



DEPARTMENT OF VETERANS AFFAIRS  
Under Secretary for Health  
Washington DC 20420

NOV 20 2017

A. Rudy Klopfer, FACHE, VHA-CM  
Director  
VA Eastern Kansas Health Care System  
2200 Gage Boulevard  
Topeka, KS 66622

Dear Mr. Klopfer:

I am responding to your July 18, 2017, request for a 38 U.S.C. § 7422 decision regarding whether an Unfair Labor Practice charge brought by the American Federation of Government Employees, Local 1939, that the Department of Veterans Affairs (VA) Eastern Kansas Health Care System unilaterally changed nurse promotion procedures when a Registered Nurse was denied a promotion because her request for an educational waiver was not granted, involves a matter or question concerning or arising out of professional conduct or competence and peer review as defined by 38 U.S.C. § 7422(c), and thus, is excluded from collective bargaining.

I have determined that the hospital's denial of an educational waiver in accordance with nurse promotion procedures involves a matter or question concerning or arising out of professional conduct or competence and peer review as defined by 38 U.S.C. § 7422(c). Please review the enclosed Decision Paper for a complete explanation of my decision.

Sincerely,

A handwritten signature in black ink, appearing to read "Carolyn M. Clancy" with a stylized flourish at the end and the initials "M.D." to the right.

Carolyn M. Clancy, M.D.  
Executive in Charge

Enclosure



DEPARTMENT OF VETERANS AFFAIRS  
Under Secretary for Health  
Washington DC 20420

NOV 20 2017

Ms. Brenda Saffer  
President, AFGE Local 1939  
VA Eastern Kansas Health Care System  
2200 Gage Boulevard  
Topeka, KS 66622

Dear Ms. Saffer:

I am responding to a request for a 38 U.S.C. § 7422 decision regarding whether an Unfair Labor Practice charge that the Department of Veterans Affairs (VA) Eastern Kansas Health Care System unilaterally changed nurse promotion procedures when a Registered Nurse was denied a promotion because her request for an educational waiver was not granted involves a matter or question concerning or arising out of professional conduct or competence and peer review as defined by 38 U.S.C. § 7422(c), and thus, is excluded from collective bargaining.

I have determined that the hospital's denial of an educational waiver in accordance with nurse promotion procedures is a matter or question concerning or arising out of professional conduct or competence and peer review as defined by 38 U.S.C. § 7422(c). Please review the enclosed Decision Paper for a complete explanation of my decision.

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A handwritten signature in black ink, appearing to read "Carolyn M. Clancy" with a stylized flourish at the end.

Carolyn M. Clancy, M.D.  
Executive in Charge

Enclosure

**Title 38 Decision Paper  
Eastern Kansas Department of Veterans Affairs (VA) Hospital  
Topeka Kansas**

**FACTS**

On August 4, 2016, the Nurse Professional Standards Board (NPSB) at the VA Eastern Kansas Health Care System (Medical Center) convened to consider a Nurse I's advancement to Nurse II. Attachment C. The NPSB remarked that the Registered Nurse (RN) did not satisfy the education requirements for advancement; however, she satisfied all other requirements. *Id.* The NPSB recommended advancement to Nurse II based on an education waiver being requested. *Id.*

On August 22, 2016, the approving authority disapproved the NPSB's recommendation for promotion stating "completion date is not until May-17 [at the] earliest." *Id.* The Chairperson of the NPSB notified the RN on August 22, 2016, that she satisfied the experience and performance scope, as well as complexity required for advancement to Nurse 2; however, she did not meet the education requirement. *Id.* The notice set forth the process to request a reconsideration appeal of the determination. *Id.*

On September 20, 2016, the RN requested reconsideration. *Id.* She also requested an educational waiver because she only had two classes remaining. *Id.*

On October 6, 2016, the NPSB convened to reconsider the RN's promotion to include the request for an educational waiver. The NPSB recommended non-promotion. Attachment D. The NPSB explained that the RN's request for an educational waiver was denied because the RN had more than 6 months left to complete her degree. The approving authority approved the NPSB's recommendation. On October 20, 2016, the RN was notified about the NPSB determination. Attachment E. The notice included the process to request a Central Office review of the determination. *Id.*

On February 28, 2017, the American Federation of Government Employees, Local 1939 (Union), filed an Unfair Labor Practice charge (ULP) with the Federal Labor Relations Authority (FLRA). Attachment A. The ULP charged that the Medical Center "bypassed the union when they unilaterally changed nurse promotion procedures without meeting their bargaining obligations" and that the RN was denied an educational waiver because she had more than 6 months left to complete her degree and VA Handbook 5005 does not include such a requirement. *Id.* On April 20, 2017, the Union amended the ULP to include that, in addition to the previous allegations, the denial was discriminatory and motivated by the RN's protected activity as the Union President. *Id.*

On March 30, 2017, the Medical Center submitted its response to the ULP. Attachment B. The Medical Center denied that it changed the nurse promotion procedures. *Id.* It explained that the approving official reviewed the NPSB recommendations and the RN's "proficiencies over the last several years." *Id.* The approving official noted that the RN "has repeatedly stated she was about to graduate and was enrolling into a Program to complete her degree" and that "she wants to complete her degree, but doesn't know if

she can get into the course.” *Id.* It was also noted that the RN had failed to submit a timely written request for reconsideration. *Id.*

On July 18, 2017, the Medical Center submitted a request for a 38 U.S.C. § 7422 determination. Attachment G; *see also* Attachment F.

On August 10, 2017, the Union submitted a response to the Medical Center's request. Attachment N.

## **AUTHORITY**

The Secretary 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). On October 18, 2017, the Secretary delegated his authority to the Under Secretary for Health. Attachment H.

## **ISSUE**

Whether a ULP charge that the Medical Center unilaterally changed nurse promotion procedures when it denied an RN a promotion to Nurse II because she did not satisfy the education requirement for that position, and was not granted an educational waiver involves a matter or question concerning or arising under peer review, and the adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b), and thus, is excluded from collective bargaining.

## **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 employees appointed under title 38 of the United States Code (Title 38), and specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence (i.e., direct patient care or clinical competence), peer review, or employee compensation, as determined by the Secretary. 38 U.S.C. § 7422(c).

Pursuant to 38 U.S.C. § 7421(a), the Secretary prescribed regulations in VA Handbook 5005, part II, chapter 3, section C, that require the establishment of professional standards boards to act on appointments, advancements and probationary reviews of Title 38 employees including nurses. Attachment O. The NPSB is a professional peer review board whose principal function is to determine eligibility for employment, suitability, and the appropriate grade levels for appointments and qualifications for advancement. *Id.* The NPSB will make recommendations based on their findings. *Id.* VA Handbook 5005 also provides that upon the NPSB's recommendation, the approving official will make a “final” decision which “does not preclude employees from requesting promotion reconsideration.” *Id.*

According to VA Handbook 5005, part III, chapter IV, NPSB promotion reviews ensure that the RN has met administrative requirements (experience and education requirements in the appropriate VA Qualification Standards), dimensions of nursing practice, and criteria for consideration of advancements. Attachment I; *see also* Attachment K. If the RN does not meet the applicable administrative requirements, “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.” Attachment I; *see also* Attachment J.

In the instant matter, the Union has failed to demonstrate how the Medical Center unilaterally changed the nurse promotion procedures.<sup>1</sup> The NPSB initially recommended the RN for advancement to Nurse II based upon an educational waiver request, but the approving official disapproved the action.<sup>2</sup> Attachment C. On September 20, 2016, within 30 days, the RN requested local reconsideration based upon an educational waiver. *Id.* On October 6, 2016, the NPSB convened to reconsider the RNs request for promotion to Nurse II based upon the educational waiver. Attachment D. The NPSB recommended non-promotion, which was approved by the approving official. *Id.* On October 20, 2016, the RN was notified of the non-promotion and that she could request VA Central Office reconsideration of the determination within 30 days. Attachment E. However, she failed to make such a request. Attachment G.

In *VAMC Minneapolis*, the Secretary concluded that an RN who was improperly boarded by an NPSB and then returned to a Nurse I position was excluded from collective bargaining. Attachment L (*VAMC Minneapolis* (Oct. 20, 2014)). The Secretary explained that the NPSB’s initial boarding process is a Title 38 peer review process, and as such, it is a matter or question “excluded from the parties’ negotiated grievance process by application of 38 U.S.C. § 7422.” *Id.* It was further noted that “because the NPSB’s recommendation impacted the registered nurse’s starting pay, the 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.” *Id.*; *see also* Attachment M (*VAMC Milwaukee* (April 28, 1992)) (The Under Secretary for Health concluded 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 and thus, challenges to an RN’s pay involve a matter or a question concerning or arising out of employee compensation within the meaning of 38 U.S.C. § 7422).

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<sup>1</sup> To the extent that the Union asserts that the denial of the educational waiver was discriminatory or related to the RN’s Union activity, the Union has failed to provide any evidence to support such a contention.

<sup>2</sup> VA Handbook 5005, part II, appendix G6 sets forth no requirement for an NPSB to make a recommendation for an education waiver. Attachment I. Further, the approving official has the discretion to authorize a waiver of the degree requirement. *Id.*

**DECISION**

The ULP charge that the Medical Center unilaterally changed nurse promotion procedures when it denied an RN a promotion to Nurse II because she did not satisfy the education requirement and was not granted an educational waiver involves a matter or question concerning or arising under peer review, and the adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b), and is thereby excluded from collective bargaining.



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Carolyn M. Clancy, M.D.  
Executive in Charge  
Office of the Under Secretary for Health

11/20/17  
Date

Exhibit List – Eastern Kansas, VA Hospital

- Attachment A Union's ULP charge, dated February 28, 2017, and Medical Center's response to ULP dated March 30, 2017
- Attachment B Union's ULP charge, dated November 2, 2016, and Medical Center's response to ULP dated January 3, 2017
- Attachment C Medical Center's Memo NPSB Review, dated August 22, 2016
- Attachment D Medical Center's NPSB Reconsideration Board Action, dated October 6, 2016
- Attachment E Medical Center's Memo NPSB Review, dated October 6, 2016
- Attachment F Medical Center's email to the FLRA, dated July 6, 2017 and email to the Union, dated July 13, 2017
- Attachment G Medical Center's Request for a 38 U.S.C. § 7422 Determination, dated July 18, 2017
- Attachment H October 18, 2017 Memorandum from the Secretary of the Department of Veterans Affairs
- Attachment I VA Handbook 5005, Part III, Chapter 4
- Attachment J VA Handbook 5005, Part II, Appendix G6
- Attachment K RN Promotions and Reconsiderations Developed by the VISN NPSB Consultants, Revised April 2015
- Attachment L VAMC Minneapolis (October 20, 2014)
- Attachment M VAMC Milwaukee (April 28, 1992).
- Attachment N Union's Response to Medical Centers 7422 Request, dated August 9, 2017
- Attachment O VA Handbook 5005, Part II, Chapter 3, Section C