

Title 38 Decision Paper
Caribbean Department of Veterans Affairs (VA) Medical Center
San Juan, Puerto Rico

FACTS

On January 22, 2020, the Nurse Professional Standards Board (NPSB) at the VA Caribbean Healthcare System (Medical Center) convened to consider a Nurse II's advancement to Nurse III. Attachment B. The NPSB remarked that the Registered Nurse (RN) did not satisfy the educational requirement for advancement; however, she satisfied all other requirements. *Id.* On February 4, 2020, the NPSB recommended advancement to Nurse III based on an educational waiver. *Id.*

On February 12, 2020, the approving authority disapproved the NPSBs recommendation for promotion as the RN did not hold "the education requirement (MSN) for promotion to a nurse grade III." Attachment A, *see also* Attachment B. Additionally, the approving authority notated on the form, "per previous discussions, need nursing service comparables and review of all approved and budgeted positions specifically level III." Attachment B.

On March 4, 2021, the American Federation of Government Employees, Local 2408 (Union), filed a Step III Grievance. Attachment C. The grievance charged that the Medical Center "in the past has approved the NPSB grade promotions. It is the first time in the VA, where a Center Director has denied a NPSB grade promotion, establishing a 'new practice'." *Id.*

On April 5, 2021, the Medical Center met with the Union to discuss the RNs "not being recommended for promotion to Grade III." Attachment D.

On April 19, 2021, the Medical Center responded to the grievance stating "[T]he waiver on education requirements is entirely discretionary and protected under 38 U.S.C. § 7422." Attachment D.

On April 21, 2021, the Union invoked arbitration. Attachment E.

On April 27, 2021, the Medical Center informed the Union of its intent to file for a 38 U.S.C. § 7422 determination, as well as setting forth, "the Subject line: 'Change in Past Practice,' is a deflection on your part in order to not recognize the actual issue at hand, which is the discretion afforded to the NPSB final approval authority to approve or disapprove a waiver of experience or education requirements for the adjustment of compensation for health care workers." Attachment F.

On May 14, 2021, the Medical Center submitted a request for a 38 U.S.C. § 7422 determination. Attachment A. The Union did not submit a response to the issues raised in the VAMC's request for determination.

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 (USH). Attachment G.

ISSUE

Whether a grievance charge that the Medical Center unilaterally changed nurse promotion procedures when it denied an RN a promotion to Nurse III 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 out of professional conduct or competence, 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 collective bargaining rights to Title 38 employees under 38 U.S.C. § 7422(a). However, for Title 38 employees described in 38 U.S.C. 7421(b), collective bargaining may not cover any matter or question concerning or arising out of professional conduct or competence (i.e., direct patient care or clinical 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). The following employees are described in 38 U.S.C. 7421(b)—physicians, dentists, podiatrist, optometrist, registered nurses, physicians assistants, expanded-duty function dental auxiliaries, and chiropractors. *Id.*; see 38 U.S.C. 7401(1).

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 H. 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 4, 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. If the RN does

not meet the applicable administrative requirements, “the appointing 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. The NPSB initially recommended the RN for advancement to Nurse III based upon an educational waiver request, but the approving official disapproved the action.¹ Attachment B. These actions are consistent with the process outlined in VA Handbook 5005. In evaluating the Nurse’s qualifications for promotion, the NPSB and approving official engaged in a peer review process and made a determination on the Nurse’s clinical competence. Furthermore, the denial of promotion was a denial of higher pay, thereby constituting a decision on the Nurse’s compensation.

In *VAMC Eastern Kansas*, the “NPSB initially recommended the RN for advancement to Nurse II based upon an educational waiver request, but the approving official disapproved the action.” Attachment K (*VAMC Eastern Kansas* (Nov. 20, 2017)). The Secretary concluded that the Medical Center did not unilaterally change nurse promotion procedures when it denied an RN a promotion to Nurse II because she did not satisfy the education requirement, and subsequently, she was not granted an educational waiver which the approving official has the discretion to authorize a waiver of the degree requirement. *Id.* The Secretary further found that the denial of an education waiver was a matter or question concerning or arising out of peer review and the adjustment of employee compensation.

In *Minneapolis*, the Secretary concluded that an RN improperly boarded by an NPSB and then returned to a Nurse I position was excluded from collective bargaining “as a title 38 peer review process, NPSB’s initial boarding decision is a matter or question excluded from the parties’ negotiated grievance process by application of 38 U.S.C. §7422. Additionally, because the NPSB’s recommendation impacted the registered nurse’s starting pay, 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.” Attachment L (*VAMC Minneapolis* (Oct. 20, 2014)).

The issue of nurse compensation, and more particularly nurse pay as a result of promotion, is an issue that is left to the discretion of VA’s Secretary and/or the USH as provided by 38 U.S.C. §§ 7451 and 7452. In *Milwaukee*, the USH’s decision in response to a negotiability appeal filed during contract negotiations by the Wisconsin Federation

¹ 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.*

of Nurses and Health Professionals noted 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.” Attachment M (Milwaukee/Wisconsin Federation of Nurses (Apr. 28, 1992)).

DECISION

The grievance charge that the Medical Center unilaterally changed nurse promotion procedures when it denied an RN a promotion to Nurse III because she did not satisfy the education requirement and was not granted an educational waiver involves a matter or question concerning or arising out of professional conduct or competence, 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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October 26, 2021

Date