

Title 38 Decision Paper
Department of Veterans Affairs (VA)
Central Plains Consolidated Patient Account Center (CPCPAC)

FACTS

On March 13, 2018, the American Federation of Government Employees (AFGE), Local 085 (Union) submitted an information request “[i]n accordance with 5 U.S.C. § 7114” of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (Statute). (Attachment A). The request sought all Wage Grade Survey documentation and results for Revenue Utilization Review (RUR) nurses at the Central Plains Consolidated Patient Account Center (CPCPAC) for the years 2012 through 2018. *Id.* The Union’s justification for the request was that the information would be “used to determine if the agency is doing the required Wage Grade Surveys and adjusting applicable employee’s pays, as required by law, rules and regulations.” *Id.* The request noted that the information was “maintained in a known system of records and is easily accessible by the Agency.” *Id.*

The CPCPAC responded to the Union’s 5 U.S.C. § 7114(b) request on April 20, 2018. (Attachment B). In response, the CPCPAC noted that they did not maintain the requested data at the facility as the CPCPAC was not deemed a “health-care facility.” *Id.* The response notes that under 38 U.S.C. § 7451, directors of health care facilities receive wage survey data for Title 38 employees. Further, the RUR nurses are centralized and fall under the LPS rates established by the local medical center, the Leavenworth VA Medical Center (VAMC). *Id.* Therefore, any increase in compensation would be determined by the Leavenworth VAMC. *Id.* The CPCPAC requested further clarification of the information request, noting that the Union had not identified a “particularized need” for the requested Wage Grade Survey documentation to assist the facility with determining “if there is an alternative document or documents that would enable the Union to fulfill their representational responsibilities.”

On April 24, 2018, the Union filed an Unfair Labor Practice charge (ULP) with the Federal Labor Relations Authority (FLRA). (Attachment C). The ULP charged that an email from the CPCPAC Director dated April 10, 2018, was a “binding agreement to provide the requested data.” *Id.* The ULP notes that the CPCPAC Director formally responded on April 20, 2018, denying the request because “particularized need was not met.” *Id.* The Union asserted that the particularized need was met and the April 10, 2018 email constituted a binding agreement. *Id.*

On June 8, 2018, the CPCPAC Director asserted that the facility was not required to provide the pay surveys requested by the Union because the matter involves “the establishment, determination, or adjustment of employee compensation” is excluded from collective bargaining under 38 U.S.C. § 7422(b). (Attachment D).

On August 21, 2018, the Union withdrew the ULP. (Attachment E).

On September 5, 2018, the Union offered “clarification” of their March 13, 2018, information request under 5 U.S.C. 7114(b). (Attachment F). The Union noted they were seeking the documentation to ensure compliance with Article 54 of the AFGE Master Agreement. *Id.* Further, although CPCPAC did not possess the information, that was insufficient reasoning for not providing the data, as the Agency (VHA) would have the data. *Id.* Lastly, although Title 38 pay might be non-grieveable, declaring a subject non-grieveable was no sufficient cause for failing to provide the requested data. *Id.* The Union provided the CPCPAC 10 days to provide the requested information. *Id.*

On September 19, 2018, the Union filed an Unfair Labor Practice charge (ULP) with the Federal Labor Relations Authority (FLRA).¹ (Attachment G). The ULP charged that the Union met the particularized need in the information request, and that the CPCPAC failed to respond to their request within the 10-day time frame which they allotted them after issuing points of clarification to the Agency on September 5, 2018. *Id.*

On October 3, 2018, the CPCPAC Director responded to the Union and reasserted that the matter is excluded by 38 U.S.C. § 7422. (Attachment H).

On November 29, 2018, the CPCPAC Director again attempted to discuss the issue with the Union, reiterating that the requested information was statutorily excluded from the scope of collective bargaining per 38 U.S.C. § 7422. (Attachment I).

On December 19, 2018, the CPCPAC filed a request for a 38 U.S.C. § 7422 determination. (Attachment J). The Union did not submit a response to the issues raised in the VAMCs request for determination.

AUTHORITY

The Secretary of Veterans Affairs 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). On October 18, 2017, the Secretary delegated his authority to the Under Secretary for Health. (Attachment K.)

ISSUE

Whether an Unfair Labor Practice charge claiming that the CPCPAC failed to provide third party Wage Grade Survey documentation and results pertaining to the adjustment of nurse pay requested pursuant to 5 U.S.C. § 7114(b)(4) involves a matter or question concerning or arising out of the establishment, determination, or adjustment of

¹ The Federal Relations cover letter dated September 24, 2018 sets forth the case as DE-CA-15-0320, although the FLRA form sets forth that it is DE-CA-18-0320

employee compensation within the meaning of 38 U.S.C. § 7422(c), and 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 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).

Nurse pay is addressed in Subchapter IV of Chapter 74 of Title 38. 38 U.S.C. §§ 7451-7459. The procedures by which VA officials establish, determine, or adjust pay for nurses are set forth in 38 U.S.C. § 7451. The statute authorizes the 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. 38 U.S.C. § 7451(a)(1). The adjustment of the rates of basic pay is based on the “beginning rate of compensation for corresponding health-care professionals in the Bureau of Labor Statistics (BLS) labor-market area of that facility.” 38 U.S.C. § 7451(d)(2). Facilities are permitted to either utilize industry-wage survey data for the local labor market from the Bureau of Labor Statistics, if available, or conduct their own surveys of the labor-market area. 38 U.S.C. § 7451(d)(3). Of note, the statute specifies that the term “health-care facility” means a medical center, an independent outpatient clinic, or an independent domiciliary facility. 38 U.S.C. § 7451(f).

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. Policies regarding nurse and other health professional pay is governed by VA Handbook and Directive 5007, entitled “Pay Administration.” Nurse salary surveys are addressed in VA Handbook 5007, Part X. This section of the Handbook provides details on the policies and procedures for adjusting basic pay rates for nurses based on the requirements listed in 38 U.S.C. § 7451, including the adjustment of locality pay based on pay survey data from BLS or based on surveys conducted by VA. See VA Handbook and Directive 5007, Part X, Chapters 1 and 2.

5 U.S.C. § 7114(b)(4)(B) 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(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.” However, 5 U.S.C. § 7114(b) also identifies five obligations parties must meet 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).

38 U.S.C. § 7422(a) states, “[T]he 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.” However, 38 U.S.C. § 7422(b) specifically prohibits collective bargaining over certain subject matters, including those matters that concern or arise out of the establishment, determination or adjustment of employee compensation. 38 U.S.C. § 7422(b)(3). While the labor-management authorities codified in Chapter 71 of Title 5 permit union representatives to make information requests, such information requests are subject to the requirements of 38 U.S.C. § 7422. Therefore, as in this case, the agency is not required to provide or bargain over the information requested given that the information in question is directly tied to employee compensation, one of the subject matters barred from collective bargaining under 38 U.S.C. § 7422(b).

Salary survey documentation for Title 38 providers has been historically determined by the VA Secretary to be excluded from collective bargaining pursuant to 38 U.S.C. § 7422. In VAMC Columbia, the Secretary determined that the Union’s information request for “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.” (Attachment L, VAMC Columbia (April 3, 2015)). Thus, the requested information was deemed by the Secretary as “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).” *Id.* 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 M, 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 VAMC 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.*

RECOMMENDED DECISION

The Unfair Labor Practice charge claiming that the CPCPAC failed to provide third party salary survey information relating to nurse pay pursuant to 5 U.S.C. § 7114(b)(4)

involves 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 and review by any other agency pursuant to 38 U.S.C. §7422(d).



February 24, 2021

Richard A. Stone, M.D.
Acting Under Secretary of Health

Date