

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

**FACTS**

On September 17, 2021, the American Federation of Government Employees, Local 2408 (Union), filed a Step 1 Grievance with the VA Caribbean Healthcare System (Medical Center). (Attachment A.) The grievance charged that the Medical Center provided an RN a “high satisfactory overall rating in his 2020 proficiency report” and that the RN was not provided “proper communication on a continuing basis before or after the evaluation.” *Id.*

On September 21, 2021, the Medical Center requested clarification on “the date of the proficiency report” to determine whether the grievance was timely. (Attachment B.)

On September 28, 2021, the Union responded that they are “very aware” of the timeliness associated with the grievance process as set forth in Article 43 of the Master Agreement, and follow them accordingly. (Attachment C.)

On September 30, 2021, the Medical Center again requested “the date the employee and/or Union became aware of the occurrence” in order to determine whether the grievance was timely. (Attachment D.)

On September 30, 2021, the Union responded that “it became aware of this violations in September 15, 2021” [sic] and asserted that the Medical Center had until “COB Friday,

October 1, 2021 to meet with employee and Union Representative and provide [a] written decision to this Grievance.” (Attachment E.)

On October 1, 2021, the Medical Center responded, “the employee was made aware of the act or occurrence on August 3, 2020, which makes this grievance untimely.” (Attachment F.)

On October 6, 2021, the Union filed a Step 2 Grievance requesting, “a fair appraisal” and “equitable framework for honest feedback and open two-way communication between employees and supervisors.” (Attachment G.)

On October 27, 2021, the Medical Center responded to the Step 2 Grievance stating the employee “did not have any deficiencies in his work” as he “met his performance appraisal as written in the ‘High Satisfactory’ achievement level,” and “[M]anagement followed the process as established in Article 27 of the Master Agreement which promotes communication between employees and supervisors.” (Attachment H.)

On October 29, 2021, the Union filed a Step 3 Grievance “as we are not satisfied with the outcomes of the previous Grievances” and requested the employee’s “appraisal final rating be changed to Outstanding.” (Attachment I.)

On November 16, 2021, the Medical Center responded to the Step 3 Grievance. (Attachment J.) The third step grievance official afforded the RN employee an opportunity to provide a self-assessment in order to determine whether the RN employee’s rating should be changed to Outstanding. *Id.* However, the grievance official concluded, “the information provided does not sustain a rating of ‘Outstanding’ as defined in the performance measures.” *Id.*

On November 30, 2021, the Union invoked arbitration. (Attachment K.)

On December 3, 2021, the Medical Center informed the Union of its intent to file for a 38 U.S.C. § 7422 determination. (Attachment L.)

On December 7, 2021, the Medical Center submitted a request for a 38 U.S.C. § 7422 determination. (Attachment M.) Although the Union requested an extension in which to provide a response, the Union did not submit a response to the issues raised in the VAMCs request for determination.

## **AUTHORITY**

The VA Secretary has the final authority to decide whether a matter or question concerns or arises out of professional competence (i.e., direct patient care or clinical competence), peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b). This authority is delegated within VA policy. (Attachment N.)

## **ISSUE**

Whether a grievance regarding an RN’s annual proficiency rating involves an issue of professional conduct or competence 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,

podiatrists, optometrists, registered nurses, physicians assistants, expanded-duty function dental auxiliaries, and chiropractors. *Id.*; see 38 U.S.C. 7401(1).

VA's Proficiency Rating System (PRS) covers the Title 38 employees identified in 38 U.S.C. § 7421(b) (Physicians, Dentists, Podiatrists, Optometrists, Registered Nurses, Physician Assistants, Expanded-duty dental auxiliaries, and Chiropractors) and is used to appraise their performance. Attachment O, VA Handbook 5013, Part II, ¶ 1. The PRS is "designed to...ensure that dealings with the public are consistent with [VA's] mission to provide the best possible care to our country's veterans." *Id.* at ¶ 6(a).

In this case, the Union filed a grievance on behalf of an RN, alleging that the RN received a "high satisfactory overall rating in his 2020 proficiency report" and "did not receive any communication before, during or after his proficiency evaluation concerning any deficiencies in his work during said period." (Attachments A, G, and I.) During the Step III Grievance meeting on November 3, 2021, the Deputy Associate Director for Patient Care Services provided the RN an opportunity to provide a self-assessment to ascertain whether a higher rating was in fact warranted. (Attachment J.) Subsequently, the Deputy Associate Director for Patient Care Services stated in the Step III Grievance response on November 16, 2021, "[A] higher level review was performed by me taking into consideration the performance appraisal and the self-assessment..." and "[A]fter careful review and consideration, I have determined that the information provided does not sustain a rating of 'Outstanding' as defined in the performance measures." *Id.*

The Secretary has directly addressed the PRS in previous 38 U.S.C. § 7422 decisions. In VAMC Phoenix, the Secretary determined an RN's proficiency rating cannot be challenged through the negotiated grievance procedure. (Attachment P, VAMC Phoenix (April 2, 2015) (finding an "RN's rating in an annual proficiency report is a matter concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) and cannot be challenged through negotiated grievance procedures.") In VAMC Ann Arbor, the Secretary also held that a grievance regarding a "proficiency rating" and a related denial of a step increase is excluded from collective bargaining since the matter concerns or arises out of professional conduct or competence. (Attachment Q, VAMC Ann Arbor (September 25, 2008)). In VAMC DC, the Secretary again determined that to "the extent that such an [proficiency] assessment involves the provider's performance of direct patient care duties, it necessarily involves issues of direct patient care and clinical competence" and held as previously determined on "several occasions that substantive ratings in proficiency reports involves issues of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b). (Attachment R, VAMC DC (January 6, 2005.))

## **RECOMMENDED DECISION**

The grievance regarding an RN's annual proficiency rating involves a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b), and is thereby excluded from collective bargaining.

Approved/Disapproved



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Shereef Elnahal, M.D., MBA  
Under Secretary for Health

9-15-2022

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Date