

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

FACTS

The Department of Veterans Affairs 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, the revised Master Collective Bargaining Agreement by and between the American Federation of Government Employees/National Veterans Council (Union), and the VA was approved, signed, and effectuated. (Attachment D.) The 2011 VA-AFGE Master Agreement includes Article 61, Title 38 Vacancy Announcements. (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/AFGE Master Agreement Bargaining team 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 the Successor VA-AFGE Master Agreement, the Union included a proposal covering Article 61 - Title 38 Vacancy Announcements. (*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 61, Title 38 Vacancy Announcements, 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 61, Title 38 Vacancy Announcements, 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 61, Title 38 Vacancy Announcements, 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 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 61, Title 38 Vacancy Announcements, of the 2011 VA-AFGE Master Agreement provides four sections that outline the required contents of a vacancy announcement and sets forth employee expectations for a vacancy. For example, "[A]ll employees will have a fair and equitable opportunity to complete for selection for a posted vacancy. All applicants will be asked the same questions during an interview," and "the Department will supply the employee with an explanation of why they were not selected for the position." (Attachment E.) Additionally, Section 4 – Title 38 Position Qualifications

asserts that the “[U]nion will be predecisionally involved and may submit recommendations for criteria to be used in the development of all bargaining unit qualifications,” as well as, “[T]he Union will be provided copies of all position qualifications for vacant positions.” (*Id.*)

The Union’s May 2, 2019, proposal for Article 61, *Title 38 Vacancy Announcements*, for the Successor VA-AFGE Master Agreement is identical to Article 61, *Title 38 Vacancy Announcements*, in the 2011 VA-AFGE Master Agreement. (*Id.*)

Professional Conduct and Competence & Peer Review

Pursuant to 38 U.S.C. § 7401, “[T]here may be appointed by the Secretary such personnel as the Secretary may find necessary for the health care of veterans.”² (Attachment I.) 38 U.S.C. § 7402 sets forth the requisite qualifications for appointment to these positions. (Attachment J.)

In addition, VA Handbook 5005, Part I, Chapter 1, addresses the recruitment process as it pertains to VA employees. (Attachment K.) Most notably, the Secretary retains the authority over VA’s recruitment process as it relates to Title 38 VA employees. (*Id.*) For example, it provides that “[f]or positions which are included in exclusively recognized units, facility management *may* consider seeking the assistance of the labor organization which holds exclusive recognition for that unit in the facility’s recruiting effort.” (*Id.*, emphasis added). VA Handbook 5005 provides permissive language that VA management *may* seek assistance of the unions in recruiting, but ultimately retains authority regarding the recruitment process for Title 38 employees.

Furthermore, VA Handbook 5005, Part II, Chapter 3(F), addresses the appointment and qualifications of Title 38 personnel. (Attachment L.) According to the VA Handbook, “the primary consideration, prior to making selections and appointments under [38 U.S.C. § 7401], is to evaluate qualifications and personal characteristics as they relate to what is essential to successful performance of assigned responsibilities. Prior to effecting appointments under this authority, Professional Standards Boards [PSBs]... and selecting officials are required to determine that the candidate’s professional qualifications, physical and mental capacity, emotional stability, and any other pertinent qualifying factors, warrant a permanent appointment. The use of this appointment authority should essentially provide tenure for the employee and ensure the continuation of quality service for VHA.” (*Id.*)

² 38 U.S.C. §7401(1) refers to the appointment of Title 38 providers: physicians, dentists, podiatrists, chiropractors, optometrists, registered nurses, physician assistants, and expanded-function dental auxiliaries.

Position qualifications for Title 38 employees described in 38 U.S.C § 7421(b) are directly related to patient care and candidates' qualifications are reviewed by PSBs prior to being appointed. PSBs, pursuant to VA Handbook 5005, Part II, Chapter 3, Section C, are comprised of three to five three or five members of the same occupation as the individual being considered. PSBs act for the Under Secretary for Health and are important components of management's decision-making function. (Attachment L - VA Handbook 5005, Part II, Chapter 3, Section C.) PSBs' principle function is to provide professional peer review in such matters related to eligibility for employment. (*Id.*) Accordingly, the recruitment process includes not only elements of professional conduct or competence, but also peer review. In a prior 38 U.S.C. § 7422 decision, Minneapolis VA Health Care System, the Secretary addressed a union challenge to a PSB's initial boarding decision regarding a nurse's qualifications for her level and step (rate of pay) and determined that a PSB's initial boarding decision is a matter or question excluded from collective bargaining pursuant to 38 U.S.C. § 7422(b) as a Title 38 peer review process. (Attachment M, Minneapolis VA Health Care System (October 20, 2014)).

The recruitment process is part and parcel of the Secretary's inherent authority to appoint personnel under 38 U.S.C. § 7401(1) to deliver health care to Veterans and to determine the needed qualifications for such Title 38 personnel. These matters directly concern or arise out of such employees' clinical competence to ensure quality care to Veterans. 38 U.S.C. § 7422(b)(1), (c). Additionally, the review conducted by PSBs of 38 U.S.C. § 7401(1) employees' qualifications during the recruitment process falls within the scope of the peer review exclusion under 38 U.S.C. § 7422(b)(2). As such, the inclusion of an Article on Title 38 vacancy announcements in a VA collective bargaining agreement that covers 38 U.S.C. § 7421(b) employees is inconsistent with the collective bargaining exclusions set forth in 38 U.S.C. § 7422(b). Both Article 61, Title 38 Vacancy Announcements, of the 2011 VA-AFGE Master Agreement, as well as the Article 61, Title 38 Vacancy Announcements, in the contract proposal submitted by the Union for the Successor VA-AFGE Master Agreement, are matters concerning or arising out of professional conduct or competence and peer review within the meaning of 38 U.S.C. § 7422(b), and are thus excluded from collective bargaining and review by any other agency pursuant to 38 U.S.C. § 7422(d).

RECOMMENDED DECISIONS

Article 61, Title 38 Vacancy Announcements, 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).

RW
Approved

Disapproved

The Article 61, Title 38 Vacancy Announcements, 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).

RW
Approved

Disapproved

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

25 OCT 19
Date