



DEPARTMENT OF VETERANS AFFAIRS  
Under Secretary for Health  
Washington DC 20420

October 31, 2017

Ms. Jennifer Marshall  
President, AFGE Local 2145  
Richmond VA Medical Center  
1201 Broad Rock, Blvd.  
Richmond, VA 23249

Dear Ms. Marshall:

I am responding to the request for a 38 U.S.C. § 7422 decision regarding AFGE Local 2145's grievance concerning the Medical Center's failure to provide notice of Nurse Professional Standards Board (Board) actions to a registered nurse.

I have determined that the issue presented regarding the failure to provide notice of the Board action, and the remedy to allow the nurse to seek reconsideration of a Board action does not address matters or questions that concern or arise out of professional conduct or competence and are thus exempted from collective bargaining by 38 U.S.C. § 7422(b). However, the remedy requested in which the nurse could seek retroactive promotion or pay is a matter concerning or arising out of employee compensation within the meaning of 38 U.S.C. § 7422(b) and is excluded from collective bargaining under 38 U.S.C § 7422. Please review the enclosed Decision Paper for a more complete explanation of my decision.

Sincerely,

A handwritten signature in cursive script, reading "Carolyn M. Clancy, M.D.", is written in black ink. The signature is positioned above the printed name and title.

Carolyn M. Clancy, M.D.  
Executive in Charge

Enclosures



DEPARTMENT OF VETERANS AFFAIRS  
Under Secretary for Health  
Washington DC 20420

October 31, 2017


Mr. John Brandecker  
Director  
Richmond VA Medical Center  
1201 Broad Rock, Blvd.  
Richmond, VA 23249

Dear Mr. Brandecker:

I am responding to your request for a 38 U.S.C. § 7422 decision regarding AFGE Local 2145's grievance concerning the Medical Center's failure to provide notice of Nurse Professional Standards Board (Board) actions to a registered nurse.

I have determined that the issue presented regarding the failure to provide notice of the Board action, and the remedy to allow the nurse to seek reconsideration of a Board action does not address matters or questions that concern or arise out of professional conduct or competence and are thus exempted from collective bargaining by 38 U.S.C. § 7422(b). However, the remedy requested in which the nurse could seek retroactive promotion or pay is a matter concerning or arising out of employee compensation within the meaning of 38 U.S.C. § 7422(b) and is excluded from collective bargaining under 38 U.S.C § 7422. Please review the enclosed Decision Paper for a more complete explanation of my decision.

Sincerely,

  
Carolyn M. Clancy, M.D.  
Executive in Charge

Enclosures

**Title 38 Decision Paper  
Department of Veterans Affairs (VA)  
Richmond VA Medical Center, Richmond, Virginia**

**FACTS**

On December 27, 2013, the American Federation of Government Employees (AFGE), Local 2145 (Union) filed a Step 3 grievance against the Richmond VA Medical Center (Medical Center). (Exhibit 1). The grievance alleged that the Medical Center improperly boarded a registered nurse (nurse) and failed to provide her with appropriate notice of several of her promotion decisions, which were issued by the Medical Center's Nurse Professional Standards Board (Board) in 2007, 2008, 2009, 2010, 2011, and 2013.<sup>1</sup> (*Id.*). According to the grievance, as a result of the lack of notification, the nurse was unable to timely request reconsideration of the Board's decisions not to promote her. The Union further alleged that the lack of notification of Board actions was "in violation of the Arbitrator's Decision dated August 11, 2011, and Memo dated December 1, 2005."<sup>2</sup> (Exhibits 1,11 and 12).

In order to remedy the grievance, the Union requested that the nurse receive notice of the historical Board actions, an opportunity to engage in the reconsideration process, appropriate retroactive promotion, and "proper consideration for back pay." (*Id.*).

The Medical Center responded to the grievance on November 21, 2014. (Exhibit 2). The Interim Chief of Mental Health Nursing (Interim Chief) stated that the nurse was properly boarded and provided copies of the most recent action by the Board, in which the Board recommended the nurse for promotion to a Nurse III position. (*Id.*). In addition, the Interim Chief stated that the matter was non-grievable and non-arbitrable because it "concerns the establishment, determination, or adjustment of employee compensation and is excluded from bargaining under 38 USC § 7422(b)." (*Id.*).

The Union invoked arbitration on the grievance. The Medical Center filed a request for a 38 U.S.C. § 7422 determination on May 27, 2015. (Exhibit 3). The Union submitted its response to the Medical Center's request on June 3, 2015. (Exhibit 4). The arbitration hearing was held June 23, 2015.<sup>3</sup> (Exhibits 3 and 13). The Arbitrator sustained the grievance in part and directed the Medical Center provide the nurse with a copy of the April 18, 2013, Board action with a cover letter that informs her of her promotion

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<sup>1</sup> One of the six allegations in the grievance stated "**Board Action dated 03 /06/2009** was never provided to the BUE nor was the BUE notified by memo that she was not promoted and why not. Appeal time limits have expired and this has adversely impacted the BUE." (emphasis in original). (Exhibit 1).

<sup>2</sup> The memo dated December 1, 2005 provides that a nurse can submit a written request for reconsideration of Board promotion decisions within 14 calendar days of receipt of written notification of the Board action form. (Exhibit 11). The 2011 Arbitrator's decision decided that the 2005 memo requiring written notification was a negotiated agreement and therefore the Agency had to abide by the agreement, i.e., had to provide written notification to nurses of Board actions regarding promotion. (Exhibit 12). The facility argues that the union's grievance "fails to cite to any VA regulations or national VA policy relating to board matters that the Medical Center has allegedly failed to follow."

<sup>3</sup> VA counsel requested that the matter be held in abeyance pending a 38 U.S.C. § 7422 determination on the matter, but Union counsel refused to postpone the arbitration hearing. (Exhibit 5).

reconsideration review rights. While the arbitrator made it clear in her award that she was not opining as to whether the nurse is entitled to be retroactively promoted or to receive back pay, she provided the nurse 30 calendar days from receipt of the letter to request reconsideration of the Board Action. The Arbitrator noted that if the nurse did seek reconsideration, "the merits of her appeal and all matters of compensation are entirely within the purview of the Agency." (Exhibit 13).

### **38 U.S.C. § 7422 AUTHORITY**

The Secretary of the Department of Veterans Affairs has the final authority to decide whether a matter or question concerns or arises out of professional conduct or competence, peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b).<sup>4</sup>

### **ISSUES**

#### **Issue 1**

Whether a Union grievance claiming that the Medical Center regularly failed to provide notice of Board actions to a nurse is a matter or question concerning or arising out of peer review, or the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b).

#### **Issue 2**

Whether the remedies sought by the Union in which the nurse can (a) seek reconsideration of the Board's promotion decision and (b) seek retroactive pay or promotion, are a matter or question concerning or arising out of peer review, or the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b).

### **DISCUSSION**

The Department of Veterans Affairs Labor Relations Improvement Act of 1991, codified in part by 38 U.S.C. § 7422, grants limited collective bargaining rights to Title 38 employees and specifically excludes from the collective bargaining process and the parties' negotiated grievance procedure, matters or questions concerning or arising out of professional conduct or competence, peer review, or employee compensation, as determined by the Secretary.

#### **Issue 1**

Whether a Union grievance claiming that the Medical Center regularly failed to provide notice of Board actions to a nurse is a matter or question concerning or arising out of peer review, or the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b).

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<sup>4</sup> "Professional conduct or competence" is more fully defined as "direct patient care" or "clinical competence." 38 U.S.C. § 7422(c).

The Union's grievance alleges that the Medical Center failed, on multiple occasions, to provide notice, following annual Board reviews of a nurse's qualifications, of the results of the Board's promotion action. (Exhibit 1). At a minimum, a nurse must be notified of the results of a Board's review and the reasons behind its promotion decision. As early as March 6, 2007, VA policy stated that, initially, a local Board determines whether a nurse meets the VA Nurse Qualification Standards and is eligible for promotion to a higher grade or to advancement within the nurse's current grade. (Exhibit 6, p. III-49). Following consideration by the Board, the Board forwards its file to the facility's Medical Center Director for appropriate action. (*Id.*). According to VA policy, when a nurse is not promoted or advanced to a higher level within her grade, the nurse is reconsidered for promotion or advancement on the nurse's next anniversary date of grade.<sup>5</sup> (*Id.*) at III-50). Following the Board's action, the nurse's supervisor must advise the nurse of any decision not to promote the nurse, the reasons for the decision, and the nurse's right to request reconsideration of the Board's actions. (*Id.*). After discussion with the nurse's supervisor, a nurse dissatisfied with a Board action may pursue reconsideration of the Board action through the procedure detailed in VA policy. (*Id.*) at III-51, 52).

The Union claims that the nurse for whom the grievance was filed did not receive notice of the Board's actions on six separate occasions, 2007, 2008, 2009, 2010, 2011, and 2013. (Exhibit 1). As a result, the nurse was unable to timely initiate a request for reconsideration of the Board's determinations. (*Id.*). It is well established that Board decisions concerning nurse advancements or promotions are not susceptible to challenge through the parties' negotiated grievance procedure.<sup>6</sup> (Exhibit 7).

However, in this instance, the Union is not directly challenging a Board action. Instead, the Union is contending that the Medical Center repeatedly failed to timely communicate the results of annual Board actions impacting the nurse.<sup>7</sup> (Exhibit 1). As explained by the Union: "This case has nothing to do with any agency authority to conduct boarding of employees or set their pay. It is entirely a question of the agency failing to notify the employee that the boarding had occurred and allowing the employee to pursue their appeal rights under the agency procedure." (emphasis added). (Exhibit 4). The Secretary has determined that a failure to follow VA policy may serve as an exception to the application of section 7422 exclusions. (Exhibit 9). Because it is unclear whether the Medical Center provided the requisite notice each year and fully complied with VA policy, I find that the Union's primary claim is not excluded from arbitration by 38 U.S.C. § 7422 (section 7422).

## Issue 2

Whether the remedies sought by the Union in which the nurse can (a) seek reconsideration of the Board's promotion decision and (b) seek retroactive pay or promotion, are a matter or

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<sup>5</sup> A Board may extend the review period up to three years when a Nurse II does not meet the education or experience requirements in the qualification standard. (Exhibit 6, p. III-50). That does not appear to be the case here. The local Board considered the nurse's qualifications each year between 2007 and 2011, and again in 2013 and 2014. (Exhibit 8); (Exhibit 10).

<sup>6</sup> See, e.g., VAMC Minneapolis (October 20, 2014). (Exhibit 7).

<sup>7</sup> While the Union's grievance is not focused on noncompliance with VA policy, for our purposes – consideration of possible exclusion of the grievance from arbitration under section 7422 – the critical question is whether the Medical Center followed VA policy.

question concerning or arising out of peer review, or the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b).

Although I find the grievance is not excluded by section 7422, the remedies requested by the Union implicate 38 U.S.C. § 7422 and may be excluded by section 38 U.S.C. §7422. The Arbitrator found that the Medical Center failed to comply with VA required notice of Board actions. The Arbitrator directed the Medical Center provide the nurse with a copy of the April 18, 2013, Board action with a cover letter that informs her of her promotion reconsideration review rights and provides the nurse 30 calendar days from receipt of the letter to request reconsideration of the Board Action. As I determined above, the nurse is entitled to notification of the Board action in compliance with Agency policy, and she can seek reconsideration of the Board's promotion decision. Seeking reconsideration of the Board's promotion decision is not excluded by 38 U.S.C. § 7422, as such request is not a matter or question that concerns or arises out of professional conduct or competence, peer review, or employee compensation. However, she cannot seek retroactive pay or promotion, as that is clearly a matter of adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b).

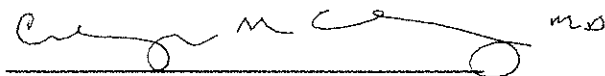
## DECISIONS

### Issue 1

A Union grievance claiming that the Medical Center regularly failed to provide notice of Board actions to a nurse is not a matter or question concerning or arising out of peer review, or the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b).

### Issue 2

The remedy sought by the Union in which the nurse can seek reconsideration of the Board's promotion decision is not a matter or question concerning or arising out of peer review, or the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b). The remedy sought by the Union in which the nurse can seek retroactive pay or promotion is a matter or question concerning or arising out of adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b) and is thus excluded from collective bargaining.



Carolyn M. Clancy, M.D.  
Executive in Charge  
Office of the Under Secretary for Health

10/31/17  
Date