

Compensation Claim Decision
Under section 3702 of title 31, United States Code

Claimant: [name]

Organization: [agency component]
[veterans hospital]
Department of Veterans Affairs
[city & State]

Claim: Improper application by agency of
title 38 pay setting regulations

Agency decision: Denied

OPM decision: Denied

OPM file number: 07-0018

/s/ for

Robert D. Hendler
Classification and Pay Claims
Program Manager
Center for Merit System Accountability

1/29/2008

Date

The claimant is a dentist with a specialty in oral surgery practicing in the [agency component], at the [veterans hospital] in [city & State]. He asserts the Department of Veterans Affairs (VA) Under Secretary for Health inappropriately denied his request for an exception to the maximum of his applicable pay range and tier for his specialty. He requests the U.S. Office of Personnel Management (OPM) overturn the agency's denial, and the salary exception and increase recommended by both the hospital and VISN 8 directors be officially implemented and made retroactive to January 8, 2006. He is also concerned his servicing human resources office has not provided him with documentation regarding his current base pay and market pay. OPM received the pay claim on December 5, 2006, and the complete agency administrative report (AAR) on July 25, 2007. For the reasons discussed herein, the claim is denied.

The claimant states his pay request was filed by his hospital director with the Chief, Management Support Office, VA central office, on April 3, 2006. The claimant indicates the request was approved by his local installation director and VISN 8 Network Director and contained all the necessary criteria specified in Appendix B, VA Handbook 5007/21, Part IX, dated December 14, 2005. In denying his request for exception, he contends that the agency did not act within the time limits specified for approval noted in Section 14 (Pay Limitations), paragraph e., of Part IX, VA Handbook 5007/21. The claimant also alleges that in establishing the pay range for his particular specialty, the agency used lower national pay survey data which did not realistically reflect actual income for oral surgeons in the private sector, thus failing to comply with the survey requirements contained in Public Law 108-445 (December 3, 2004).

The AAR states that following congressional committee hearings in June 2004, the Department of Veterans Affairs Health Care Personnel Enhancement Act of 2004 (Public Law 108-445) was enacted on December 3, 2004. The law amended title 38, United States Code, to simplify and improve pay provisions for physicians and dentists. The public law established "base pay" and "market pay" which taken together are identified as "annual pay" for a physician or dentist. Added to annual pay is a third component, "performance pay." The AAR indicates in determining annual pay, the VA is committed to assuring that levels of pay for the agency's physicians and dentists are comparable with the income of non-VA physicians and dentists performing like services. Therefore, in accordance with P.L. 108-445, in determining market pay for physicians and dentists the agency was to consult two or more national surveys of pay for physicians and dentists, as applicable, whether prepared by private, public, or quasi-public entities. These surveys were consulted in order to make a general assessment of the range of pays payable to physicians and dentists. The AAR states the VA consulted several national surveys including the Survey of Dental Practice published by the American Dental Association (ADA); the Association of American Medical Colleges (AAMC); Hospital Healthcare Compensation Survey (HHCS); and Sullivan Cotter and Associates (SCA). The agency determined that because the ADA survey data represented net income from independent solo private practices or private practice partnerships, it did not closely represent VA comparability in the areas of practice setting, employment environment and hospital/healthcare systems. Therefore, the data from the ADA survey were not used. The AAR indicates under title 38, the Secretary of VA prescribes the minimum and maximum amounts of pay for a specialty or assignment, and the claimant was placed in Pay Table 2 (Oral Surgery), Tier 2 (Section Chief), effective January 8, 2006. Subsequently, a local Compensation Panel recommended to the Under Secretary for Health that the claimant's annual pay be set at \$300,000, which exceeded the annual pay cap of \$275,000 for his assigned pay tier.

In accordance with provisions established in Part IX, VA Handbook 5007/21, Section 14, the request for exception to the maximum applicable pay range and tier required the Under Secretary for Health's approval, so it was forwarded by the local installation to the VA Management Support Office at VA central office

The claimant indicates the request for exception was sent to VACO by VISN 8 staff and received at central office sometime between May 24, and June 1, 2006. He was verbally notified of its denial on August 18, 2006, and received a letter on January 4, 2007, from the Chief, Management Support Office, dated December 22, 2006, further explaining the national pay survey process and denial of the requested exception. In the AAR, the agency indicates the claimant misinterpreted paragraph e., Section 14, since he assumed the request for exception was not acted upon within 30 days from the date of receipt, it was automatically approved because the VISN 8 Network Director concurred with the recommendation. The agency's interpretation of paragraph e. is that **once approved** by the Under Secretary for Health or designee, the exception will be effective the beginning of the first pay period beginning on or after the date of approval, or 30 days from the date of receipt in VACO whichever is earlier.

Paragraph e. of Section 14, Part IX, VA Handbook 5007/21, states:

Exceptions requiring VACO approval under subparagraphs 14b and 14d will be effective the beginning of the first pay period beginning on or after the date of approval, or 30 days from the date of receipt in VACO, whichever is earlier.

The claimant's assertion that because the agency did not take action on his claim for exception within 30 days of receipt, it should have been automatically approved in accordance with paragraph e., Section 14, Part IX, of VA Handbook 5007/21, is misplaced. Black's Law Dictionary, revised fourth edition, 1968, defines "approval" as:

The act of confirming, ratifying, sanctioning, or consenting to some act or thing done by another. *Rooney v. South Sioux City*, 111 Neb. 1, 195 N.W. 474, 475. "Approval" implies knowledge and exercise of discretion after knowledge. *State v. Duckett*, 133 S.C. 85, 130 S.E. 340, 342; *McCarten v. Sanderson*, 111 Mont. 407, 109 P.2d 1108, 1112, 132 A.L.R. 1229.

"Exceptions *requiring VACO approval*...will be effective..." (emphasis added) make clear that the latter part of the sentence is governed by the limitation, regardless of the inartful wording. The latter part of the sentence only defies the alternate effective date of exceptions that have already been approved. The agency's interpretation of the paragraph at issue is in consonance with the legal definition and meaning of "approval." Therefore, the claimant's rationale regarding the exception approval process must be rejected.

The claimant believes that in establishing his pay range the agency used unrealistic national pay survey data for his specialty, thus failing to comply with the national pay survey requirements mandated by Public Law 108-445. He mentions the agency should have used the ADA national pay survey in establishing his pay table. OPM's authority to adjudicate compensation and leave claims flows from 31 U.S.C. 3702 which is narrow and limited to adjudications of compensation and leave claims. Section 3702 does not include the authority to review the validity of agency regulations or policies issued under statutory authority as the claimant appears to request OPM to do. In claims such as this, our role is to determine agency regulations and/or policies were

applied appropriately by the agency to the claimant's situation unless they conflict with the express language of the statute itself and, thus, result in an erroneous compensation or leave decision.

Public Law 108-445 does not specifically designate particular national surveys to be used. Rather, it notes in determining the amount of market pay for physicians or dentists, the VA Secretary is to consult two or more national surveys, as applicable:

(4)(A) In determining the amount of market pay for physicians or dentists, the Secretary shall consult two or more national surveys of pay for physicians or dentists, as applicable, whether prepared by private, public, or quasi-public entities in order to make a general assessment of the range of pays payable to physicians or dentists, as applicable.

The record shows that the agency complied with its responsibility under the law for constructing pay ranges for physicians and dentists by consulting data published in the AAMC, HHCS, and SCA national surveys. Therefore, the claimant's rationale regarding the agency's use of national surveys in setting his pay must be rejected.

Where the agency's factual determination is reasonable, we will not substitute our judgment for that of the agency. See Comptroller General decision B-160107, October 7, 1966, and *Jimmie D. Brewer*, B-205452, Mar. 15, 1982, as cited in Philip M. Brey, *supra*. Accordingly, this pay setting claim is denied. Based on the record, we cannot say the VA's action in denying the claimant's request for exception to the maximum of his pay table and tier by applying the relevant section of VA Handbook 5007/21, or in establishing market pay for his specialty based on selected national pay surveys, was arbitrary, capricious or unreasonable.

The claimant is concerned he has not received documentation for his current base and market pay from his installation's human resources office. In processing this claim, we contacted the servicing human resources office and were advised such documentation is available for the claimant's review at the office as part of his official personnel records. While he should have received the appropriate documents (i.e., Standard Form 50-Notification of Personnel Action) upon issuance, copies can be furnished to him if requested.

This settlement is final. No further administrative review is available within OPM. Nothing in this settlement limits the employee's right to bring an action in an appropriate United States court.