

**Title 38 Decision Paper**  
**Department of Veterans Affairs (VA)**  
**San Diego Healthcare System (Medical Center)**

**FACTS**

On or about May 15, 2018, the San Diego Healthcare System (Medical Center) provided a briefing of the newly implemented Registered Nurse (RN) pay scales to National Nurses United (Union or NNU). The briefing included a “further explanation” of the adjustments to the pay of RNs based on the Locality Pay System (LPS), as well as, afforded the Union “an opportunity to ask clarifying questions or discuss the matter in person.” (Attachment A). The briefing outlined the percentage change in pay for each RN occupation at the Medical Center, an explanation regarding the sources of survey data used, and the authorities utilized to make the adjustments. (Attachment B).

On May 22, 2018, in response to the Union’s request for pay data utilized in the determination of the RN pay scales, the Medical Center provided a detailed summary of the RN pay increases, including information relative to the “retroactive payment and anticipated date of payout as well as the approved percentages for each occupation.” (Attachment C). The summary also included the name of the 3<sup>rd</sup> party survey used and the job match information. Id.

On June 5, 2018, the Medical Center provided the Union with an update on RN salary increases, which encompassed the “data points” utilized to create the new salary schedules. (Attachment D). The update included the approved percentages broken down by each occupation, the 3<sup>rd</sup> party survey the data was pulled from, and the job match information, as well as data points that described either the “percentile, midpoint, or maximum dollar amount for each position. The specific dollar amounts were also included.” Id.

On August 1, 2018, during the monthly Medical Center and Union meeting, the Union “indicated that the survey information should be provided in accordance with Article 53<sup>1</sup>” of the VA NNU Master Collective Bargaining Agreement (Master Agreement). (Attachment E). The Union reported discontent from RNs at the I and II levels and “requested to obtain all survey data and management’s rationale for the percentage increases.” Id. The Union informed management that they wanted to see “if the Agency’s analysis was consistent with their analysis.” Id.

On August 28, 2018, the Medical Center issued a written response to the Union’s request for the survey data asserting that the Medical Center “determined that it needs more information as it relates to the Union’s particularized need in order to further

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<sup>1</sup> The Union indicated that the Medical Center had also violated Article 6 of the Master Agreement, entitled “Employee Rights.” The Union later raised this argument in the Step 3 grievance. However, the Union did not articulate a clear basis for alleging that Section 1(a) of Article 6 was violated. Therefore, the alleged violation of Article 6 will not be addressed in this decision.

evaluate the request” and that the “information provided to NNU thus far is in compliance with Article 53.” (Attachment E). The Medical Center requested information on the “uses to which the information would be put and the connection between the uses and Union’s responsibilities” to represent the members. Id. In the response, the Medical Center summarized the information already provided to the Union regarding the determination of the RN pay scales. Id.

On September 20, 2018, the Union filed a Step 3 Grievance which stated that the Medical Center failed “to provide the pay surveys and all data used to determine the pay increases given to bargaining unit RNs in March 2018.” (Attachment F). The Union reiterated that the Agency had violated Article 53 of the Master Agreement. Id.

On October 10, 2018, the Medical Center issued a Step 3 Grievance Memorandum denying the grievance based upon the fact that the Medical Center had already “provided the specific data points used to determine the pay scales as revised from March 2018.” (Attachment G). The Medical Center asserted that the data points provided reflected “the survey used and the percentile or band used to formulate each respective pay increase.” The grievance response highlighted the May 15, 2018 briefing to the Union during which additional details and explanation regarding the RN pay scales were provided. Id. Furthermore, the Medical Center noted that matters concerning or arising out of RN compensation are excluded from the negotiated grievance procedures and collective bargaining pursuant to 38 U.S.C. § 7422, when applicable. Id.

On October 16, 2018, the Union invoked arbitration, citing to the VAMCs failure to provide the pay survey and all data used to determine the pay increases given to bargaining unit RNs in March 2018. (Attachment H).

On February 20, 2019, the Medical Center filed a request for a 38 U.S.C. § 7422 determination. (Attachment A). The Union was informed of the request but did not submit a response.

## **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 38 U.S.C. § 7422(d) authority to the Under Secretary for Health. (Attachment I).

## **ISSUE**

Whether the grievance concerning the Medical Center’s refusal to provide the third party RN pay surveys and all data used to determine the pay increases given to RNs, 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).

## **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 identified in 38 U.S.C. § 7421(b) 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.

The procedures by which VA officials adjust Title 38 RNs' 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 RNs' 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). Where there is no current Bureau of Labor Statistics (BLS) survey of RN 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 VA Secretary has promulgated regulations pertaining to RN 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 "[w]hen BLS data are not available or not current, the Director shall, to the extent practicable, use other third-party wage surveys to determine if LPS adjustments are necessary." VA Handbook 5007, Part X, Chapter 1, paragraph 4(d)(1). 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 RN grade levels; provide job descriptions for each of the positions reported; be conducted at least once every other year; and include enough participant facilities to provide a statistically valid sample. VA Handbook 5007, Part X, Chapter 1, paragraph 4(d)(1)(a)-

(f). The San Diego Director's use of the salary surveys<sup>2</sup> to adjust RN pay met these requirements.

In its grievance charge, the Union alleged that it was entitled to the RN pay surveys and all data used to determine the pay increases given to bargaining unit RNs in March 2018 in accordance with Article 53 of the Master Agreement.<sup>3</sup> Article 53, Section B of the Master Agreement states, "RN pay scales are determined by the Department and are not subject to collective bargaining and/or the negotiated grievance procedures.... Upon request, NNU will be provided a copy of the data used to determine RN pay scales." (Attachment J). However, the Union's allegation is not supported by the record. First, the data utilized to determine the pay increases was, in fact, provided to the Union. (Attachment C, Attachment D). The Union was given a briefing on May 15, 2018, where it was provided a general explanation of the adjustments and permitted to ask questions. (Attachment B). Then, on May 22, 2018, the Medical Center provided a written summary of the data used to adjust the RN pay scales. (Attachment C). Finally, on June 5, 2018, the Medical Center provided further details about the data used, including the 3<sup>rd</sup> party survey used, the job match information, a breakdown by occupation, and the specific data points describing the "percentile, midpoint, or maximum dollar amount for each position." (Attachment D). Based on the information provided, the data provided to the Union by the Medical Center appears to have also met the requirements of Article 53, Section B to provide "a copy of the data used to determine RN pay scales."<sup>4</sup>

However, even if the Union disagreed with the Medical Center's determinations concerning the RN pay scales, a plain reading of Article 53 makes clear that the determination of RN pay scales are not subject to collective bargaining and grievance procedures.<sup>5</sup> Article 53, Section B ("RN pay scales are determined by the Department and are not subject to collective bargaining and/or the negotiated grievance procedures.") The Union's own rationale for requesting the entirety of the pay survey data – to ensure that the Medical Center's analysis matches the Union's own analysis – places the Union's resulting grievance concerning RN pay information provided by the Medical Center in direct conflict with 38 U.S.C. § 7422 and the language of Article 53. (Attachment E). 38 U.S.C. § 7422(b) makes clear that the "establishment, determination, or adjustment of employee compensation" may not be covered by collective bargaining or grievance procedures for employees described in 38 U.S.C. § 7421(b). While an allegation of disparate pay, and resulting discovery, may be

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<sup>2</sup> The VAMC utilized the following surveys: 2017 California Hospital Association; 2017 Korn Ferry Hay Group National Healthcare Survey with Physicians; 2017 Integrated Health Strategies Survey; 2017 Mercer Integrated Healthcare Executive Compensation Survey; and 2017 Mercer Integrated Healthcare Individual Contributors.

<sup>3</sup> The VA NNU Master Agreement, effective November 8, 2012.

<sup>4</sup> The Medical Center also noted that the disclosure of the survey data would be problematic because it is proprietary and disclosure by VA to the Union would potentially breach agreements between VA and third-party vendors. (Attachment A).

<sup>5</sup> Article 53 of the NNU Master Agreement, as written, involves matters related to RN pay and could be deemed to directly conflict with 38 U.S.C. § 7422.

appropriate in a different context (e.g. a Title VII claim), the grievance and resulting arbitration request filed by the Union in this matter concerns or arises out of the establishment, determination, or adjustment of RN pay and is therefore exempt from the grievance and arbitration procedures in the Master Agreement.

The USH has previously determined that information pertaining to the adjustment of RN locality pay is excluded from collective bargaining by 38 U.S.C. § 7422. In North Florida/South Georgia, the Secretary determined that the Medical Center's denial of the union's request for third party data that was used to set pay for RNs employed at the North Florida/South Georgia Veteran's Medical Center was excluded from collective bargaining. (Attachment K, VAMC North Florida/South Georgia (January 6, 2006)). Similar to the current case, the local union in North Florida/South Georgia requested a copy of a third-party salary survey that the facility was planning to use to make the RN locality pay adjustment.

**RECOMMENDED DECISION**

The issues underlying the grievance and arbitration request filed by the Union, 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 (including any grievance procedures provided under a collective bargaining agreement) and review by any other agency pursuant to 38 U.S.C. §7422(d).



January 29, 2021

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

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Date