



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

JAN 06 2005

Director, North Florida/South Georgia Veterans Health System
1601 S.W. Archer Road
Gainesville, Florida 32608

Executive Vice President, AFGE Local 2779
1601 S.W. Archer Road
Gainesville, Florida 32608

Dear Mr. _____ and Mr. _____ :

I am responding to the issues raised in your memoranda of November 3 and November 29, 2005, respectively, concerning the union's unfair labor practice charge (ULP) relating to management's denial of the union's request for third party data to be used to set pay for nurses employed at the North Florida/South Georgia Veterans Health System.

Pursuant to delegated authority, I have decided, on the basis of the enclosed paper, that the issue presented is a matter concerning or arising out of the establishment, determination or adjustment of employees compensation, and is thus exempted from collective bargaining by 38 U.S.C. 7422(b).

Sincerely yours,

A handwritten signature in black ink, appearing to read "Jonathan B. Perlin", is written over the typed name.

Jonathan B. Perlin, MD, PhD, MSHA, FACP
Under Secretary for Health

Title 38 Decision Paper
North Florida/South Georgia Veterans Health System

VA – 06-02

FACTS:

On September 12, 2005, the Executive Vice President of AFGE Local 2779 sent an email to the Supervisory Human Resources Specialist at the North Florida/South Georgia Veterans Health System (NF/SGVHS) requesting a copy of a third party salary survey that the facility was considering for use in connection with its nurse locality pay adjustment process. The union stated that it needed the "Florida Hospital Survey ... to fully represent all [bargaining unit employees] in Nursing Service not only in the outpatient clinic settings but also in the hospital." The union asked that the requested information be made available the following day. (Attachment A.)

On September 13, 2005, facility management denied the union's request, stating that "the exclusive representative is only entitled to information necessary to carry out the representational duties. The 'establishment, determination, or adjustment of employee compensation' for Title 38 employees is specifically excluded from the representational process, as outlined in [38 U.S.C. §7422]." (Attachment B.)

On October, 11, 2005, the union filed an Unfair Labor Charge (ULP) with the Federal Labor Relations Authority (FLRA), alleging that management violated 5 U.S.C. § 7114(b)(4) when it refused to provide the requested salary survey information. (Attachment C.)

On November 2, 2005, the Director of the NF/SGVHS responded to the ULP, informing the FLRA that the union was not entitled to the requested information because 38 U.S.C. §7422 bars both bargaining and grievances over issues involving the establishment, determination or adjustment of Title 38 employee compensation. (Attachment D.)

By memorandum dated November 3, 2005, the Director of the NF/SGVHS requested a determination by the Under Secretary for Health that the issues involved in the ULP are excluded from collective bargaining and not subject to FLRA review pursuant to 38 U.S.C. §7422(b). (Attachment E.)

On November 29, 2005, the union submitted to the USH a memorandum requesting that the Director's request for a 38 U.S.C. §7422 decision be denied. (Attachment F.) In its memorandum, the union alleged that NF/SGVHS' use of "the 'Florida Hospital Survey' is an attempt to circumvent the Nurse Locality Pay Survey addressed in Article 51 of the Master Agreement." More specifically, the union alleged:

The 'Florida Hospital Survey' ... is not being used to address base pay as implied in management's Memorandum dated November 3, 2005. It is being used to set locality pay. Article 51 of the [AFGE] Master Agreement assures union involvement in Locality Pay Surveys. This facility has an active Partnership Council that meets on a monthly basis. True, setting base pay for nurses is outside the 'Collective Bargaining' process; however[,] Article 51 assures involvement of the Local in the Nurse Locality Pay survey as does a local MOU assuring the same.

(Attachment F, paragraphs 1-2).¹

RELEVANT PROVISIONS OF NATIONAL AND LOCAL COLLECTIVE BARGAINING AGREEMENTS:

The VA-AFGE Master Agreement provides, at Article 51, Section 1:

- A. The Union will have a mutually agreed upon representative on each Title 38 nurse pay survey team.
- B. The selection of the discretionary facilities to be surveyed will be a subject for partnership.
- C. In accordance with 38 USC 7451 and VA regulations, Title 38 nurse pay surveys shall be limited to the labor market area or other areas as authorized by regulations.
- D. Surveys shall be done consistent with the provisions of 38 USC 7451 and VA regulations.
- E. 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.

(Attachment G.)

¹ The union also alleges in its November 29, 2005 memorandum that VA's Central Office Labor Relations (VACO LMR) staff advised NF/SGVHS prior to management's November 3, 2005 submission that the matter "was a 7422 issue," apparently meaning that the matter was in some way improperly pre-judged. Attachment F, paragraph 2. Because this is the third time the USH has been asked to render a 38 U.S.C. §7422 determination in connection with a union's request for Title 38 pay adjustment information at a Florida-based VA facility, it might have benefited the union, not just local management, to consult VACO LMR before proceeding to litigate the ULP in this matter. While the USH's determinations under 38 U.S.C. §7422 (d) are case-specific, this matter is so factually similar to the prior Florida locality pay cases as to mandate a similar result, and it seems a waste of the union's time – as well as management's and FLRA's – to proceed with the subject ULP in light of that history. See discussion of prior USH decisions at page 5 below.

The NF/SGVHS entered into a memorandum of understanding (MOU) with AFGE Local 2779 relating to nurse salary surveys on August 26, 2003. That MOU provides, in pertinent part:

The Agency agrees to comply with provisions of the applicable Master Labor Agreement between the parties and all applicable VA regulations relating to Title 38 Nurse Pay Survey.

(Attachment H.)

PROCEDURAL HISTORY:

The Secretary has delegated to the Under Secretary for Health (USH) the final authority in the VA to determine whether a matter or question concerns or arises out of the establishment, determination, or adjustment of employee compensation under Title 38.

ISSUE:

Whether the issues underlying the union's ULP, relating to the failure of NF/SGVHS management to provide requested information pertaining to the adjustment of nurse locality pay at the NF/SGVHS and its outpatient clinics, are 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.

DISCUSSION:

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

The procedures by which VA officials adjust Title 38 nurses' pay are set forth in 38 U.S.C. §7451 and in VA regulations implementing the statutory authorities. 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. 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 Act (FOIA),] section 552 of Title 5." 38 U.S.C. §7451(d)(5).²

The VA Secretary has promulgated regulations pertaining to nurse salary surveys in VA Handbook 5007, Part X. Those regulations generally provide 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." VA Handbook 5007, Part X, Chapter 1, paragraph 4(b)(1). More specifically, the regulations provide that "when 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. VA Handbook 5007, Part X, Chapter 1, paragraph 4(d). If a third-party survey is used, the regulations require 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." VA Handbook 5007, Part X, Chapter 1, paragraph 4.d.(1)-(6). The NF/SGVHS Director's use of the Florida Hospital Survey to adjust nurse pay met these regulatory requirements.

In its ULP charge, the union alleged that it had a right to obtain the Florida Hospital Survey from NF/SGVHS management under the Federal Service Labor Management Relations Statute, 5 U.S.C. § 7114(b)(4). Under that statute, a union's right to information depends on whether there is an appropriate representational use to which the data might be put. In this case, the information requested concerns locality pay for nurses at the NF/SGVHS and at that facility's satellite outpatient clinics. To the extent that such issue is outside the scope of collective bargaining under 38 U.S.C. § 7422, there is no representational right of the union that relates to the requested information, and the failure of management to comply with the information request does not give rise to a ULP that is subject to FLRA's jurisdiction. *Department of Veterans Affairs, Washington, DC and VA Medical Center, Amarillo, TX v. Federal Labor Relations Authority*, 1 F.3d 19 (D.C. Cir. 1993); see also February 4, 2003 notice of dismissal in FLRA Case No. AT-CA-02-0501 (withdrawing complaint and dismissing ULP charge filed by NFFE Local 1453, Oakland Park Outpatient Clinic (OPOC), over Miami VA Medical Center's failure to provide information relating to

²The placement of this FOIA exception within 38 U.S.C. §7451 suggests that it applies both to VA surveys and to third party survey data used in lieu of VA-collected data under 38 U.S.C. §7451(d)(3). However, because 38 U.S.C. §7422 applies only to collective bargaining, not to FOIA requests, the union's entitlement to the requested data under FOIA will not be addressed in this decision paper.

management's determination of scarce specialty pay to be awarded to physicians at the Miami Medical Center and OPOPC, respectively).

The union further alleges in this case that the NF/SGVHS' use of a third-party survey to set locality pay, rather than conducting its own survey, violated Article 51 of the VA-AFGE Master Agreement and/or similar provisions of a local MOU providing for union representation on salary survey teams. This allegation is unfounded for several reasons. First, the subject agreements, by their terms, do not require local management to field a survey team, but only to include a union representative when a team is fielded. Moreover, the subject agreements must be read to be consistent with the Title 38 locality pay statute, including the provision of 38 U.S.C. §7451(d)(3)(B) requiring facility Directors to use third-party pay survey data to the extent practicable rather than conducting surveys of their own. Nothing in Article 51 of the Master Agreement or in the local parties' MOU conflicts with that statutory provision, nor could the parties negotiate a procedure that is contrary to the express statutory requirements.³ The parties cannot vary an express statutory requirement through collective bargaining. 5 U.S.C. § 7103(a)((14)(C); see also NFFE Local 28 and Dept. of Army, 45 FLRA 603, 606-07 (1992). Indeed, had they attempted to bargain around a statutory requirement relating to the adjustment of nurse pay, that bargaining itself would have violated 38 U.S.C. §7422(b).

In two previous cases involving requests for information relating to Title 38 pay surveys, the USH has determined that such a request involves the establishment, determination or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b). In a December 11, 2003 determination (VA-03-11), the USH determined that information relating to a nurse salary survey conducted by the Miami VA Medical Center involved the establishment, determination or adjustment of employee compensation, and that a ULP relating to management's denial of a union request for that information therefore involved issues excluded from collective bargaining under 38 U.S.C. §7422. Similarly, in a December 16, 2002 determination (VA-02-07), the USH ruled that information relating to adjustment of physician scarce specialty pay within the Miami-Dade and Broward County local labor market areas, respectively, arose out of a matter or question of the establishment, determination or adjustment of employee compensation under Title 38. On the basis of the USH's § 7422 determination, the FLRA withdrew the complaint and dismissed the union's charge. (See

³ The VA-AFGE Master Agreement, which took effect in 1997, pre-dates the amendment of 38 U.S.C. §7451 that included what is now 38 U.S.C. §7451(d)(3)(B). The version of the statute that was in effect when that agreement was signed required VAMC Directors to conduct their own salary surveys if there was no current BLS information on compensation for corresponding health-care professionals. The requirement to use third-party data where practicable was not added to the statute until November 2000. Compare Public Law 101-366 [H.R. 1199], Section 102(b) (8/15/1999), with Public Law 106-419 [S. 1402], Section 201(a)(1)(C)(i) (a) (11/1/2000). However, the local MOU requiring NF/SGVHS management to abide by the provisions of the VA-AFGE Master Agreement was signed in 2003, several years after the current version of 38 U.S.C. § 7451(d)(3) took effect.

dismissal dated February 4, 2003 in FLRA Case No. AT-CA-02-0501. This matter is so similar to those prior cases as to require the same result.

RECOMMENDED DECISION

That the issues underlying the union's ULP, relating to the failure of NF/SGVHS management 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.

APPROVED _____



DISAPPROVED _____

A handwritten signature in cursive script, appearing to read 'Jonathan B. Perlin', is written over a horizontal line.

Jonathan B. Perlin, MD, PhD, MSHA, FACP
Under Secretary for Health

1-6-06

Date