

38 USC 7422 entitles only Title 38 medical professionals (Physicians, Registered Nurses, Dentists, Podiatrists, Optometrists, Physician Assistants, Chiropractors, and Expanded-duty Dental Auxiliaries) to unionize, engage in collective bargaining, and pursue grievances in a manner similar to other VA employees, with 3 broad exclusions generally meant to ensure clinical decisions are kept in the hands of VA clinicians and not subject to external review. These three subject matters excluded from collective bargaining (including negotiations and access to the negotiated grievance procedure): Professional conduct or competence; peer review; and the establishment, determination, or adjustment of employee compensation.

Prior to formally requesting a 38 USC 7422 determination, informally discuss the matter with Workforce Management and Consulting Office's, HR Center of Expertise, Employee and Labor Relations to ensure that the matter is excluded from collective bargaining based upon 38 USC 7422. If it is determined that the matter is excluded from collective bargaining, below are the requirements to request a 38 USC 7422 determination. A sample Memorandum with each step has been included to help guide you through these requirements. Please cite and attach all documentation as individual / separate attachments in your electronic request (for example, the memo is one attachment, the grievance is one attachment, the ULP is one attachment etc.)

1. State your request for a determination at the top of the Memorandum.
2. Provide a brief factual background of the issue to be determined.
3. Explain the clinical basis (if claiming a PCC exclusion) for the specific management decision(s).
4. Chronologically provide a detailed account of all management and/or union actions taken before submitting the issue for a determination.
5. Provide dates of scheduled events that impact the timeliness of the Secretary 's determination.
6. Provide information showing how management addressed the potential matter with their respective union, as well as, what efforts have been taken to resolve the issue informally with the union.
7. Cite VA regulations, if any, pertinent to the issue.
8. Cite any prior USH/Secretary decisions that govern the same subject matter. Prior determinations may be found on the VA LMR website at: <https://www.va.gov/LMR/38USC7422.asp>.
9. Clearly state the issue you would like the Secretary to decide and the exclusion under section 7422 which is being claimed (i.e. professional conduct or competence (direct patient care and/or clinical competence), compensation or peer review).
10. Provide your full contact information.
11. Have the Medical Center Director sign the request..
12. The request will be sent to the EIC through Workforce Management and Consulting Office, HR Center of Expertise.

SAMPLE

**Department of
Veterans Affairs**

Memorandum

Date:

From: Medical Center Director, VAMC, Anytown, USA

Subj: Request for 38 U.S.C. § 7422(b) Determination

To: Executive in Charge for the Veterans Health Administration

Thru: Workforce Management and Consulting Office, HR Center of Expertise

1. I am writing to request a determination by the Executive in Charge that the actions and issues described below are excluded from collective bargaining or the grievance process under 38 U.S.C. § 7422(b).
2. On January 3, 2020, at a Strategic Planning Meeting, management of VAMC Anytown determined that a change in the staff mix of the Primary Care Clinic and the Urgent Care unit was required to improve patient care. More specifically, management determined that the Primary Care Clinic was overstaffed with Registered Nurses (RNs), while RN staffing at the Urgent Care unit was inadequate. (Attachment A). As a result, management reassigned three (3) RNs from the Primary Care Clinic to the Urgent Care unit.
3. The RNs who were reassigned -- Alice Apple, RN, Betty Ball, RN, and Candace Cook, RN -- were chosen for their experience in Urgent Care, which was more recent and more substantial than the Urgent Care experience of the other RNs assigned to the Primary Care Clinic. Ms. Apple worked in the Urgent Care unit at VAMC Smallsville from January 2015 through November 2018, when she relocated to Anytown VAMC. Ms. Ball was detailed to the Anytown Urgent Care unit for six (6) months in 2019. Ms. Cook is an experienced Urgent Care and Acute Care nurse whose most recent Urgent Care assignment ended in June 2019.
4.
 - A. On January 10, 2020, management gave Ms. Apple, Ms. Ball, and Ms. Cook written notice of their reassignments to the Urgent Care unit, with such reassignments to take effect on January 30, 2020. (Attachment B)
 - B. On January 10, 2020, management informed and offered to discuss with the ABC union, Local 1234, which represents registered nurses at the Anytown VAMC of the intent to reassign the nurses effective January 30, 2020. (Attachment C)
 - C. On January 11, 2020, the union requested to bargain over the RN reassignments. (Attachment D) More specifically, the union proposed that management first solicit

volunteers to be reassigned from the Primary Care Clinic to the Urgent Care unit, and if there were not enough volunteers to fill the three (3) slots, that the least senior nurses from the Primary Care Clinic be chosen for the reassignment.

D. On January 14, 2020, management met with the ABC union and explained the underlying reasons for the need to reassign the three particular RNs. The union insisted on negotiating the proposals and the meeting ended without reaching agreement. (Attachment E)

E. On January 20, 2020, management notified the union in writing that it considered its January 11, 2020 proposals to be non-negotiable and would implement as proposed. (Attachment F)

F. On January 21, 2020, the parties met and discussed the issues, tried to find a resolution, but could not reach agreement. (Attachment G).

G. On January 22, 2020, management provided a formal written notice to the union that the reassignments would continue as scheduled and that the issue was covered by the PCC 7422 exclusion. (Attachment H). The notice was forwarded to the VISN Director with a request for assistance in resolving the issue informally.

H. On January 28, 2020, the union filed an Unfair Labor Practice (ULP) complaint with the Federal Labor Relations Authority (FLRA), charging that management had failed to negotiate in good faith over the RN reassignments. (Attachment I)

I. On March 3, 2020, VAMC management submitted its position statement to the FLRA, stating that the issues raised in the ULP was a matter of professional conduct or competence (PCC). (Attachment J).

J. On March 27, 2020, management sent the union a copy of its request to the Secretary for a 7422 determination on the above referenced case. (Attachment K)

5. On March 30, 2020, FLRA stated the case was in abeyance until a decision is made by the Secretary on the 7422 allegations. (Attachment L)

6. As referred to in Section 4E, on January 20, 2020, Don Manager, LR Specialist for the VAMC, sent an email to Bill Union, union President, that it was the VAMC's belief that the issue is covered by one of the 7422 exclusions and is therefore non-negotiable. Mr. Manager provided Mr. Union a copy of the statute, previous similar 7422 decisions, and invited the union to a meeting to discuss the issue and the union's concerns.

As referred to in Section 4F, on January 21, 2020, the parties met and discussed the issues, tried to meet find a resolution, but could not reach agreement.

As referred to in Section 4G, on January 22, 2020, management provided a formal written notice to the union that the reassignments would continue as scheduled and that the issue was covered by the PCC 7422 exclusion. (Attachment H). The notice was forwarded to the VISN Director with a request for assistance in resolving the issue informally.

7. VA has promulgated regulations relating to the assignment and reassignment of RNs. These regulations are set forth in VA Directive and Handbook 5005, Part IV, Ch. 3, § B. (Attachment M).
8. In several prior cases involving involuntary or directed reassignments of RNs, the Under Secretary for Health (or Secretary) has determined that such assignments involve professional competence and conduct within the meaning of 38 U.S.C. § 7422(b). These include: West Haven VAMC on October 24, 2002 (Attachment N), Milwaukee VAMC on February 22, 2008 (Attachment O), VA Connecticut HCS on October 9, 2008 (Attachment P), and Salisbury VAMC on September 14, 2004 (Attachment Q). For example, in *VAMC Salisbury*, VA considered mandatory seniority-based reassignment procedures, which the Union had negotiated with the VAMC in previous years. (Attachment Q). The VAMC asserted that the seniority-based reassignment criteria were non-negotiable under 38 U.S.C. §7422, because they prevented “management from selecting nurses to fill vacancies based upon the clinical competencies of the candidates.” *Id.* In that case, VA determined that the mandatory seniority-based criteria “involve[s] professional conduct or competence within the meaning of 38 U.S.C. §7422 because requiring that management select the senior-most nurse for each vacancy – rather than place nurses according to their relative levels of clinical competence – has the potential to significantly impact the manner in which patient care is delivered.” *Id.*
9. We believe that the issue related to the ULP, including the union’s requested relief, is outside the scope of collective bargaining under Section 7422.

As stated above, Alice Apple, RN, Betty Ball, RN, and Candace Cook, RN were reassigned to cover patient care needs. The reassignment is excluded from collective bargaining because it is an issue of professional conduct or competence, specifically addressing direct patient care needs.

10. If I can provide additional assistance, please contact me at 123-456-7890 or your.email@va.gov, or the HR Manager, Peter Persons, at 123-456-7899 or peter.person@va.gov.
11. *Donna D. Director*
Donna D. Director, MA, ACHE
Director, VAMC Anytown