In the Matter of

DEPARTMENT OF VETERANS AFFAIRS
SAMUEL S. STRATTON VA MEDICAL CENTER
ALBANY, NEW YORK

and

LOCAL 200UNITED, SERVICE EMPLOYEES INTERNATIONAL UNION

Case No. 15 FSIP 28

ARBITRATOR'S OPINION AND DECISION

Local 200United, Service Employees International Union (Union) filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, between it and the Department of Veterans Affairs (VA), Samuel S. Stratton VA Medical Center, Albany, New York (Stratton VAMC or Employer).

The parties had reached agreement on a successor collective bargaining agreement (CBA), but the agency head, pursuant to 5 U.S.C § 7114(c) (4), disapproved portions of that agreement.[1/] In subsequent bargaining the parties were able to reach agreement on all but five of the disapproved provisions, which were the subject of the request for Panel assistance. Following an investigation of the request, the Panel directed the parties to submit their dispute to the undersigned for mediation-arbitration at the Panel's offices in Washington, D.C. The parties were informed that if a complete settlement were not reached during mediation, I would issue a binding decision to resolve the dispute. On July 14 and 15, 2015, I conducted a mediation-arbitration proceeding with representatives of the parties. During the mediation portion of the proceeding, the parties resolved four of the five provisions in dispute but were not able to reach agreement on Article 29, § 29.6, "Work

1/ The VA's Assistant Secretary for Human Resources and Administration disapproved the agreement on July 22, 2014, based on a review by its Acting General Counsel, who found 69 provisions to be either "legally deficient or require clarification."

Schedules - Tours of Duty." Therefore, I am required to issue a final and binding decision resolving the parties' dispute regarding this provision. In reaching this decision, I have considered the entire record in this matter, including the parties' last best offers and post-hearing briefs.

BACKGROUND

The VA's mission is to "fulfill President Lincoln's promise 'to care for him who shall have borne the battle, and for his widow, and his orphan' by serving and honoring the men and women who are America's veterans." Since 1951, Stratton VAMC has served veterans in 22 counties of upstate New York, western Massachusetts and Vermont. The Union represents 596 non-professional Title 5 and Title 38 Hybrid General Schedule (GS) and Wage Grade (WG) employees who work in VA hospitals, nursing and assisted living homes, and at Syracuse University.[2/] Examples of GS positions include licensed practical nurse (LPN), nursing assistant (NA), medical support assistant (MSA), administrative assistant, secretary, and police officer. Housekeeping workers, food and laundry service employees, maintenance workers, machine operators and carpenters are among those classified as WG. The

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2/ There are 310 Title 5 employees and 286 Title 38 Hybrid employees in the bargaining unit. In the context of this case, "Title 5" refers to 5 U.S.C. § 5301 *et seq*., otherwise known as "Chapter 53, Pay Rates and Systems" for GS employees. "Title 38" is used to reference the pay system and collective bargaining rights of VA employees addressed in "Chapter 74 – Veterans Health Administration – Personnel," 38 U.S.C. § 7401 *et seq.* There are two kinds of Title 38 employees: Pure and Hybrid. Pure Title 38 employees (e.g., physicians, dentists, registered nurses, podiatrists, and physician assistants) have limited collective bargaining rights and are not in this bargaining unit. Title 38 Hybrid employees, such as those in this unit (e.g., LPNs, NAs and MSAs), are hired pursuant to 5 U.S.C. § 7401 (3). They are in positions that would "otherwise receive basic pay in accordance with the General Schedule under section 5332 of title 5" (38 U.S.C. § 7401 (A) (ii)). For all personnel-related matters, Hybrid employees are subject to the collective bargaining provisions of the Statute unless the "matter" or "question" involves: "(1) professional conduct or competence, (2) peer review or (3) the establishment, determination or adjustment of employee compensation under this title" (38 U.S.C. § 7422(a) and (b)).

parties' current CBA took effect in October 2004 but has been extended in 3-year increments since its original 2007 expiration date.

ISSUE AT IMPASSE

The agency head disapproved the following agreed-upon provision regarding Article 29, § 29.6:

> Rotating or permanent tours of duty will be scheduled in a fair and equitable manner. Where permanent tours of duty are in effect or proposed, the senior qualified employee in the work group will be given preference insofar as possible, in the selection of a shift. In the event that there is a scheduling change within a position description, there will first be a voluntary solicitation to fill the position. If all the positions are not filled, then the least senior person will be selected to fill the position.[3/]

Following resumed negotiations over the provision, the parties now essentially disagree over: (1) the role seniority should play in assigning employees to new tours of duty or to vacancies on established ones; and (2) what impact, if any, § 29.6 tour assignments would have on matters excluded from bargaining under 38 U.S.C. § 7422(b) for Title 38 Hybrid employees.

POSITIONS OF THE PARTIES

1. The Union's Position

The Union contends that the following wording, with substantive changes highlighted, should be imposed because it appropriately addresses the legal issues raised by the agency head without unnecessarily altering the previously agreed-upon provision:

> Rotating or Permanent tours of duty will be scheduled in a fair and equitable manner **to the extent possible**. Where permanent tours of duty are in effect or

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3/ According to the VA's Assistant Secretary for Human Resources and Administration, the provision violates management's right "to determine the personnel by which agency operations shall be conducted. 5 U.S.C. § 7106(a)(2)(B). Moreover, for Title 38 employees, the Union may not negotiate matters excluded under 38 U.S.C. § 7422(b)."

> proposed, the **most senior equally qualified** employee in the work group will be **asked by seniority preference first for the available shift**. In the event that there is a scheduling change within a position description, there will be a voluntary solicitation to fill the position. If all the positions are not filled, then the least senior **equally qualified** person will **generally** be selected to fill the position.

This proposal, like the previously agreed-upon provision, does not violate management's right "to determine the personnel by which agency operations shall be conducted." A union may negotiate over hours of duty or shifts and nothing in the Union's proposal infringes on management rights. With regard to the Title 38 Hybrid employees, "rotating or permanent tours of duty are negotiable" and do not interfere with "non-negotiable procedures of professional conduct or competence, peer review and employee compensation." The proposal "is for a vacant position that exists within a department" for equally qualified employees "and would be a lateral change based on seniority." It is "not intended for new hires" and would not affect management's right to hire new employees or its right to establish qualifications.

The Union disagrees with the Employer's premise that considerations unique to Title 38 Hybrid employment should affect the wording of § 29.6. While it concedes that it cannot negotiate over matters excluded under 38 U.S.C. § 7422(b), the Union is entitled to "negotiate over all other matters pertaining to Title 38 Hybrid positions covered under Title 5." The excluded subjects have nothing to do with hours of work, much less an employee's bid to work a different tour. The Union notes that the parties have already agreed in Article 29, § 29.1 that "[f]or Title 38 and Hybrid Title 38 employees, the Union may not negotiate matters excluded under 38 U.S.C. § 7422(b); professional conduct or competence; peer review; or the establishment, determination, or adjustment of employee compensation."[4/] Because § 29.1 is meant to apply to all sections

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4/ Section 29.1 is a general provision that addresses the work week and scheduling matters. The agency head's disapproval of § 29.1 specifically faults the parties for failing to make it clear that the Union is statutorily prohibited from negotiating over "matters excluded under 38 U.S.C. § 7422(b)." The parties incorporated the language quoted above at the end of § 29.1 to meet this objection.

of Article 29, there is no need to duplicate it in § 29.6, as proposed by the Employer.

2. The Employer's Position

The Employer's proposes the adoption of the following wording to resolve the parties' impasse:

> Rotating or permanent tours of duty will be scheduled in a fair and equitable manner to the extent possible.
>
> Where permanent tours of duty are in effect or proposed, employees may submit a request for a change in location or change in shift within the same service. In filling such a vacancy, management reserves the right to make the assignment based on good faith considerations in assuring effective management of the work. Seniority will be considered and the request may be granted if the employee has the requisite skills and abilities, provided such relocation would be consistent with effective and efficient staffing.
>
> In the event that there is a scheduling change, there will first be a voluntary solicitation to fill the position. If all the positions are not filled, the least senior will generally be selected to fill the position.
>
> Assignment of Title 38 employees is a matter of professional conduct or competence in that it involves direct patient care and clinical competence (e.g., specific competencies of an individual on duty in a given unit at a given time may impact the quality of patient care available on that unit). Accordingly, the following provisions must be read consistently with the exemptions from collective bargaining provided by 38 [U.S.C. §] 7422(b) and to allow for exceptions within management's sole discretion to meet patient care needs.

First, the Employer asserts that issues of professional conduct and competence affecting Title 38 Hybrid employees are not negotiable under 38 U.S.C. § 7422, noting that VA Handbook 5005/57, Part II, Chapter 3 outlines the appointment of Title 38 Hybrids. During the mediation portion of the proceeding, the Employer argued that the Union's proposal necessarily affects

both professional conduct and competence. It gave examples of circumstances where it needs to consider issues other than general qualifications when assigning employees to tours of duty, such as whether a particular employee has difficulty working at night or with certain patients.

Second, the Union's proposal "infringes on Management's right to hire, assign and direct." The Union's proposal would have "a significant impact on Management's ability to reassign [and] fill vacant positions [,] and the agency will be impacted in attempting to ensure that Veterans receive the best possible care." Utilizing seniority as the criterion "for hiring, work assignments or shift assignments is not taking into consideration [] the unique requirements of a medical facility and the best interests of our patients." Seniority determinations also "fail to take into consideration national hiring standards, retention and recruiting difficulties and the accommodation of individuals with disabilities." For these reasons, *American Federation of Government Employees, Local 1164 and Social Security Administration,* 60 FSIP 785 (2005), which was discussed during mediation, does not apply to this situation.

CONCLUSIONS

Having carefully considered the entire record in this case, including the evidence and arguments presented by the parties during the mediation-arbitration proceeding and in their post-hearing briefs, I have concluded that the Union's proposal takes into account the Employer's rights, under both Title 38 and the Statute, and is the more appropriate resolution of this dispute.

With regard to the Employer's contention that the Union's proposal infringes on management's rights under § 7106(a)(2) of the Statute, the Panel may resolve such a claim only by applying previous Federal Labor Relations Authority (FLRA) cases where a "substantively identical" proposal has been found negotiable. *Commander, Carswell Air Force Base, Texas and American Federation of Government Employees, Local 1364*, 31 FLRA 620, 624-25 (1988) (*Carswell AFB*). Contrary to the Employer's position, in *American Federation of Government Employees, Local* 1164 *and Social Security Administration*, 60 FLRA 785 (2005) (*SSA*), the FLRA found a proposal substantively identical to the one proposed by the Union to be negotiable. The proposal in *SSA* required assignment to specialized units, by seniority, of employees who met the qualifications established by management to perform the work. Based on precedent, the FLRA stated that

"[a] proposal requiring selection based on seniority does not affect management's rights to assign work and/or assign employees where management has already determined, or retains the authority to determine, that the employees are equally qualified for the work assignments." In reaching that conclusion, the FLRA pointed out that, in addition to requiring employees to possess specific knowledge, skills, and abilities needed to do the work of a position, an agency may take into consideration "job-related individual characteristics such as judgment and reliability."

The Union's proposal specifically allows the Employer to make assignments to permanent tours of duty, by seniority, among "equally qualified" employees. Only management can set and apply those qualifications and only management can determine which employees are equally qualified for a particular tour of duty. As the Employer may take into account "job-related individual characteristics" in making this determination, it should not have the problem alluded to at the hearing of being forced to assign a particular employee to a tour of duty to which that employee is not suited for job-related reasons. Therefore, I conclude that the Union's proposal is substantively identical to the proposal found negotiable in *SSA.* Accordingly, consistent with the guidance provided by the FLRA in *Carswell AFB*, I reject the Employer's contention that the proposal interferes with its rights under § 7106(a)(2) of the Statute.

Insofar as the Employer argues that the proposal fails to take into consideration matters involving hiring, retention, and recruiting, it is raising issues that are at most tangential to an article governing work schedules and tours of duty. If the existence of such issues could negate the use of seniority in making assignments to tours of duty, they could also override the use of seniority in a wide range of other circumstances, which would be inconsistent with longstanding FLRA precedent. The Employer also raised the issue of the effect of the proposal on the accommodation of individuals with disabilities. According to the Union's unrefuted claims at the hearing, such matters are handled by a separate process and are not relevant to procedures under Article 29.

The Employer also asserts that the proposal impinges on its right under 38 U.S.C. § 7422 to refrain from negotiating over matters of professional conduct and competence for the Title 38 Hybrid employees in the unit. As the Union acknowledges, matters of professional conduct and competence are excluded from negotiations by 38 U.S.C. § 7422(b). Indeed, the parties have

already agreed to place that proscription in § 29.1, which applies to Article 29 in its entirety. Pursuant to 38 U.S.C. § 7422(c), "professional conduct or competence" means "direct patient care" and "clinical competence." This language gives the Employer wide latitude to determine that an employee with high seniority is nonetheless less able than another employee with lower seniority to provide direct patient care on a particular tour of duty. Conversely, however, if the Employer wanted to deny a tour of duty to a qualified employee based on factors other than direct patient care or clinical competence, § 7422(b) would provide no defense and seniority would govern the assignment, thereby providing fairness and more predictability to the assignment process. Thus, the Union's proposal ensures, to the extent possible in a health care institution, that equally qualified employees will have an equal opportunity for assignments to desired tours of duty.

In contrast, although the Employer's proposal states that "[s]eniority will be considered," that consideration would always be subordinated to vague concepts such as "assuring effective management of the work" and "effective and efficient staffing." With regard to Title 38 Hybrid employees, the Employer's proposal equates all assignments with the provision of direct patient care and clinical competence, even though that may not be the case in all circumstances. Finally, as the requirement to abide by the exclusions in 38 U.S.C. § 7422(b) is clearly stated in § 29.1, a general provision that applies to Article 29 in its entirety, it is not necessary to repeat that proscription in § 29.6.

For all these reasons, I have concluded that the Union's proposal will have the beneficial effect of allowing more unit employees the opportunity of assignments to desired tours of duty, while maintaining the Employer's rights under 5 U.S.C. § 7422 and § 7106(a)(2) of the Statute.

DECISION

The parties shall adopt the Union's proposal to resolve their impasse.

Barbara B. Franklin
Arbitrator

September 10, 2015
Washington, D.C.