



# **CONGRESSIONAL TESTIMONY**

***STATEMENT FOR THE RECORD***

**AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO**

**PROVIDED TO THE**

**HOUSE COMMITTEE ON VETERANS' AFFAIRS**

**SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS**

**HEARING ON**

**PENDING LEGISLATION**

**APRIL 21, 2021**

Chairman Pappas, Ranking Member Mann, and Members of the Subcommittee:

The American Federation of Government Employees, AFL-CIO and its National Veterans Affairs Council (AFGE) appreciate the opportunity to provide our views on today's hearing on pending legislation. AFGE represents more than 700,000 federal and District of Columbia government employees, 260,000 of whom are dedicated Department of Veterans Affairs (VA) employees. This includes over 100,000 employees who are "pure Title 38" healthcare providers who have been deprived of equal collective bargaining rights and an equal voice in the VA health care workplace for decades. As such we will be focusing the majority of our comments today on Chairman Takano's H.R. 1948, the "VA Employee Fairness Act," that restores equal bargaining rights to these essential VA clinicians.

#### **H.R. 1948, the VA Employee Fairness Act**

AFGE strongly endorses Chairman Takano's Bill H.R. 1948, the "VA Employee Fairness Act" in the 117<sup>th</sup> Congress, as it has championed the same legislation for over a decade. AFGE is proud to represent VA employees throughout the VA's three administrations. Within the Veterans Health Administration (VHA), employees represented by AFGE are covered under one of three different personnel system: full Title 38, Title 5, and Hybrid Title 38.

The full Title 38 employees who require the relief provided by this legislation are identified in 38 USC §7401(1), and include: "Physicians, dentists, podiatrists, chiropractors, optometrists, registered nurses, physician assistants, and expanded-function dental auxiliaries." In contrast to Title 5 and Hybrid Title 38 VHA employees, whose collective bargaining rights are provided by 5 USC 7106, full Title 48 clinicians' bargaining rights are provided by 38 USC §7422.

In 1991, Congress enacted 38 USC §7422 to ensure that medical professionals who work at VA facilities are afforded full collective bargaining rights (which include the rights to use the negotiated grievance procedure and arbitration) (P.L. 102-40 §202). Under 38 USC §7422, covered employees can negotiate, file grievances and arbitrate disputes over working conditions except “any matter or question concerning or arising out of”:

- professional conduct or competence (defined as direct patient care or clinical competence);
- peer review; or
- the establishment, determination, or adjustment of employee compensation.

VA management’s interpretation of these three exceptions to bargaining has varied widely over the years. For nearly the past two decades, the Department has interpreted these exceptions very broadly and refused to bargain over virtually every significant workplace issue affecting Title 38 medical professionals. It is also very problematic that VA managers have frequently acted in violation of the clear mandate in the law that only the VA Secretary determine when an exclusion to bargaining applies by asserting “7422” themselves, rather than requesting a 7422 ruling from the Secretary. In a 1992 memorandum, the VA Secretary delegated this authority to the VA Under Secretary for Health (USH) (formerly called the Chief Medical Director.).

When managers refuse to seek a USH 7422 ruling, the union’s efforts to enforce the rights of Title 38 professionals are hamstrung because nothing prevents the VA medical center from belatedly and retroactively obtaining a USH 7422 ruling when the Federal Labor Relations Authority (FLRA) threatens the VA with ordering remedial relief for the professionals. When local management asserts Section 7422 but does not seek an USH ruling, the union is forced to

file an Unfair Labor Practice (ULP). The FLRA Regions generally decline to take any action. However, if the FLRA region starts to pursue an action over the ULP charge, the management will then seek an USH ruling even though it is late in the FLRA litigation process.

VA Title 38 medical professionals have extremely limited collective bargaining rights in comparison to their counterparts in other federal agencies, state and local government systems, and the private sector. As a result, Registered Nurses (RNs), doctors and other impacted employees at the VA are experiencing increased job stress, low morale, and burnout. This in turn, exacerbates the VA's recruitment and retention problems.

This problem has brought us to where we are today, and to Chairman Takano's legislation to fix this problem. At its core, H.R. 1948 is a bill about fairness. The Chairman's legislation, if enacted, would repeal the sections of 38 USC 7422 which the VA uses to exclude critical workplace issues from being subject to collective bargaining. This legislation would provide Title 38 medical personnel with essential tools for improving the delivery of quality and safe patient care to our nation's veterans. They cannot currently negotiate with management over schedules in order to challenge excessive work hours that can result in medical errors and patient harm. They cannot currently challenge reassignments by managers who are not properly staffing units such as Intensive Care to demand proper training in specialized skills that they will have to perform for the first time. They cannot currently challenge the lack of adequate safe patient handling procedures and equipment that put both patients and front line nurses at risk of injury.

Every day, Title 38 employees work side by side with other VA employees who use full collective bargaining rights to improve their working conditions and curtail management mistreatment. For example, VA Hybrid Title 38 psychologists can bargain with management

over schedules or incentive pay while VA psychiatrists cannot. Similarly, VA clinicians caring for veterans cannot challenge unfair or unsafe working conditions while clinicians working at Department of Defense hospitals and clinics can.

This disparate treatment of Title 38 medical personnel results in a work environment that undermines the ability of the Veterans Health Administration (VHA) to recruit and retain a strong workforce in the face of severe national shortages that have been identified by the VA Office of the Inspector General<sup>1</sup>. Chronic short staffing has been shown to adversely impact the quality of care, patient safety, and workplace safety, and it leads to costly stopgap measures such as overuse of contract nurses and doctors. Medical professionals working at the Bureau of Prison's medical facilities also regularly bargain over safety issues.

Management's interpretation of Section 7422 also deprives veterans of full protection against improper and unsafe care. A VA RN cannot bargain over the failure to receive adequate training in new clinical duties or new health care technology while a VA licensed practical nurse can. Collective bargaining rights also allow the union to negotiate with management over unsafe working conditions such as excessive mandatory overtime that deprives health care personnel of adequate rest between shifts or inadequate training on new medical equipment.

The plain language of Section 7422 also makes clear that the exclusions to bargaining should be interpreted narrowly to allow bargaining over routine workplace matters, including those only indirectly impacting patient care and compensation disputes that are not related to the setting of pay.

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<sup>1</sup> *OIG Determination of Veterans Health Administration's Occupational Staffing Shortages, FY 2018* (Report No. 18-0163-196, June 4, 2018).

Despite clear Congressional intent and plain language supporting bargaining over routine matters, the Secretary has historically used his unfettered discretion to apply extremely broad interpretations of the three exclusions to bargaining in Section 7422 to block virtually any dispute involving patient care or any aspect of compensation, as the Secretary decisions over what is subject to collective bargaining that are published by the VA indicate.<sup>2</sup> For example, in every published determination issued in 2016, 2017 and 2018, the multiple VA Secretaries denied bargaining based on one or more of the Section 7422 exclusions. In 2019, every published Secretary determination pertained to the ongoing AFGE-VA contract negotiations; the Secretary refused to bargain over nine longstanding Title 38 articles in the master agreement related to medical professional needs and recruitment and retention, including promotions, processes for keeping VHA pay competitive, clinical research, proficiencies and job vacancies.

VA's wasteful and counterproductive policies on even the most basic right of accurate calculation of pay are best illustrated by the case involving operating room nurses at the Asheville, North Carolina VA Medical Center. AFGE waged an unsuccessful seven-year fight to secure statutory premium pay for nurses working night and weekend shifts. The dispute arose out of a basic pay rule in place at virtually every public and private sector hospital: nurses earn a higher hourly rate when they work evenings and weekends. When the arbitrator ruled in favor of the nurses, and ordered back pay, the VA invoked the 7422-compensation exclusion to refuse to pay. The FLRA refused to enforce the arbitrator's award because the VA asserted 7422 to get the case dismissed for lack of jurisdiction.<sup>3</sup> For the next six years, the VA refused to provide back pay to these nurses. The U.S. Court of Appeals for the D.C. Circuit stated that while the VA's

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<sup>2</sup> <https://www.va.gov/LMR/38USC7422.asp>

<sup>3</sup> U.S. Dep't of Veterans Affairs, Veterans Affairs Medical Center, Asheville, NC and AFGE, Local 446, AFL-CIO, 57 FLRA 681 (2002).

ability to invoke Section 7422 to get a case dismissed “may be inconsiderate or even unfair,” the VA’s interpretation of the law was permissible as currently written.

Former Under Secretary for Health Kenneth Kizer recognized the critical role that labor-management cooperation played in transforming the VA health care system into a world class provider of veterans’ care and national health care leader. AFGE and the other unions representing Title 38 personnel were invited to participate in a workgroup to develop a commonsense bargaining rights policy, the “VA Partnership Council’s Guide to Collective Bargaining and Joint Resolution of 38 U.S.C. 7422” that came to be known as the “Primer.” The Primer addressed many aspects of labor-management dispute resolution, including the scope of the Section 7422 patient care and compensation exclusions. The Primer made clear that management should only apply the patient care exclusion to matters *directly* affecting patient care, and should allow bargaining on compensation disputes involving pay surveys, rules for earning overtime pay, compensatory time and alternative work schedules.

Labor-management cooperation facilitated a highly successful transformation and the VA health care system and allowed it to lead the nation in major innovations such as the successful implementation of the electronic health record and bar code medication administration.

Sadly, E.O. 12871 was revoked on February 17, 2001, reviving the VA policy of applying the three exclusions to bargaining extremely broadly. This led to an immediate increase in the number of Title 38 labor-management disputes. During the period 1995-2000, no 7422 determinations were published, in 2001 and 2002, there were six and in 2003 and 2004, there were 11.

A second effort to jointly improve Section 7422 also took place during the Obama Administration. In 2010, a labor management work group developed a “Decision Document” that was issued as policy by Secretary Eric Shinseki. Two of the most significant reforms arising out of the Decision Document were to allow bargaining over violations of the agency’s own rules and regulations, and the establishment of a new decision process that allowed the unions to argue their positions in advance of the Secretary’s determinations of what can be bargained.

Unfortunately, the Decision Document never achieved its full potential due to management’s refusal to allow full implementation of these broader collective bargaining rights and many backdoor attempts by the Department to bog down the process. The Decision Document was nullified by Secretary Wilkie on August 17, 2018, leaving VA’s Title 38 workforce, and the veterans who depend on their ability to advocate for them, once again completely at the mercy of the Secretary’s discretion.

For these reasons, AFGE is proud to support H.R. 1948, and encourage a **yes** vote when the Committee considers this bill.

**H.R. 711, the West Los Angeles VA Campus Improvement Act of 2021**

AFGE takes no position on this legislation at this time.

**H.R. 2428 – Strengthening Oversight for Veterans Act of 2021**

AFGE takes no position on this legislation at this time.

**H.R. 2429 – VA Police Improvement and Accountability Act**

AFGE is proud to represent VA police officers throughout the country. When the “VA Police Improvement and Accountability Act” was introduced last Congress, AFGE was happy to

support language in the bill which will help train officers in “recognizing, defining, understanding, and avoiding racial profiling and implicit bias and best practices regarding the duty to intervene,” and “preventing suicide among the population served by the police officers.” This training will better allow VA police to support the veteran and staff population it serves. AFGE is glad this language was enacted as part of the VA COMPACT Act in the 116th Congress.

In the current legislation, AFGE supports the intent of Section 2(d) of the bill which calls for a “Plan On Police Staffing.” AFGE strongly supports the filling of vacancies within the Department and making sure that VA police officers receive compensation and benefits at minimum equal to those in surrounding areas. However, AFGE is concerned about the drafting of the bill which could make it possible for the Secretary to reduce staff or pay for VA Police Officers in particular facilities. AFGE urges clarification to this language to prevent the authority granted by this legislation from being used a way to reduce the number of police officers in a facility.

AFGE endorses Section 2(e) of the bill, which requires the VA to create a report on the “Staffing needs of the Department police force.” This report will help identify staffing needs of the VA police force and ways to recruit and retain officers, including how “compensation for Department police officers affects such needs and turnover.” AFGE is particularly happy about the inclusion Section 2(e)(B) which calls on the VA to examine “how the compensation for Department police officers affects such turnover” as well as Section 2(e)(C) which requires the VA to make “a comparison of such compensation with the compensation provided to specialty police units, such as police units at medical facilities and other police units in the same locality

pay area.” When developing this report, AFGE requests the VA to work with AFGE as the representative of the VA workforce to help solicit worker input and feedback in this report.

Furthermore, as it relates to Section 2(e) of the bill, AFGE urges the VA to focus on how retirement benefits impact the recruitment and retention of the VA Police Force. AFGE strongly believes that VA Police Officers not being considered “Law Enforcement Officers” under 5 USC 8336(c), and lacking the “6(c)” retirement benefits harms recruitment and retention for VA police. In particular, this lack of benefits creates a disparity with federal officers who have “6(c)” benefits and have the ability to retire after 20 years of service at the age of 50, or after 25 years of service at any age. This is particularly problematic for the VA, as it spends considerable time and resources training VA police to address veteran centric police issues, including preventing veteran suicide as was enacted as part of the VA COMPACT Act last Congress. The VA, VA Police Officers, and veterans would be better served by increased stability in the ranks of the VA Police. AFGE commends Chairman Takano, Chairman Pappas, and Congressman Lamb for co-sponsoring H.R. 962, the “Law Enforcement Officers Equity Act” which would extend “6(c)” status to VA Police and other federal law enforcement officers who do not currently enjoy this benefit.

Lastly, in relation to Section 2(b)(3) of the bill, as the representative of the VA workforce, AFGE urges the committee to include AFGE on the list of named stakeholders that the VA must consult with when it implements policy changes.

### **H.R. 2082 – VA Supply Chain Resiliency Act**

AFGE supports Ranking Member Bost’s H.R. 2082. From the beginning of the COVID-19 pandemic we have heard horror stories about facilities with little-to-no personal protective

equipment (PPE) and other crucial resources to protect providers fighting on the frontline of this pandemic. H.R. 2082 would require the VA to take inventory of existing items needed to fight COVID-19 and future pandemics while helping the VA prepare for a new emergency after this pandemic is over. We are proud to support this legislation.

**Discussion Draft – Strengthening VA Whistleblower Protection Act of 2021**

AFGE takes no position on this legislation at this time.

**Discussion Draft – VA FOIA Reform Act of 2021**

AFGE takes no position on this legislation at this time.

**Discussion Draft – VA Quality Health Care Accountability and Transparency Act**

AFGE takes no position on this legislation at this time.

**Discussion Draft – Improving VA’s Accountability to Prevent Sexual Harassment and Discrimination Act of 2021**

AFGE takes no position on this legislation at this time. We appreciate the Committee being receptive to our initial thoughts and questions around this legislation and look forward to continued discussion.

**Discussion Draft – Stopping Harm and Implementing Enhanced Lead time for Debts for Veterans Act of 2021**

AFGE takes no position on this legislation at this time.

**Discussion Draft – VA Equal Employment Counseling Modernization Act**

AFGE is supports this legislation, which will remove the arbitrary cap on the number of EEO counselors that the VA can hire. This bill would be a step forward toward making sure the VA has a diverse and inclusive workforce free of discrimination. We are proud to support this legislation.

**Discussion Draft – Strengthening VA Background Checks Act**

AFGE takes no position on this legislation at this time.

**Discussion Draft – to direct the Secretary of Veterans Affairs to submit to Congress a plan for expending Coronavirus pandemic funding made available to the Department of Veterans Affairs, and for other purposes**

AFGE takes no position on this legislation at this time.

**Discussion Draft – To amend title 38, United States Code, to make certain improvements to the Office of Accountability and Whistleblower Protection of the Department of Veterans Affairs, and for other purposes**

AFGE takes no position on this legislation at this time.

**H.R. 2494, To amend title 38, United States Code, to establish in the Department the Veterans Economic Opportunity and Transition Administration, and for other purposes.**

AFGE understands the sponsors' intent of the bill to establish the Veterans Economic Opportunity and Transition Administration (VEOTA) and separate it from VBA. AFGE is proud to serve as the representatives of employees who work throughout VBA, including the majority of those bargaining unit employees who would be transferred from VBA to VEOTA if this legislation is enacted.

AFGE remains neutral on the need for the creation of VEOTA but would like to take this opportunity to thank the sponsors in both the Senate and House for working in a bipartisan manner and in good faith with AFGE to protect labor rights in the legislation. Specifically, AFGE applauds the inclusion of Section 1(d) of the legislation that guarantees the continuation of labor and collective bargaining rights for new VEOTA employees who are transferred from VBA.