

**Title 38 Decision Paper
Department of Veterans Affairs (VA)**

FACTS

The Department of Veterans Affairs (VA) is comprised of three administrations: the Veterans Health Administration (VHA); the Veterans Benefits Administration (VBA); and the National Cemetery Administration (NCA). (Attachment A). VA is the second largest Federal Department and has a workforce of approximately 351,540 full-time employees. (Id.) At present, the VA employs approximately 108,606 Title 38 personnel in positions identified in 38 U.S.C. § 74201(1)¹. (Attachment B). VHA is America's largest integrated health care system, providing care at 1,255 health care facilities, including 170 medical centers and 1,074 outpatient sites of care of varying complexity (VHA outpatient clinics), serving 9 million enrolled Veterans each year. (Attachment C).

On March 15, 2011, a Master Collective Bargaining Agreement (2011 VA-AFGE Master Agreement) by and between the American Federation of Government Employees/National Veterans Council (Union or AFGE), and the VA was approved, signed, and effectuated. (Attachment D). The 2011 VA-AFGE Master Agreement includes Article 54, Title 38 – *Nurse Pay/Survey*. (Attachment E).

On December 15, 2017, the VA provided notification to the Union to “reopen and renegotiate the 2011 VA-AFGE Master Agreement.” (Attachment F).

On May 2, 2019, the VA/AFGE Master Agreement Bargaining team exchanged initial contract proposals in order to negotiate a successor VA-AFGE Master Agreement (Successor VA-AFGE Master Agreement). (Attachment G). In the exchanged proposals for the Successor VA-AFGE Master Agreement, the Union included a proposal covering Article 54 - *Title 38 Nurse Pay/Survey*. (Id.)

On September 10, 2019, Richard A. Stone, the Executive in Charge of VHA, submitted a Request for a 38 U.S.C. § 7422(b) determination by the VA Secretary on Article 54, *Title 38 Nurse Pay/Survey*, in the 2011 VA-AFGE Master Agreement and the Successor VA-AFGE Master Agreement negotiations. (Attachment H).

¹ The employees described in 38 U.S.C. § 7421(b), Physicians, Dentists, Podiatrists, Optometrists, Registered Nurses, Physician Assistants, Expanded-duty dental auxiliaries, and Chiropractors, are appointed under 38 U.S.C. § 7401(1).

AUTHORITY

The VA Secretary has the final authority to decide 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).

ISSUES

- (1) Whether Article 54, *Title 38 Nurse Pay/Survey*, of the 2011 VA-AFGE Master Agreement is 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 is thus excluded from collective bargaining and review by any other agency pursuant to 38 U.S.C. § 7422(d).
- (2) Whether the Union's contract proposal for Article 54, *Title 38 Nurse Pay/Survey*, which the Union submitted to the Agency during the collective bargaining negotiations over a Successor VA-AFGE Master Agreement, is 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 is thus excluded from collective bargaining and review by any other agency pursuant to 38 U.S.C. § 7422(d).

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 under 38 U.S.C. § 7422(a) 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 any matter or question concerning or arising from employee compensation, as determined by the Secretary. 38 U.S.C. § 7422(b). "Professional conduct or competence" is defined to mean "direct patient care" and "clinical competence." 38 U.S.C. § 7422(c).

Article 54, *Title 38 Nurse Pay/Survey*, of the 2011 VA-AFGE Master Agreement consists of three sections. (Attachment E). Section 1, titled "Nurse Pay Survey" states, "[T]he Union will have a mutually agreed upon representative on each Title 38 nurse pay survey team" and that "[T]he selection of the discretionary facilities to be surveyed will be a subject for partnership." (Id.) Section 1 references 38 U.S.C. § 7451, the statute

covering competitive pay for nurses and other health care personnel. (Id.) Section 2 of Article 54 of the 2011 VA-AFGE Master Agreement covers "Adjustments to Pay". (Attachment E). Section 2 also references 38 U.S.C. § 7451 in discussing the subject matter – annual adjustments to nurse pay. (Id.) Section 3 of Article 54 of the VA-AFGE Master Agreement is titled "Premium Pay." (Attachment E.) Section 3 references and covers the subject matter of 38 U.S.C. §7453 – additional pay authorities for nurses– holiday pay. (Id.)

On May 2, 2019, the VA/AFGE Master Agreement Bargaining team exchanged initial contract proposals. (Attachment G). The Union's proposal covering Article 54, *Title 38 Nurse Pay/Survey*, for the Successor VA-AFGE Master Agreement states:

"Section 1 – Nurse Pay Survey

The Union will have a mutually agreed upon representative on each Title 38 nurse pay survey team.

The selection of the discretionary facilities to be surveyed will be a subject for partnership.

In accordance with 38 USC 7451 and Department regulations, Title 38 nurse pay surveys shall be limited to the labor market area or other areas as authorized by regulations.

Surveys shall be done consistent with the provisions of 38 USC 7451 and Department regulations.

In gathering data in accordance with 38 USC 7451, and wherever feasible, survey data for Title 38 nurse pay surveys shall be collected based on on-site visits data collected by way of the Hay Group Survey or any successor provider.

The Department will provide the local union a copy of all data collected from the Hay Group Survey.

Section 2 - Adjustments to Pay

In accordance with 38 USC 7451 and Department regulations, any adjustments in Title 38 nurse pay shall be examined on an annual basis whenever adjustments are made in General Schedule pay.

Whenever an adjustment in Title 38 nurse pay is delayed due to administrative error, a nurse shall be retroactively compensated for any lost salary.

Section 3 - Premium Pay

Evening - In accordance with 38 USC 7453(b), a nurse performing service, any part of which is within the period beginning at 6 pm and ending at 6 am, shall receive additional pay for each hour of service at a rate equal to 10 percent of the nurse's hourly rate of basic pay if at least four hours fall between 6 pm and 6 am. When less than four hours fall between 6 pm and 6 am, the nurse shall be paid the differential for each hour of service performed between those hours.

Weekend - In accordance with 38 USC 7453(c), a nurse performing service, any part of which is within the period commencing at midnight Friday and ending at midnight Sunday, shall receive additional pay for each hour of service at a rate equal to 25 percent of such nurse's hourly rate of basic pay.

Federal Holiday - In accordance with 38 USC 7453(d), a nurse performing service on a holiday designated by Federal statute or Executive Order shall receive for each hour of such service the nurse's hourly rate of basic pay, plus additional pay at a rate equal to such hourly rate of basic pay, for that holiday service, including overtime service. Any service required to be performed by a nurse on such a designated holiday shall be deemed to be a minimum of two hours in duration. Registered Nurses working compressed tours are paid their hourly rate of basic pay plus additional pay at a rate equal to such hourly rate of basic pay (known as "double-time"). However, split tours on a holiday are not paid the same way. The Registered nurse working a split tour will receive "double-time" for the first tour worked and overtime for the second tour worked (e.g. RN works 12 a.m. — 8 a.m.; returns and works 3:30 p.m. to 12 midnight).

Overtime - In accordance with 38 USC 7453(e)(l), a nurse performing officially ordered or approved hours in excess of 40 hours in an administrative work week, or in excess of 8 hours in a day, shall receive overtime pay for each hour of such additional service. The overtime rates shall be one and one-half times such nurse's hourly rate of basic pay. For further clarification, see Article 20 - Hours of Work and Overtime (Alternative Work Schedules).

Compensatory Time - In accordance with 38 USC

7453(e)(3), compensatory time off in lieu of pay for service performed under the overtime provisions of Title 38 shall not be permitted unless voluntarily requested in writing by the nurse in question.

On-Call Duty - In accordance with 38 USC 7453(h), a nurse who is officially scheduled to be on call outside such nurse's regular hours or on a holiday designated by Federal statute or Executive Order shall be paid for each hour of such on call duty, except for such time as such nurse may be called back to work, at a rate equal to 10 percent of the hourly rate for overtime service (i.e., 15 percent of the hourly rate of basic pay)."

(Id.)

Subchapter IV of Chapter 74 of Title 38 addresses pay for nurses and other health-care personnel. 38 U.S.C. §§ 7451-7459. The procedures by which VA officials establish, determine, or adjust Title 38 nurses' pay are set forth in 38 U.S.C. § 7451. (Attachment I). Section 7451 of Title 38 authorizes directors of VA health care facilities to adjust nurses' basic pay as needed to remain competitive with the salaries offered by non-Department health care facilities in the same market area. (Id.) Where there is no current Bureau of Labor Statistics (BLS) survey of nurse salaries in the area, the statute provides that "the director of that facility shall conduct a survey in accordance with this subparagraph and shall adjust the amount of the minimum rate of basic pay for grades in that covered position at that facility based upon that survey. To the extent practicable, the director shall use third-party industry wage surveys to meet the requirements of the preceding sentence." 38 U.S.C. §7451(d)(3)(B). The statute further provides that "[i]nformation collected by the Department in surveys conducted under this subsection is not subject to disclosure under [the Freedom of Information Action (FOIA)], section 552 of Title 5." (Id.)

Additional pay authorities for Title 38 nurses are found in 38 U.S.C. § 7453. (Attachment J). The statute covers nurse pay matters including pay on weekends (38 U.S.C. § 7453(c)), pay during Federal holidays (38 U.S.C. § 7453(d)), overtime (38 U.S.C. § 7453(e)(1)), compensatory time (38 U.S.C. § 7453(e)(3)), and on-call duty (38 U.S.C. § 7453(h)). (Id.)

Pursuant to 38 U.S.C. § 7421(a), the VA Secretary has the authority to prescribe by regulation the hours and conditions of employment and leaves of absence of personnel appointed under Chapter 74 of Title 38 in the positions listed in 38 U.S.C. 7421(b), which includes nurses. 38 U.S.C. § 7421. VA Handbook and Directive 5007, entitled "Pay Administration", addresses nurse pay. (Attachment K). While 38 U.S.C. § 7422(a) states: "the authority of the Secretary to prescribe regulations under section 7421 of [title 38] is subject to the right of Federal employees to engage in collective bargaining

with respect to conditions of employment through representatives chosen by them in accordance with chapter 71 of title 5 (relating to labor-management relations)", 38 U.S.C. § 7422(b) specifically prohibits collective bargaining over matters that concern or arise out of the establishment, determination, or adjustment of employee compensation for such employees. 38 U.S.C. § 7422(b)(3).

Article 54 of the 2011 VA-AFGE Master Agreement and the Union's proposal for Article 54 in the Successor VA-AFGE Master Agreement cover matters concerning or arising out of nurse pay and pay surveys. A review of Article 54 in both the 2011 VA-AFGE Master Agreement and the Union's proposal for the Successor VA-AFGE Master Agreement shows that much of the content simply restates what is already outlined by the Title 38 Nurse pay statutes identified above and does not significantly diverge from the language in those provisions. For example, Section 2, Subsection A of Article 54 of the 2011 VA-AFGE Master Agreement states, "In accordance with 38 U.S.C. § 7451 and Department regulations, any adjustments in Title 38 nurse pay shall be examined on an annual basis whenever adjustments are made in General Schedule pay." (Attachment E). This directly reflects the language of 38 U.S.C. § 7451(d)(1)(A), which indicates that rates for basic pay will be adjusted "whenever there is an adjustment under section 5303 of title 5 in the rates of pay under the General Schedule." (Attachment I).

Similarly, Section 3 of the proposed Article 54 in the Successor VA-AFGE Master Agreement covers "Premium Pay." The section directly references various subsections of 38 U.S.C. § 7453 and merely restates what those subsections cover. For example, the Union's Article 54 proposal includes a section titled "Evening," which directly references 38 U.S.C. § 7453(b). The opening section of that subsection of the statute states, "A nurse performing service, any part of which is within the period commencing at 6 postmeridian and ending at 6 antemeridian, shall receive additional pay...." The proposed language for Article 54 in the Successor VA-AFGE Master Agreement merely substitutes "beginning" for the term "commencing" in the statute and the abbreviations "pm" and "am" for the respective time periods.

One area where Article 54 of the VA-AFGE Master Agreement diverges from statute and policy is the subject of nurse pay surveys. VA Handbook 5007 addresses nurse salary surveys in Part X. (Attachment K, VA Handbook 5007, Part X). VA Handbook 5007, Part X states that if a "facility Director determines that a significant pay-related staffing problem exists or is likely to exist for any grade of a covered occupation or specialty, the Director must conduct a salary survey or use a BLS or other third-party industry salary survey to determine whether a rate adjustment is necessary to remain competitive with the rates of compensation for corresponding positions, if such a survey has not been conducted within 120 days." (Id., VA Handbook 5007, Part X, chapter 1, ¶ 4(b)(1)). More specifically, VA Handbook 5007, Part X provides that "[W]hen BLS data

are not available [for a facility's labor market area] or [are] not current, the Director shall, to the extent practicable, use other third-party wage surveys' to determine whether an adjustment to nurse pay is warranted." (Id., VA Handbook 5007, Part X, chapter 1, ¶ 4(d)). If a third-party survey is used, VA Handbook 5007, Part X requires that the survey include a number of specific types of salary data; reflect salary data for a labor market area that "includes the county in which the covered employees will be assigned and is representative of the location of competing establishments;" report data that is easily equated to the VA nurse grade levels; and include enough participant facilities to provide a statistically valid sample. (Id., VA Handbook 5007, Part X, chapter 1, ¶ 4(d)(a)(1)-(6)).

The subject matters and content of Article 54 – Title 38 *Nurse Pay/Survey* in the 2011 VA-AFGE Master Agreement and the Union proposal covering Article 54, Title 38 Nurse Pay/Survey, for the Successor VA-AFGE Master Agreement directly concern or arise out of nurse compensation. The inclusion of such Articles in both the current 2011 VA-AFGE Master Agreement and a successor VA-AFGE Master Agreement constitute collective bargaining over Title 38 nurse pay and are inconsistent with the collective bargaining exclusions in 38 U.S.C. § 7422(b). Such matters are specifically excluded from the collective bargaining rights of the employees listed in 38 U.S.C. § 7421(b), including nurses.

The Secretary has previously determined that information pertaining to the adjustment of RN locality pay and nurse pay surveys is excluded from collective bargaining by 38 U.S.C. § 7422. In VAMC North Florida/South Georgia, the union requested a copy of a third-party salary survey that the facility was considering for use relating to its nurse locality pay adjustment process. (Attachment L, VAMC North Florida/South Georgia (January 6, 2006)). The union filed a ULP with the FLRA alleging that they had a right to obtain the third-party data (i.e. Florida Hospital Survey). The Medical Center denied the request as excluded from collective bargaining by 38 U.S.C. § 7422(b). (Id.) The Secretary determined that the VAMC's failure "to provide requested information pertaining to the adjustment of nurse locality pay, be deemed exempt from the collective bargaining process under 38 U.S.C. §7422(b) as matters concerning or arising out of the establishment, determination or adjustment of employee compensation under Title 38." (Id.)

The Secretary has also determined that the adjustment of nurse overtime and reduction in nurse pay are excluded from collective bargaining by 38 U.S.C. § 7422. In Louisville VAMC, the Secretary determined that a grievance filed regarding overtime compensation for nurses in the Geriatric Extended Care Facility involved issues concerning or arising out of the establishment, determination, or adjustment of employee compensation. (Attachment M, (VAMC Louisville, May 20, 2008)). The decision noted that the term "compensation" in 38 U.S.C. § 7422(b) covered all aspects

of compensation, including overtime compensation as covered by 38 U.S.C. § 7453(e)(1). In Central Alabama Veterans HCS, AFGE filed a grievance over nurses whose compensation was adjusted after it was discovered that they were improperly paid a specialty rate. (Attachment N, (Central Alabama Veterans HCS, September 10, 2013)). The Secretary determined that the grievance concerning the nurses' reduction in pay involved a matter concerning or arising out of the establishment, determination, or adjustment of employee compensation under 38 U.S.C § 7422 and noted that VA Handbook 5007, Part X, Section 1 placed the responsibility for determining and adjusting nurse pay rates under the Locality Pay System on facility directors.

Similar to the above decisions, Article 54, Title 38 *Nurse Pay/Survey*, in both the 2011 VA-AFGE-Master Agreement and union proposal for the Successor VA-AFGE-Master Agreement address nurse premium pay, pay adjustments, and pay surveys. Therefore, the inclusion of such articles in any VA collective bargaining agreement is inconsistent with the collective bargaining exclusion concerning employee compensation in 38 U.S.C. § 7422(b)(3).

RECOMMENDED DECISION

The Article 54, *Title 38 Nurse Pay/Survey*, of the 2011 VA-AFGE Master Agreement concerns or arises out of the establishment, determination or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b) and is thus excluded from collective bargaining and review by any other agency pursuant to 38 U.S.C. §7422(d).

RLW
Approved

Disapproved

The Article 54, *Title 38 Nurse Pay/Survey*, contract proposal submitted by the Union for the Successor VA-AFGE Master Agreement concerns or arises out of the establishment, determination or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b) and is thus excluded from collective bargaining and review by any other agency pursuant to 38 U.S.C. §7422(d).

RLW
Approved

Disapproved

Robert L. Wilkie
Robert L. Wilkie
Secretary of Veterans Affairs

25 OCT 19
Date