

IN THE MATTER IN ARBITRATION

BETWEEN

DEPARTMENT OF THE ARMY
WOMACK ARMY MEDICAL CENTER
FORT BRAGG, NC 28310

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL #1770
P. O. BOX 70027
FORT BRAGG, NC 28310

) ARISING OUT OF
) A GRIEVANCE FILED ON
) BEHALF OF:
) AFGE LOCAL #1770
) & MEMBERS OF THE
) BARGAINING UNIT IT
) REPRESENTS
) DATE OF GRIEVANCE
) NOVEMBER 22, 2004
) FMCS CASE #:
) 05-55436-3
) HEARING DATE:
) APRIL 27, 2006
) BRIEFS FILED:
) AUGUST 7, 2006
) DATE OF AWARD:
) AUGUST 25, 2006

BEFORE
JOE D. WOODWARD
ARBITRATOR

APPEARANCES

FOR THE AGENCY:

MR. PAUL A. RAAF, ESQUIRE
TEXAS EII AIRBORNE CORPS.
FORT BRAGG HEADQUARTERS,
XVIII AIRBORNE CORPS & FORT
BRAGG BUILDING 2-1133
ATTN: AFZA-JA-V
FORT BRAGG, NC 28310

MS. SHARREAN J. MCCRIMMON, CPAC
HR CONSUTANT-LABOR FT BRAGG CPAC
1414 JACKSON ST.
FORT BRAGG, NC 28310

FOR THE UNION:

MR. MICHAEL J. SNIDER, ESQUIRE
SNIDER & ASSOCIATES LLC
104 CHURCH LANE, SUITE 201
BALTIMORE, MD 21208

MR. DONALD W. GAMBILL, PRESIDENT
LOCAL #1770, DISTRICT-04, AFGE
P. O. BOX 70027
FORT BRAGG, NC 28307-500

THE FACTS

The Department of the Army operates a large Medical Center, Womack Army Medical Center, at Fort Bragg, North Carolina. The Center employs approximately 1700 employees of which 1400 are represented by Local #1770.

In May, 2004, the Department of the Army delegated its authority to use certain Title 38 regulations regarding special pay provisions for on-call and premium pay to the United States Army Medical Command (MEDCOM) for the purpose of attracting or retaining certain desirable personnel for medical and dental services. Title 38 was originally applicable only to the Department of Veterans' Affairs.

On September 30, 2004, MEDCOM further delegated this authority to the Commander of Womack Army Medical Center (WAMC). When MEDCOM (hereinafter referred to as "WAMC" or "Agency") delegated this authority to the Commander of WAMC, it issued Policy Guidance covering the use and administration of the pay authority and also, issued Implementing Instructions. MEDCOM delegated authority related to "all activities employing civilian health care personnel who are assigned to authorized positions only affecting physicians' assistants, registered nurses, dental assistants, dental hygienists and dental

laboratory technicians”. MEDCOM anticipated that recipients of the delegation would exercise the Department of the Army’s authority, per instructions, to change the premium pay indicator “Code K” for all civilian employees who were covered by its action so that the employees would be paid “on-call, night differential, weekend differential, holiday pay and overtime pay under the provisions of Title 38, under Veterans’ Benefits, of the United States Code”.

On September 27, 2004, the Agency notified Local #1770 of its intention to implement Title 38 - Special Pay for On-call and Premium Pay for authorized positions identified by MEDCOM in its delegation of authority to the Commander of Womack Army Medical Center. The notification to the Union, dated September 27, 2004, stated “Title 38 pay provision for all on-call and premium pay will be implemented MEDCOM wide effective “October 1, 2004”, subject to completion of impact and implementation bargaining.” The Union responded on September 29, 2004 that it “wishes to negotiate appropriate arrangements for its affected employees.” On September 30, 2004, the Agency responded “that it had incorrectly stated the date of implementation; that it intended to implement Title 38 - Special Pay for On-Call and Premium Pay additional pay authorities on October 31, 2004” rather than on “October 1, 2004”.

On October 25, the Union was notified by the Agency that “negotiation for implementation of Title 38 - On-Call procedures would be held on Tuesday, October 26” and further that “under Title 38 Provisions, the Agency has been granted authority to negotiate “On-Call pay” and set out the description of the employees they had been authorized to implement on-call pay for. On October 27, 2004, the Union notified the Agency that it did not agree that the Agency had the authority to negotiate the matter set out in its letter of October 25 (On-Call Pay”) and stated that the Union’s proposal was to negotiate a “command-wide ‘on-call’ policy at Womack Army Medical Center”. On November 18, 2004, the Agency notified the Union that “with agreement from the Union, it would proceed with provisions to compensate employees authorized under Title 38 and utilized in an On-Call status”. The letter also stated “absent written agreement from your office, the Agency will be unable to compensate employees. They must be coded “K” in an agreement from your office.”

On November 22, the Union filed two grievances against the Agency on behalf of itself and the Bargaining Unit employees of the Agency represented by the Union stating

“the specific nature of this agreement is that the Agency failed to compensate the above authorized employees that were assigned on-

call duties on or after October 31, 2004, and ongoing pursuant to Agency-wide rule and/or regulation. The employees are not being compensated properly for work performed on weekend days as called for by the Agency-wide rules and regulations other moneys due the above-mentioned Grievants that are called for in U.S. Army Medical Command's Title 38 Policy Guidance with an effective date of October 31, 2004."

The remedial action sought by the Union was "to make the Grievants whole and that they be compensated for the on-call hours which the Grievants were assigned to and asked that the Grievants be compensated with differential weekend pay as called for by the Agency-wide rules and regulations for "liquidated damages".

(Joint Exhibit 2G)

The second grievance (Joint Exhibit 2F) filed on the same date is almost identical to the first.

Later the two grievances were consolidated into one grievance by the Agency. No action was taken on the grievance until December 22, 2004, when the Agency requested an extension on scheduling a grievance meeting until January 10, 2005. There was no response by the Union to the Agency's request for an extension.

The matter has proceeded through the steps of the grievance procedure and the matter is now properly before the arbitrator for resolution of the dispute.

THE ISSUE

The parties stipulated that the issue to be submitted to the arbitrator is:

DID THE AGENCY FAIL TO IMPLEMENT TITLE 38 - ON-CALL PAY PROVISIONS IN A TIMELY MANNER AND DID THE AGENCY FAIL TO IMPLEMENT TITLE 38 PREMIUM PAY PROVISIONS IN A TIMELY MANNER AND, IF SO, WHAT SHALL THE REMEDY BE?

CONTENTIONS OF THE PARTIES

UNION'S CONTENTIONS

The Union contends that it was the Union's intention from the beginning of communications between the parties to have Title 38 implemented immediately and that its intention was demonstrated clearly by its actions and that when it did not request the status quo, at the beginning of I & I negotiations, the Union confirmed its intent not to delay implementation of Title 38 payments. The Union further argues that its filing of the grievances on November 22, 2004, clearly demonstrated its intentions to have Title 38 pay implemented immediately and on the time frame proposed by the MEDCOM; that the Union, in good faith, held the belief that its Grievants could be harmed in its policy negotiations if the Union signed a memorandum of understanding or other agreement relating to Title 38 and that such a memorandum of understanding was unnecessary; that the

Agency's argument that it needed impact and implementation with respect to pay or that the Union was fearful of an unfair labor practice is false; that the Union only bargained over "on-call policy provisions" and not premium pay because pay rates are non-negotiable under the law; that negotiations regarding on-call procedures were distinct matters and should not have affected the implementation of Title 38 payments; that implementation of Title 38 payments did not and should not have required written consent from the Union; that the Union's eventual agreement to a Memorandum of Understanding between the parties does not support the Agency's argument that the Union impeded implementation of Title 38 pay; that the Agency's argument that the Union held Title 38 pay hostage to better negotiate on-call policy for hospital employees is erroneous and unsupported; that the Agency failed to provide proper notice of its intention to withhold Title 38 payment; that retroactive Title 38 payment should be made to the affected employees; that there was no legal manner in which the Union and management could have negotiated Title 38 pay rates; that the Union gave the Agency written notice of its intent not to bargain on Title 38 pay; that the Agency witnesses testified that the employees should be paid back pay for the pay rates illegally withheld. The Union contends that the parties are in agreement

that the arbitrator should order the Agency to pay the affected employees retroactive Title 38 - On-Call and Premium Pay from October 31, 2004, and that the employees affected should be made whole, including back pay, interest and any other emoluments of which they have been deprived.

AGENCY'S CONTENTIONS

The Agency argues that Federal law requires impact and implementation bargaining prior to paying or implementing on-call and premium pay authorized to paid to certain employees at the Womack Army Medical Center beginning October 31, 2004; that the only manner by which the parties can escape the requirement to conduct impact and implementation bargaining is that such bargaining is not required when the change to employees is more than *de minimus* in nature and that the change proposed by the Agency was, in fact, a change in employees' working conditions which was more than *de minimus* in nature. The Agency contends that the Collective Bargaining Agreement required impact and implementation bargaining under Section 1, Article XXXVI, together with the six steps set out in Section 2 of Article XXXVI of the Collective Bargaining Agreement (Joint Exhibit 1). The Agency also contends that WAMC directed impact and implementation bargaining, as part of its managements' rights, and

further argues that management complied with the Federal law, the Collective Bargaining Agreement and MEDCOM's directives when it demanded impact and implementation negotiations of Title 38 pay provisions which were within MEDCOM's control and further argues that the reason negotiations were not finalized until 2005 was because the Union, in violation of 5 USC 7114 (b)(1), refused to engage in good faith negotiations due to its ulterior motives in seeking to have all of their health occupational series employees included in a hospital-wide on-call policy change. Finally, the Agency contends that the Union failed to prove by a preponderance of the evidence that management should have implemented pay provisions of Title 38 while negotiations continued thus the grievance should be denied.

FINDINGS, OPINION AND AWARD

The evidence in this case is undisputed that authority was duly given and delegated to the Commander of Womack Army Medical Center and U. S. Army Dental Activity at Fort Bragg, North Carolina, to pay on-call and premium pay to certain specified employees of the facility, effective October 31, 2004. The evidence is also undisputed that the purpose of the authority and delegation was to bring civilian employees who worked in those specified positions to a par with

respect to compensation with other Federal agencies operating under Title 38 provisions and with the further purpose of retention of current employees and the recruitment of new qualified employees.

The evidence is clear that the affected employees of Womack Army Medical Center and U. S. Army Dental Activity were not paid the rates of pay for on-call and premium pay provided by the delegated provisions of Title 38 until at least January 23, 2005, when the provisions of Title 38 were unilaterally implemented by the Commander of Womack Army Medical Center and U.S. Army Dental Activity. It is also clear from the evidence adduced at the hearing that the reason the payments were not made, was that the Agency, erroneously, contended that it could not pay the specified employees until the Union either agreed in writing, or signed a Memorandum of Understanding as required by the Agency and that but for such erroneous contention, the specified employees would have been paid under the provisions of Title 38 from and after October 31, 2004, for premium and on-call pay.

The grievances, here under consideration, Joint Exhibit 2F & Joint Exhibit 2G, were filed on November 22, 2004, and both grievances clearly state that the purpose of the grievances was to seek redress for the specified employees who

were not being paid pursuant to the Title 38 provisions, which were delegated to the Commander of Womack Army Medical Center and U.S. Army Dental Activity on September 22, 2004, to take effect on October 31, 2004. WAMC failed or refused to code the specified employees for on-call and premium pay based on the erroneous conclusion that they were not authorized and could not do so until the parties successfully engaged in impact and implementation bargaining.

The grievances (Joint Exhibits 2F & 2G) were actual and emphatic notice to the Agency of the Union's demand that the Title 38 pay adjustments should be placed in effect.

On October 22, 2002, over two years prior to the delegation of the authority to the Womack Army Medical Center by the Department of Defense to place Title 38 in effect on October 31, 2004, the Agency and the Union completed negotiations and signed a Memorandum of Understanding concerning on-call procedures for certain nursing personnel at Womack Army Medical Center. This fact clearly proves that those personnel had no change in conditions of employment and were not subject to I & I negotiations. The employees obviously should have been coded "K" and paid as of October 31, 2004. There was *de minimus* change in their working conditions, if any at all. These nursing

employees were not certified until well up into 2005.

This is evidence of good faith on the part of the Union as it had clearly been seeking to negotiate on-call procedures for the hospital employees since before the delegation of the Title 38 pay procedures.

The evidence further shows that the parties did, in fact, engage in bargaining about impact and implementation of the on-call policies. It is clear, however, that the Union negotiated with the Agency on a “non-status quo basis” which the parties had long recognized as part of their bargaining process which would have allowed the Agency to implement the pay provisions subject to any continuing policy negotiations. The Union had historically specified which of their negotiations were on a “status quo” basis and which of those which were not. The Union introduced proof that the vast majority of the cases it negotiated with the Agency were on a basis that status quo status was to be maintained until the outcome of negotiations, however several of their negotiations were based on a “non-status quo basis”. Here, it is found specifically that the parties were negotiating Impact and Implementation on a “non-status quo basis” and, under those circumstances, the Agency was on notice that the Union understood that the on-call and premium pay status of the affected employees would be phased in

on October 31, 2004, as provided by the Title 38 pay authority delegated to the Womack Army Medical Center. This fact was confirmed, without any question, when the Union filed the two grievances involved herein (Joint Exhibits 2F & 2G). Specifically, the basis of those two grievances was the complaint that the Agency was not paying its affected bargaining unit members properly under the authority delegated to WAMC by MEDCOM and the Department of Defense. Certainly nothing could state the position of the Union any clearer than the two November 22, 2004, grievances. The Union, pursuant to the parties' Collective Bargaining Agreement, had also advised the Agency, long before it filed the grievances, that it was going to file the grievance for the purpose of complaining that the specified employees were not being paid properly under the Title 38 delegation.

The Agency maintains that the Union was obligated to engage in impact and implementation negotiations to conclusion and failed to do so. The evidence in this case does not back this position. The evidence indicates that the Union notified the Agency, in writing, that it wanted to engage in impact and implementation bargaining but, it was clear that it wanted the employees paid pursuant to the delegation from MEDCOM under the provisions of Title 38,

pending conclusion of any I & I negotiations. This fact is clearly proven by a preponderance of the evidence.

The Union has also taken the position that the fact that it desired to negotiate the on-call policies and procedures of the Medical Center was a separate question from that of on-call and premium pay. Certainly it is well-settled that the parties have no right, under 5 USC, to negotiate the rates of pay, which include premium pay and on-call pay. These are not subjects of collective bargaining between the parties. They are matters which have been reserved exclusively by Congress.

The testimony at the arbitration hearing, on the other hand, showed that the Union desired to negotiate on policies and procedures for on-call and that was a fair subject of negotiations. The evidence shows that the parties eventually concluded these negotiations and entered into a Memorandum of Understanding memorializing their agreement but that agreement had nothing to do with Title 38 pay.

This arbitrator cannot find that the Union engaged in unfair bargaining as contended by the Agency. The Agency contends that the Union, in effect, held the Impact and Implementation negotiations of on-call pay and premium pay as

“hostage” for the sake of gaining an unfair position or settlement on the question of on-call procedures at the Medical Center. I cannot find evidence that it did that. However, even if it did, negotiation tactics of the Union should not be a question raised here as long as they were in good faith. I can find no evidence that negotiating tactics of the Union were questionable or that they were in bad faith.

Under the circumstances, the evidence shows that the specified employees were entitled to the on-call pay and premium pay provisions of Title 38 on October 31, 2004, and that, but for the mistaken and erroneous conclusion of the Agency that it did not have the authority to legally implement the pay provisions of Title 38, the specified employees would have received Title 38 pay on and after October 31, 2004. In addition, the Agency probably violated the terms of the Collective Bargaining Agreement when it failed to answer the grievances at step 3 of the grievance procedure.

AWARD

The grievance is sustained. The Agency did not timely pay the specified employees for on-call and/or premium pay, under Title 38, on and after October 31, 2004.


Those employees of the Agency who were coded “K” for pay purposes

under Title 38 after October 31, 2004, shall be coded "K" for pay purposes as of October 31, 2004 and shall be paid back pay for on-call and/or premium pay, as the case may be, from and after that date until they were, in fact, coded properly, together with interest thereon at the highest rate provided by law. The Grievants are also awarded reasonable attorneys' fees.

It is the intent of this Award that any employee who lost any pay for on-call and/or premium pay due to the failure of the Agency to implement Title 38 pay for on-call or premium pay on October 31, 2004, shall be made whole for any such losses, together with interest and reasonable attorneys' fees.

The arbitrator shall retain jurisdiction of this matter for purposes of any clarification of this Award necessary to effectuate the intent hereof for a period of not in excess of 90 days.

August 25, 2006



Joe D. Woodward, Arbitrator