

**Title 38 Decision Paper**  
**Department of Veterans Affairs (VA)**  
**Hines VA Health Care System (VAMC)**

**FACTS**

On September 23, 2020, the VAMC posted a vacancy announcement for a full-time permanent, Registered Nurse (RN) position in the Post Anesthesia Care Unit (PACU). Attachment A. The position was recruited amongst RNs internal to the Hines VAMC and its community based outpatient clinics (CBOC) only. *Id.* Preferred qualifications listed were Bachelor of Science in Nursing (BSN), minimum of 3 years PACU or Intensive Care Unit (ICU) experience, current Basic Life Support (BLS) certification (American Heart Association), and current Advanced Cardiac Life Support (ACLS) Certification (American Heart Association). *Id.* The position closed on, or about, October 6, 2020. *Id.*

Hines VA Staffing Specialists certified five internal applicants for PACU RN position. Attachment B. A resume review was conducted on October 16, 2020, and a scoring matrix was completed, with points awarded for Education, Certifications, Charge Nurse Experience, PACU Direct Patient Care experience, Nursing Years of Experience, Certification in Paraneesthesia Nursing, and Telemetry/Critical Care Experience. *Id.* Based on the review, the RN grievant received a total of 9 points. *Id.* Other candidates received point totals of 8, 9, 10 and 13 points respectively. *Id.* The RN grievant was non-selected for the position and the internal candidate receiving 13 points was selected. Attachment C.

On, or about, October 30, 2020, the RN grievant discussed her non-selection for the position with management. Attachment D. This was followed by management's phone conversation with the Union. *Id.* During the conversation, management affirmed that the RN selected was an internal candidate and that the decision to hire another RN was based on the fact that the selected RN was determined to be more qualified, predominately due to direct PACU experience and a higher level of education. *Id.*

On October 22, 2020, the Union filed a Step 1 Grievance stating that the "grievant was not treated fairly and equitably, management failed to give fair consideration" as it related to the "job bid in as the PACU, as the grievant meets all the qualifications for this position and is an internal candidate that should be given preference to at least be interviewed, if not awarded the position." Attachment E.

On October 27, 2020, management met with the Union, provided the selection grid, as well as the announcement, but were unable to resolve the issue. Attachment F.

On November 22, 2020, the Union filed a Step 2 Grievance reiterating that the grievant was not given "fair consideration" for the position in the PACU. Attachment G.

On January 19, 2021, management responded to the grievance stating that although the “union is of the opinion that the grievance is qualified for this position, however the announcement stated that the preferred qualifications for this position is a minimum of 3 years of PACU experience or ICU experience. Management opted for the employee with the PACU experience which is well within management’s rights as defined in US Code 7106.” Attachment H.

On February 4, 2021, the Union filed a Step 3 Grievance to which on March 1, 2020, management denied the grievance indicating that matter is both “excluded from the grievance procedure” as well as the “issue raised pertains to an appointment and is non-negotiable and not grievable because it involves hiring, interview, and the selection process of title 38 nurses based on their professional conduct or competence within the meaning of under 38 USC § 7422.” Attachment I.

The Union invoked arbitration on March 3, 2021. Attachment J.

On March 18, 2021, the Medical Center formally requested a 38 U.S.C. § 7422 determination. Attachment K.

On April 12, 2021, the Union submitted a response to the Medical Center’s request. Attachment S. The Union asserted “the qualifications listed on the posting for this position were ‘preferred’ giving management the undue right to customize the position for bidders of their preference. The contract violations effectively distorted the process that should have been based on seniority of the qualified (basic) internal applicants, a way to circumvent contractual obligations.” *Id.* Additionally, the Union asserted that “[M]anagement failed to give preference to the most qualified candidate and not only failed to give her due credit, they adulterated the process to make another external candidate appear more qualified. Management says they did everything correctly and also wanted carte blanche- that’s why they are hiding behind 7422.” *Id.*

## **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 L.

## **ISSUE**

Whether the Union grievance concerning the non-selection of a Registered Nurse for a PACU position concerns or arises out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) and is thereby 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, physician assistants, expanded-duty function dental auxiliaries, and chiropractors. *Id.*; see 38 U.S.C. 7401(1).

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) to implement assignments of Title 38 employees, including RNs. Attachment M, VA Handbook 5005, part IV, chapter 3, section A. In accordance with paragraph 4b and 4c, respectively, “primary consideration will be given to the efficient and effective accomplishment of the VA mission” and “[a]pproving officials will make maximum use of an employee's skills and capabilities.” *Id.* at (¶¶ 4b-4c). In accordance with paragraph 4d, “[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.” *Id.* at ¶ 4d). In the instant case, the selection official based her selection on the candidates’ respective clinical competence qualifications.

The Union repeatedly asserts that the Medical Center violated Master Agreement Article 22, Vacancy Announcements, Section C, “[V]acancy announcements may be advertised simultaneously internally and externally, and should contain the same qualifications. The Department is encouraged to give internal RNs first consideration when filling bargaining unit positions.” Attachment N. Based on the Medical Center’s vacancy announcement RN Internal Only – 2020-#92, Position Title: PACU RN, this announcement was posted for internal candidates only. Attachment A.

The Medical Center clarified in its 38 U.S.C. § 7422 request that it performed a “resume review” of the five internal candidates for the vacant PACU RN position and awarded points for Education, Certifications, Charge Nurse Experience, PACU Direct Patient Care experience, Nursing Years of Experience, Certification in Paranesthesia Nursing, and Telemetry/Critical Care Experience. Attachment K. Based on the review, the RN grievant received a total of 9 points, while other the other candidates received a point totals of 8, 9, 10 and 13 points respectively. *Id.* The candidate receiving a 13 which was the highest cumulative score in those categories was selected for the position. *Id.* The Union’s grievance seeks to override management’s selection criteria, and ultimately, the selected applicants’ clinical competence in relation to the position he/she filled.

The Secretary has determined that 38 U.S.C. § 7422 bars grievances over the selection criteria that the Medical Center uses to assess and compare the clinical competence of

nursing candidates. In *VAMC Bay Pines*, the Medical Center announced a reassignment/shift change opportunity for a RN Care Coordinator position in the Ambulatory Service/Nephrology Clinic. Attachment O, *VAMC Bay Pines* (January 25, 2021). The announcement stated that the preferences for the position would be a RN with “at least 3-5 years of recent dialysis or nephrology clinical experience. BSN or MSN preferred. National Nursing Certification in Nephrology or Dialysis (CNN or CDN) is preferred.” *Id.* Eight RNs applied for the vacant position, and during the initial screening, four of the eight RNs did not have either 3-5 years of recent dialysis or nephrology clinical experience, or a CNN or CDN as preferred, and were not granted an interview. *Id.* The remaining four RNs were interviewed by a panel and the candidate receiving the highest cumulative interview score was selected for the RN care coordinator position. *Id.* The Union argued that seniority should be utilized as the selection criterion. *Id.* The Secretary determined that the criteria that the Medical Center used to assess and compare the clinical competence of the candidates for the RN Care Coordinator position, rather than “seniority” when selecting an RN for a reassignment concerns or arises out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) and is thereby excluded from collective bargaining. *Id.*

The Secretary has also determined in multiple cases that 38 U.S.C. § 7422 bars grievances over selections for nursing positions that are based on candidates’ clinical competence. In *VAMC Salisbury, VA* considered mandatory seniority-based reassignment procedures, which the Union had negotiated with the VAMC in previous years. Attachment P, *VAMC Salisbury* (September 14, 2004). 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, the Secretary determined that rules imposing 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.*; *see also* Attachment Q, *VAMC Erie*, November 19, 2008) (determining the non-selection of an RN to be a matter of professional conduct or competence); Attachment R, *Buffalo VAMC* (August 16, 1994) (determining a grievance over RN reassignment to be a matter of professional conduct or competence).

In this case, both the criteria that the Medical Center used to assess and compare the clinical competence of the candidates for the RN PACU position and the selection of the candidate are matters that concern or arise from direct patient care and clinical competence, and consequently are excluded from collective bargaining.

**DECISION**

The Union grievance concerning the non-selection of a Registered Nurse for a PACU position concerns or arises out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) and is thereby excluded from collective bargaining.



October 14, 2022

---

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

---

Date