

71 FLRA No. 228

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
VA COUNCIL OF CONSOLIDATED LOCALS
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
(Agency)

0-NG-3474

DECISION AND ORDER
ON NEGOTIABILITY ISSUE

December 15, 2020

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Member DuBester concurring)

Decision by Member Abbott for the Authority

I. Statement of the Case

In this case, the Union filed a petition for review concerning a Memorandum of Understanding (MOU) that was disapproved by the Secretary of Veterans Affairs (VA) as inconsistent with 38 U.S.C. § 7422. For the reasons that follow, we conclude that the Authority lacks jurisdiction to review the Secretary’s negotiability determination under Title 38 of the U.S. Code. We dismiss the Union’s petition.

II. Background

On November 19, 2019, Agency and Union representatives signed a MOU regarding a policy for compensatory time for religious observances for Title 38 employees appointed under 38 U.S.C. § 7401(1).¹ On December 19, 2019, the Secretary of VA disapproved the MOU pursuant to § 7114(c) of the Federal Service

¹ Under 38 U.S.C. § 7401, the Secretary of VA may appoint personnel necessary for the health care of veterans, to include “[p]hysicians, dentists, podiatrists, chiropractors, optometrists, registered nurses, physician assistants, and expanded-function dental auxiliaries.” 38 U.S.C. § 7401(1). These employees, also identified in 38 U.S.C. § 7421(b), are subject to certain statutory limitations on their collective-bargaining and grievance procedure rights, as discussed in more detail below.

Labor-Management Relations Statute (the Statute),² finding the MOU inconsistent with law, rule or regulation; namely, 38 U.S.C. § 7422.³ The Union filed a petition for review with the Authority on December 23, 2019 and the Agency subsequently filed a statement of position (statement). On February 5, 2020, an Authority representative conducted a post-petition conference with the parties pursuant to § 2424.23 of the Authority’s Regulations.⁴ Thereafter, the Union filed a response to the Agency’s statement.

III. Analysis and Conclusion: The Authority is without jurisdiction to review the Union’s petition.

The Agency argues that the Authority lacks jurisdiction to review the Union’s petition.⁵ Specifically, the Agency contends that “the Secretary [of VA] has determined, through his Agency[-]head [r]eview decision, that this MOU addressing the issue of compensatory time is to be excluded from bargaining pursuant to the authority granted to him under [38 U.S.C.] § 7422(d)” and that decision may not be reviewed by the Authority.⁶

Section 7421(a) of Title 38 authorizes the Secretary of VA to prescribe regulations governing the hours, conditions of employment, and leaves of absences of employees appointed under Title 38 and listed in § 7421(b).⁷ This authority to prescribe regulations under § 7421 “is subject to the right of Federal employees to engage in collective bargaining” under the Statute, but with certain enumerated exceptions.⁸ Under § 7422(b):

Such collective bargaining (and any grievance procedures provided under a collective[-]bargaining agreement) in the case of employees described in [§] 7421(b) . . . may not cover, or have any applicability to, any matter or question concerning or arising out of (1)

² 5 U.S.C. § 7114(c)(1) (“An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency”).

³ Pet., Attach. 1, Agency-Head Disapproval Letter (Disapproval) at 1.

⁴ 5 C.F.R. § 2424.23.

⁵ Statement at 2-3.

⁶ *Id.* at 3.

⁷ 38 U.S.C. § 7421(a) (stating in full: “Notwithstanding any law, Executive order, or regulation, the Secretary shall prescribe by regulation the hours and conditions of employment and leaves of absence of employees appointed under any provision of this chapter in positions in the Veterans Health Administration listed in subsection (b).”). The employees listed in subsection (b) include: physicians, dentists, podiatrists, optometrists, registered nurses, physician assistants, expanded-duty dental auxiliaries, and chiropractors. *Id.* § 7421(b).

⁸ *Id.* § 7422(a).

professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation under this title.⁹

IV. Decision

We dismiss the Union's petition.

Under § 7422(d), the issue of whether a matter or question concerns or arises out of one of these enumerated exceptions "shall be decided by the Secretary and is not itself subject to collective bargaining and may not be reviewed by any other agency."¹⁰ Accordingly, once the Secretary has made a determination under § 7422(d) that a matter or question concerns or arises out of one of the enumerated exceptions under § 7422(b), and thus that it is not subject to collective bargaining under the Statute, the Authority is deprived of jurisdiction over the matter or question at issue.¹¹

Here, the Secretary, in his Agency-head disapproval letter, disapproved the MOU because he found it inconsistent with 38 U.S.C. § 7422.¹² He determined that the MOU involved matters pertaining to employee compensation and professional conduct or competence under § 7422(b).¹³ The Secretary thus made a determination under § 7422(d), which removes the provisions contained within the MOU from the scope of collective bargaining under the Statute and may not be reviewed by the Authority. The Authority, accordingly, lacks jurisdiction to review the Union's petition. We therefore dismiss the petition.¹⁴

⁹ *Id.* § 7422(b).

¹⁰ *Id.* § 7422(d).

¹¹ See *AFGE, Local 221*, 64 FLRA 1153, 1154 (2010) (*AFGE*); *NAGE, Local RI-187, SEIU*, 64 FLRA 627, 628 (2010) (*NAGE*); see also *Wis. Fed'n of Nurses & Health Professionals Veterans Admin., Staff Nurses Council, Local 5032*, 47 FLRA 910, 913 (1993) (*Local 5032*) ("Based on the language of the statute and the legislative history, it is evident that the Secretary's determination as to whether a proposal concerns a matter excluded from collective bargaining under section 7422(b) of title 38 is not reviewable by the Authority.").

¹² Disapproval at 1.

¹³ *Id.* ("The legal deficiencies identified during the review process are listed in the enclosure"); *Id.* at 4 ("This MOU involves matters pertaining to those employees' compensation as well as the Department's assessment of their professional conduct and competence."); see also 38 U.S.C. § 7422(b).

¹⁴ See *AFGE*, 64 FLRA at 1154-55 (the Authority dismissed the union's petition to the extent it covered the employees listed in § 7241(b) because the Under Secretary had determined that the proposals at issue involved matters under § 7422(b)); *NAGE*, 64 FLRA at 629 (the Authority dismissed the union's petition because the Under Secretary found that the petition involved matters concerning professional conduct or competence for employees listed under § 7421(b)); *Local 5032*, 47 FLRA at 913-14 (the Authority dismissed the union's negotiability petition after the Secretary determined that § 7422(d) removed matter from the scope of collective bargaining).

Member DuBester, concurring:

I agree with the Decision to dismiss the Union's petition.