

**Title 38 Decision Paper
Department of Veterans Affairs (VA)
Minneapolis VA Health Care System**

FACTS

On February 16, 2010, the Minneapolis VA Health Care System (Medical Center) hired a registered nurse to work in the facility's Extended Care and Rehabilitation Patient Service Line. (Exhibit 1). The registered nurse was initially boarded by a Nurse Professional Standards Board (NPSB).¹ (Exhibit 2). Based on NPSB's recommendation, she was hired as a Nurse I, Level 1, Step 1, registered nurse with a salary of \$57,425. (Exhibit 1).

On May 24, 2011, the registered nurse was boarded a second time, and NPSB recommended that she be advanced to a Nurse I, Level 2. (Exhibit 3, Exhibit 4). The registered nurse then received a within grade increase to Nurse I, Level 2, Step 4, effective February 26, 2012. (Exhibit 5). On June 21, 2012, the registered nurse was boarded a third time and was promoted to a Nurse II, Step 1, effective July 1, 2012. (Exhibit 6, Exhibit 7). She advanced to a Nurse II, Step 2, effective February 10, 2013. (Exhibit 8).

In 2013, the Medical Center conducted a comprehensive back pay study and determined that the registered nurse had been improperly promoted to a Nurse II position in July 2012. (Exhibit 9). To rectify the error, on March 9, 2013, the Medical Center canceled the promotion and placed the nurse in a Nurse I, Level 3, Step 6 position, effective March 11, 2012.² (Exhibit 10, Exhibit 11). On March 20, 2013, she was given a within grade increase and advanced to a Nurse I, Level 3, Step 8 position, effective March 10, 2013.³ (Exhibit 12).

Upon learning that the registered nurse had been placed back in a Nurse I position, the American Federation of Government Employees, Local 3669 (Union), filed a Step 2 grievance on April 17, 2013, on behalf of the nurse, asserting a violation of the Master Agreement. (Exhibit 15). On April 30, 2013, management met with the registered nurse

¹ One of the primary functions of an NPSB is to "[r]eview and act on employment applications and determine whether the applicant meets the requirements set forth in VA qualification standards." (VA Handbook 5005, Part II, Chapter 3, Section C(5), p. II-87). (Exhibit 13).

² The Medical Center claimed that the action was required because the registered nurse did not meet time-in grade requirements for promotion. (Exhibit 9). However, the Department's time-in-grade requirements for Title 38 promotions were eliminated in June 2012. (VA Handbook 5005, Update 58 (June 14, 2012)). (Exhibit 23). A more accurate explanation can be found in the Nurse Qualification Standard, which says, "employees at Nurse I must successfully advance through each level of the grade before being promoted to Nurse II." (Exhibit 26).

³ Both the Medical Center's Step III Grievance Decision (Exhibit 18) and its Request for a 38 United States Code (U.S.C.) § 7422(b) Determination (Exhibit 9) mistakenly indicate that instead of promoting the RN to a Nurse II, Step 1, she should have been promoted to a Nurse I, Level 3, Step 9. In reality, the RN was a Nurse I, Level 2, Step 4, at the time of the erroneous promotion and was properly restored to a Nurse I, Level 3, Step 6, when the mistake was discovered. (Exhibit 7, Exhibit 11, Exhibit 14).

and her Union representative. The nurse stated that her initial 2010 boarding was incorrect and that she should be returned to a Nurse II position. (*Id.*)

On May 1, 2013, the Medical Center's Chief Nurse for Extended Care (Chief Nurse) issued the facility's response to the Union's grievance, denying the requested remedies. (Exhibit 16). The Chief Nurse explained that the registered nurse was correctly boarded initially based on her education and experience and "incorrectly promoted from a Nurse I Level 2 to a Nurse 2. She should have been presented for an advancement to the Nurse I Level 3." (*Id.*). The Chief Nurse further stated that the VA Handbook "clearly states that an RN must pass through each level before being promoted to the next level." (*Id.*).

On May 7, 2013, the Union filed its Step 3 grievance. (Exhibit 17). On May 29, 2013, the Associate Director issued a Step 3 grievance response. (Exhibit 18). He apologized for the Medical Center's failure to notify the registered nurse before her pay was reduced, but defended the initial boarding of the registered nurse as correct. (*Id.*). He also addressed the registered nurse's career ladder progress: "[Registered nurse] is currently at the Nurse I Level 3 Step 8. After boarding it is anticipated that she will go to a Nurse II Step 2. After the boarding process is completed, "[Registered nurse]'s back pay will also be retroactive to 3/24/13."⁴ (*Id.*). The Associate Director further stated that Human Resources was working with the registered nurse to complete and process a debt waiver for any overpayment she received.⁵ (*Id.*). He agreed that for all future employee pay adjustments, employees would be notified in advance and given the opportunity to involve the Union. (*Id.*).

The Union invoked arbitration on the grievance on June 13, 2013. (Exhibit 9). The VA verbally notified the Union that the Medical Center would seek to have the matter excluded from collective bargaining based on 38 U.S.C. § 7422, and on August 8, 2013, sent Union counsel an email with a link to the Department's 38 U.S.C. § 7422 decisions. (Exhibit 9, Exhibit 21). Management initiated the 7422 checklist on September 24, 2013. (Exhibit 9). On September 25, 2013, the Medical Center emailed the Union to say that it was seeking an informal review from the VA Office of Labor-Management Relations on the potential application of 38 U.S.C. § 7422. (Exhibit 22).

On November 1, 2013, the Medical Center Director submitted a formal amended request for a 38 U.S.C. § 7422 determination (hereafter "Request"). The Request was signed by both the Medical Center Director and the Network Director for the Veterans Integrated Service Network (VISN) 23. (Exhibit 9). On November 15, 2013, the Union filed its own request for a 38 U.S.C. § 7422 determination (hereafter "Response"), asserting that the "actions and issues" described in its request are not excluded from collective bargaining or the grievance process under 38 U.S.C. 7422(b)." (Emphasis in original). (Exhibit 24).

⁴ The registered nurse was boarded a fourth time on June 11, 2013. (Exhibit 19). She was promoted to a Nurse II, Step 2, effective March 24, 2013. (Exhibit 20).

⁵ The registered nurse received a debt notice following her retroactive placement back into a Nurse I position. The debt was waived on July 1, 2013. (Exhibit 9).

AUTHORITY

The Secretary has the final authority to determine whether a matter or question concerns or arises out of professional conduct or competence (i.e., direct patient care or clinical competence), peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b).

ISSUES

- A. Whether the Union's grievance claiming that a registered nurse was improperly boarded by an NPSB when she was initially hired by the Medical Center 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).
- B. Whether the Union's grievance claiming that a registered nurse was improperly returned to a Nurse I position to rectify an earlier error by the Medical Center's NPSB is a matter or question concerning or arising out of 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, 38 U.S.C. § 7422, granted collective bargaining rights to title 38 employees, but specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence (direct patient care or clinical competence), peer review, or employee compensation, as determined by the Secretary.

A. Initial Boarding of Registered Nurse

In February 2010 when the registered nurse was first appointed, the facility's NPSB recommended that she be placed in a Nurse I, Level 1, Step 1 position.⁶ (Exhibit 1). In reaching its initial boarding decision for a registered nurse, an NPSB compares a nurse's background, education, and experience to the Nurse Qualification Standard in VA Handbook 5005, Part II, Appendix G6. (Exhibit 33). Based on the Nurse Qualification Standard, a registered nurse is qualified as a Nurse I, Level 1, if she has an "Associate Degree or Diploma in Nursing" and no nursing experience. (Exhibit 26). In order to qualify as a Nurse I, Level 2, a registered nurse must have either an "Associate Degree or Diploma in Nursing" and approximately 1 year of nursing

⁶ "In matters concerning appointments, advancements, and probationary reviews for [registered nurses], [Professional Standards Boards] (PSB) will determine eligibility and recommend the appropriate grade and step for appointment, recommend candidates for advancement, and conduct probationary reviews." (Emphasis added). (Exhibit 13).

experience or an “Associate Degree or Diploma in Nursing and bachelors degree in a related field” and no nursing experience. (*Id.*).

The Union’s Response explained that the registered nurse had both an associate’s degree in nursing and a bachelor’s degree in psychology. (Exhibit 24). The Union asserted that the registered nurse’s psychology degree should have been credited as a “degree in a related field,” and thus, the nurse should have been originally boarded as a Nurse I, Level 2, rather than a Nurse I, Level 1. (*Id.*). In support of its position, the Union pointed to *Guidelines for Degrees in Fields Related to Nursing* (Guidelines), a VA Office of Nursing Services publication intended to assist NPSBs in determining which degrees qualify as fields related to nursing. (*Id.*, Exhibit 35). The Union emphasized that a degree in psychology is among the degrees listed in the Guidelines as a degree likely to be related to nursing. Further, a review of the nurse’s transcript demonstrates that “the majority of her coursework for her psychology degree fits within the coursework areas in Table 1 [of the Guidelines], including biology, chemistry, communication, health promotion, psychology, and social science.” (Exhibit 24). The Union asserted that the Medical Center’s NPSB erred in failing to recognize and credit the registered nurse’s psychology degree as a “degree in a related field,” and the resulting appointment of the nurse to a Level 1 rather than Level 2 position was an error that should now be corrected. (*Id.*).

According to the Medical Center, the NPSB exercised its discretion in deciding not to credit the registered nurse’s psychology degree as a “degree in a related field.” (Exhibit 2). Management explains that the registered nurse’s psychology degree did not entitle her to a higher rate because the degree was not directly applicable to the position she was hired for in Extended Care.⁷ (Exhibit 9).

The Union is challenging NPSB’s original boarding decision through the parties’ negotiated grievance procedure. The boarding decision might be susceptible to challenge had the NPSB failed to follow a designated national policy relating to board matters.⁸ However, there is no evidence of a violation of national VA policy. The Guidelines discussed above recognize the substantial discretion exercised by an NPSB: “The degree lists in Tables 3, 4, and 5 are not all-inclusive and are not a substitute for the responsibility of NPSB to review each degree presented and make a determination whether the degree is considered to be a degree in a related field.” (Exhibit 35).

⁷ The Nurse Qualification Standard allows certain limited deviations from the Qualification Standard. (Exhibit 26). For example, the Medical Center can waive certain accreditation requirements for nursing degrees. And the “approving official may authorize a waiver of experience and/or the degree requirements for individuals whose professional accomplishments, performance, and qualifications warrant such consideration based on demonstrated ability to meet the requirements for promotion to the next higher grade or advancement to a higher level within the grade. Waivers of degree requirements are not authorized for appointments.” (emphasis added). (*Id.*).

⁸ See *Joint 38 U.S.C. § 7422 Workgroup Recommendations As Revised and Approved by the Secretary of the Department of Veterans Affairs* (Secretary’s Decision Document), which states in Section A(2), “The VA’s failure to follow its own regulations and policies is not excluded by 7422.” (Exhibit 29).

An NPSB is a peer review body of accomplished and experienced health care professionals tasked with assessing a new employee's qualifications and placing the new employee in the appropriate grade and level.⁹ The *Hampton/AFGE* (July 1, 2011) decision noted that issues regarding a PSB involve peer review and thus are excluded from collective bargaining by 38 U.S.C. § 7422(b). In the instant matter, as a title 38 peer review process, NPSB's initial boarding decision is a matter or question excluded from the parties' negotiated grievance process by application of 38 U.S.C. § 7422. Additionally, because the NPSB's recommendation impacted the registered nurse's starting pay, NPSB's decision is also excluded from the negotiated grievance procedure under 38 U.S.C. § 7422 as a matter or question concerning or arising out of employee compensation.

B. Correction of Registered Nurse's Grade Level

NPSBs consider both a registered nurse's potential advancement within a grade and potential promotions to a higher grade. An NPSB reaches an advancement or promotion decision based on the guidelines in Handbook 5005. (Exhibit 25). Here, the NPSB initially reviewed the registered nurse's qualifications and recommended that she be placed in a Nurse I, Level I, Step 1 position. (Exhibit 2). The Nurse Qualification Standard is clear about the required progression from Nurse I to Nurse II: "*Employees at Nurse I must successfully advance through each level of the grade before being promoted to Nurse II.*" (Emphasis in original). (Exhibit 26). Assuming that a registered nurse is reviewed each year at the end of her first year, a Nurse I, Level 1, registered nurse may advance to Nurse I, Level 2, and after the second year of nursing experience, may advance to Nurse I, Level 3.

When the registered nurse's qualifications were reviewed in June 2012, 2 years and 4 months after the nurse was first hired, she was in a Nurse I, Level 2 position. (Exhibit 6). Based on the Nurse Qualification Standard, she was required to successfully advance through each level of the grade (e.g., Nurse 1, Level 3), before being considered for a promotion to Nurse II. (Exhibit 26). NPSB, however, recommended her for promotion to Nurse II in error, and the promotion became effective on July 1, 2012. (Exhibit 6, Exhibit 7). When this error was discovered during a comprehensive pay study in 2013, the Medical Center addressed the discrepancy by cancelling the promotion and adjusting the registered nurse's status to a Nurse I, Level 3, Step 6. (Exhibit 9, Exhibit 10, Exhibit 11).

Once the initial boarding decision was made to place the registered nurse in a Nurse I, Level 1 position, NPSB had no discretion to do more than approve successive advancements. Although the Union argues that the registered nurse should not have been placed back in a Nurse I position when the error was discovered, adherence to VA Handbook 5005 requires it. (Exhibit 26).

⁹ PSB by definition are engaged in peer review. VA Handbook 5005 states, "Whenever possible, PSBs will be composed of three or five employees from the same occupation as the individual being considered." (Exhibit 13).

A registered nurse's pay level is a matter of employee compensation. A prior Under Secretary for Health's 7422 decision noted that "Title 38 explicitly prescribes the manner and procedures the Secretary will use to determine how such employees are compensated and how that compensation is determined." (*Milwaukee/Wisconsin Federation of Nurses* (April 28, 1992)). Therefore, challenges to a registered nurse's pay level concern or arise out of the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b).

C. Union Allegations of Medical Center's Failure to Follow Policies and Regulations

The Union advanced a number of assertions to support its claim that the grievance "falls outside the scope of 7422(b) due to Management's failure to follow its own governing policy and regulations." (Exhibit 24). The Union cited *VAMC West Haven* (August 1, 2008), in asserting that an allegation that a medical center failed to follow the Department's compensation policies is sufficient to serve as an exception to the application of the 38 U.S.C. § 7422 compensation exclusion. The Secretary's Decision Document, signed in December 2010, addressed this issue more recently and more completely. Section B(4) of the Decision Document states, "Not following established VA policy regarding payment of compensation to which [an] employee is entitled is grievable, including appropriate remedy as determined by the Secretary." (Exhibit 29). Thus, to rely on the exception, a grievant must demonstrate that a VA compensation policy was actually violated, and that the grievant received less compensation than she was otherwise entitled as a result of the violation.

In its Response, the Union asserts that refusing to allow the registered nurse to retain her pay after the discovery of her inappropriate promotion violates the Office of Personnel Management's guidance on pay retention. (Exhibit 24). That guidance, however, applies only to title 5 employees, not employees whose pay is determined under title 38. (Exhibit 30).

The Union further contends that management inaccurately stated that it was unable to allow the nurse to stay as a Nurse II because of time-in-grade requirements. Even though the Union is correct when stating that such time-in-grade requirements are no longer applicable (refer to footnote 2), VA Handbook 5005 lists the education and experience requirements for nurses, as well as the requirements for advancement from one grade to the next. (Exhibit 25, Exhibit 26).

In addition, the Union complains that the Medical Center violated Article 36 of the parties' Master Agreement by failing to advise the registered nurse of the procedures available to her when the Medical Center realized she had been overpaid in error. (Exhibit 24). Reliance on a claimed violation of a Master Agreement provision, however, is unavailing when the issue relates to a matter or question concerning or arising out of a 38 U.S.C. § 7422 exclusion. Such matters or questions are specifically referenced and excluded from the parties' negotiated grievance procedure in Article 43, § 2(C) of the Master Agreement. (Exhibit 31).

The Union complains as well that the parties' Master Agreement requires the Medical Center to "assert any claim of non-grievability or non-arbitrability no later than the Step 3 decision." (Exhibit 24). The Secretary, however, may make a determination that a matter is excluded from the negotiated grievance procedure by 38 U.S.C. § 7422 at any stage of the proceedings. *American Federation of Government Employees, Local 446 v. R. James Nicolson, Secretary of Veterans Affairs, et al*, 475 F.3d 341 (D.C. Cir. 2007). (Exhibit 32).

Finally, the Union contends that the Medical Center failed to follow the "7422 process" set out in the Department's 7422 training. (Exhibit 24). It stated that management at the Medical Center did not "sit down or request to meet informally with the Local to resolve the issue" and the VISN similarly failed to "request a meeting to resolve the issue." (*Id.*). The Department and Union's joint training suggests that the parties, at Stage 1, try to resolve the issue locally through a collaborative approach, and at Stage 2, involve the VISN or Labor-Management Relations, or both. (Exhibit 28). At the same time, the training materials plainly state that, if not resolved informally, "either party can elevate to stage 2 or bypass stage 2 and go directly to the Secretary." (*Id.*). In the present case, the Medical Center met twice with the Union during grievance meetings, met informally with the registered nurse and her Union representative, involved its regional counsel and VISN management, alerted the Union that it viewed the matter as excluded by 38 U.S.C. § 7422, and sought an informal determination from the Office of Labor-Management Relations. These actions are all consistent with the joint training materials. (*Id.*, Exhibit 9).

None of the Union's assertions constitute a valid claim that the Department failed to follow its own regulations and policies. Once the Medical Center recognized its boarding error, it quickly placed the registered nurse in the appropriate grade, level, and step, and it has continued to promote her and advance her in compliance with the policy provisions in Handbook 5005. (Exhibit 11, Exhibit 12). The Union's insistence that the registered nurse should have continued in a position for which she was not qualified is unpersuasive and would simply compound the original mistake. The Medical Center's decision to place the registered nurse in the appropriate Nurse I position 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) and, as a consequence, may not be challenged through the parties' negotiated grievance procedure.

RECOMMENDED DECISIONS

A. The Union's grievance claiming that a registered nurse was improperly boarded by an NPSB when she was initially hired by the Medical Center 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) and is thus excluded from collective bargaining.

APPROVED/DISAPPROVED: ✓

B. The Union's grievance claiming that a registered nurse was improperly returned to a Nurse I position to rectify an earlier error by the Medical Center's NPSB is a matter or question concerning or arising out of the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b) and is thus excluded from collective bargaining.

APPROVED/DISAPPROVED: ✓

Robert A. McDonald
Robert A. McDonald
Secretary of Veterans Affairs

10/22/14
Date