CONGRESSIONAL TESTIMONY

STATEMENT BY

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BEFORE THE
HOUSE COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

ON

H.R 1133, THE "VA EMPLOYEE FAIRNESS ACT"

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

Thank you for the opportunity to testify today on behalf of the American Federation of Government Employees, AFL-CIO and its National VA Council (AFGE) regarding H.R. 1133, the "VA Employee Fairness Act of 2019." AFGE represents approximately 700,000 federal and District of Columbia government employees in 70 agencies, including approximately 260,000 employees of the Department of Veterans Affairs (VA).

My name is Kathleen Pachomski. I am a proud Navy veteran with extensive personnel experience. I am also a retired VA registered nurse (RN) who felt like the luckiest nurse in my graduating class when I got a job with the Memphis VA Medical Center 29 years ago. For the past 25 years, I have represented Title 38 employees at my facility as President of AFGE Local 3930. Title 38 employees are medical professionals appointed under 38 USC 7401(1) and include physicians, dentists, registered nurses (RN), physician assistants, podiatrists, chiropractors, optometrists, and expanded-function dental auxiliaries.

On behalf of AFGE, I wish to express my great appreciation to Chairman Takano for his leadership in introducing H.R. 1133, the "VA Employee Fairness Act" to restore equal collective bargaining rights to Title 38 medical personnel. H.R. 1133 provides the VA with a commonsense means of addressing agency issues involving Title 38 medical personnel and is a much needed fix to a gross inequity in longstanding VA policy.

For decades, with the exception of two brief periods when reform was attempted, the VA Secretary has consistently used his unfettered discretion to block collective bargaining by Title 38 personnel and their labor representatives through an extremely broad interpretation of the three exclusions to bargaining in 38 U.S.C. 7422: (1) "professional conduct or competence" (includes direct patient care and clinical competence); (2) peer review; and (3) the "establishment, determination, or adjustment of employee compensation." Management invokes Section 7422 to block individual grievances, national grievances, arbitrations, and local and national demands to bargain.

As a union representative handling Title 38 local and national bargaining, training, legislative advocacy and contract negotiations, I find it very demoralizing to see Title 38 employees singled out day after day for differential treatment and fewer workplace rights. As a 12 year veteran of the United States Navy, I also feel offended and dishonored that those of us who have borne the battle and chosen to serve our fellow veterans at the VA have been silenced and treated as lesser than other federal employees taking care of veterans at the VA and active duty personnel at Department of Defense (DoD) facilities.

H.R. 1133 provides Title 38 medical personnel with essential tools for improving the delivery of safe, quality patient care to our nation's veterans. They cannot currently negotiate with management over schedules or work shifts in order to challenge excessive work hours that can result in medical errors and patient harm. Title 38 employees cannot currently challenge reassignments by managers who are not properly staffing units such as the Intensive Care Unit and demand proper training when needed. 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 using 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 RNs cannot challenge incorrect calculations of weekend pay while an RN working at a DoD facility can challenge pay errors.

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.[1]

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

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 for new clinical duties or new health care technology while a VA licensed practical nurse does have bargaining rights. 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. RNs working at the Bureau of Prisons' medical facilities are also able to regularly bargain over safety issues.

I started working at the VA at approximately the same time that Congress enacted Section 7422, three years after a federal appeals court held that the VA was not required to collectively bargain with its Title 38 employees. Colorado Nurses Association v. FLRA, 851 F.2d 1486 (D.C. Cir. 1988). The Congressional intent in enacting Section 7422 is clear: to ensure that VA medical professionals have equal bargaining rights. As previously stated, the law prohibits bargaining in matters involving direct patient care and clinical competence, peer review and the establishment, determination, or adjustment of pay. I did not view these exclusions as anything broader than the exclusions to bargaining that are applicable to Title 5 employees. The intent was not to eliminate bargaining altogether.

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.

Despite clear Congressional intent and plain language supporting bargaining over routine matters, the Secretary has 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 indicated by the Secretary's decisions published by the VA.[2] For example, in 2016, 2017 and 2018, the Secretary denied bargaining based on one or more of the Section 7422

[2] https://www.va.gov/LMR/38USC7422.asp

exclusions in every case published on the agency website. In 2019, every published Secretary determination pertained to the ongoing AFGE-VA contract negotiations; in those determinations, 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.[3] 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 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.

I have also seen the benefits of a commonsense 7422 policy that was in place during two brief time periods during my tenure at the VA. Shortly after I joined the VA workforce, the Clinton Administration embraced labor-management cooperation in the form of Executive Order 12871 that established labor-management partnerships in recognition that "[o]nly by changing the nature of Federal labor-management relations so that managers, employees, and employees' elected union representatives serve as partners will it be possible to design and implement comprehensive changes necessary to reform Government."

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

Then 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." (Attachment A) 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 over compensation disputes involving pay surveys, rules for earning overtime pay, compensatory time and alternative work schedules.

Labor-management cooperation facilitated a highly successful transformation of 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 between 1995 and 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 then Secretary Eric Shinseki. (Attachment B) 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.

AFGE has come before this Committee on many occasions to address the arguments made by the VA, management groups and others opposing 7422 reform legislation. For example, opponents have argued that legislation to fix the 7422 problem creates new bargaining rights. This is not correct: H.R. 1133 and similar legislation merely restore equal bargaining rights consistent with Congressional intent.

They also have asserted that the union wants to interfere with management's right to carry out the agency mission. To be sure that restoring full collective bargaining rights to Title 38 personnel will not interfere with the agency's mission, one needs only to look at Section 7106(a) of Title 5 that affords VA management the same rights as all federal managers to carry out the agency's mission, including the right to determine the number of employees, and to hire, assign, discipline and remove employees, and "to take whatever actions may be necessary to carry out the agency mission during emergencies." Title 5 clearly prohibits VHA Hybrid Title 38 employees with full collective bargaining rights from determining how medical procedures are performed. It should be noted that VA management has never claimed that Hybrid 38 health care employees using their full bargaining rights interfere with patient care. Nor are Title 5 employees in the VA or any agency ever allowed to bargain over the setting of pay rates, but they can bargain over the incorrect application of pay rules such as those related to overtime pay.

In November 2019, the VA took Section 7422 a step further to deprive union officials of the ability to represent Title 38 employees before VHA Disciplinary Appeals Boards (DAB) and other agency appeals boards. As a result, a physician, RN or other Title 38 employee going before an agency appeals board to challenge a termination, discipline or denial of a promotion is barred from bringing a union representative to the hearing to assist him or her.

Last November the VA also invoked Section 7422 to eliminate <u>all</u> the official time of Title 38 employees needed to represent employees at grievances and arbitrations. This action by the Secretary

followed several failed attempts by some in Congress to eliminate Title 38 official time through legislation. This denial of official time also interferes with the right of rank and file employees to choose the most suitable labor representative.

The loss of all official time makes it extremely difficult for Title 38 employees to act as union representatives, especially since management at many facilities has taken the unreasonable position of refusing to hold grievance meetings after hours. The recent implementation of the Executive Order evicting unions from their offices has further impeded the ability of employees to access union representation.

In Memphis, this loss of time devastated my local union because the entire bargaining unit is covered by Title 38. I am only able to represent the employees in my local because I am retired.

Section 7422 is continuing to wreak havoc at the bargaining table where the VA is refusing to bargain in good faith and is attempting to impose an extreme anti-union contract through the Federal Service Impasses Panel. The Secretary has already invoked Section 7422 to refuse to bargain over nine contract articles. Each of those articles was peripheral to the 7422 exclusions to bargaining. In some instances, the agency's use of Section 7422 was also inconsistent with other statutory rights. For example, the Secretary is refusing to bargain over Article 60 of the AFGE-VA contract, which provides union representation of Title 38 employees before the DAB, even though that right is guaranteed under Section 7464 of Title 38. Similarly, the Secretary is relying on Section 7422 to refuse to bargain over physical standards boards that determine fitness for duty, even though applying Section 7422 here also impacts Hybrid Title 38 employees who are not covered by Section 7422. Furthermore, the Secretary failed to give us any advance notice that he was invoking Section 7422 prior to issuing his determination. AFGE is pursuing legal appeals on both of these recent actions.

CONCLUSION

Thank you again for the opportunity to present the views of AFGE on H.R. 1133, the VA Employee Fairness Act. This critical legislation introduced by Chairman Takano will clarify the scope of the law and ensure fair treatment of all VA employees. It will also allow VHA to maintain a strong workforce and hold the agency accountable for violations of the laws that Congress enacted. Thank you.

KATHLEEN PACHOMSKI, R.N.

CURRICULUM VITAE

Kathleen Pachomski is a registered nurse who worked at the VA Medical Center, Memphis, Tennessee for 29 years until her retirement in May 2019. She continues in her role as the President of AFGE Local 3930 where she has served in that role for 25 years. Kathleen also serves as a National VA Council (VA Council) Representative (at will), Vice-President of the AFGE 5th District VA Council; National Trainer for the VA Council; member of the VA Council Legislative Committee, Title 38 Mid-Term Bargaining Committee, Title 38 Grievance and Arbitration Committee; and is currently serving as a member of the VA Council Negotiating Team for the contract between the VA and AFGE.

Kathleen has 40-plus years of federal service and is a disabled veteran having served 12-plus years from the United States Navy. Kathleen served and received high honors in the Navy, to include but not limited to the Navy Achievement Medal for her part in the development of an instructional modality adopted Navy-wide, saving the U.S. Navy millions of dollars annually while serving as a drill instructor at the recruit training command in Orlando, Florida. Kathleen served aboard the 1st Navy Ship, USS Sanctuary-AH-17, which consisted of a mixed crew of male and female sailors. Kathleen went on to serve aboard the USS Simon-Lake, (AS-33), Submarine Tender as the Assistant Personnel Officer.

As a nurse at the VA Medical Center, Kathleen served in many roles, from medical-surgical nursing to spinal cord injury nursing. Kathleen was instrumental in testifying before a VA nurse task force many years ago with respect to the staffing crisis within the Department of the Veterans Affairs and also to support a change allowing some 30,000 registered nurses to receive the cost of living allowance (COLA) as registered nurses were the only group of federal employees not receiving the COLA. In 2017 Kathleen also testified before Congress regarding concerns about the privatization of the Veterans Health Administration.

Kathleen is an avid supporter and member of multiple veteran groups and organizations.