

**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).<sup>1</sup> (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 57, *Physical Standards Board*. (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 Master Agreement. (Attachment G). In the exchanged proposals for Successor VA-AFGE Master Agreement, the Union included a proposal covering Article 57, *Physical Standards Board*. *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 57 in the 2011 VA-AFGE Master Agreement and the Successor VA-AFGE Master Agreement negotiations. (Attachment H).

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<sup>1</sup> 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 VA Secretary 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 57, *Physical Standards Board*, of the 2011 VA-AFGE Master Agreement, is a matter or question concerning or arising out of professional conduct or competence and peer review 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 57, *Physical Standards Board*, 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 professional conduct or competence and peer review 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 under 38 U.S.C. § 7422(a) and specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence, peer review, or any matter or question concerning or arising from 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 57, *Physical Standards Boards*, of the 2011 VA-AFGE Master Agreement states that the provision "applies only to Title 38 employees and is provided for informational purposes only." (Attachment E). Nevertheless, the article includes seven sections covering a span of three pages that address not only the Physical Standards Board Process in general terms, but also the required notification, examination, and appeal procedures. (Id.)

The Union's May 2, 2019, proposal covering Article 57, *Physical Standards Board*, for the Successor VA-AFGE Master Agreement is identical to Article 57, *Physical Standards Board*, in the 2011 VA-AFGE Master Agreement. (Attachment G). Pursuant to 38 U.S.C. § 7421(a), the VA Secretary has the authority to prescribe by regulation the hours and conditions of employment and leaves of absences of personnel appointed under Chapter 74 of Title 38, which include employees in the positions listed in 38 U.S.C. § 7421(b). 38 U.S.C. § 7421. VA Handbook 5019, entitled "Employee Occupational Health Service," and VA Handbook 5021, entitled "Employee-Management Relations," contain Physical Standards Board processes and procedures for such employees. (Attachment I, Attachment J). While 38 U.S.C. § 7422(a) states "the authority of the Secretary to prescribe regulations under section 7421 of [title 38] is subject to the right of Federal employees to engage in collective bargaining with respect to conditions of employment through representative chosen by them in accordance with chapter 71 of title 5 (relating to labor-management relations)," 38 U.S.C. § 7422(b) specifically prohibits collective bargaining over matters that concern or arise out of professional conduct or competence and peer review. 38 U.S.C. §§ 7422(b)(1), (2).

Part III of VA Handbook 5019, titled "Physical Standards Board", applies to Title 38 employees appointed under 38 U.S.C. § 7401(1), who are also described in 38 U.S.C. § 7421(b). (Attachment I, VA Handbook 5019, part III, ¶1). VA Handbook 5019 provides that a "Physical Standards Board act[s] for the Under Secretary for Health. The Boards are responsible for determining the physical, cognitive, and emotional fitness, and for recommending action based on examination findings." (Attachment I, VA Handbook 5019, part III, ¶2). As noted above, the term "professional conduct and competence" is defined for 38 U.S.C. § 7422 purposes to mean "direct patient care" or "clinical competence." 38 U.S.C. § 7422(c). The functions performed by Physical Standards Boards directly relate to both professional conduct and competence issues; Physical Standards Boards assess the "physical, cognitive, and emotional fitness" of Title 38 health care providers to determine whether the providers can provide "direct patient care" or have the "clinical competence" to perform their clinical duties. (Attachment I, VA Handbook 5019, part III, ¶2).

In addition, VA Handbook 5019, Part III provides that a Physical Standards Board will "consist of a minimum of three physicians with appropriate professional expertise to make a fitness determination." (Id., VA Handbook 5019, part III, ¶4). Therefore, Physical Standards Boards are also responsible for performing a peer review function for the physicians described in 38 U.S.C. § 7421(b).

The process set forth in VA Handbook 5019 for questioning employees' reasonable physical fitness states that as part of "health care operations," Employee Occupational

Health<sup>2</sup> may release individual medical records to the Professional Standards Board. (Attachment I, VA Handbook 5019, part III, ¶5). VA Handbook 5019 also references 45 C.F.R. § 164.501, which defines healthcare operations to include:

*(2) Reviewing the competence or qualifications of health care professionals, evaluating practitioner and provider performance, health plan performance, conducting training programs in which students, trainees, or practitioners in areas of health care learn under supervision to practice or improve their skills as health care providers, training of non-health care professionals, accreditation, certification, licensing, or credentialing activities.*

(Attachment I (emphasis added)).

Once the Physical Standards Board has concluded its assessment, the Board will prepare its findings on Board Action VA Form 10-2543 and submit its report to the appropriate officials for action. (Attachment I, VA Handbook 5019, part III, ¶5). The reference to 45 C.F.R. § 164.501 emphasizes the role Physical Standards Boards play in ensuring appropriate clinical operations, including "reviewing the competence or qualifications of health care professionals," among other issues. (Attachment I).

The provisions in VA Handbook 5019, Part III and VA Handbook 5021, Part V addressing Physical Standards Boards make it clear that Physical Standards Boards are peer review bodies that evaluate Title 38 employees' professional competence. Therefore, the subject matter and content of Article 57 in both the 2011 VA-AFGE Master Agreement and the Union's proposal for the Successor VA-AFGE Master Agreement are directly tied to professional conduct or competence and peer review as described in 38 U.S.C. § 7422(b). The inclusion of such Articles in the current 2011 VA-AFGE Master Agreement and a Successor VA-AFGE Master Agreement is inconsistent with the collective bargaining exclusions for 38 U.S.C. § 7421(b) employees set forth in 38 U.S.C. § 7422(b).

As noted above, Section 1 of Article 57 indicates that the contents of the article are "provided for informational purposes only." The qualifier suggests that the contents of Article 57 are not collectively bargained. However, this is misleading. A comparison of the contents of Article 57 in the 2011 VA-AFGE Master Agreement and the Union proposal covering Article 57 for the Successor VA-AFGE Master Agreement to the contents of VA Handbook 5019, Part III show notable discrepancies. Each paragraph of

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<sup>2</sup> Similarly, Disciplinary Appeals Boards, which review appeals by 38 U.S.C. § 7401(1) employees concerning major adverse actions that include or arise out of questions of professional conduct or competence, may refer matters concerning employees' physical and/or mental capacity to a Physical Standards Board for review. (38 U.S.C. § 7461; Attachment J, VA Handbook 5021, Part V, Chapter 1, ¶7f).

Part III of the VA Handbook 5019 covers a separate topic, including the following: the employees covered (¶1), responsibilities of the relevant parties (¶2), the approving authority (¶3), composition of the Physical Standards Board (¶4), and the process for questioning physical fitness (¶5). However, both the 2011 VA-AFGE Master Agreement and Union proposed Successor VA-AFGE Master Agreement versions of Article 57 contain information beyond what is covered by VA Handbook 5019.<sup>3</sup> In fact, most of the information covered in Article 57 are matters and procedures not covered in Part III of VA Handbook 5019.

The Secretary has addressed matters pertaining to Physical Standards Boards in previous decisions. In VAMC Richmond, the Under Secretary for Health (USH) set forth that "as a general rule, a determination by a Physical Standards Board that a medical professional appointed under 38 U.S.C. § 7401(1) is unfit for duty is a peer review process and involves issues of conduct or competence within the meaning of 38 U.S.C. § 7422 (b)." (Attachment K, VAMC Richmond (July 19, 2004)). In VAMC San Juan, the USH recognized that "professional conduct includes the scope, nature, and manner of performance of duties." (Attachment L, VAMC San Juan (July 3, 2003)). The decision defined "professional competency" as including the determination of whether the employee meets the physical requirements of the job. (Id.) Further, the decision highlighted Physical Standards Boards' responsibilities, to include reviewing the fitness for duty and physical qualifications of all registered nurses and the issues of a registered nurse's fitness for duty and physical standards to perform those duties, and noted that those duties were exempt from the collective bargaining process under 38 U.S.C. § 7422(b) as matters concerning or arising out of professional competency and conduct and peer review under Title 38. (Id.)

Based on the foregoing, Article 57, *Physical Standards Boards*, in both the 2011 VA-AFGE Master Agreement and the Union's proposal for the Successor VA-AFGE Master Agreement addresses a peer review process that is inextricably intertwined with direct patient care and clinical competence and therefore inconsistent with the collective bargaining exclusions set forth in 38 U.S.C. § 7422(b)(2).

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<sup>3</sup> For example, Section 3 of Article 57 of the 2011 VA-AFGE Master Agreement is titled "Guidelines for Physicians." The section addresses topics including what information to provide to examining physicians (subsections A and E) and parameters for determining when a fitness for duty examination may be conducted (subsection D). The language in Article 57, Section 3(A) even goes as far as utilizing the term "shall," meaning that VA must provide the information outlined to the examining physicians. However, no such requirement exists in VA Handbook 5019, Part III. Instead, paragraph 5b states, "As part of health care operations, EOH *may* release the individual medical records to the Professional Standards Board for evaluating the abilities of title 38 employees..." (Attachment I, VA Handbook 5019, Part III, ¶5b, (emphasis added)).

**RECOMMENDED DECISION**

Article 57, *Physical Standards Board*, of the 2011 VA-AFGE Master Agreement, concerns or arises out of professional conduct or competence and peer review 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

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Disapproved

The Article 57, *Physical Standards Board*, contract proposal submitted by the Union for the Successor VA-AFGE Master Agreement concerns or arises out of professional conduct or competence and peer review 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

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Disapproved

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

25 OCT 19  
Date