

## Calendar No. 558

111TH CONGRESS }  
2d Session }

SENATE

{ REPORT  
{ 111-287

---

---

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 2, 2010.—Ordered to be printed

Filed, under authority of the order of the Senate of August 5, 2010

Mr. AKAKA, from the Committee on Veterans' Affairs,  
submitted the following

### R E P O R T

together with

### MINORITY VIEWS

[To accompany S. 3486]

The Committee on Veterans' Affairs (hereinafter, "the Committee"), to which was referred the bill (S. 3486), 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, having considered the same, reports favorably thereon, and recommends that the bill do pass.

#### INTRODUCTION

On June 15, 2010, Senator Brown of Ohio introduced S. 3486. S. 3486 would repeal the prohibition on collective bargaining for matters and questions regarding compensation of employees of the Department of Veterans Affairs, other than rates of basic pay.

In a Committee markup on August 5, 2010, Senator Brown of Ohio introduced an amendment, which contained the text of S. 3486, to the Committee Print of S. 3325.

## COMMITTEE MEETING

The Committee met in open session on August 5, 2010, to consider, among other legislation, an amendment to the Committee Print of S. 3325, introduced by Mr. Brown of Ohio. The Committee agreed by voice vote to separate this amendment and to report it individually if agreed to. The Committee then agreed to the amendment by a call of the roll.

## SUMMARY OF S. 3486 AS REPORTED

S. 3486, as reported (hereinafter, “the Committee bill”), would repeal the prohibition on collective bargaining with respect to matters and questions regarding compensation of employees of the Department of Veterans Affairs (hereinafter, “the Department” or “VA”) other than 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.*

The Committee bill would repeal the prohibition on collective bargaining for Department employees hired under the authority of title 38, United States Code (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, United States Code, and are subject to the provisions of chapter 74 of title 38, United States Code, 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, United States Code, for pay schedules, disciplinary and adverse action procedures, and performance management and leave systems (hereinafter, “Title 38 Hybrid Employees”).

Title 5, United States Code, 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, United States Code. Under section 7422 of title 38, United States Code, 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 the American Federation of Government Employees (hereinafter, "AFGE") on April 22, 2009, regarding S. 362, a related bill addressing collective bargaining rights, which was introduced by Senator Rockefeller on January 30, 2009. AFGE contended that the Department's interpretation of the exclusions to collective bargaining have been overly broad. Ammie Hilsabeck, a registered nurse at the Oscar G. Johnson VA Medical Center in Iron Mountain, Michigan, representing AFGE, stated that the Department applies the exception to bargaining over compensation, "not just to negotiation over the setting of pay scales (which is clearly prohibited already by Title 5 for all federal employees), but also entitlements to 'additional pay' such as overtime, weekend pay, and retention pay that Congress has specifically enacted to ensure a fair and desirable workplace."

Also, in testimony submitted at the same hearing, the Disabled American Veterans stated that it endorsed the intent of S. 362 and believed it to be an appropriate remedy that would give the Department and labor to a more balanced bargaining relationship on issues of importance to VA's professional workforce.

*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, August 30, 2010.*

Hon. DANIEL K. AKAKA,  
*Chairman,*  
*Committee on Veterans' Affairs,*  
*U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 3486, a bill to amend title 38, United States Code, to repeal the prohibition on collective bar-

gaining 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 Sunita D'Monte.

Sincerely,

DOUGLAS W. ELMENDORF,  
*Director.*

Enclosure.

*S. 3486—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. 3486 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. 3486 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 78,500 of the administration's roughly 260,000 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; such compensation is estimated to total almost \$24 billion in 2010. Under the bill, collective bargaining could increase VHA's personnel costs in several ways; for example, employees could negotiate bonuses or performance awards, higher rates for overtime pay, and higher special pay for employees in highly demanded specialties. However, CBO has no basis upon which to estimate the likelihood or potential magnitude of those effects.

Enacting S. 3486 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

S. 3486 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 Sunita D'Monte. 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 August 5, 2010, meeting. On that date the Committee agreed by voice vote to report separately the amendment introduced by Mr. Brown of Ohio, if agreed to. The following senators were present: Mr. Rockefeller, Ms. Murray, Mr. Brown of Ohio, Mr. Webb, Mr. Tester, Mr. Begich, Mr. Burr, Mr. Burr, Mr. Isakson, Mr. Brown of Massachusetts, and Chairman Akaka.

The Committee then agreed to the measure and ordered S. 3486, to be reported favorably to the Senate by a call of the roll.

Yeas	Senator	Nays
X	Mr. Rockefeller	
X	Mrs. Murray	
X (by proxy)	Mr. Sanders	
X	Mr. Brown of Ohio	
X (by proxy)	Mr. Webb	
X	Mr. Tester	
X	Mr. Begich	
X	Mr. Burr	
X (by proxy)	Mr. Specter	
	Mr. Burr	X
	Mr. Isakson	X
	Mr. Wicker	X (by proxy)
	Mr. Johanns	X (by proxy)
	Mr. Brown of Massachusetts	X
	Mr. Graham	X (by proxy)
X	Mr. Chairman	
10	TALLY	6

#### AGENCY REPORT

On July 30, 2010, the Committee received a letter from Secretary Shinseki which was supplemental to the Department's views on pending legislation provided at the Committee hearing on May 19, 2010, at which Thomas J. Pamperin, Associate Deputy Under Secretary for Policy and Program Management, Veterans Benefits Administration, and Robert Jesse, MD, Acting Principal Deputy Under Secretary for Health, Veterans Health Administration, appeared before the Committee and submitted written testimony on pending legislation. Excerpts of the additional views are reprinted below:

THE SECRETARY OF VETERANS AFFAIRS,  
*Washington, DC, July 30, 2010.*

Hon. DANIEL K. AKAKA,  
*Chairman,*  
*Committee on Veterans' Affairs,*  
*U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: I am pleased to provide the Committee with the views of the Department of Veterans Affairs (VA) on twelve of the thirteen bills listed in your May 21, 2010, letter. In addition, we are providing cost estimates for three bills about which we testified at the Committee's May 19, 2010, hearing but for which we were unable to develop cost estimates in time for that hearing. We will provide views and costs on S. 3486 to the Committee in a separate letter.

\* \* \* \* \*

S. 3486

S. 3486 would repeal the prohibition on collective bargaining with respect to compensation of VA employees other than rates of basic pay. We will provide the Committee with formal written comments on this bill in a separate letter.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

ERIC K. SHINSEKI.

\* \* \* \* \*

MINORITY VIEWS OF HON. RICHARD BURR,  
RANKING MEMBER

I am concerned that my colleagues in the majority have approved this legislation to expand collective bargaining rights without a full understanding of its potential impact on VA's health care system. The Committee did not have the views of the administration or other interested groups, did not have the ability to question witnesses about the legislation's effect and, at the August 5 markup, was not presented with any compelling evidence as to why the Committee's consideration of the bill needed to be rushed.

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.

Here are my concerns:

The Committee received testimony in each of the last two 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 Bush and Obama administrations testified strongly against the legislation. For example, here is an excerpt from VA testimony at the April 22, 2009, Committee hearing to review legislation to modify the collective bargaining law:

"While we appreciate the many positive contributions collective bargaining and labor-management partnership make to VA's mission, VA strongly opposes S. 362, which, if enacted, would imperil VA's ability to furnish timely and quality care for veterans."

Although what we considered at the August 5, 2010, mark up was narrower in scope than the legislation referred to in the above testimony, as a Congress, we have an obligation to understand the consequences, both intended and unintended, of what we considered. Certainly any matter affecting union rights to bargain which may "imperil VA's ability to furnish timely and quality care for veterans" should give us all pause.

I was able to get a brief list of the items that, under the legislation adopted by the majority, would be open to collective bargaining. It includes 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. Are we prepared to say that we understand how extending the ability to bargain over these matters will affect operation of VA's health care system? What would be the effect of protracted negotia-

tions 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?

Again, without answers to all of these questions—each raised in the last few years by both the Bush and Obama administrations—we are simply flying blind. I believe that it is important to see the views of the Administration and others before this bill is considered by the full Senate. I would have hoped for a more deliberative Committee process and not one that, in my opinion, threw caution to the wind.



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**

\* \* \* \* \*

**PART V. BOARDS, ADMINISTRATIONS, AND SERVICES**

\* \* \* \* \*

**CHAPTER 74. VETERANS HEALTH ADMINISTRATION—PERSONNEL**

\* \* \* \* \*

**Subchapter II. Collective Bargaining and Personnel Administration**

\* \* \* \* \*

**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.

(e) \* \* \*

\* \* \* \* \*