Out of Many/One Union
AFGE NVAC/AFL-CIO

NATIONAL VETERANS AFFAIRS COUNCIL
American Federation of Government Employees, Affiliated with the AFL-CIO

June 7, 2022

Under Secretary for Health, Veterans Health Administration
Department of Veterans Affairs
Thru: michelle.dominski@va.gov
Sent via electronic mail only

RE: May 23, 2022 Request for 38 U.S.C. §7422(b) Determination

The National Veterans Affairs Council of the American Federation of Government Employees, AFL-CIO ("Union" or "AFGE/NVAC") submits this reply to Kurt Martin's May 23, 2022 Request for a 38 U.S.C. §7422(d) Determination. Mr. Martin, as the Chief Negotiator for the Department of Veterans Affairs ("Department") during negotiations for a successor term agreement, has made this request pertaining to the Union's proposals on Article 16, Employee Awards and Recognition, as they relate to Title 38 employees.

AFGE/NVAC is the largest labor organization at the VA. Our bargaining unit includes 283,000 employees working at thousands of facilities around the country. We represent more than 63,000 Registered Nurses, who are the backbone of the nation's largest health care system, and tens of thousands of other Title 38 providers and clinicians who are delivering exceptional care to our nation's Veterans.

Authority Under 7422(d)

First, the Union objects to the determination being made by the Acting Under Secretary for Health Performing the Delegable Duties of the Under Secretary for Health. On October 18, 2017, then-Secretary David Shulkin issued a delegation of exclusive authority to the Under Secretary of Health to decide matters under 38 U.S.C. §7422(d). The delegation expressly prohibits redelegation. The delegation also states that it will remain in place until rescinded. As of the date of this submission, the delegation is still listed under "Active VA Delegations of Authority" on VA's website. The Acting Under Secretary for Health is limited to performing the delegable duties of the Under Secretary for Health. As the active delegation of authority under 7422(d) is explicitly nondelegable, the Acting Under Secretary for Health cannot be delegated the authority to issue determinations under 38 U.S.C. §7422(d). Therefore, it is unreasonable to interpret that the Acting Under Secretary for Health has authority to decide a 7422(d) matter. Resultingly, the Acting Under Secretary for Health is without authority to issue the determination, and any such determination, if issued, would be contrary to law.

Awards Are Not Excludable Under 7422(b)

Next, despite past determinations, awards as proposed by the Union do not concern or arise out of the establishment, determination, or adjustment of compensation under Title 38. The plain language of the statute specifically lists as excludable, "3) the establishment, determination, or adjustment of employee compensation under this title." 38 U.S.C. §7422(b) (*emphasis added*).

Basic statutory construction requires that "employee compensation" and "employee compensation under this title" have different meanings. Here, the Department has construed its authority more broadly than the text of the statute allows – namely, that all Title 38 employee compensation is excludable. However, the final clause, wholly ignored by the Department in its previous determinations, requires a narrower interpretation of employee compensation subject to 7422(d) – namely, that employee compensation provided under Title 38 of the United States Code is excludable. Surely if Congress intended to encompass all employee compensation, it would not have included the qualifier "under this title." Demonstrably, no similar qualifier is listed for peer review or professional conduct or competence. The Department may assert that "under this title" was meant to qualify each of the listed matters and not solely employee compensation; however, statutory construction requires the rule of the last antecedent because there is no indication to the contrary. Namely, peer review and professional conduct or competence are not provided for elsewhere in Title 38. Further, a review of the legislative history supports this construction. In the original bill, employee compensation was not listed as an excludable matter. Instead, the listed matters were: (A) Direct Patient Care; (B) Clinical competence; (C) Professional judgment; and (D) Peer review. *See* H.R. 4557, 101st Congress, 2d session, 101-466 (April 19, 1990). The phrase "under this title" does not appear in relation to these matters, including the subsequent amendments. Employee compensation is then added in H.R. 598, 102nd Congress, 1st Session (January 23, 1991). "Under this title" only appears in relation to employee compensation. In the final language, "under this title" modifies employee compensation in 7422(b) and (d). This intent is further demonstrated given Congress was simultaneously discussing physician compensation while discussing collective bargaining rights; Congress did not intend to make such compensation subject to collective bargaining.

Here, the awards provisions proposed by the Union are not compensation provided for under Title 38. Notably, Title 38 explicitly provides for the following types of compensation: basic pay (38 U.S.C. §7404); advance payments, recruitment or relocation bonuses, and retention allowances (38 U.S.C. §7410); reimbursement of continuing professional education expenses (38 U.S.C. §7411); nurse pay (38 U.S.C. 7451); cash bonuses not to exceed $2,000 for specialty certification for nurses and bonuses to an employee in such a position who has demonstrated both exemplary job performance and exemplary job achievement (38 U.S.C. §7452(b)(1) ("The authority of the Secretary under this subsection is *in addition to any other authority of the Secretary to provide job performance incentives*.") (*emphasis added*)); premium pay for nurses (38 U.S.C. §7453) and hybrid employees (38 U.S.C. §7454); increases to basic pay (38 U.S.C. §7455); on call pay (38 U.S.C. §7457); and, recruitment and retention bonus pay for nurses (38 U.S.C. §7458). Therefore, each of the types of compensation specifically provided for under Title 38 concern the establishment, determination, or adjustment of employee compensation *under this title*. As the awards proposed by the Union are not provided for in Title 38, they do not concern the establishment, determination, or adjustment of employee compensation under the title, and therefore, are not subject to the Secretary's authority to exclude matters from collective bargaining.

Awards Are Not Compensation Under 7422(d)

Alternatively, awards are not compensation, subject to 7422(d). Congress' intent in passing the Department of Veterans Affairs Labor Relations Improvement Act of 1991 was to mirror the collective bargaining rights under Title 5. "Specifically, the provisions in the compromise agreement would provide limited collective-bargaining rights similar to those which exist under title 5 to VA employees employed under the title 38 personnel system-physicians, dentists, nurses, podiatrists, optometrists, physician assistants, and expanded function dental auxiliaries." 137 Cong.Rec. S3387-02, 1991 WL 33976, Senate Proceedings and Debates of the 102nd Congress, First Session (Statement of Representative Sonny Montgomery) (March 14, 1991). Notably, Title 5 employees cannot bargain their wages, because they are specifically provided for by statute. So, Congress intended the same prohibition for Title 38s. There is no indication that awards, which are not provided for by statute, were contemplated as compensation to be excluded from collective bargaining. Mr. Martin asserts that OPM and the Department's inclusion of awards in the annual aggregate compensation renders awards compensation. However, there is no support for the conclusion that proposals related to awards constitute the establishment, determination, or adjustment of compensation. Compensation refers to mandatory payments, such as salaries, wages, premiums, and differentials, which are all set by statute or regulation. Awards are not set by statute or regulation; they are wholly discretionary and cannot constitute such mandatory compensation.

The Proposals at Issue

Proposal A

The Union proposed the following:

> Within 90 days after the conclusion of the performance year or 90 days after the Department receives its budget, whichever is later, the Department will allocate a portion of its overall awards budget for bargaining unit employees. When a duty station determines its awards budget, the local union will be notified of that amount. The duty station will allocate a portion of that budget for bargaining unit employees as a percentage equal to the number of bargaining unit employees divided by the number of overall employees at the duty station and notify the local union of that allocation.

Proposal A, on its face, does not concern or arise out of the establishment, determination, or adjustment of compensation under Title 38. Merriam-Webster defines "establishment" as the act of establishing and "establish" as to institute (something, such as a law) permanently by enactment or agreement. "Determination" is defined as the act of deciding definitely and firmly. "Adjustment" is defined as a correction or modification to reflect actual conditions. The proposal explicitly concerns setting aside an amount for distribution of awards to Title 38 employees. It does not institute, decide, or correct any compensation. It is a procedure that does not impact the Department's decision to provide any compensation.

Proposal B

The Union proposed the following:

> Should the duty station, at any time during the life of this Agreement, modify its awards budgets, it shall give the local union formal notification at the time the duty station makes the determination to change its awards budget. Upon such notice, or upon any deviation from the established budgets, either Party may negotiate the procedures for implementing the Department's proposed change and/or deviation, and any appropriate arrangements for adversely affected employees. Such negotiations shall be conducted in accordance with the provisions of Article 47, Mid-Term Bargaining.

Similar to Proposal A, Proposal B refers to mid-term bargaining notice and rights related to any changes to the awards budget. This proposal also does not institute, decide, or correct any compensation. This, too, is only a procedural proposal.

Proposal C

The Union proposed the following:

> The Department will allocate awards into four (4) pools: Title 38 Proficiency Awards, Performance Awards based on Summary Ratings, Group Awards, and Other Awards. To the maximum extent possible, the amount allocated to the Title 38 Proficiency Awards and Performance Awards based on Summary Ratings Pools will be proportionate to the gross salary paid to all bargaining unit employees who may be eligible to receive awards in each award pool.

Also similar to Proposals A and B, Proposal C refers to the allocation of the awards budget into pools for different groups of employees by type of award. It does not institute, decide, or correct any compensation.

Proposal D

The Union proposed the following:

> Awards which employees may be eligible to receive include but are not limited to:
> A. Performance Awards
> B. Quality Step Increases
> C. Special Contribution Awards, including On-the-Spot Awards
> D. Time Off Award
> E. Suggestion/Invention Award
> F. Special Advancement for Achievement (SAA)
> G. Special Advancement for Performance (SAP)

Proposal D simply lists the types of awards. While SAAs and SAPs are also applicable to Hybrid employees, they are the only listed awards that are the subject of the Department's request. It is incomprehensible how simply listing the types of awards that an employee may be eligible to receive constitutes the institution, decision, or correction of compensation.

Proposal E

The Union proposed the following:

> Title 38 Proficiency Awards Pool
>
> Performance awards based on proficiencies for bargaining unit Title 38 employees will be allocated and distributed in accordance with Section 3 of this Article.
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> Approval of all awards recommended under this Article shall not be withheld unless the decision is based on criteria that are uniformly applied to all employees. Notices of disapproval must be in writing and explain the reason(s) for the disapproval.
>
> By November 30th of each fiscal year, the Department will determine the shares for the Title 38 awards pool. The pool will be divided by the total number of shares to determine the value of each share. (The total number of shares is the denominator and the total amount of money in the pool is the numerator.) Within 60 calendar days of the determination of the value of the shares, employees will receive awards in proportion to their total number of shares.
>
> The following will be used to distribute individual awards from the pool:
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> A. Outstanding will get three (3) shares;
> B. High Satisfactory will get two (2) shares; and,
> C. Satisfactory will get one (1) share.
>
> An SAA or SAP will not be denied solely because the employee received a performance award.

Proposal E is the sole proposal that institutes how performance awards will be distributed. However, as stated above, performance awards are not provided for under Title 38 or are not compensation.

Further, the Union's proposal concerning the denial of SAAs and SAPs simply provides a procedure that does not institute, decide, or correct any compensation. Nothing in the proposal attempts to negotiate any portion of the peer review process. (It should also be noted that the Department does not use the peer review process for SAA's and SAP's. Instead, these decisions are made exclusively by supervisors and management officials.) As employees are permitted to receive both a cash award and an SAA or SAP (including its allowance under VA policy), the proposal simply puts supervisors and employees on notice that a cash award does not prohibit the granting of an SAA or SAP.

Discretionary Authority

Notwithstanding whether awards are determined to concern or arise out of the establishment, determination, or adjustment of employee compensation under Title 38, the determination under 7422(d) is a discretionary one and not mandatory. Notably, on January 22, 2021, President Joseph R. Biden issued Executive Order 14003, which stated, "It is the policy of the United States to protect, empower and rebuild the career federal workforce. It is also the policy of the United States to *encourage union organizing and collective bargaining*. The federal government should serve as a model employer." (*emphasis added*.) Likewise, on April 26, 2021, President Biden issued Executive Order 14025, noting, "In the past few decades, the Federal Government has not used its full authority to promote and implement this policy of support for workers organizing unions and bargaining collectively with their employers," and declaring, "it is the policy of my Administration to encourage worker organizing and collective bargaining." Secretary McDonough serves on the Task Force on Worker Organizing and Empowerment established under Executive Order 14025, which is tasked with the responsibility of developing recommendations to "to promote [President Biden's] Administration's policy of support for worker power, worker organizing, and collective bargaining." Under the Biden Administration, Secretary McDonough and senior VA leaders should be taking steps in partnership with the Union to expand collective bargaining rights for Title 38 employees. Instead, VA negotiators are urging the Secretary to maintain the status quo, disregard President Biden's directives, and limit the ability of labor unions to secure better working conditions for VA providers and clinicians.

Further, the Department has been unequivocal in its concern regarding the retention of employees. Secretary McDonough has declared rewarding employees as a matter in his 10-point plan. February 2022: Secretary McDonough's Human Infrastructure plan - VAntage Point ("Maximize bonuses and retention incentives by waiving limits on bonuses for work done during the pandemic and increasing retention incentives.") Assistant Secretary for Human Resources and Administration/Operations, Security & Preparedness, Gina Grosso, made similar statements in her testimony to the Senate VA Committee on May 3, 2022. https://www.veterans.senate.gov/2022/5/the-va-workforce-assessing-ways-to-bolster-recruitment-and-retention. Permitting the discussion of procedural proposals for awards for Title 38s during successor agreement negotiations does nothing to curtail the current Secretary's rights, or a future Secretary's rights, under 38 U.S.C. §7422, while also taking strides to meet the Department's goals. This is not a grievance or unfair labor practice where a third party will decide on the Department's authority. Instead, in successor agreement negotiations, the Department is a party to the discussion and can work with the Union to meet the Department's and employees' needs. The party's negotiations provide a forum for the Department's consultation with the Union.

Such discussion should be a minimum requirement before the use of 7422(d) authority. Under President Barrack H. Obama, in 2010, the Department issued a Decision Document outlining the procedures for requesting 7422 determinations. An important part of the process was that the relevant Agency office was required to work to resolve the issue with the Union prior to submitting the 7422 requests. Attempting to resolve the issue is a basic foundational

element of labor-management relations. However, the Department's bargaining team has so far been uninterested in doing so. Evident in Mr. Martin's request is the absence of any attempt at resolution.

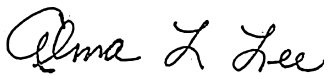
This failure is more poignant given President Biden's commitment to promoting collective bargaining. However, right in the President's backyard, Title 38s are subject to less collective bargaining rights simply because the Department does not want to discuss the matter with its labor organizations. The Department's wielding of this authority like a sword is directly contrary to the encouragement of collective bargaining as championed by the President.

Conclusion

The Acting Under Secretary for Health does not have the authority to issue a determination under 7422(d). Further, as the awards proposed by the Union are not subject to 7422(d), Mr. Martin's request should be disapproved, and the Department should fulfill its obligations under the statute and return to the table to discuss the Union's proposals in good faith.

The undersigned may be reached at iroberts@robertslaborlaw.com or (202) 235-5026 for any questions or concerns related to this Response.

Respectfully submitted,



Alma L. Lee
President, National Veterans Affairs Council
AFGE, AFL-CIO
Union's Chief Negotiator

cc: Kurt Martin, Department's Chief Negotiator