



DEPARTMENT OF VETERANS AFFAIRS  
UNDER SECRETARY FOR HEALTH  
WASHINGTON DC 20420

MAY 19 2008

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VA Maryland Health Care System  
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Director's Office (BT/00)  
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Baltimore, MD 21201

James J. Dever  
Assistant Regional Counsel  
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Dear Mr. Smith and Mr. Dever:

I am responding to your correspondence of August 24, 2007 and September 21, 2007, concerning a grievance filed by NAGE Local R3-19 over the non-selection of a registered nurse for the position of External Peer Review Program Coordinator.

Pursuant to delegated authority, I have determined on the basis of the enclosed decision paper that the union's local grievance concerning the non-selection of Ms. [redacted] is not excluded from collective bargaining as a matter or question concerning or arising out of professional competence or conduct; however, the union's requested remedies are non-grievable and non-negotiable because they concern or arise out of the determination or adjustment of compensation and involve the hiring, interview, and selection process of title 38 nurses based on their professional conduct or competence within the meaning of under 38 U.S.C. § 7422.

Please provide this decision to your Regional Counsel as soon as possible.

Sincerely yours,

Michael J. Kussman, M.D., MS, MACP  
Under Secretary for Health

Enclosure

## FACTS

On August 4, 2006, the nurse recruiter at the VA Maryland Health Care System (MHCS) posted a vacancy announcement for an External Peer Review Program Coordinator (EPRPC). (Attachment A) The announcement stated that the incumbent would report to the Director, Performance Improvement and Accreditation and that the vacancy would remain open until August 25, 2006, or until filled. On August 28, 2006, the nurse recruiter forwarded to the Director, Performance Improvement and Accreditation a list of qualified candidates for the EPRPC position. (Attachment B)

After the August 4 announcement closed, the nurse recruiter learned that the position would be aligned under the Office of Coordinator, Performance Center. On September 20, 2006, the nurse recruiter rescinded the August 4 vacancy announcement and posted a new one with corrected information about the reporting relationship and a new closing date of October 11, 2006, or until filled. (Attachment C) On October 11, 2006, the nurse recruiter sent a list of qualified candidates to Alice Krupski, Acting Director, Performance Measures, who was the selecting official. (Attachment D) This list was different from the list of qualified candidates referred to the Director, Performance Improvement and Accreditation, after the earlier announcement closed.

Ms. Krupski reviewed the documents in the candidates' application packages and made a selection without interviews. \_\_\_\_\_, an internal applicant who was referred to the selecting officials on both lists, was selected for the position. Ms. \_\_\_\_\_ was notified of her selection on December 4, 2006. (Attachment E) Ms. Krupski articulated the following reasons for her selection:

- Applicant is a team player; enhancing group dynamics but remains an individual
- Relates extremely well with all levels of staff
- Has effective communication (written and verbal) skills
- Is a self starter; works independently
- Takes constructive criticism well

(Attachment F) In addition, Ms. Krupski stated that "...the reason I selected \_\_\_\_\_ was the pure fact she had great customer service (excellent communicator) and worked extremely well as a team player. There are no [p]atient [c]are [f]unctions with this position except for knowledge of [c]linical [c]onditions and [h]ealth [c]are [s]trategies." (Attachment G)

On February 2, 2007, the National Association of Government Employees, Local R3-19 (NAGE or union), filed a Step 1 grievance on behalf of \_\_\_\_\_, who had applied for EPRPC position when it was announced the second time but not when it was announced the first time. (Attachment H) Although Ms. \_\_\_\_\_ was determined to be qualified for the position and was referred to Ms. Krupski for consideration, she was not selected. (Attachment I) In the grievance, NAGE asserted that management purposefully delayed the selection process to allow a less qualified candidate to obtain the qualification requirements for the position. Additionally, NAGE complained that interviews were not conducted despite the fact that an interview panel was appointed



## Title 38 Decision Paper- VA Maryland Health Care System

and interview criteria were developed. NAGE further alleged that, by its actions, management engaged in pre-selection and favoritism in violation of Article XXI, Section 7B and C of the local supplemental agreement and Article 32, Sections 2 and 3 of the Master Agreement. NAGE also alleged that management's actions violated VA Directives and merit principles. The union's requested remedy was to place Ms. in the EPRPC position. Ms. Krupski denied the grievance in a written response dated February 14, 2007. (Attachment J)

NAGE elevated the grievance to Step 2 on February 21, 2007, again alleging that management improperly delayed the selection process in order to allow the person who was selected to become qualified for the position. (Attachment K) As relief, the Step 2 grievance requested that management should place Ms. in the EPRPC position. Dorothy Snow, M.D., Chief of Staff, denied the Step 2 grievance in a written response dated March 1, 2007. (Attachment L)

On March 8, 2007, the union advanced the grievance to Step 3. (Attachment M) In addition to requesting that Ms. be placed in the EPRPC position, NAGE stated that it "urges the Agency to develop, in conjunction with NAGE, an interview and selection process that is in keeping with regulations for Title 38 RN positions and that this process will be followed consistently by all Management Officials."

Dennis Smith, MHCS Director, denied the Step 3 grievance on April 25, 2007. (Attachment N) Mr. Smith stated that all qualified candidates were referred for selection and given fair and equitable consideration for the position. He also noted that the relief sought by the union included "[c]ompensation in the form of annual leave or financial" and "[s]tandardized hiring, interview and selection process."

NAGE invoked arbitration in a memo dated May 16, 2007. (Attachment O) On September 4, 2007, B.J. Eareckson, Chief, Human Resources Management Service, notified the union that management requested that the Under Secretary for Health (USH) make a determination that the grievance cannot proceed to arbitration in accordance with 38 U.S.C. § 7422. (Attachment P) Management's memorandum to the USH requesting that determination was dated August 24, 2007. (Attachment Q)

On September 21, 2007, NAGE submitted a response to management's request for a 7422 determination. (Attachment R) The union raised two arguments in its response. First, NAGE argued that the VA failed to raise a 38 U.S.C. § 7422 arbitrability objection by Step 3 of the grievance procedure as required in the Master Agreement and the local supplemental agreement. Accordingly, the union argued, management is now foreclosed from taking a 38 U.S.C. § 7422 position. The union's second argument was that "the underlying grievance does not involve a matter of professional conduct and competence. The grievance is not over a matter of discipline, rather the union filed it because the selection process (as outlined in both the Master Agreement and Local Agreement) for a vacancy was not followed by Agency officials. Therefore, the provisions of Title 38 do not prevent the issue from being arbitrated, since it is neither discipline nor an adverse action."



## Title 38 Decision Paper- VA Maryland Health Care System

PROCEDURAL HISTORY

The Secretary has delegated to the USH the final authority in the VA 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).

ISSUE

Whether the local union's grievance concerning the MHCS' failure to select for the EPRPC position is excluded from collective bargaining as a matter or question that concerns or arises out of professional conduct or competence and peer review within the meaning of 38 U.S.C. § 7422(b).

DISCUSSION

The Department of Veterans Affairs Labor Relations Act of 1991, 38 U.S.C. § 7422, granted collective bargaining rights to Title 38 employees in accordance with Title 5 provisions but 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 and employee compensation as determined by the USH.

Pursuant to 38 U.S.C. § 7451(a)(4), the Secretary has prescribed regulations (contained in VA Handbook 5005, Part IV, Chapter 3, Section A, paragraphs 4. c. and d.) to implement assignments of Title 38 employees, including registered nurses. Paragraph 4.c. of the referenced handbook provides that "[a]pproving officials will make maximum use of an employee's skills and capabilities...." In accordance with paragraph 4.d., "[e]mployees will only be assigned duties and responsibilities for which they have appropriate credentials and there is a reasonable expectation that they will be able to perform satisfactorily."

As a general rule, 38 U.S.C. § 7422 would bar negotiated grievances and/or arbitration over selection determinations for nursing positions based on the candidates' clinical competence. See for example, VAMC Erie, July 1, 2002, where the USH decided that the union's grievance alleging non-selection of a registered nurse was non-grievable and exempt from collective bargaining under 38 U.S.C. § 7422(b). In the instant case, however, the selecting official did not base her selection on the candidates' respective clinical qualifications. Rather, the selectee was selected for the position because of her customer service skills, her independent work ethic, and her ability to interact successfully with co-workers.<sup>1</sup> Moreover, the impact of the EPRPC position on patient care is negligible as, in the selecting official's words, "[t]here are no Patient Care Functions with this position except for knowledge of Clinical Conditions and Health Care

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<sup>1</sup> If the EPRPC position does not perform clinical skills or patient care functions, the MHCS should consider the nature of the position and whether converting the position to the competitive service is appropriate. VA Handbook 5005, Part III, Appendix N, (2) ("It is VHA policy that responsible officials assign title 38 employees duties requiring clinical skills; that the utilization of title 38 employees in competitive civil service positions is prohibited; and that positions which do not require clinical skills be placed in the competitive civil service.")



Strategies.” While the selectee was determined to be the most qualified applicant for the EPRPC position, her qualifications were not directly linked to clinical competence or patient care issues. Therefore, the non-selection of the grievant does not involve issues of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).<sup>2</sup>

As a remedy for her non-selection, NAGE requested that Ms. \_\_\_\_\_ be remunerated with annual leave or financial payment. 38 U.S.C. § 7421 specifically grants the Secretary the authority to establish the leaves of absence for nurses that are set forth in VA Handbook 5011. In addition, Subchapter IV of Title 38 specifically addresses how nurse pay should be calculated. Neither the VA Handbook nor Subchapter IV authorizes the payment of annual leave or additional pay to a nurse who is grieving their non-selection for a position. Yet, NAGE is requesting that Ms. \_\_\_\_\_'s pay be adjusted to redress Management's alleged “pre-selection and favoritism” and improprieties during the selection process. However, because the union's requested remedy attempts to compensate Ms. \_\_\_\_\_ for her non-selection, it is non-grievable and non-negotiable as a matter concerning or arising out of the determination or adjustment of Title 38 compensation under 38 U.S.C § 7422(b).

NAGE also requested that the MHCS implement a standardized hiring, interview and selection process developed in conjunction with the union. The recruitment and hiring of qualified nurses is fundamental to enabling the Department to meet patient care needs and the selection of nurses through the interview and hiring process is generally based upon the nurses' professional qualifications. As a result, the union's requested remedy of the implementation of a standardized hiring, interview and selection process is similarly non-grievable and non-negotiable because the hiring, interview and selection process for Title 38 nurses is based upon their professional conduct or competence.

### RECOMMENDED DECISION

That the local union's grievance concerning the MHCS' failure to select \_\_\_\_\_ for the EPRPC position is not excluded from collective bargaining as a matter or question that concerns or arises out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).<sup>3</sup>

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<sup>2</sup> NAGE's argument as to the timeliness of management's 38 U.S.C. § 7422 assertion is in error. The union's assertion that management must raise a 38 U.S.C. § 7422 grievability/arbitrability assertion by Step 3 of the grievance process is contrary to the rulings of the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit, both of which have recently held that the 38 U.S.C. § 7422 exclusions are jurisdictional in nature and that the Under Secretary for Health may exercise his authority to determine a grievance to be non-arbitrable at any time in the process, even after an arbitration award has been issued and become binding on the parties. *AFGE, Local 446 v. Principi*, 404 F. Supp. 2d 14, 25 (D.D.C. 2005) (“The plain terms of the statute grant the Secretary of the VA plenary authority over decisions as to whether matters fall within the § 7422 exclusion from collective bargaining, and the plain terms do not limit the Secretary's authority such that he must exercise it during a given period of time ....”), vacated and remanded, *AFGE, AFL-CIO, Local 446 v. Nicholson*, 374 U.S. App. D.C. 332, 475 F.3d 341, 2007 U.S. App. LEXIS 846 (2007) (Nothing in Title 38 imposes a time limit on VA's authority to decide an issue under § 7422(d)).

Title 38 Decision Paper- VA Maryland Health Care System

APPROVED X

DISAPPROVED \_\_\_\_\_

That the local union's requested remedy of compensation in the form of annual leave or financial payment concerns or arises out of the establishment, determination, or adjustment of Title 38 compensation within the meaning of 38 U.S.C. § 7422(b).

APPROVED X

DISAPPROVED \_\_\_\_\_

That the local union's requested remedy of the implementation of a standardized hiring, interview and selection process developed in conjunction with the union is excluded from collective bargaining as a matter or question that concerns or arises out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

APPROVED X

DISAPPROVED \_\_\_\_\_

Michael J. Kussman  
Michael J. Kussman, M.D., MS, MACP  
Acting Under Secretary for Health

5/20/08  
Date