

Title 38 Decision Paper
Department of Veterans Affairs (VA)
Veterans Health Administration (VHA)
Connecticut Healthcare System, West Haven, CT

FACTS

On October 15, 2019, Ms. SN and Ms. BK entered on duty as Advanced Practice Registered Nurses (APRN) at the VA Connecticut Healthcare System, West Haven, CT, (VA CT) Mental Health (MH) Clinic, under a 38 U.S.C. § 7401(1) appointment.¹ (Exhibit 1; Exhibit 2).

A VA CT Nurse Professional Standards Board (NPSB) conducted a pre-appointment qualifications review of Ms. SN and Ms. BK. (Exhibit 4; Exhibit 5). Each NPSB recommended an appointment grade and salary of Nurse II/Step 5 for Ms. SN and Ms. BK, respectively. (Exhibit 4 at p. 3; Exhibit 5 at p. 3). The Nursing Director, Operations/Recruitment, subsequently recommended a starting pay “above the minimum rate of the grade based on the candidate’s existing pay, recent salary history, or competing job offer” for Ms. SN and Ms. BK. (Exhibit 4 at p. 4; Exhibit 5 at p. 4). The Medical Center Director (MCD) ultimately approved the appointment of both Ms. SN and Ms. BK at a salary level of Nurse II/Step 8.² (Exhibit 4 at p. 5; Exhibit 5 at p. 5). On December 8, 2019, Ms. EE entered on duty as a MH APRN, and she was also appointed under 38 U.S.C. § 7401(1).³ (Exhibit 6). An NPSB conducted a pre-appointment qualifications review of Ms. EE and recommended an appointment grade and salary of Nurse II/Step 6. (Exhibit 7 at p. 3). The Nursing Director, Operations/Recruitment, subsequently recommended a starting pay “above the minimum rate of the grade based on the candidate’s existing pay, recent salary history, or competing job offer.” *Id.* at p. 4. The MCD ultimately approved appointment of Ms. EE at a salary level of Nurse II/Step 10. *Id.* at p. 5.

On May 20, 2020, the American Federation of Government Employees, Local 2138 (Union) filed a grievance on behalf of Ms. BK, asserting pay disparity among the three MH APRNs who had “identical jobs in [sic] same department but are being paid differently.” (Exhibit 8). The Union also alleged VA CT violated the “Master Agreement and all other articles that might apply to this case [under the] Fair Labor Standards Act/Equal Pay Act” and “VA handbook (sic) 5007.” *Id.* The Union sought “reconsideration of the determination with correction and retroactive salary adjustment,” including back pay, front pay, student loan forgiveness, and promotion of step and grade where it applies. *Id.*

¹ Ms. SN was hired through a competitive process via a job announcement. (Exhibit 3). Ms. BK was hired through a non-competitive process. (Exhibit 2).

² The announcement from which Ms. SN was hired authorized eligible hires the opportunity for participation in VHA’s Education Debt Reduction Program (EDRP).² (Exhibit 3 at p. 2). During the onboarding process; however, Ms. SN was deemed ineligible for the VHA EDRP program because she had received education debt relief assistance from her prior employer. (Exhibit 4 at p. 6).

³ Ms. EE was hired through a non-competitive process. (Exhibit 6).

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On June 1, 2020, VA CT denied the grievance as “excluded from coverage as outlined in the Master Agreement, Article 43, Section 2.C.” (Exhibit 9). On June 5, 2020, the Union filed a 2nd step grievance, again seeking remedies of back pay, front pay, student loan forgiveness, and, if applicable, promotion of step and grade. (Exhibit 10). On July 2, 2020, VA CT denied the 2nd step grievance. (Exhibit 11). On or about July 22, 2020, the Union filed a 3rd step grievance, which VA CT denied on August 25, 2020, for the same reasons given in previous denials. (Exhibit 12).

On August 28, 2020, the Union notified VA CT it would seek arbitration. (Exhibit 13). On December 11, 2020, the VA CT MDC formally requested a 38 U.S.C. § 7422 determination. (Exhibit 15). The Union did not submit a response to the issues raised in the MCD’s request for 38 U.S.C. § 7422 determination.

AUTHORITY

The Secretary has final authority to determine 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 this authority to the Under Secretary for Health (USH). (Exhibit 16).

ISSUE

Whether the VA CT Medical Center’s appointment of three MH APRNs during approximately the same time period to the same department and position but offering different starting pay is a matter concerning or arising out of peer review or compensation within the meaning of 38 U.S.C. § 7422(b).

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).

The Union’s grievance asserts that there is disparity among the three MH APRNs because they were hired around the same time, in the same job, but with different pay.

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Pursuant to 38 U.S.C. § 7421(a), the Secretary has prescribed procedures by which VA officials may appoint nurses.

VA Directive/Handbook 5005, Part II, Chapter 3 requires an NPSB to "[r]eview and act on employment applications and determine whether the applicant meets the requirements set forth in VA qualification standards." (Exhibit 17 at Section C (5)(a)). NPSB membership "is composed of a majority of the employees from the occupation involved." *Id.* at Section C(4). NPSB members "must be at a grade and level that is equal to or higher than that of the candidate being considered." *Id.* at Section C(3)(a).

In reaching its initial boarding decision for a registered nurse, an NPSB compares a nurse's background, education, and experience to the Nurse Qualification Standard in VA Handbook 5005, Part II, Appendix G6. (Exhibit 18). Based on the Nurse Qualification Standard, the NPSB recommends an appropriate appointment grade and level. *Id.*

In the instant matter, as part of the onboarding process, an NPSB reviewed each APRN's application and qualifications and recommended an initial boarding for each at the initial grade of Nurse II. (Exhibit 4; Exhibit 5; Exhibit 7). The respective NPSBs for two of the APRNs recommended pay at level step 5 and the NPSB for the third APRN recommended pay at level step 6. *Id.*

In similar cases, the Secretary has determined that 38 U.S.C. § 7422 bars grievances over (N)PSB activities, including the initial boarding assessment, as involving peer review. (Exhibit 19, *Hampton/AFGE* (July 15, 2011)); (Exhibit 20, *Minneapolis/AFGE* (October 20, 2014)). In *Hampton/AFGE*, the Secretary determined that grievances regarding a VAMC's alleged refusal to acknowledge the right of the Union to represent witnesses appearing before a PSB summary review proceeding raised issues of peer review. (Exhibit 19, *Hampton/AFGE* (July 15, 2011)). Similarly, in *Minneapolis/AFGE*, the Secretary determined that an NPSB's review and assessment of a new employee's qualifications and placing them in the appropriate grade and level is a matter of peer review. (Exhibit 20, *Minneapolis/AFGE* (October 20, 2014)).

Likewise, in the instant case, the NPSB's activities of reviewing and assessing each nurses' qualifications and placing them in the appropriate grade and level also involves peer review, which is excluded from bargaining. See (Exhibits 19, 20).

The question of the APRNs' initial pay is also excluded under 38 U.S.C. § 7422 based on it involving the establishment, determination, or adjustment of employee compensation. Through various congressionally promulgated statutory provisions, the Secretary is authorized to comprehensively address pay for nurses, including basic pay, additional pay, and bonus pay. See, e.g., 38 U.S.C. § 7451 (3)(B); 38 U.S.C. § 7453(j); 38 U.S.C. § 7458 (Exhibit 21). VA Directive/Handbook 5005, Part II, Chapter 3, Section

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E addresses general appointment provisions of nurses under 38 U.S.C. Chapter 74. (Exhibit 22). Section E (2)(a) provides “[t]he initial rate of pay may be set at any step rate within the grade.” *Id.* Section E (2)(c) permits “[a]ppointment at a step rate above the minimum” of the grade if specific Agency criteria are met. *Id.* Section E 2(d) permits the facility Director (or delegate) to approve a recommended appointment of a nurse “at any step above the minimum of the grade.” *Id.*

In the instant case, after each NPSB routed its respective recommendation to the Nursing Director, Operations/Recruitment, each APRN was further considered for appointment above the minimum of the appropriate grade. (Exhibit 4 at p. 4; Exhibit 5 at p. 4; Exhibit 7 at p. 4). For each APRN, the Nursing Director recommended a starting pay “above the minimum rate of the grade based on the candidate’s existing pay, recent salary history, or competing job offer.” *Id.* The MCD subsequently approved each recommendation approving an initial pay for each APRN at Nurse II/Step 8 for Ms. SN and Ms. BK and at Nurse II/Step 10 for Ms. EE, respectively. (Exhibit 4 at p. 5; Exhibit 5 at p. 5; Exhibit 7 at p. 5).

The Secretary has previously determined 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.” (Exhibit 23, *Milwaukee/Wisconsin Federation of Nurses* (April 28, 1992); Exhibit 20, *Minneapolis/AFGE* (October 20, 2014)). In the instant case, there is no evidence of a violation of national VA policy. Thus, the Union’s challenge to the APRN’s respective pay levels concern or arise out of the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422 (b) and are excluded from collective bargaining.

RECOMMENDED DECISION

The Union’s grievance regarding the appointment of an initial compensation of Advanced Practice Registered Nurses at the West Haven, CT VA Medical Center is a matter or question concerning or arising out of peer review or the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b) and as such, excluded from collective bargaining.

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APPROVED X

DISAPPROVED _____



3-18-2022

Steven L. Lieberman, M.D.
Deputy Under Secretary for Health,
Performing the Delegable Duties of the
Under Secretary for Health

Date