

**Title 38 Decision Paper
Department of Veterans Affairs (VA)**

FACTS

The Department of Veterans Affairs (VA) is comprised of three administrations: the Veterans Health Administration (VHA); the Veterans Benefits Administration (VBA); and the National Cemetery Administration (NCA). (Attachment A). VA is the second largest Federal Department and has a workforce of approximately 351,540 full-time employees. *Id.* At present, the VA employs approximately 108,606 Title 38 personnel appointed under 38 U.S.C. § 7401(1).^[1] (Attachment B). VHA is America's largest integrated health care system, providing care at 1,255 health care facilities, including 170 medical centers and 1,074 outpatient sites of care of varying complexity (VHA outpatient clinics), serving 9 million enrolled Veterans each year. (Attachment C).

On March 15, 2011, a Master Collective Bargaining Agreement (2011 VA-AFGE Master Agreement) by and between the American Federation of Government Employees/National Veterans Council (Union or AFGE), and the VA was approved, signed, and effectuated. (Attachment D). The 2011 VA-AFGE Master Agreement includes Article 52, *Title 38 Advancement*. (Attachment E).

On December 15, 2017, the VA provided notification to the Union to "reopen and renegotiate the 2011 VA-AFGE Master Agreement." (Attachment F).

On May 2, 2019, the VA and AFGE Master Agreement bargaining teams exchanged initial contract proposals in order to negotiate a successor VA-AFGE Master Agreement (Successor VA-AFGE Maser Agreement. (Attachment G). In the exchanged proposals for Successor VA-AFGE Master Agreement, the Union included a proposal covering Article 52, *Title 38 Advancement*. *Id.*

On September 10, 2019, Richard A. Stone, the Executive in Charge of VHA, submitted a Request for a 38 U.S.C. § 7422(b) determination by the VA Secretary on Article 52 in the 2011 VA-AFGE Master Agreement and the Successor VA-AFGE Master Agreement negotiations. (Attachment H).

^[1] The employees described in 38 U.S.C. § 7421(b), Physicians, Dentists, Podiatrists, Optometrists, Registered Nurses, Physician Assistants, Expanded-duty dental auxiliaries, and Chiropractors, are appointed under 38 U.S.C. § 7401(1).

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 (i.e., direct patient care or clinical competence), peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b).

ISSUES

- (1) Whether Article 52, *Title 38 Advancement*, of the 2011 VA-AFGE Master Agreement, is a matter or question concerning or arising out of professional conduct or competence, peer review, and 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 and review by any other agency pursuant to 38 U.S.C. § 7422(d).
- (2) Whether the Union's contract proposal for Article 52, *Title 38 Advancement*, which the Union submitted to the Agency during the collective bargaining negotiations over a Successor VA-AFGE Master Agreement, 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 and review by any other agency pursuant to 38 U.S.C. § 7422(d).

DISCUSSION

The Department of Veterans Affairs Labor Relations Improvement Act of 1991, codified in part at 38 U.S.C. § 7422, granted limited collective bargaining rights to Title 38 employees and specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence, peer review, or employee compensation, as determined by the Secretary. 38 U.S.C. § 7422(b). "Professional conduct or competence" is defined to mean "direct patient care" and "clinical competence." 38 U.S.C. § 7422(c).

Article 52, *Title 38 Advancement*, of the 2011 VA-AFGE Master Agreement includes three provisions:

- A. Compensation for all advancements will be made within two pay periods from the effective date of advancement.

B. Notice of decisions on advancement shall be communicated in writing within 10 workdays of the action taken.

C. Supervisors shall monitor and review performance in order to determine progress or problems and to provide employees with information concerning performance. Discussions about performance will be held as often as needed, as determined by the employee and the supervisor.

(Attachment E.)

On May 2, 2019, the VA/AFGE Master Agreement Bargaining team exchanged initial contract proposals. (Attachment G.) The Article 52, *Title 38 Advancement*, proposal provided by the Union stated:

Compensation for all advancements will be made within two pay periods from the effective date of the advancement *Point of clarification* Where the Department fails to comply with its own Policy and Procedures, the matter becomes grievable. Reference: Secretary's Decision Document of December 2010.¹

Notice of decisions on advancement shall be communicated in writing within 10 workdays of the action taken.

Supervisors shall monitor and review performance in order to determine progress or problems and to provide employees with information concerning performance. Discussions about performance will be held as often as needed, as determined by the employee and the supervisor.

(Id.)

VA Handbook 5005, Part II, Chapter 3, Section C, requires the establishment of Professional Standards Boards (PSBs) to act on appointments, **advancements**, and probationary reviews of Title 38 employees. (Attachment J. (emphasis added).) PSBs are comprised of three or five members of the same occupation of the individual being considered. (Id.) PSBs act for the Under Secretary for Health and are important components of management's decision-making function. (Id.) PSBs' principle function is to provide professional peer review in such matters as eligibility for employment, suitability, appropriate grade levels for appointments and **qualifications for**

¹ On August 17, 2018, the VA Secretary rescinded the referenced Secretary's Decision Document of 2010. Attachment I.

advancement and to make recommendations based on their findings. (Id. (emphasis added))

VA Handbook 5017, part V, addresses the “policies, procedures and guidelines governing the advancement of [] podiatrists, optometrists, chiropractors, registered nurses, nurse anesthetists, physician assistants and expanded-function dental auxiliaries appointed under authority of 38 U.S.C. §§ 7401(1) or 7405(a); and, Title 38 hybrid employees appointed under 38 U.S.C. §§ 7401(3) or 7405(a)(1)(B). Excluded are facility directors, chiefs of staff, medical and dental residents appointed under authority of 38 U.S.C. § 7406, and health care executives appointed under 38 U.S.C. § 7306.” (Attachment K.)

VA Handbook 5017, part V addresses the following advancements:

1. Criteria for Special Advancement for Achievement (SAA) for Title 38 personnel who may qualify for a step advance on the basis of “professional achievement” provided they have demonstrated a high level of performance and potential for “assumption of greater responsibility.”² (Attachment K.)
2. Criteria for Special Advancement for Performance (SAP) consideration is given to “[F]ull-time, part-time and intermittent podiatrists, optometrists, chiropractors, registered nurses, nurse anesthetists, physician assistants, and expanded-function dental auxiliaries who have demonstrated a sustained high level of performance and professional competence over and above that normally expected of employees in the particular grade and profession, or who have made noted contributions in some phase of their profession, may be considered for SAPs.”³ (Attachment K.)
3. Criteria for Cash Awards for Full-Time, Part-Time, and Intermittent Registered Nurses and Nurse Anesthetists Appointed under 38 U.S.C. §§ 7306, 7401(1) and 7405 which are “[C]ash awards under this paragraph are in addition to special advancements mentioned previously in this chapter. A registered nurse or nurse anesthetist may not receive a Special Advancement for Performance and a Special Contribution Award based on the same performance, nor may they

² Each Title 38 Occupation has different criteria specific to that Title 38 occupation, as well as standards for processing and documenting the SAA, including the use of PSBs which is set forth in VA Handbook 5017, Part V. (Attachment K.)

³ Each Title 38 Occupation has different criteria specific to that Title 38 occupation, as well as standards for processing and documenting the SAP, including the use of PSBs which is set forth in VA Handbook 5017, Part V. (Attachment K.)

receive a Special Advancement for Achievement and a Special Contribution Award based on the same achievement or contribution. However, when it is determined appropriate, a registered nurse or nurse anesthetist may be granted a Special Advancement for Performance or Achievement and a cash award for exemplary job performance and exemplary job achievement as outlined ... below." (Attachment K.)

38 U.S.C. § 7422(b) specifically prohibits collective bargaining over matters that concern or arise out of professional conduct or competence, peer review, and the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b).

Professional Conduct or Competence

Article 52 and the Union's proposal for Article 52 in the Successor VA-AFGE Master Agreement address the evaluation of 38 U.S.C. § 7421(b) employees' performance. Title 38 employee Proficiency Rating System, which is used to "appraise the performance of full-time, part-time and intermittent Physicians, Dentists, Podiatrists, Optometrists, Chiropractors, Nurses, Nurse Anesthetists, Physician Assistants, and Expanded-Function Dental Auxiliaries appointed under 38 U.S.C., chapter 73 or 74." (Attachment L, VA Handbook 5013, Part II). The requirements for the Title 38 Proficiency Rating System are prescribed by the Secretary pursuant to 38 U.S.C. § 7421(a). "The Proficiency Rating System is designed to assure the effective and efficient utilization of the covered employees and to furnish bases for assistance and guidance to them in the performance of their assignments and the development of their skills and abilities." (Id.) It also provides for "planned, continuous, and systematic review, analysis and evaluation by all supervisors of the effectiveness of employees in their assignments." (Id.) Because the evaluation of the performance of 38 U.S.C. § 7421(b) employees includes their professional skills as well as the manner in which they provide clinical care to Veterans, Article 52 and the Union's proposal for Article 52 in the Successor VA-AFGE Master Agreement are inconsistent with 38 U.S.C. § 7422(b), which prohibits collective bargaining over matters that concern or arise out of professional conduct or competence.

The Secretary has addressed matters pertaining to the Title 38 employee Proficiency Rating system in previous decisions as it relates to professional conduct or competence, and as a result, are excluded from collective bargaining. In VAMC Phoenix, the union filed a grievance on behalf of an RN, "alleging that the RN's supervisor failed to talk to the RN about his performance deficiencies prior to lowering the RN's proficiency rating to satisfactory." (Attachment M, (VAMC Phoenix (April 2, 2015).) The Secretary determined the RN's proficiency rating was not lowered, the VAMC properly rated the RN's proficiency, and the RN's proficiency ratings cannot be

challenged through the negotiated grievance procedure. (Id.) The Secretary concluded an "RN's rating in an annual proficiency report is a matter concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) and cannot be challenged through negotiated grievance procedures." (Id.) In VAMC Ann Arbor, the Union filed a grievance on behalf of an RN who received an overall rating of "low satisfactory" based upon Category II, Interpersonal Relationships. (Attachment N, VAMC Ann Arbor (September 25, 2008).) The VA Secretary held that a grievance regarding a "proficiency rating" is excluded from collective bargaining since the matter concerns or arises out of professional conduct or competence. (Id.) In VAMC DC, the Secretary determined that to "the extent that such an assessment involves the provider's performance of direct patient care duties, it necessarily involves issues of direct patient care and clinical competence" and held as previously determined on "several occasions that substantive ratings in proficiency reports involves issues of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b). (Attachment O, VAMC DC (January 6, 2005).)

Employee Compensation & Peer Review

Article 52 and the Union's proposal for Article 52 in the Successor VA-AFGE Master Agreement address the compensation and advancement of 38 U.S.C. § 7421(b) employees. As noted above, VA Handbook 5017, part V addresses the policies, procedures, and guidelines governing the advancement of 38 U.S.C. § 7421(b) employees other than physicians and dentists. (Attachment K.) Such advancements include SAAs, SAPs, and cash awards. (Id.) PSBs, which are peer review bodies comprised of three or five members of the same occupation as the individual being considered, act on those advancements. (Attachment J.) Because Article 52 and the Union's proposal for Article 52 in the VA-AFGE Successor Master Agreement address the compensation associated with, and the decision process for, monetary advancements, the articles are matters that concern or arise under out of peer review and the establishment, determination or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b), and are therefore excluded from collective bargaining.

The Secretary has previously determined SAAs concern employee compensation and peer review, and as a result, are excluded from collective bargaining. In VAMC North Florida/South Georgia, the union filed a grievance challenging the way the Medical Center unilaterally changed the manner of how SAA awards were given to Optometrists. (Attachment P, VAMC North Florida/South Georgia (October 30, 2018).) The Medical Center acted consistent with VA policy with regard to how the PSB conducted "the appropriate reviews and made specific recommendations to the approving officials for the PSB (i.e., the Medical Center Director) who in turn made a final decision on those

recommendations." (Id.) The Secretary concluded that the "requested remedies address[ed] not only the compensation of Optometrists but also the peer review process utilized by Optometry PSBs ...[because an] SAA is the equivalent of a step increase, which results in a salary increase, and the process set forth in VA policy for the approval of such SAAs includes peer review by the appropriate PSB." (Id.)

In VAMC Houston, an RN was recommended for a SAA award for obtaining a Nurse Certification. (Attachment Q, VAMC Houston (June 10, 2016).) The RN received a cash award but did not receive a step increase. (Id.) The Union filed a grievance stating that the RN was not properly advanced. (Id.) The Under Secretary for Health stated that, with regard to Title 38 SAA and cash awards "[b]ased on VA policy, the entire process for consideration of a special advancement for achievement is discretionary" and "[t]he Medical Center exercised its discretion by choosing not to award a nurse a step increase for obtaining a new specialty certification." (Id.) Further, the USH concluded that the Union's grievance concerning a SAA and cash award for a Title 38 employee who completed a specialty certification is a "matter or question that concerns or arises out of peer review or the establishment, determination, or adjustment of employee compensation." (Id.)

Based on the foregoing, Article 52 in the 2011 VA-AFGE Master Agreement and the Union's proposal for Article 52 in the Successor VA-AFGE Master Agreement concerns or arises out of professional conduct or competence, peer review, and the establishment, determination, or the adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b).

RECOMMENDED DECISIONS

Article 52, Title 38 Advancement, of the 2011 VA-AFGE Master Agreement concerns or arises out of professional conduct or competence, peer review, and 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 and review by any other agency pursuant to 38 U.S.C. §7422(d).

RLW
Approved

Disapproved

Article 52, Title 38 Advancement, contract proposal submitted by the Union for the Successor VA-AFGE Master Agreement concerns or arises out of professional conduct or competence, peer review, and 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 and review by any other agency pursuant to 38 U.S.C. §7422(d).

RLW
Approved

Disapproved

Robert L. Wilkie
Robert L. Wilkie
Secretary of Veterans Affairs

25 OCT 19
Date