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112TH CONGRESS
1st Session

SENATE

REPORT
112–68

A BILL TO AMEND TITLE 38, UNITED STATES CODE, TO REPEAL THE PROHIBITION ON COLLECTIVE BARGAINING WITH RESPECT TO MATTERS AND QUESTIONS REGARDING COMPENSATION OF EMPLOYEES OF THE DEPARTMENT OF VETERANS AFFAIRS OTHER THAN RATES OF BASIC PAY, AND FOR OTHER PURPOSES

SEPTEMBER 6, 2011.—Ordered to be printed

Mrs. MURRAY, from the Committee on Veterans' Affairs, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany S. 572]

The Committee on Veterans' Affairs (hereinafter, "the Committee"), to which was referred the bill (S. 572), to amend title 38, United States Code (hereinafter, "U.S.C."), to repeal the prohibition on collective bargaining with respect to matters and questions regarding compensation of employees of the Department of Veterans Affairs other than rates of basic pay, and for other purposes, having considered the same, reports favorably thereon, and recommends that the bill do pass.

INTRODUCTION

On March 14, 2011, Senator Sherrod Brown of Ohio introduced S. 572. Senators Begich, Franken, Merkley, Mikulski, Rockefeller and Sanders were original cosponsors. S. 572, as introduced, would amend title 38 to repeal the prohibition on collective bargaining with respect to matters and questions regarding compensation of employees of the Department of Veterans Affairs (hereinafter, "VA"

or "the Department") other than rates of basic pay, and for other purposes. The bill was referred to the Committee.

COMMITTEE HEARING

On June 8, 2011, the Committee held a hearing on pending legislation, including S. 572. Testimony on S. 572 was offered by: Robert L. Jesse, MD, PhD, Principal Deputy Under Secretary for Health, Veterans Health Administration, Department of Veterans Affairs; Joseph A. Violante, National Legislative Director, Disabled American Veterans; and J. David Cox, National Secretary-Treasurer, American Federation of Government Employees (hereinafter, "AFGE").

COMMITTEE MEETING

After carefully reviewing the testimony from the foregoing hearing, the Committee met in open session on June 29, 2011, to consider, among other legislation, S. 572, as introduced by Mr. Brown of Ohio. The Committee then agreed to the bill by a call of the roll.

SUMMARY OF S. 572 AS REPORTED

S. 572 as reported (hereinafter, "the Committee bill") is summarized below:

Section 1 would repeal the prohibition on collective bargaining for Department employees hired under the authority of title 38, U.S.C., with respect to matters and questions regarding compensation of such employees other than matters and questions regarding rates of basic pay.

BACKGROUND AND DISCUSSION

Sec. 1. Repeal of prohibition on collective bargaining with respect to compensation of Department of Veterans Affairs employees other than rates of basic pay.

Section 1 of the Committee bill would repeal the prohibition on collective bargaining for Department employees hired under the authority of title 38, U.S.C. (hereinafter, "Title 38 Employees"), with respect to matters and questions regarding compensation of such employees other than matters and questions regarding rates of basic pay.

Background. Collective bargaining rights refer to the rights of employees to grieve, arbitrate, and negotiate over conditions of their employment. The Veterans Health Administration (hereinafter, "VHA") employees are hired under different statutory authority, depending upon their occupation, and, as such, are subject to different personnel laws. Certain personnel, such as physicians, dentists, registered nurses, optometrists, physician assistants, and podiatrists, are hired under the authority of title 38, U.S.C., and are subject to the provisions of chapter 74 of title 38, U.S.C., for placement, pay schedules, leave, hours of duty, discipline, adverse actions and appeals, and performance management. Other employees, such as practical nurses, occupational therapists, pharmacists, physical therapists, and respiratory therapists are covered by rules in title 38 for placement and pay administration, but are covered by rules in title 5, U.S.C., for pay schedules, disciplinary and ad-

verse action procedures, and performance management and leave systems (hereinafter, "Title 38 Hybrid Employees").

Title 5, U.S.C., generally encompasses employment laws for all Federal employees, except some VA personnel and national security personnel, and provides more robust collective bargaining rights for the employees hired under that authority. In 1991, in recognition that both Title 38 Employees and Title 38 Hybrid Employees with different bargaining rights may work alongside one another in VA facilities, Congress passed Public Law 102–40, to provide collective bargaining rights to all Department medical personnel hired under the authority of title 38, U.S.C. Under section 7422 of title 38, U.S.C., Title 38 Employees may negotiate, file grievances, and arbitrate disputes over working conditions with three exceptions: matters concerning professional conduct or competence, peer review, or compensation.

The Committee received testimony from AFGE on June 8, 2011, regarding S. 572. In a statement, AFGE National Secretary-Treasurer J. David Cox asserted that "VA's 7422 policy seems especially arbitrary because it singles out one group of VHA employees while affording full compensation bargaining rights to others working in the same hospitals and clinics. For example, a VA registered nurse cannot grieve over overtime pay while a VA licensed practical nurse can. Similarly, a VA psychiatrist cannot grieve over the loss of incentive pay while a VA psychologist can. This disparate treatment also harms the VA's ability to attract and retain medical professionals." Cox further stated that S. 572 "restores equal bargaining rights over routine compensation matters," and "provides a commonsense solution for reducing costly, demoralizing disputes between VHA managers and employees." It is also the position of AFGE that S. 572 "saves VA health care dollars that should be spent on veterans, boosts workplace morale, and helps the VA remain an employer of choice in the health care marketplace."

Committee Bill. The Committee bill would amend subsections (b) and (d) of section 7422 of title 38, United States Code, so as to clarify the scope of the compensation exclusion to bargaining, by substituting the phrase "rates of basic pay" for "compensation."

It is the Committee's intent that the term "rates of basic pay" will clarify that the right to set pay scales is reserved for Congress, and that Title 38 Employees may bargain over other compensation issues, such as calculation of overtime pay, access to wage survey data, and implementation of performance pay measures.

COMMITTEE BILL COST ESTIMATE

In compliance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate, the Committee, based on information supplied by the Congressional Budget Office (hereinafter, "CBO"), could increase personnel costs but there is not enough information to estimate the likelihood or potential magnitude of the potential increases. CBO further estimates that enacting the bill would not increase direct spending or affect revenues. Enactment of the Committee bill would not affect receipts and would not affect the budget of state, local or tribal governments.

The cost estimate provided by CBO, setting forth a detailed breakdown of costs, follows:

CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 6, 2011.

Hon. PATTY MURRAY,
Chairman,
Committee on Veterans' Affairs,
U.S. Senate, Washington, DC.

DEAR MADAM CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 572, a bill to amend title 38, United States Code, to repeal the prohibition on collective bargaining with respect to matters and questions regarding compensation of employees of the Department of Veterans Affairs other than rates of basic pay, and for other purposes.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Dwayne M. Wright.

Sincerely,

DOUGLAS W. ELMENDORF,
Director.

Enclosure.

S. 572, A bill to amend title 38, United States Code, to repeal the prohibition on collective bargaining with respect to matters and questions regarding compensation of employees of the Department of Veterans Affairs other than rates of basic pay, and for other purposes

S. 572 would expand the collective bargaining authority of certain employees of the Veterans Health Administration (VHA). Under current law, the Secretary of Veterans Affairs has the discretion to appoint certain personnel to VHA—such as physicians, nurses, dentists, and physician assistants—and to set their hours and conditions of employment. Such employees are prohibited from collectively bargaining over matters pertaining to professional conduct or competence, peer reviews, or compensation. S. 572 would relax those restrictions by allowing collective bargaining over compensation issues excluding rates of basic pay.

Based on information from VHA, CBO expects that under the bill about 80,000 employees of the agency's roughly 250,000 employees would be able to collectively bargain over forms of compensation such as special pays (which are based on performance, cost of living, or market conditions), awards and bonuses, and overtime or special scheduling arrangements. Compensation for VHA employees is funded through annual appropriations and will total almost $20 billion in 2011, CBO estimates. Under the bill, VHA's personnel costs could increase in several ways; for example, employees could negotiate bonuses or performance awards, higher rates for overtime pay, and higher special pay for employees in specialties that are in high demand. However, CBO has no basis upon which to estimate the likelihood or potential magnitude of those effects.

Enacting S. 572 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

S. 572 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Dwayne M. Wright. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee on Veterans' Affairs has made an evaluation of the regulatory impact that would be incurred in carrying out the Committee bill. The Committee finds that the Committee bill would not entail any regulation of individuals or businesses or result in any impact on the personal privacy of any individuals and that the paperwork resulting from enactment would be minimal.

TABULATION OF VOTES CAST IN COMMITTEE

In compliance with paragraph 7 of rule XXVI of the Standing Rules of the Senate, the following is a tabulation of votes cast in person or by proxy by members of the Committee on Veterans' Affairs at its June 29, 2011, meeting. The following senators were present: Mr. Akaka, Mr. Tester, Mr. Burr, Mr. Isakson, Mr. Brown of Massachusetts, Mr. Moran, Mr. Boozman, Madam Chairman.

The Committee then agreed to the measure and ordered S. 572, to be reported favorably to the Senate by a call of the roll.

Yeas	Senator	Nays
X (by proxy)	Mr. Rockefeller	
X	Mr. Akaka	
X (by proxy)	Mr. Sanders	
X (by proxy)	Mr. Brown of Ohio	
X (by proxy)	Mr. Webb	
X	Mr. Tester	
X (by proxy)	Mr. Begich	
	Mr. Burr	X
	Mr. Isakson	X
	Mr. Wicker	X (by proxy)
	Mr. Johanns	X (by proxy)
	Mr. Brown of Massachusetts	X
	Mr. Moran	X
	Mr. Boozman	X
X	Madam Chairman	
8	TALLY	7

AGENCY REPORT

On June 8, 2011, Robert L. Jesse, MD, PhD, Principal Deputy Under Secretary for Health, Veterans Health Administration, Department of Veterans Affairs, appeared before the Committee on Veterans' Affairs and submitted testimony on, among other things, S. 572. Excerpts from this statement are reprinted below:

STATEMENT OF ROBERT L. JESSE, M.D., PH.D., PRINCIPAL DEPUTY UNDER SECRETARY FOR HEALTH, VETERANS HEALTH ADMINISTRATION, U.S. DEPARTMENT OF VETERANS AFFAIRS

* * * * * * *

S. 572 would amend 38 U.S.C. 7422 by replacing the word "compensation" in sections (b) and (d) with the words "rates of basic pay." While we appreciate the many contributions collective bargaining and the labor-management partnership make to VA's mission, we strongly oppose S. 572.

VA would like to stress to the Committee that we deeply value the contributions of our employees, and work to enjoy a collaborative, positive working relationship with unions across the country. We hold retention of employees as a critically important goal, and encourage the management teams of VA facilities to offer professional development opportunities and encourage personal growth.

This bill would repeal the prohibition on collective bargaining with respect to compensation of title 38 employees. Currently, 38 U.S.C. 7422(b) and (d) exempt "any matter or question concerning or arising out of * * * the establishment, determination, and adjustment of [title 38] employee compensation" from collective bargaining. This bill would replace the word "compensation" with the phrase "rates of basic pay." This change would apparently make subject to collective bargaining all matters relating to the compensation of title 38 employees (physicians, dentists, nurses, et al.) over which the Secretary has been granted any discretion.

In order to provide the flexibility necessary to administer the title 38 system, Congress granted the Secretary significant discretion in determining the compensation of VA's health care professionals. When Congress first authorized title 38 employees to engage in collective bargaining with respect to conditions of employment, it expressly exempted bargaining over "compensation" in recognition of the U.S. Supreme Court's ruling in *Ft. Stewart Schools* v. *FLRA*, 495 U.S. 641 (1990). In that case the Court held that the term "conditions of employment," as used in the Federal Service Labor-Management Relations Statute (5 U.S.C. 7101), included salary, to the extent that the agency has discretion in establishing, implementing, or adjusting employee compensation. Id. at 646–47. Thus, Congress sought to make clear in 38 U.S.C. 7422(b) that title 38 employees' right to bargain with respect to "conditions of employment" did not include the right to bargain over compensation. Over the years, Congress has authorized VA to exercise considerable discretion and flexibility with respect to title 38 compensation to enable VA to recruit and retain the highest quality health care providers.

The term "rates of basic pay" is not defined in title 38. However, the Department has defined "basic pay" as the "rate of pay fixed by law or administrative action for the position held by an employee before any deductions and exclusive of additional pay of any kind." VA Handbook 5007, Part IX, par. 5. Such additional pay includes market pay, performance pay, and any other recruitment or retention incentives. Id. Accordingly, S. 572 would subject many discretionary aspects of title 38 compensation to collective bargaining. For example, there are two discretionary components of compensation for VA physicians and dentists under the title 38 pay system—market pay and performance pay. Market pay, when combined with basic pay, is meant to reflect the recruitment and retention needs for the specialty or assignment of the particular physician or dentist in a VA facility. Basic pay for physicians and dentists is set by law and would remain non-negotiable under this bill, but the Secretary has discretion to set market pay on a case-by-case basis. Market pay is determined through a peer-review process based on factors such as experience, qualifications, complexity of the position, and difficulty recruiting for the position. In many cases, market pay exceeds basic pay. In those situations, this bill would render a large portion or even the majority of most physicians' pay subject to collective bargaining. The Secretary also has discretion over the amount of performance pay, which is a statutorily authorized element of annual pay paid to physicians and dentists for meeting goals and performance objectives. Under this bill, performance pay would also be negotiable. Likewise, pay for nurses entails discretion because it is set by locality-pay surveys. Further, Congress has granted VA other pay flexibilities involving discretion, including premium pay, on-call pay, alternate work schedules, Baylor Plan, special salary rates, and recruitment and retention bonuses. The ability to exercise these pay flexibilities is a vital recruitment and retention tool. It is necessary to allow VA to efficiently compete on a cost-effective basis with the private sector and to attract and retain clinical staff who deliver health care to Veterans. As described below, this flexibility would be greatly hindered by the collective bargaining ramifications of S. 572.

This bill would obligate VA to negotiate with unions over all discretionary matters relating to compensation, and to permit employees to file grievances and receive relief from arbitrators when they are unsatisfied with VA decisions about discretionary pay. If VA were obligated to negotiate over such matters, it could be barred from implementing decisions about discretionary pay until it either reaches agreements with its unions or until it receives a binding decision from the Federal Service Impasses Panel. Stated differently, VA could be prevented from hiring clinical staff and have decisions regarding appropriate clinical staff subject to third party delay and retroactive change. This could significantly hinder our ability and flexibility to hire clinical staff as needed to timely meet patient-care needs.

Moreover, any time an employee was unsatisfied with VA's determination of his or her discretionary pay, the union could grieve and ultimately take the matter to binding arbitration. This would allow an arbitrator to substitute his or her judgment for that of VA and, with regard to physician market pay, to override peer review rec-

ommendations. This bill would allow independent third-party arbitrators and other non-VA, non-clinical labor third parties who lack clinical training and expertise to make compensation determinations. VA would have limited, if any, recourse to appeal such decisions.

Importantly, S. 572 would result in unprecedented changes in how the Federal Government operates. It would permit unions to bargain over, grieve, and arbitrate a subject—employee compensation—that is generally exempted from collective bargaining even under title 5. Although Congress has built much more Agency discretion into the title 38 compensation system both to achieve the desired flexibility and because the system is unique to VA, permitting title 38 employees to negotiate the discretionary aspects of their compensation would be at odds with how other Federal employees are generally treated. Further, collective bargaining over discretionary aspects of pay is unnecessary. VA's retention rates for physicians and dentists are comparable to private sector retention rates, while retention rates for VA registered nurses significantly exceed those of the private sector, strongly suggesting that the lack of bargaining ability over discretionary aspects of pay has not negatively affected VA's ability to retain title 38 employees.

To address some of the concerns expressed by the unions, the Secretary convened a group of union and management officials to formulate recommendations to jointly explore and clarify the implementation of the title 38 exclusions under section 7422.

This workgroup was a significant cooperative effort, spanning multiple meetings, in person and via conference calls, from July 2009 through May 2010. The 7422 workgroup membership included field clinicians, the Office of General Counsel, the Office of Labor Management Relations, and the five national unions (American Federation of Government Employees (AFGE); National Association of Government Employees (NAGE); Service Employees International Union (SEIU); United American Nurses (UAN) (now National Nurses United (NNU)); and, National Federation of Federal Employees (NFFE). Assistant Secretary for HR&A, John Sepúlveda, participated in all face to face meetings of the workgroup.

The final result of the workgroup was sixteen individual recommendations, as well as concise position papers of the parties and joint supporting documents. Included in the recommendations approved by the Secretary in December 2010 was language to address union concerns with the way section 7422, including the compensation exclusion is implemented. Also in December 2010, Memorandum of Understanding (MOU) with the approved recommendations was signed by the Deputy Secretary, W. Scott Gould; the Under Secretary for Health, Robert A. Petzel, MD; the Assistant Secretary for HR&A, John U. Sepúlveda; and the leaders of four of the five national unions. The Secretary has charged an implementation team to work on further development of an action plan to implement the 7422 working group's approved recommendations. A meeting is scheduled for July 6–7, 2011, in Washington, DC. Additional meetings will be scheduled to complete the implementation process. The MOU as well as our actions to implement it show our

commitment to collaborate with the unions and make the passage of S. 572 unnecessary.

We are not able to estimate the cost of S. 572 for two reasons. First, if VA is required to negotiate over compensation matters, and if the Agency is unable to reach agreements with the unions, the final decisions on pay will ultimately rest with the Federal Service Impasses Panel. The Panel has discretion to order VA to comply with the unions' proposals. Second, if pay issues become grievable and arbitrable, the final decisions on pay will rest in the hands of arbitrators.

On the whole, our efforts to recruit and retain health care professionals have been widely successful, and have not in any way been impaired by the exclusion of matters concerning or arising out of compensation from collective bargaining. We would be glad to share applicable data with the Committee and brief the members on our continuing efforts in this area.

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MINORITY VIEWS OF HON. RICHARD BURR, RANKING MEMBER

I write separately because any matter affecting union rights to bargain, which may negatively affect the health care benefits our nation's veterans receive, should give us all pause.

Employees governed under the title 38, United States Code, personnel system can collectively bargain over all matters except professional conduct or competence; matters affecting peer review; or the establishment, determination, or adjustment of employee compensation. The legislation approved by the majority would make all compensation matters (except basic rates of pay) open to collective bargaining. Specifically, this change would allow collective bargaining with respect to items that are now at the Secretary's discretion, including market pay; performance pay; premium pay; on-call pay; pay connected with the Baylor Plan schedule; special salary rates; recruitment and retention bonuses; and nurse locality pay.

Here are my concerns:

The Committee received testimony in each of the last three Congresses regarding legislation to amend the law governing VA employees' collective bargaining rights, a law that has not been amended since its inception 20 years ago. Both the Obama and Bush administrations testified strongly against the legislation. For example, here is an excerpt from VA's testimony at the June 8, 2011, Committee hearing to review legislation to modify the collective bargaining law:

> While we appreciate the many contributions collective bargaining and the labor-management partnership make to VA's mission, we strongly oppose S. 572.
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> * * * * * * *
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> * * * The ability to exercise * * * pay flexibilities is a vital recruitment and retention tool. It is necessary to allow VA to efficiently compete on a cost-effective basis with the private sector and to attract and retain clinical staff who deliver health care to Veterans * * *. [T]his flexibility would be greatly hindered by the collective bargaining ramifications of S. 572.
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> * * * VA could be prevented from hiring clinical staff and have decisions regarding appropriate clinical staff subject to third party delay and retroactive change. This could significantly hinder our ability and flexibility to hire clinical staff as needed to timely meet patient-care needs.

In the face of this testimony, are we prepared to say that extending the ability to bargain over these matters will not negatively affect operation of VA's health care system? What would be the effect of protracted negotiations on these matters if VA and the unions

could not reach agreements? What would be the effect of a third party arbitrator deciding matters impacting operations of a health care system? What would the impact be on hospital budgets and management flexibility to use resources on critical items?

Furthermore, it's hard to imagine how this legislation could be considered necessary. To address union concerns that apparently led to this legislation, the Secretary convened a workgroup of management officials and national unions to clarify and explore the exclusions in section 7422 of title 38. This workgroup held meetings spanning close to a year which resulted in numerous recommendations approved by the Secretary in December 2010, prescribing the manner in which exclusions under section 7422 are implemented. In other words, VA is already addressing the unions' concerns.

While I support the men and women who tirelessly work to serve our nation's veterans, I must recommend caution in moving forward with any legislation that may adversely affect the health care our nation's veterans receive.

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CHANGES IN EXISTING LAW

In compliance with paragraph 12 of Rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman).

TITLE 38. VETERANS' BENEFITS

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PART V. BOARDS, ADMINISTRATIONS, AND SERVICES

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CHAPTER 74. VETERANS HEALTH ADMINISTRATION—PERSONNEL

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Subchapter II. Collective Bargaining and Personnel Administration

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SEC. 7422. COLLECTIVE BARGAINING

(a) * * *

(b) Such collective bargaining (and any grievance procedures provided under a collective bargaining agreement) in the case of employees described in section 7421(b) of this title may not cover, or have any applicability to, any matter or question concerning or arising out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee [compensation] *rates of basic pay* under this title.

(c) * * *

(d) An issue of whether a matter or question concerns or arises out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee [compensation] *rates of basic pay* under this title shall be decided by the Secretary and is not itself subject to collective bargaining and may not be reviewed by any other agency.

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