

**Title 38 Decision Paper
Department of Veterans Affairs (VA)
Harry S. Truman Memorial Veterans Hospital, Columbia, Missouri**

FACTS

On December 12, 2013, the American Federation of Government Employees, Local 903 (Union) submitted an information request “[i]n accordance with 5 U.S.C. § 7114(b)(4)” of The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (Statute), “and Article 46, Section 5¹ of the Master Agreement” to management at the Harry S. Truman Memorial Veterans Hospital in Columbia, Missouri (Medical Center). (Exhibit 1). At the outset, the request stated: “It has come to our attention that some newly appointed physicians and dentists may be receiving preferential treatment in pay determinations in comparison to the incumbent physicians and dentists with comparable qualifications.” (*Id.*). The request sought the following three categories of information concerning physicians employed at the Medical Center:

1. A listing of each and every physician in the Primary and Ambulatory Care Service Line employed at Harry S. Truman Memorial Veterans Hospital during the past 5 years, which includes the Name, Age, Gender, Ethnicity, Specialty, Pay Table, Tier, Grade and Step, Duty Station, Years of Service with the Department of Veterans Affairs in the capacity of physician, and Amount [sic] of total pay with breakdown of all individual components of pay to include basic pay, market pay, performance pay, recruitment and retention incentive, incentive awards, and any and all other pay and awards.
2. For each of the physicians listed in #1, provide the VA Form 10-0432A which documents the recommendation of total pay and market pay by the Compensation Panel and any and all paperwork detailing the final decision on pay and how the figure was determined, e.g. market pay breakdown for training, experience, accomplishment, and Medical School faculty affiliation, internal and external labor market information pertaining to different duty stations, contract information, projected pay information, supervisor recommendation, etc.
3. For each of the physicians listed in #1, provide the Curriculum Vitae and any other documents used to justify a component of their pay, including, but not limited to, documents identifying their training, board certification, work experience, accomplishment

¹ Article 46 of the VA-AFGE Master Agreement pertains to Local Supplements, does not have a Section 5, and does not reference any specific right to information.

within the specialty or assignment, and Medical School faculty affiliation.

(Id.).

The Union stated its particularized need for the requested information in terms specific to each of the three categories of information requested. For information request category #1, the Union explained that it needed the information “so that we may compare the demographics of the physicians and determine if there is any trend in the total pay and individual pay components based on these demographics. We will also conduct a disparate treatment analysis based on each of these factors.” *(Id.)*. For information request category #2, the Union explained that it needed the information “so that we may analyze whether legitimate factors exist to explain any identified differences in pay. We will use this information to determine if these factors have been consistently applied by the Compensation Panel. We will also compare the Compensation Panel’s pay recommendation with the final decision signed by the Director to see if there were any changes and whether the justification for those changes is contained in these documents.” *(Id.)*. For information request category #3, the Union explained that it needed the information “to corroborate any legitimate factors considered by the Compensation Panel or determine if the stated factor was pretextual.” *(Id.)*.

The Union also provided generally that the requested information “will allow us to determine if any violations have occurred necessitating further legal action by the Local,” and, “[d]isclosure of the requested information for the past 5 years will shed light on the Agency’s performance of its statutory requirements under EEO law.” *(Id.)*.

The Medical Center refused to provide the requested information. The Medical Center explained its rationale in an e-mail dated February 6, 2014: “[The rationale for] [e]ach of your requests... suggests that the Union is interested in accumulating information that may lead to its filing a discrimination-type grievance on behalf of a Title 38 employee. As you are aware, however, 38 U.S.C. § 7422 excludes from the parties’ negotiated grievance procedure any matter or question concerning or arising out of the establishment, determination, or adjustment of physician compensation. As your entire request for information relates to physician pay, the request is wholly excluded by operation of 38 U.S.C. § 7422.” The e-mail also stated, “[t]he Agency is invoking 7422 on this matter and [is] available to meet to discuss further.” (Exhibit 2).

Informal efforts to resolve the dispute were unsuccessful and the Union filed an Unfair Labor Practice charge (ULP) with the Federal Labor Relations Authority (FLRA) on February 14, 2014. (Exhibit 3). In the ULP, the Union explained that it was not “asking to negotiate physicians’ pay,” but had requested the information “to determine if physicians with more experience and/or longer tenure, etc. are being paid commensurate with their various qualifications.” *(Id.)*.

On March 20, 2014, the Office of Labor-Management Relations received the Medical Center's formal request for a 38 U.S.C. § 7422 determination.² (Exhibit 4).

On March 21, 2014, the Medical Center's Chief of Human Resources filed the facility's ULP response with the FLRA. (Exhibit 5).

The Union filed its response (Response) to the Medical Center's request for determination on April 25, 2014.³ (Exhibit 6).

AUTHORITY

The Secretary of the Department of Veterans Affairs (Department) has the final authority to decide whether a matter or question concerns or arises out of professional conduct or competence, peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b).

ISSUE

Whether an Unfair Labor Practice charge claiming that the Medical Center failed to provide information relating to physician pay requested pursuant to 5 U.S.C. § 7114(b)(4) involves a matter or question concerning or arising out of peer review or the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b).

DISCUSSION

The Department of Veterans Affairs Labor Relations Improvement Act of 1991 granted collective bargaining rights to Title 38 employees but specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence, peer review, or employee compensation as determined by the Secretary. 38 U.S.C. § 7422.

Determining the validity of the Medical Center's refusal to provide the information requested requires discussion of two separate questions. First, does the information request have any applicability to any matter or question concerning or arising out of peer review, or the establishment, determination, or adjustment of the compensation of a Title 38 professional? Second, does the Union's information request implicate collective bargaining or the parties' negotiated grievance procedure such that the Secretary is authorized to determine that the matter is excluded under 38 U.S.C. § 7422?

A. The Information Request and the 38 U.S.C. § 7422 Exclusions

The Union's information request was made pursuant to 5 U.S.C. § 7114(b)(4) and

² The request for determination is dated March 12, 2014.

³ The Union was provided copies of the request for determination and accompanying attachments on April 6, 2014.

focused on information relating to the calculation of total pay for Medical Center physicians. In request category #1, for example, the Union requested a “breakdown of all individual components of pay to include basic pay, market pay, performance pay, recruitment and retention incentive, incentive awards, and any and all other pay and awards.” (Exhibit 1). In request category #2, the Union asked for “any and all paperwork detailing the final decision on pay and how the figure was determined.” (*Id.*). In request category #3, the Union sought copies of the physicians’ “Curriculum Vitae and any other documents used to justify a component of their pay.” (*Id.*). Without question, the Union’s information request involves, in total, a matter or question concerning or arising out of the establishment, determination, or adjustment of employee compensation.

In addition, request category #2 sought information concerning the recommendations of the Medical Center’s Compensation Panel, a peer review body instrumental in recommending appropriate pay for physicians at the facility.⁴ Request category #3 also referenced “the Curriculum Vitae and any other documents used to justify a component of [the physicians’] pay.” Therefore, to the extent that the information request sought information considered or reviewed by the Medical Center’s Compensation Panel while preparing its recommendations, it also involves a matter or question concerning or arising out of peer review.

Because the Union’s information request sought information concerning the details of the Medical Center’s establishment and determination of physician compensation and the peer review process for physician compensation at the Medical Center, the information request related to matters excluded from the collective bargaining process under 38 U.S.C. § 7422(b).

B. The Relationship Between the 5 U.S.C. § 7114(b)(4) Information Request and Collective Bargaining

5 U.S.C. § 7114(b)(4) requires Federal agencies to furnish information “necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining” unless the disclosure of such information is prohibited by law. 5 U.S.C. § 7114(b)(4)(B). 5 U.S.C. § 7114(a)(1) describes a union’s representation rights and duties and states that a union is “entitled to . . . negotiate collective bargaining agreements covering all employees in the unit.” 5 U.S.C. § 7114(b) also identifies five obligations parties must meet in order to fulfill their duty to “negotiate in good faith.” Among those obligations is management’s obligation “to furnish to the exclusive representative . . . *to the extent not prohibited by law, data . . . necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining.*” 5 U.S.C. § 7114(b)(4) (emphasis added). Therefore, a properly filed 5 U.S.C. § 7114(b)(4) request necessarily involves collective bargaining

⁴ VA Handbook 5007, Part IX, ¶ 5(g), describes a Compensation Panel as “a group of physicians or dentists responsible for the evaluation of physicians or dentists and making recommendations to the approving official for annual pay.” (Exhibit 7). Requirements for the composition of particular panels are set out in VA Handbook 5007, Part IX, ¶ 13(b). (Exhibit 8).

and 5 U.S.C. § 7114(b)(4) cannot be used to request information concerning a matter that is outside of the scope of collective bargaining pursuant to 38 U.S.C. § 7422(b) (i.e., a matter concerning or arising out of peer review or physician compensation).

The Union's assertion that the matter at hand does not involve "conditions of employment" undercuts its argument that the Medical Center must supply it copies of the requested information. (Exhibit 6). 5 U.S.C. § 7114(b)(4) only applies to "data . . . necessary for . . . discussion, understanding, and negotiation of subjects within the scope of collective bargaining," and the requirement to collectively bargain only applies to "conditions of employment." 5 U.S.C. § 7103(12). Employment matters that do not involve "conditions of employment" are outside the parties' duty to bargain and, in those instances, are not subject to the 5 U.S.C. § 7114(b)(4) information disclosure requirements. 5 U.S.C. §§ 7114(b)(4), 7103(12). In fact, the U.S. Court of Appeals for the District of Columbia Circuit (DC Circuit) has consistently found that the Statute explicitly ties a union's right to information under 5 U.S.C. § 7114(b)(4) to the collective bargaining process. United States Department of Veterans Affairs v. FLRA, 1 F.3d 19, 23 (D.C. Cir. 1993) (Amarillo) (finding that "the existence or requirement of collective bargaining [was] critical to the information right described in 5 U.S.C. § 7114(b)(4)(B)")⁶ (Exhibit 9); American Federation of Government Employees, Local 1345 v. FLRA, 793 F.2d 1360, 1363 (D.C. Cir. 1986) (Local 1345) (noting that "in collective bargaining, the duty to request and supply information is *part and parcel* of the fundamental duty to bargain") (citation omitted) (Exhibit 10). Prior 38 U.S.C. § 7422 determinations have also determined that a union has no right to information under 5 U.S.C. § 7114(b)(4) when a matter is excluded from collective bargaining pursuant to 38 U.S.C. § 7422(b). Washington VAMC (June 9, 2014); North Florida/South Georgia HCS (January 6, 2005).

In Local 1345, the DC Circuit clarified that when considering whether an employer has complied with the requirements of 5 U.S.C. § 7114(b)(4), the FLRA must consider the union's request within the "context of the *full range* of union responsibilities in both negotiation and the administration of a labor agreement." Local 1345, 793 F.2d at 1363. The DC Circuit also explained that the duty to request and supply information under 5 U.S.C. § 7114 applies "not only to information needed to negotiate an agreement, but also to data relevant to its administration." (*Id.*). However, the parties' collective bargaining agreement in this case does not contain negotiated conditions of employment concerning physician pay or peer review because such matters are excluded from collective bargaining and the negotiated grievance procedure pursuant to 38 U.S.C. § 7422. See, e.g., Article 55 – VHA Physician and Dentist Pay, Section 1(A) (Exhibit 13); see also Article 43 – Grievance Procedure, Section 2(C) (Exhibit 12); Article 2 – Governing Laws and Regulations, Section 1 (Exhibit 11). Therefore, the Medical Center was under no obligation to provide the requested information under 5 U.S.C. § 7114 (b)(4). Amarillo, 1 F. 3d. at 23.

⁶ The Amarillo decision involves actions that predate the 1991 statutory amendments that added section 7422 to Title 38.

C. The Relationship Between the 5 U.S.C. § 7114(b)(4) Information Request and the Parties' Negotiated Grievance Procedure

5 U.S.C. § 7114(b)(4) normally creates a duty on the part of a Federal agency to supply information that would assist a union in the evaluation and processing of a grievance. In its information request, the Union stated that the information was being requested to determine whether there were any "unlawful disparities in pay" or "any violations . . . necessitating further legal action by the Local." (Exhibit 1). The Union also explained that the information would "shed light on the Agency's performance of its statutory requirements under EEO law." (*Id.*). The Medical Center therefore concluded that the Union intended to use the information to support a discrimination-type grievance under the parties' collective bargaining agreement and denied the request on that basis. (Exhibit 2). Based on the content of the administrative record, it does not appear that the Union attempted to rebut the Medical Center's presumption that the Union was requesting the information in order to file a "discrimination-type grievance" until the Medical Center submitted a formal request for a 38 U.S.C. § 7422 determination several months later. The Union then clarified that the information request "*explicitly state[d]* that the purpose of the request [wa]s to determine if pursuit of an EEO matter [wa]s necessary" and clarified that "[n]o grievance under the collective bargaining agreement [wa]s being pursued or contemplated by this request for information." (Exhibit 6) (emphasis in original). In light of the Union's clarification, it is now clear that the Union was not requesting the information either to pursue such a grievance or to enforce compliance with the parties' collective bargaining agreement. (Exhibit 6).

The Union's response also cited to Veterans Administration Medical Center, Jackson, MS and NFFE, Local 589, 32 FLRA 133 (1988) (Jackson) (Exhibit 14), to support its contention that the Union had a right to the requested information in connection with its "representational functions." (Exhibit 6). However, Jackson addressed a 5 U.S.C. § 7114(b)(4) information request for the names, position titles, grades, sex, and race of *all* facility employees "in order to 'intelligently examine' complaints and determine whether a *grievance* should be filed." Jackson, 32 FLRA at 134. By contrast, the Union's information request in this matter seeks information concerning the establishment, determination, and adjustment of physician pay as well as the peer review process for physician pay, matters which are neither grievable nor subject to collective bargaining pursuant to 38 U.S.C. § 7422 (b). Since no grievance is at issue in this matter and a grievance pertaining to physician pay and the peer review process for physician pay would normally be outside the scope of the parties' negotiated grievance procedure, the Medical Center was not required to furnish the requested information to the Union pursuant to 5 U.S.C. § 7114(b)(4). Veterans Administration Medical Center, Long Beach, California and AFGE, Local 3943, 48 FLRA 970, 976 (1993) (Exhibit 15). Prior 38 U.S.C. § 7422 decisions have also determined that a union is foreclosed from pursuing a grievance under the parties' negotiated grievance procedure concerning a matter determined to concern or arise out of peer review or physician compensation pursuant to 38 U.S.C. § 7422 (b). *Hampton, VA* (July 15, 2011); *Louisville, KY* (May 20, 2008).

The Union's response also cited to Army and Air Force Exchange Service, Ft. Carson, Colorado, 25 FLRA 1060 (1987) (Exhibit 16), and U.S. Department of Justice Federal Bureau of Prisons, U.S. Penitentiary Marion, Illinois and AFGE Local 2343, 66 FLRA 669 (2012) (Exhibit 17), to support its contention that it is not required to file a Freedom of Information Act (FOIA) request for the information and that the Privacy Act does not bar release of the requested information. (Exhibit 6). However, because the information requested relates to matters excluded from collective bargaining by 38 U.S.C. § 7422(b), any entitlement the Union may have to the requested information must be found under FOIA and will not be addressed in this decision paper.

CONCLUSION

We conclude that the Medical Center was under no obligation to produce the information requested by the Union under 5 U.S.C. § 7114(b)(4). The physician pay determinations recommended by the Medical Center's Compensation Panel and the related requested pay documentation involve peer review processes and the establishment, determination, or adjustment of employee compensation. The information the union requests is excluded from mandatory disclosure because it relates to the collective bargaining process, and as such is a matter or question concerning or arising under 38 U.S.C. § 7422(b).

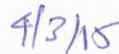
RECOMMENDED DECISION

The Unfair Labor Practice charge claiming that the Medical Center failed to provide information relating to physician pay requested pursuant to 5 U.S.C. § 7114(b)(4) involves a matter or question concerning or arising out of peer review or the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b).

APPROVED/DISAPPROVED



Robert A. McDonald
Secretary of Veterans Affairs



Date