, 2005 memorandum concerning a union grievance over the termination of a retention allowance for Further information was provided in a subsequent letter dated May 9, 2005, to the VACO Office of Labor-Management Relations from your Chief of Human Resources.

Pursuant to delegated authority, I have determined, on the basis of the enclosed decision paper, that the issue presented by the grievance is a matter concerning the establishment, determination or adjustment of employee compensation and is thus exempted from collective bargaining under 38 USC §7422(b).

Please provide a copy of this decision to your Union President and your Regional Counsel as soon as possible.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Jonathan Perlin", is written over the typed name.

Jonathan Perlin, MD, PhD, MSHA, FACP
Under Secretary for Health

Enclosure

Title 38 Decision Paper
VAMC Asheville
VA – 05 – 06

FACTS:

On November 19, 2002, the Director at the Asheville VA Medical Center (VAMC), _____, approved a retention allowance (25% of base pay) for _____, M.D., for a period of two years. The Director approved this retention allowance based on the recommendation of the Chief of Medicine, Eva Morgenstern, M.D. At the time of the approval, the Director was unaware that VA regulations require review of retention allowance authorizations on a yearly basis.

On November 28, 2003, Dr. _____ requested that Dr. _____ retention allowance be continued for one year. (Attachment A) On December 5, 2003, the Director determined that Dr. _____ no longer met the criteria for a retention allowance provided in VA Handbook 5007, Part VI, Chapter 3, and disapproved the request on that basis. (Attachment B)

On March 18, 2004, the American Federation of Government Employees (AFGE) Local 446 filed a "breach of contract" grievance over the termination of Dr. _____ retention allowance. In their grievance, the union alleged that the Director had violated Article 16, Sections 1& 8 of the AFGE Master Agreement, which provide for treating employees fairly, equitably, with dignity and mutual respect. As a remedy, the union requested that Dr. _____ retention allowance be resumed, that he paid retention monies withheld since November 2003, and that a letter of apology be issued to him for breach of contract. (Attachment C)

On April 2, 2004, the Chief of Human Resources, on delegation from the Director, provided a third step response to the union President. The response denied the grievance, stating that VA Handbook 5007 requires that all retention allowances be reviewed annually and that such allowances may be terminated at any time if no longer warranted. The response pointed out that this requirement was understood and acknowledged by Dr. _____. The response also informed the union that Asheville management considered the matter to be outside the scope of collective bargaining and non-grievable in accordance with 38 USC 7422 as concerning a matter arising out of professional conduct or competence, peer review or the establishment, determination or adjustment of employee compensation. (Attachment D)

Following this response, the union moved to invoke arbitration on the matter. By agreement, however, the arbitration hearing in this matter has been placed in abeyance pending a decision by the Under Secretary for Health (USH) as to whether

the matter falls under the provisions of 38 USC 7422. By letter of April 19, 2005, the Director requested that the USH make such a determination. (Attachment E)

PROCEDURAL HISTORY:

The Secretary has delegated to the USH the authority to determine 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 the union grievance over the termination of a retention allowance previously authorized for Dr. _____ involves a matter or question concerning or arising out of the establishment, determination or adjustment of employee compensation.

DISCUSSION:

The Department of Veterans Affairs Labor relations Act of 1991, codified at 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 and clinical competence), peer review or employees compensation determined by the USH.

38 U.S.C. § 7421(a) authorizes the Secretary of Veterans Affairs to prescribe by regulation "the hours of work, conditions of employment and leaves of absence" of title 38 medical professionals, including physicians. In addition, Chapter 74 of Title 38 contains numerous provisions concerning pay, which is an element of compensation (see, e.g., 38 U.S.C. §§ 7404 (base pay), 7410 (additional pay), 7431-7440 (physician and dentist special pay), 7451-58 (pay for nurses and other healthcare personnel)). With respect to retention allowances, 38 U.S.C. § 7410 authorizes the Secretary, through the Under Secretary for Health, "to pay advance payments, recruitment or relocation bonuses, and retention allowances to [title 38 personnel, including physicians,] ... in the same manner, and subject to the same limitations, as in the case of the authority provided under sections 5524a, 5706b, 5753, and 5754 of Title 5." The Secretary has exercised these authorities with respect to retention allowances by prescribing regulations contained in VA Directive and Handbook 5007 on Pay Administration.

VA Handbook 5007, Part VI, Chapter 3, sets forth the criteria to be met and the procedures to be followed in authorizing retention pay allowances. Paragraph 9 of that Chapter requires that each retention allowance authorization must be reviewed at least

annually to determine whether continued payment is authorized. While completing the required annual review, the Director of the Asheville VAMC properly determined that the retention allowance he had previously authorized for Dr. _____ was no longer warranted. The Director's decision to disapprove the Chief of Staff's request to continue Dr. _____ retention allowance was consistent with the provisions of VA Handbook 5007. As a result the retention allowance was properly terminated after one year.¹

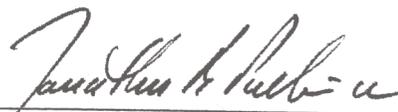
RECOMMENDED DECISION:

That the union grievance of March 8, 2004 over the termination of a retention allowance for Dr. _____ involves a matter arising out of the establishment, determination or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422 (b) and is therefore outside the scope of collective bargaining



Approved

Disapproved



Jonathan B. Perlin, MD, PhD, MSHA, FACP
Under Secretary for Health



date

¹ It should be pointed out that in accordance with requirements in Handbook 5007, Part VI, Chapter 3, Para. 4, Dr. _____ on both 9/27/02 and 12/04/03, signed statements of understanding stating that his retention allowance may be reduced or terminated at any time and that this is not an adverse action.