

**Title 38 Decision Paper  
Department of Veterans Affairs (VA)  
VA North Texas Health Care System (Medical Center)**

**FACTS**

On December 28, 2015, the American Federation of Government Employees, Local 2437 (Union or AFGE Local 2437) filed a demand to bargain stating “[i]t has come to the attention of AFGE Local 2437 that you have revised the criteria used for the performance awards for physicians (MDs).” Attachment A. The Union also requested that the Medical Center “provide reasonable advance notice to the appropriate Union official(s) prior to changing conditions of employment of bargaining unit employees” and that it “agrees to forward along with the notice, a copy of any and all information and/or material relied upon to propose the change(s) in conditions of employment.” *Id.*

On February 29, 2016, the Union filed an unfair labor practice (ULP) charge with the Federal Labor Relations Authority (FLRA) asserting that, since December 29, 2015, the VAMC “has refused to consult or negotiate in good faith concerning matters affecting working conditions with AFGE Local 2437 . . . by refusing to meet at a mutual date & time and confer in good faith regarding the [d]emand to [b]argain.” Attachment C.

On March 16, 2016, the Medical Center responded to the ULP by stating that it “inadvertently failed to respond to the Union’s [d]emand to [b]argain as it was mistaken for a duplicate information request.” Attachment D. The Medical Center also explained that pursuant to 38 U.S.C. § 7422(b)(3), this matter is excluded from bargaining as it concerns or arises out of the establishment, determination, or adjustment of employee compensation. *Id.*

Subsequently, on November 3, 2016, the Medical Center responded to the Union’s December 28, 2015, demand to bargain, asserting that the matter concerns the compensation of physicians under title 38 of the United States Code (Title 38) and as such, the matter is excluded from collective bargaining pursuant to 38 U.S.C. § 7422. Attachment G.

On November 17, 2016, the Medical Center notified the Union that it intended to move forward with a request for a 7422 determination. Attachment I. The Union did not respond. Attachment K.

On November 22, 2016, the Medical Center formally requested a 38 U.S.C. § 7422 determination. *Id.*

On December 1, 2016, the Union was notified of the request and the timeframe in which it could file a response to the issues presented. Attachment L. The Union did not submit a response.

## AUTHORITY

The Secretary has final 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). On October 18, 2017, the Secretary delegated his authority to the Under Secretary for Health. Attachment M.

## ISSUE

Whether the Medical Center's failure to bargain over the criteria used for performance awards for physicians and the Union's subsequent ULP about that issue involve a matter or question concerning or arising out of the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b), and thus, are excluded from collective bargaining.

## DISCUSSION

The Department of Veterans Affairs Labor Relations Improvement Act of 1991, codified in part at 38 U.S.C. § 7422, granted limited collective bargaining rights to Title 38 employees, and specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence (i.e., direct patient care or clinical competence), peer review, or employee compensation, as determined by the Secretary.

38 U.S.C. § 7431 sets forth the three elements of physician and dentist pay in the Veterans Health Administration as base pay, market pay and performance pay. 38 U.S.C. § 7433 solely empowers the Secretary "to prescribe regulations relating to the pay of physicians and dentists in the Veterans Health Administration."

The Master Agreement between the Department of Veterans Affairs and the American Federation of Government Employees recognizes the exclusion of Title 38 compensation from bargaining. The Master Agreement explicitly sets forth in section 1 of article 55: VHA Physician and Dentist Pay:

- A. *Compensation is excluded from negotiation under 38 USC 7422.* Physician and dentist pay in the VHA is governed by Title 38 of the United States Code and VA Handbook 5007, Part IX.
- B. The following language in Sections 2 through 3 is purely for informational purposes and is not itself subject to collective bargaining or grievable under the negotiated grievance procedure. *The Secretary's pay policies will control this matter.*

Attachment N (emphasis added).

Physician performance pay is included in section 3 of article 55. That section, along with section 2, while included in the Master Agreement, “is purely for information purposes and is not itself subject to collective bargaining or grievable under the negotiated grievance procedure.” *Id.* Indeed, the Master Agreement goes on to state that the “Secretary’s pay policies will control,” notwithstanding sections 2 and 3. *Id.*

In *VAMC Columbia*, the Union sought to obtain “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” along with other supporting documentation such as “VA Form 10-0432A which documents the recommendation of total pay and market pay by the Compensation Panel”, and the “Curriculum Vitae and other documents used to justify a component of their pay.” Attachment J, (*VAMC Columbia* (April 3, 2015)). The Secretary determined that “[t]he 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.” *Id.* As such, the Secretary concluded that the information the union requested was excluded from disclosure because it related to a matter or question concerning or arising under 38 U.S.C. § 7422(b).” *Id.*

Based on the foregoing, the Medical Center’s failure to bargain over the criteria used for physician performance awards and the Union’s subsequent ULP about that issue involve a matter or question concerning or arising out of the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b), and thus, are excluded from collective bargaining.

### **DECISION**

The Medical Center’s failure to bargain over the criteria used for physician performance awards and the Union’s subsequent ULP about that issue involve a matter or question concerning or arising out of the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b), and thus, are excluded from collective bargaining.



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3/15/18  
Date