



DEPARTMENT OF VETERANS AFFAIRS
Veterans Health Administration
Washington DC 20420

DEC 11 2003

In Reply Refer To:

Medical Center Director
VA Medical Center
1201 N.W. 16th Street
Miami, Florida 33125

Dear

I am responding to the issue raised in your letter of October 6, 2003 concerning an unfair labor practice charge (ULP) filed by the National Federation of Government Employees (NFFE) union. The issue pertains to the union's request for information regarding nurse locality pay surveys and resultant nurse locality pay adjustments at the Miami Medical Center and one of its satellite outpatient clinics, the Oakland Park Outpatient Clinic.

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).

Please provide this decision to your Regional Counsel as soon as possible.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Robert H. Roswell", is written over the typed name.

Robert H. Roswell, M.D.

Enclosure

VA – 03-11

FACTS

The Miami VA Medical Center is a consolidated facility consisting of a large tertiary care hospital in downtown Miami and eight outpatient clinics located throughout the South Florida area.

In November and December 2002, Miami VAMC management conducted a Nurse Locality Pay Survey (LPS) pursuant to 38 U.S.C. § 7451(d) and VA Handbook 5007, Part X, Chapter 2. As a result of the LPS, locality pay increases were granted to nurses at the Miami Medical Center and outpatient clinics effective January 12, 2003.

By statutory¹ and regulatory² mandate, Miami VAMC management conducted separate salary surveys for the main Miami Medical Center, which at the time of the surveys fell within the Miami-Dade County Primary Metropolitan Statistical Area (PMSA), and for the Oakland Park Outpatient Clinic (OPOPC) and other satellite clinics in Broward County, which were then within the Fort Lauderdale PMSA.³ The data collected indicated that community salaries were higher in the Miami-Dade County PMSA than in the Fort Lauderdale PMSA. Accordingly,

¹ 38 U.S.C. § 7451(a)(1) provides for collection of nurse salary survey data, and for adjustment of nurse pay based on such data, "to ensure ... that the rates of basic pay for [nurses] ... in each Department health-care facility ... are sufficient for that facility to be competitive ... with non-Department health-care facilities in the same labor market area..." 38 U.S.C. § 7451(d)(2) defines the relevant labor market area as "the Bureau of Labor Statistics (BLS) labor market area of [the VHA] facility." Pursuant to 44 U.S.C. 3504(e)(3) and 31 U.S.C. 1104(d) and Executive Order No. 10253 (June 11, 1951), the Office of Management and Budget (OMB) defines Metropolitan Statistical Areas (MSAs), Primary Metropolitan Statistical Areas (PMSAs), and other statistical areas used by BLS and other Federal agencies in statistical activities such as salary surveys.

² VA Handbook 5007, Part X, Chapter 2 provides (at Section 4.a.(1)) that where a VA facility is within an OMB-defined MSA or PMSA, the MSA or PMSA is the local labor market area (LLMA) to be surveyed in connection with salaries at that facility. That Handbook further provides (at Part X, Chapter 2, Section 4.a.(6)) that if a satellite outpatient clinic is not in the LLMA of the parent facility, a separate survey will be required of the LLMA in which the outpatient clinic is located. A copy of Handbook 5007, Part X, Chapter 2 is attached as Attachment A for ease of reference.

³ Effective June 6, 2003, OMB consolidated Miami-Dade County and Ft. Lauderdale-Broward County in to a single large MSA, with the two counties identified as separate "Metropolitan Divisions" within the new MSA. However, the 2002 surveys at issue herein were subject to the prior OMB definitions, which treated the two counties as separate MSAs.

management set locality pay at the main hospital higher than at the OPOPC and other clinics in Broward County.

On March 13, 2003, _____, president of the NFFE union local at the OPOPC⁴, filed a written request for information relating to the nurse locality pay survey and authorization. (Attachment B) Specifically, the union requested information pertaining to "Position Descriptions of the outpatient clinic in Miami VA Medical Center (Dade County) for all Nurse categories, ARNP's and PA's and is also requesting the data on Position Descriptions of the outpatient clinic in OPOPC, Pembroke Pines, and Hallandale (Broward County) for the purpose of determining if disparity of working conditions exist [sic] and if discrimination in the workforce is occurring." (Attachment B, numbered paragraph 2.) The union stated in its information request that it had "a particularized need to know this information to determine if [the] implementation [of the January 12, 2003 locality pay adjustments] will discourage employees from transferring to [or from the outpatient clinics in] Broward County ... [and] to determine if VA Handbook 5007, Part X, and Nurses Pay Act of 1990 discriminates against the NFFE union and its members and or it assist [sic] the other unions in recruitment of future employees and transfers to the Dade County VA Medical Center." (Attachment B, numbered paragraph 3.)

Also on March 13, 2003, Mr. _____ sent an email to _____, Acting Medical Center Director of the Miami VAMC, referencing a February 2003 meeting about locality pay at OPOPC. (Attachment C.) In the email, Mr. Shapiro opined that the meeting was "not sufficient to discuss the implementation nor the impact of the nurses working conditions as it relates to pay" and stated that "the Union would like to express to management how the Nurses Pay Act of 1990 and VA Handbook 5007, Part X impacts the working conditions at OPOPC."

On March 24, 2003, Miami VAMC's Human Resources Management Chief, _____, responded to Mr. _____'s March 13 information request and email. In his response, Mr. _____ stated that although the union was entitled to information required for the exercise of its collective bargaining rights, 38 U.S.C. § 7422(b) precludes collective bargaining over "the establishment, determination, or adjustment of employee compensation" under title 38. Accordingly, the information request was denied. (Attachment D.) _____

On April 7, 2003, the NFFE union local filed with the Federal Labor Relations Authority (FLRA) a ULP relating to management's failure to furnish the requested information to the union. (Attachment E.)

On May 12, 2003, management responded to the union's ULP in a letter to the FLRA attorney investigating the charge. In this letter, management explained

⁴ It should be noted that NFFE represents the nurses at the OPOC, but does not represent the nurses at the main Miami Medical Center or any of the other South Florida outpatient clinics.

that nurse compensation, including locality pay, is excluded from collective bargaining under 38 U.S.C. § 7422, so that the union had no representational right or responsibility related to the requested information. Management also pointed out that the USH had found non-negotiable a similar request by the local NFFE union relating to differences in physician scarce specialty pay at the Miami Medical Center and OPOPC, and that FLRA had dismissed that ULP for lack of jurisdiction based on the USH's determination. (Attachment F.)

On October 1, 2003, the FLRA issued a complaint and notice of hearing, alleging that Miami VAMC management's failure to provide the requested information was contrary to 5 U.S.C. §§ 7114(b)(4). (Attachment G.)

By memorandum dated October 6, 2003, management requested that the Under Secretary for Health determine whether the issues giving rise to the ULP concern or arise out of the establishment, determination or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b). (Attachment H.)

By letter dated October 21, 2003, management notified the union of its section 7422 decision request and invited the union to provide any input on the issue to the USH no later than October 30, 2003. (Attachment I.)

By letter dated October 27, 2003, the union provided its input to the USH (Attachment J). In that letter, the union stated that it was seeking the requested information "under 7116(a)(1), (5) and (8)⁵ on behalf of its Level III Nurses over the age of forty (40), stationed at Broward County (OPOPC)." The union further asserted that it "has a particularized need to know if the 2002-2003 LLMA [sic] conducted by the Miami VAMC had a discriminatory disparate impact on individual nurses within the NFFE Local 1453 bargaining unit," and that "the LLMA [sic] resulted in an adverse impact on the older nurses in the Broward County facilities (OPOPC), which statistically are most nurses at the entry Level III who are over forty (40) years old."

More particularly, the union argued in the October 27, 2003 letter that Miami VAMC management erred in conducting separate surveys for the facilities in Miami-Dade and Broward Counties pursuant to VA Handbook 5007, Part X, Chapter 2, Section 2(6) because the decision to conduct such separate surveys "did not take into consideration that Broward County Nurses and Broward County VA Nurses do reside and commute on a regular basis to the VA Miami, Cedars of Lebanon, and Jackson Memorial Hospital." In support of this argument, the union quoted the portion of Handbook 5007, Part X, Chapter 2, Section 2.a.(4) that states that "the minimum LLMA defined under this subparagraph shall not exceed the commuting area of the VA facility, and shall include a minimum of three establishments with employees in the occupation or specialty being

⁵ These are presumably references to 5 U.S.C. § 7116. However, the right of a union to request information is provided not by that statute but by 5 U.S.C. § 7114(b)(4).

surveyed.” However, the union omitted to note that Section 2(4), by its terms, applies only “if subparagraphs 2a(1) through (3) do not apply” – meaning if there is no OMB-defined MSA or PMSA to define the LLMA. As explained in footnote 2 above, the surveys at issue herein were conducted under Section 2.a.(1), not under Section 2.a.(4), because Miami-Dade and Broward Counties are within OMB-defined MSAs. For that reason, the handbook provision cited by the union is inapplicable in this case.⁶

The union concluded its October 27, 2003 correspondence by citing OMB’s June 6, 2003 consolidation of the Miami-Dade and Broward County MSAs, referred to in footnote 3 above, and asked that “the USH in his discretion and wisdom ... make whole all the nurses in this case.”

DISCUSSION

Pursuant to the Federal Service Labor Management Relations Statute, 5 U.S.C. 7114(b)(4), 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 Miami Medical Center and at that facility’s satellite outpatient clinics in Broward County. 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 the jurisdiction of FLRA. *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, over Miami VAMC’s failure to provide information relating to management’s determination of scarce specialty pay to be awarded to physicians at the Miami Medical Center and OPOPC, respectively.)

⁶ Section 2.b. of VA Handbook 5007, Part X, Chapter 2 does permit facility Directors, in their discretion, to “contiguously expand survey areas for one or more covered occupations or specialties to include any recognized economic area, such as ... county(ies), MSA(s) and PMSA(s) ... based on a review of the conditions in subparagraph 2.a.(4) and a determination by the Director that the minimum survey area does not adequately reflect the LLMA for those occupations or specialties.” On November 5, 2003, the Miami VAMC Director submitted to the Chief, Human Resources Management Service (05) a memorandum documenting that the LLMAs to be used in the 2003 LPS for the Miami Hospital and the OPOC would include both Miami-Dade and Broward Counties. (Attachment K.) However, the Director’s failure to exercise his discretion under section 2.b. to expand the LLMAs for the 2002 LPS is not subject to negotiation or other challenge by the local union, because that decision involved the adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b).

PROCEDURAL HISTORY

The Secretary has delegated to the USH the final authority in the VA to decide 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 NFFE union's ULP, relating to the Miami VAMC's failure to provide requested information pertaining to the adjustment of nurse locality pay at the Miami Medical Center and the OPOPC, 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 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 issue of nurse compensation, and more particularly nurse locality pay, is an issue that is left to the unfettered discretion of the VA Secretary and/or USH as provided by 38 U.S.C. sections 7451 and 7452.

The VA Secretary, in consultation with the USH, has promulgated regulations pertaining to nurse locality pay. These regulations are contained in VA Handbook 5007, Part X. Pursuant to those regulations, and consistent with 38 U.S.C. § 7451, nurse locality pay must be adjusted to ensure that VA nurse compensation is competitive with that offered by non-VA facilities in the same local labor market. Under OMB's rules in place at the time of the subject survey, the local labor market for the Miami Medical Center was defined as the Miami-Dade PMSA, while the local labor market for the OPOPC was defined as the Ft. Lauderdale-Broward County PMSA. Miami VAMC management was bound by these rules to adjust nurse locality pay at these different facilities in accordance with the data relating to the economically divergent statistical areas in which they are located.

In a previous case involving an information request filed by the local NFFE union at the OPOPC outpatient clinic of the Miami VAMC, the USH has determined that such request involves the establishment, determination or adjustment of employee compensation within the meaning of 38 U.S.C. 7422(b). 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 Dismissal dated February 4, 2003 in FLRA Case No. AT-CA-02-0501. This is because the USH's determination that a matter is non-negotiable or non-grievable under 38 U.S.C. § 7422 deprives FLRA of jurisdiction in the matter. *VA Maryland Health Care System, Baltimore, MD and PSNA Local 1998*, 59 FLRA No. 55 (Oct. 9, 2003); *VAMC Asheville, NC and AFGE Local 446*, 57 FLRA No. 137 (2002).

While an employee might properly raise an allegation of disparate treatment in the adjustment of nurses' locality pay in another context, such adjustment is not subject to collective bargaining, to challenge through a negotiated grievance procedure, or to review by FLRA. The Title 38 statutes and implementing VA regulations make it clear that the adjustment of nurse compensation, including nurse locality pay, is a matter reserved to the Secretary and his designees.

RECOMMENDED DECISION

That the issues underlying the NFFE union's ULP, relating to the Miami VAMC's failure to provide requested information pertaining to the adjustment of nurse locality pay at the Miami Medical Center and the OPOPC, 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 _____



Robert H. Roswell, M.D.
Under Secretary for Health

12.11.03
Date _____