64 FLRA No. 187

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VETERANS HEALTH ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL VETERANS AFFAIRS COUNCIL
(Union)

0-AR-4260

_____

DECISION

June 30, 2010

_____

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members[1]

I. Statement of the Case

The matter is before the Authority on exceptions to an award of Arbitrator Donald S. Wasserman filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

In his original award, the Arbitrator directed the Agency to reconstruct the process it used to determine which Agency positions are eligible for Saturday premium pay under 38 U.S.C. § 7454(b)(3).[2] In a supplemental award, he concluded that the Agency's new process for determining which positions are covered by § 7454(b)(3) failed to comply with his original award, and he directed the Agency to reconstruct the process again, with pre-decisional involvement by the Union.

For the reasons set forth below, we deny the exceptions.

II. Background and Arbitrator's Awards

Congress amended 38 U.S.C. § 7454, "Physician assistants and other health care professionals: additional pay" by enacting Public Law 108-70, Section 303(a), codified at 38 U.S.C. § 7454(b)(3). The amended provision requires the Agency to pay Saturday premium pay to "[e]mployees appointed under [38 U.S.C. § 7408]" on the same basis that it pays Saturday premium pay to nurses under 38 U.S.C. § 7453(c). 38 U.S.C. § 7454(b)(3).

The Agency determined that § 7454(b)(3) applies -- and creates an entitlement to Saturday premium pay -- only to positions that provide "direct patient-care services or services incident to direct patient-care services." Supp. Award at 10 (quoting 5 U.S.C. § 5371(a)). The Agency also concluded that § 7454(b)(3) did not cover any Federal Wage Service (FWS) positions. *See* Original Award at 17.

The Union filed a grievance challenging these determinations. The matter was unresolved and was submitted to arbitration.

A. Original Award

In his original award, the Arbitrator framed the issue as whether the Agency had properly interpreted and implemented § 7454(b)(3). *See id.* at 14-15. Before the Arbitrator, the Agency argued that the Arbitrator was required to defer to its interpretation because § 7454(b)(3) is ambiguous and the Agency's interpretation was reasonable. *See id.* at 5, 13. For support, the Agency cited *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (*Chevron*). The Arbitrator rejected this argument, finding that § 7454(b)(3) is unambiguous and that, even it were ambiguous, the Agency's interpretation was not reasonable. *See* Original Award at 19-20. Instead, the Arbitrator found that § 7454(b)(3) covers all positions that provide direct patient-care services or services incident to direct patient-care services, including FWS employees. *See id.* at 19, 20.

Accordingly, the Arbitrator directed the Agency to reconstruct the process it had used to determine which positions were covered by § 7454(b)(3). *See id.* at 21. In this connection, the Arbitrator directed the Agency to: (1) carefully examine all titles, positions, or occupations within every occupational series that were omitted from its current list of eligible positions; (2) examine each FWS

1. Member Beck's separate opinion, dissenting in part, is set forth at the end of this decision.

2. The relevant statutory provisions are set forth in the attached Appendix. We note that Title 38 of the United States Code (Title 38) sets forth the federal statutes that govern the Agency.

occupational series rather than automatically declaring all FWS positions ineligible; and (3) consult with the Office of Personnel Management (OPM) and consider consulting with other organizations or entities, such as the Union, to determine which positions are covered by § 7454(b)(3). *See id.* The parties agreed to allow the Arbitrator to retain jurisdiction to resolve any problems stemming from the reconstruction process. *See id.* at 22; Supp. Award at 1. Neither party filed exceptions to the original award.

B. Supplemental Award

Subsequently, the Agency engaged in a process of redefining the phrase "direct patient-care services or services incident to direct patient-care services." Supp. Award at 2. As part of this process, the Agency contacted several agencies (OPM, the Department of Defense (DoD), and the Department of Health and Human Services (DHHS)) that had analyzed this phrase under 5 U.S.C. § 5371(a).[3] DoD and DHHS did not give the Agency a precise definition, and OPM stated that it was the Agency's responsibility to define the phrase. *See id.* at 4. The Agency also examined the phrase as it is used in other Title 38 compensation-enhancement provisions and Medicare billing information. Based on the information it received, the Agency defined the phrase as: "(1) [c]linical care services to patients such as diagnosis, treatment, prevention, follow-up, patient counseling, etc.[;] (2) [m]edical support of health care delivery to patients[;] and/or (3) [h]ealth care administration of the services described in 1 and 2[.]" *Id.*

During this process, the Union sent several information requests to the Agency. The Agency informed the Union that it: (1) had taken the above outlined steps; (2) had crafted the above definition; and (3) would allow the Union an opportunity to comment on the reconstruction process prior to its implementation.

The Agency applied its definition and determined that ten additional positions should receive Saturday premium pay pursuant to § 7454(b)(3). *See id.* It again determined that all FWS positions should not receive such pay. *See id.* at 5. The Union contacted the Arbitrator and claimed that the Agency had not complied with his original award. The parties submitted supplemental briefs and stipulated the supplemental issue as: "Did the [Agency] comply with [t]he Arbitrator's [original award]? If not, what is the appropriate remedy?" *Id.* at 6.

The Arbitrator concluded that the Agency had not complied with his original award. The Arbitrator found that, although the Agency was permitted to define the phrase "direct patient-care services or services incident to direct patient-care services," the process by which the Agency determined the new definition was essentially an attempt to circumvent his original award. *See id.* at 9, 18. The Arbitrator again ordered the Agency to reconstruct the process it had used to determine which positions were covered by § 7454(b)(3) and prohibited the Agency from automatically excluding all FWS positions. The Arbitrator also prohibited the Agency from using the definition that it had developed and ordered the Agency to consult dictionaries and 5 U.S.C. § 5371 to determine which positions are covered by § 7454(b)(3). *See id.* at 18-19, 20-21. The Arbitrator stated that the Agency's definition was deficient because it was not consistent with 5 U.S.C. § 5371. *See id.* at 10. The Arbitrator further stated that the Agency's reliance on Medicare billing information was misplaced because that information was not directly applicable, and that the Agency should have made more attempts to involve OPM. *See id.* at 9, 18.

In addition, the Arbitrator found that the Agency had not sufficiently involved the Union in the reconstruction process. Specifically, the Arbitrator stated: "The parties lost an opportunity to work together in a constructive way subsequent to the [original] award. It is intended that not be repeated. Their [agreement] is replete with provisions that are designed to assist them in this effort." *Id.* at 21. For support, he cited "the Preamble[,] where they 'agree to work together in partnership . . . craft solutions . . . and deliver the best quality of service to the nation's veterans[,]'" as well as Articles 3, 4, 5, 6, 7, and 46 of the agreement.[4] *Id.* In this connection, he stated

3. 5 U.S.C. § 5371(a) provides, in relevant part: "'[H]ealth care' means direct patient-care services or services incident to direct patient-care services." It does not define the phrase "direct patient-care services or services incident to direct patient-care services." *Id.*

4. Article 3 provides, in pertinent part, that "[t]he principles which guide [the parties' partnership] effort include[] . . . pre-decisional involvement[.]" Exceptions, Ex. J at 1. Article 4 provides for, among other things, "Joint Master Agreement Training" and "Joint Labor Management Training." *Id.*, Ex. K at 1. Article 5 provides, in pertinent part, for a "joint Labor-Management Relations Committee[.]" *Id.*, Ex. L at 1. Article 6, "Alternative Dispute Resolution," provides for an alternative dispute resolution (ADR) process and states, in pertinent part, that

that "[t]he parties should be able to select an appropriate vehicle through which they engage in a constructive process enabling them to share information and input." *Id.* Accordingly, he directed the Agency to allow the Union to "be involved on a pre-decisional basis throughout" the new reconstruction process. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency claims that the Arbitrator's supplemental award is contrary to law because he failed to defer to the Agency's interpretation of § 7454(b)(3) or, alternatively, he failed to find that the Agency's interpretation of that provision is reasonable. In this connection, the Agency asserts that § 7454(b)(3) is ambiguous because it refers to employees appointed under § 7408 even though, according to the Agency: (1) § 7408 is not an appointment authority; and (2) § 7408(a) and (b) reference two significantly different groups of employees. *See* Exceptions at 8-11. The Agency also asserts that the Arbitrator should have deferred to the Agency's decision to exclude FWS employees from the scope of its definition because: (1) related Title 38 compensation-enhancement provisions and 5 U.S.C. § 5371 exclude FWS employees; and (2) under Senate Standing Rules, the Senate Veterans Affairs Committee (SVAC) lacked subject-matter jurisdiction to enact legislation concerning FWS employees. *See id.* at 12-13. In addition, the Agency contends that the Arbitrator's direction of pre-decisional involvement by the Union is contrary to § 7454(b)(3). *See id.* at 11.

Further, the Agency argues that the supplemental award fails to draw its essence from the parties' agreement because the agreement does not create a general pre-decisional consultation requirement with the Union. *See id.* at 14-15. The Agency asserts that, although the Agency complied with the original award, the Arbitrator nevertheless "fashioned a pre-decisional consultation requirement" from the agreement because he was "not satisfied with [the Agency's] efforts[.]" *Id.* at 16.

B. Union's Opposition

The Union asserts that the supplemental award is not contrary to law and that the Agency is merely attempting to reargue the facts and findings of the Arbitrator's original award. *See* Opp'n at 13. The Union also asserts that the Agency's essence exception is meritless because the parties' agreement allows the Union the right to "pre-decisional involvement" throughout the reconstruction process. *Id.* at 10.

IV. Preliminary Issue

We reject the Union's assertion that the Agency is attempting to reargue the facts and findings of the original award. In this regard, the Arbitrator stated that the supplemental award takes "preceden[ce]" over the original award. Supp. Award at 20; *see also id.* at 1. Moreover, the Agency's exceptions challenge findings that are made, or expressly reaffirmed, in the supplemental award. As such, we find that the Agency's exceptions are properly before us. *Cf. U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 56 FLRA 1057, 1059 (2001) (arbitrator's supplemental award did not renew period for filing exceptions to original award because issues raised in exceptions were not addressed in supplemental award).

V. Analysis and Conclusions

A. The award is not contrary to law.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award *de novo*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of *de novo* review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

"[a]ny ADR process must be jointly designed by Union and Management." *Id.*, Ex. M at 1. Article 7, "Total Quality Improvement," provides, among other things, that: (1) "the parties should strive for open communication, developing teamwork, [and] sharing of information[;]" (2) "[i]t is in the interest of both parties that there be a sharing and communication of information[,]" and (3) the parties will establish "a National Quality Council (NQC) and quality councils throughout" the Agency. *Id.*, Ex. N at 1-2. Article 46, "Rights and Responsibilities," provides, in pertinent part, that "[t]he parties recognize that a new relationship between the Union and the [Agency] as full partners is essential[.]" *Id.*, Ex. O at 1.

The Agency asserts that the Arbitrator's award is contrary to law because § 7454(b)(3) is ambiguous and the Arbitrator should have deferred to the Agency's interpretation of that provision. Under *Chevron*, the decision-maker first must determine whether Congress has spoken directly to the question at issue. *See U.S. Dep't of the Interior, Nat'l Park Serv., Pictured Rocks Nat'l Lakeshore, Munising, Mich.*, 61 FLRA 404, 407 (2005) (*NPS*) (citing *Chevron*, 467 U.S. at 842-43). If the intent of Congress is clear, then that is the end of the matter. However, if Congress has not spoken directly to the question, an agency that is charged with interpreting the statutory provision at issue receives considerable deference in interpreting the provision. Specifically, the decision-maker must defer to the agency's interpretation if it is "based on a 'permissible construction of the statute'." *Id.* (quoting *Chevron*, 467 U.S. at 843).

In § 7454(b)(3), Congress has spoken directly to the question of what employees are covered. In this connection, § 7454(b)(3) provides: "Employees appointed under section 7408 of [Title 38] shall be entitled to additional pay on the same basis as provided for nurses in section 7453(c) of [Title 38]." 38 U.S.C. § 7454(b)(3). Thus, under the plain wording of this provision, if an employee is "appointed under" § 7408, then that employee "shall be entitled" to Saturday premium pay "on the same basis as provided for nurses in" § 7453(c). *Id.*

In addition, both the plain wording of §§ 7408 and 7454(b)(3) and its context among other provisions of Title 38 demonstrate that § 7408 is an appointment authority. As an initial matter, various provisions of Title 38 allow the Secretary of the Department of Veterans Affairs (Secretary) to appoint certain types of employees without regard to various civil-service laws, rules, and regulations. *See, e.g.*, 38 U.S.C. § 7401 (allowing certain "[a]ppointments"); § 7403 (stating that some appointments are "without regard to civil-service requirements"; § 7405 (permitting certain employment "without regard to civil service or classification laws, rules, or regulations"). Section 7408(a) states that "[t]here shall be appointed by the Secretary under civil service laws, rules, and regulations, [certain] additional employees" -- i.e., employees in addition to those that are appointed under other provisions of Title 38. 38 U.S.C. § 7408(a). The wording stating that the Secretary shall appoint employees "under civil service laws, rules, and regulations[]" distinguishes the employees appointed under § 7408 from the employees appointed under the preceding sections -- i.e., those employees who are appointed *without* regard to civil-service laws, rules, and regulations. Put simply, § 7408 provides the Secretary authority to appoint employees who are not appointed under other provisions of title 38, but makes clear that civil-service laws, rules, and regulations apply to those employees.

Similarly, § 7408(b) provides that "[t]he Secretary . . . may *appoint*" certain individuals "to a position . . . at a rate of pay above the minimum rate of the appropriate grade." 5 U.S.C. § 7408(b) (emphasis added). This too plainly establishes that § 7408 grants the Secretary appointment authority, not only pay authority.

Further, any ambiguity that exists in § 7408 is eliminated by § 7454(b)(3). In this connection, § 7454(b)(3) expressly refers to employees "appointed under section 7408[,]" which further reinforces both that § 7408 is an appointment authority and that, in drafting § 7454(b)(3), Congress viewed § 7408 as such. 38 U.S.C. § 7454(b)(3). Any conclusion that § 7408 is not an appointment authority (including the dissent's) would nullify this wording in § 7454(b)(3), "contrary to the 'fundamental principle of statutory construction that effect must be given, if possible, to every word, clause, and sentence of a statute . . . so that no part will be inoperative or superfluous, void, or insignificant." *U.S. Gov't Printing Office, Wash., D.C.*, 57 FLRA 299, 302 (2001) (quoting *Indianapolis Power & Light Co. v. Interstate Commerce Comm'n*, 687 F.2d 1098, 1101 (7th Cir. 1982)) (internal quotations omitted).

The Agency asserts, and the dissent agrees, that § 7408(a) and (b) apply to significantly different groups of people. Exceptions at 6 n.13; Dissent at 14-15. However, even assuming that this is the case, it would not render § 7454(b)(3) ambiguous; it would mean only that different groups of employees are covered under § 7454(b)(3). In this regard, § 7454(b)(3) discusses appointment under § 7408 generally -- not under either specific subsection of § 7408. Thus, § 7454(b)(3) would apply to both groups (assuming that they are, in fact, different groups).

In sum, § 7454(b)(3) is unambiguous: It applies to all employees appointed under § 7408.[5] As

5. The dissent states that our interpretation of § 7454(b)(3) creates an "odd situation" that not only "upholds the Arbitrator's conclusion that § 7454(b)(3) is unambiguous" but also interprets the provision differently from the

Congress has spoken directly to the issue of the employees to which § 7454(b)(3) applies, we find it unnecessary to reach the second *Chevron* inquiry, i.e., whether the Agency's interpretation is based on a permissible interpretation of § 7454(b)(3).

We note that, in arguing that FWS employees are excluded from coverage of § 7454(b)(3), the Agency asserts that: (1) related compensation-enhancement statutes exclude FWS employees; and (2) the SVAC does not have subject matter jurisdiction to enact legislation concerning FWS employees. We reject both of these assertions.

With regard to the first assertion, a comparison of § 7454(b)(3) to the compensation-enhancement statutes cited by the Agency supports a conclusion that § 7454(b)(3) does not exclude FWS employees. In this connection, unlike 5 U.S.C. § 5371(c) and 38 U.S.C. § 7455(a)(2)(B)(ii), which limit compensation enhancement to General Schedule (GS) positions that provide direct patient-care services or services incident to direct patient-care services, § 7454(b)(3) contains no such limiting language; in fact, it does not even mention GS employees. The presence of express language in §§ 7455 and 5371 that limits their application to GS employees, and the absence of such language in § 7454(b)(3), indicates that Congress did not intend to limit § 7454(b)(3) to GS employees. *See EEOC*, 53 FLRA 465, 482-83 (1997) (citing *Russello v. U.S.*, 464 U.S. 16, 23 (1983)) (the presence of certain language in a statutory provision established that the exclusion of similar language in a related statute was intentional).

With regard to the second assertion, the Agency cites no precedent to support a conclusion that the Standing Rules of the Senate are persuasive guides for determining Congressional intent. In fact, the Agency's argument that the SVAC lacked jurisdiction to promulgate bills concerning FWS employees is undercut by the fact that the bill was presented to, and enacted by, Congress. In addition, the Agency cites no authority to support its assertion that the Standing Rules prevent the SVAC from enacting legislation concerning FWS employees.

Finally, with regard to the Agency's assertion that the Arbitrator's direction of pre-decisional involvement by the Union is contrary to § 7454(b)(3), nothing in that statutory provision either addresses or precludes pre-decisional involvement by an exclusive representative of employees. Accordingly, there is no basis for finding the supplemental award contrary to law in this respect.

For the foregoing reasons, the Agency has not demonstrated that the supplemental award is contrary to § 7454(b)(3), and we deny the Agency's contrary-to-law exceptions.

B. The award draws its essence from the parties' agreement.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *See U.S. Dep't of Labor* (*OSHA*), 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id*. at 576.

As a remedy for the Agency's failure to comply with his original award, the Arbitrator directed the Agency to allow the Union to be involved, on a pre-decisional basis, in the reconstruction process. In so

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Arbitrator. Dissent at 16-17. However, our findings are governed by the scope of the arguments before us. The Agency has excepted on the ground that the Arbitrator's interpretation of § 7454(b)(3) is too broad, and that the Agency's narrower interpretation is entitled to *Chevron* deference. In assessing whether *Chevron* deference is appropriate, we find that the Agency's interpretation of § 7454(b)(3) is inconsistent with its plain wording. To the extent that the Arbitrator gave § 7454(b)(3) a more narrow interpretation than its plain wording warrants -- i.e., to the extent that the Arbitrator improperly found that § 7454(b)(3) applies only to employees who provide direct patient-care services or service incident to direct patient-care services -- neither party excepts on this ground. As such, that issue is not before us. Moreover, to the extent that the dissent implies that an otherwise unambiguous statute can be rendered ambiguous merely because an arbitrator -- and/or parties, for that matter -- interpret it incorrectly, we disagree.

directing, the Arbitrator noted that the parties' agreement "is replete with provisions that are designed to assist them in this effort[,]" and he cited several provisions of the parties' agreement. Supp. Award at 21. The Arbitrator's direction is not inconsistent with any of the cited provisions, *see supra*, note 4, and the Agency does not otherwise provide a basis for finding that the direction is irrational, unfounded, implausible, or in manifest disregard of the agreement. Accordingly, we deny the Agency's essence exception.[6]

VI. Decision

The exceptions are denied.

6. The dissent states that the Arbitrator exceeded his authority because he "examined *sua sponte* whether the Agency owed the Union a contractual obligation of pre-decisional consultation and, if so, whether it had violated that obligation." Dissent at 13. However, the Arbitrator did no such thing. Instead, the Arbitrator determined whether the Agency failed to comply with his original award and, upon clearly and repeatedly finding a failure to comply, *see, e.g.*, Supp. Award at 17, 19, *awarded a remedy* that required consultation with the Union. As the issue of an appropriate remedy was before the Arbitrator, he did not exceed his authority by granting this remedy. We note in this connection, that it is well established that arbitrators have broad discretion to fashion remedies. *See, e.g., U.S. Dep't of the Air Force, Okla. City Air Logistics Ctr., Tinker Air Force Base, Okla.*, 47 FLRA 98, 101 (1993).

APPENDIX

5 U.S.C. § 5371(a) and (c) provides:

> (a) For the purposes of this section, "health care" means direct patient-care services or services incident to direct patient-care services.
>
> . . . .
>
> (c) Authority under subsection (b) may be exercised with respect to any employee holding a position--
>
> > (1) to which chapter 51 applies, excluding any Senior Executive Service position and any position in the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service; and
> > (2) which involves health care responsibilities.

38 U.S.C. § 711 provides, in relevant part:

> (b) A grade reduction . . . is a systematic reduction, for the purpose of reducing the average salary cost for Department employees described in subsection (c), in the number of such Department employees at a specific grade level.
>
> (c) The employees referred to in subsection (b) are--
>
> (1) health-care personnel who are determined by the Secretary to be providing either direct patient-care services or services incident to direct patient-care services[.]

38 U.S.C. § 7408 provides:

> (a) There shall be appointed by the Secretary under civil service laws, rules, and regulations, such additional employees, other than those provided in section 7306 and paragraphs (1) and (3) of section 7401 of [Title 38] and those specified in sections 7405 and 7406 of [Title 38], as may be necessary to carry out the provisions of this chapter.
>
> (b) The Secretary, after considering an individual's existing pay, higher or unique qualifications, or the special needs of the

> Department, may appoint the individual to a position in the Administration providing direct patient-care services or services incident to direct patient-services at a rate of pay above the minimum rate of the appropriate grade.

38 U.S.C. § 7453(c) provides:

> A nurse performing service on a tour of duty, any part of which is within the period commencing at midnight Friday and ending at midnight Sunday, shall receive additional pay for each hour of service on such tour at a rate equal to 25 percent of such nurse's hourly rate of basic pay.

38 U.S.C. § 7454(b)(3) provides:

> Employees appointed under section 7408 of [Title 38] shall be entitled to additional pay on the same basis as provided for nurses in section 7453(c) of [Title 38].

38 U.S.C. § 7455 provides, in relevant part:

> (a)(1) Subject to subsections (b), (c), and (d), when the Secretary determines it to be necessary in order to obtain or retain the services of persons described in paragraph (2), the Secretary may increase the minimum, intermediate, or maximum rates of basic pay authorized under applicable statutes and regulations.
>
> . . . .
>
> (2) Paragraph (1) applies to the following:
>
> > (A) Individuals employed in positions listed in paragraphs (1) and (3) of section 7401 of this title.
> >
> > (B) Health-care personnel who--
> >
> > > (i) are employed in the Administration (other than administrative, clerical, and physical plant maintenance and protective services employees);
> > >
> > > (ii) are paid under the General Schedule pursuant to section 5332 of title 5;
> > >
> > > (iii) are determined by the Secretary to be providing either direct patient-care services or services incident to direct patient-care services; and
> > >
> > > (iv) would not otherwise be available to provide medical care and treatment for veterans.

38 U.S.C. § 7457 provides, in relevant part:

> (a) The Secretary may pay an employee to whom this section applies pay at the rate provided in section 7453(h) of this title except for such time as the employee may be called back to work.
>
> (b) This section applies to an employee who meets each of the following criteria:
>
> > (1) The employee is employed in a position listed in paragraph (3) of section 7401 of this title or meets the criteria specified in clauses (i), (ii), and (iii) of section 7455(a)(2)(B) of this title.

5 C.F.R. § 9901.363(a)(1) provides:

> [Premium pay for health care personnel] applies to DoD health care personnel covered under [the National Security Personnel System] who may be eligible for premium pay, as described in paragraphs (b), (c), and (d) of this section. For the purpose of this section, health care personnel means employees providing direct patient care services or services incident to direct patient care services. Examples include employees in the following occupations: nurse, biomedical engineer, dietitian, dental hygienist, psychologist, and medical records technician.

Member Beck, Dissenting in part:

I concur with my colleagues' conclusion that the Agency's exceptions are properly before us.[1] I also agree with my colleagues, for the reasons set forth in the Majority Opinion, that Federal Wage Service employees are not excluded from the coverage of 38 U.S.C. § 7454(b)(3). However, I disagree with my colleagues' conclusions in several other respects. Specifically, I conclude that the Arbitrator exceeded his authority; that the supplemental award fails to draw its essence from the parties' agreement; and that § 7454(b)(3) is ambiguous.

The parties stipulated that the issue before the Arbitrator was: "Did the [Agency] comply with [t]he Arbitrator's [original award]? If not, what is the appropriate remedy?" Supp. Award at 8. The issues framed in the original award concerned solely whether the Agency properly interpreted and implemented 38 U.S.C. § 7454(b)(3). *See* Original Award at 14-15. Nothing in the record indicates that the parties asked the Arbitrator to address any contractual questions. Thus, in assessing whether the Agency complied with his original award, the Arbitrator should not have needed to -- indeed, he was not authorized to -- concern himself with contractual rights or obligations between the parties.

Despite this limitation, the Arbitrator examined *sua sponte* whether the Agency owed the Union a contractual obligation of pre-decisional consultation and, if so, whether it had violated this obligation. The limited issues before the Arbitrator provided him no basis to address such a contractual matter. Consequently, I would find that the Arbitrator exceeded his authority by resolving an issue that was not submitted to him.[2] *See U.S. EPA, Region 2, N.Y.*, *N.Y.*, 63 FLRA 476, 479 (2009) (arbitrator exceeded authority by resolving issue that was not part of the stipulated issue).

Furthermore, even if I were to conclude that the Arbitrator properly considered this contractual issue, I would nevertheless disagree with the Majority's conclusion that the Arbitrator's supplemental award draws its essence from the parties' agreement. In reaching this conclusion, the Majority finds the Arbitrator did nothing more than fashion a remedy based on the Agency's supposed "failure to comply with his original award[.]" Maj. Op. at 8. This finding ignores one key fact: The Arbitrator concluded that the Agency *did comply* with the relevant portion of his original award.

The Arbitrator stated that, under his original award, the Agency was required only to consider consulting with the Union. *See* Supp. Award at 18. He further noted that the Agency consulted with the Union several times. *See id.* Although the Arbitrator characterized this consultation as "'arms length' dealings[,]" he nevertheless found it "unlikely that [the Agency's] actions . . . were significantly out of compliance with the [original award] or rose to the level of harmful error."[3] *Id.* Despite this conclusion,

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1. In addition to the reason provided by the Majority, I believe that our review of the exceptions is justified by the Arbitrator's decision to incorporate his original award into his supplemental award. *See* Supp. Award at 1 (stating that original award was "constituent element" of supplemental award); *id.* at 20 (stating that original award was an "element" of supplemental award). This action effectively renewed, and thereby reset the time period for filing exceptions to, the original award. *Cf. U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 56 FLRA 1057, 1059 (2001).

2. Moreover, even if this issue had been before the Arbitrator, he could not properly award the Union a remedy. As I discuss below, the Arbitrator found that the Agency sufficiently consulted with the Union; nevertheless, he ordered the Agency to engage in further pre-consultation. *See* Supp. Award at 18, 21. The Authority consistently has held that an arbitrator exceeds his or her authority when he finds no violation of contract or law, but nevertheless awards a remedy. *See, e.g., U.S. Dep't of the Navy, Naval Sea Logistics Ctr., Detachment Atl., Indian Head, Md.*, 57 FLRA 687, 688 (2002). The Arbitrator awarded a remedy for a non-existent violation; consequently, the Arbitrator exceeded his authority. *See id.* at 688-89 (finding that arbitrator exceeded his authority by awarding a remedy despite concluding that party committed no violation).

3. The Majority's assertion that the Arbitrator "clearly and repeatedly" found that the Agency failed to comply with the original award is misplaced. Maj. Op. at 9 n.6. The Majority offers two citations from the supplemental award in support of this proposition. *Id.* (citing Supp. Award at 17, 19). The Majority fails to note, however, that the findings on these pages concern solely whether the Agency properly construed § 7454(b)(3), and not the Agency's pre-consultation with the Union. Indeed, the Majority does not address the Arbitrator's determination that it was "unlikely" that the Agency's consultation with the Union was "significantly out of compliance with the [original] [a]ward[.]" Supp. Award at 18. This finding clearly and solely addresses whether the Agency complied with its alleged duty of pre-consultation, and it is separate and distinct from the Arbitrator's findings concerning the Agency's alleged failure to construe § 7454(b)(3). *Compare id.* (finding that Agency's consultation with Union, i.e., a contractual issue, *did not* "r[i]se to level of harmful error") *with id.* at 19 (finding that Agency's analysis of the term, i.e., a statutory issue, *did* "constitute[]

the Arbitrator inexplicably imposed a duty of pre-consultation on the Agency based on various provisions contained in the parties' agreement and then found a violation of this duty. *See id.* at 21.

The Arbitrator clearly and unequivocally found that the Agency consulted with the Union. The Arbitrator's finding of a duty under the consultation provisions of the parties' agreement -- and a violation of the same -- cannot be squared with this finding. Consequently, I cannot conclude that this portion of the Arbitrator's award is rationally derived from the parties' agreement. Accordingly, I would find that this portion of the supplemental award fails to draw its essence from the parties' agreement and is, therefore, deficient. *See, e.g., U.S. Dep't of Justice, Immigration & Naturalization Serv., Del Rio Border Patrol Sector, Tex.*, 45 FLRA 926, 933 (1992) (finding award failed to draw its essence from the just cause provision of the parties' agreement where arbitrator set aside disciplinary action despite concluding that the agency satisfied the just cause provision).

Finally, unlike the Majority, I find 38 U.S.C. § 7454(b)(3) to be ambiguous. It provides that "[e]mployees appointed under 7408 of [Title 38] shall be entitled to additional pay[.]" The Majority asserts that this "plain wording" establishes that any employee "appointed" under § 7408 is necessarily entitled to enhanced pay. Maj. Op. at 6. However, this assertion begs the question: Which, if any, employees are appointed under § 7408? Despite the suggestion found in § 7454(b)(3), a close look at § 7408 reveals that no employees are appointed under it.

The Supreme Court has emphasized that, in order to ascertain whether a statute is ambiguous, a reviewing authority "should not confine itself to examining a particular statutory provision in isolation." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (*NAH*) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)). Rather, it must examine "the language itself, the specific context in which the language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (citations omitted). This is because "[t]he meaning-or ambiguity-of certain words or phrases may only become evident when placed in context[.]" *NAH*, 551 U.S. at 666 (citations omitted).

The plain language of § 7454(b)(3) establishes that the word "appointment" must not be viewed in isolation. Rather, § 7454(b)(3) states that one must look to § 7408 to identify which, if any, employees are "appointed" under that provision. *See* 38 U.S.C. § 7454(b)(3).

Section 7408(a) states that "[t]here shall be appointed by the Secretary *under civil service laws, rules, and regulations*, such additional employees . . . as may be necessary to carry out the provisions of this chapter." 38 U.S.C. § 7408(a) (emphasis added). Thus, these employees are not appointed under § 7408(a); rather, they are appointed "under civil service laws, rules, and regulations" -- i.e., provisions of Title 5. Any appointment authority, therefore, lies in Title 5, not § 7408(a).

The Majority contends that § 7408(a) merely states that "civil-service laws, rules, and regulations" are applicable to employees "appointed" under it. *See* Maj. Op. at 6. However, the plain language of § 7408(a) states that employees are appointed "*under* civil-service laws, rules, and regulations." 38 U.S.C. § 7408(a) (emphasis added). Thus, "civil-service laws, rules, and regulations" do not merely "apply" to employees, they control the terms of their appointment. The Majority's interpretation reads the "under" requirement out of this statutory provision.

Moreover, employees are not appointed under § 7408(b). Rather, § 7408(b) merely permits the Secretary to authorize a higher rate of pay for certain Title 5 employees. *See* 38 U.S.C. § 7408(b) (stating that the Secretary "may appoint [an] individual to a position in the [Agency] providing direct patient-care services or services incident to direct patient-services at a rate of pay above the minimum rate of the appropriate grade"). Consequently, the term "appointed" in § 7454(b)(3), when read in light of § 7408, does not itself provide clear guidance as to which individuals are entitled to enhanced pay.

The Majority avers that § 7408 must be an appointment authority because § 7454(b)(3) contains the word "appointed"; accordingly, any differing interpretation would render this word "superfluous, void, or insignificant." Maj. Op. at 7 (citation omitted). That the meaning of 7454(b)(3) is unclear, however, does not mean that the term "appointed" is somehow rendered "superfluous, void or significant." Rather, it simply means that it is appropriate to look to the Agency's interpretation of the phrase to see if it is reasonable. *See NAH*, 551 U.S. at 666 (because statute at issue was ambiguous, Court looked to implementing agency's "expert interpretation").

. . . harmful error). The Majority effectively nullifies this finding.

Further, even if it were accurate to say that employees are appointed under § 7408, § 7454(b)(3) remains ambiguous. Sections 7408(a) and (b) clearly refer to two different groups of employees, yet § 7454(b)(3) fails to specify whether it applies to one -- and, if so, which one -- or both groups of employees. Section 7408(a) refers broadly to all of the Title 5 employees that may be "necessary" for the Agency to carry out its work. In contrast, § 7408(b) refers only to those Title 5 employees "providing direct patient-care services or services incident to direct patient-services." Congress' failure to distinguish between these two groups in § 7454(b)(3), thus creates inherent ambiguity. The Majority does not attempt to address this point. Rather, the Majority simply assumes -- without explanation -- that subsections (a) and (b) refer to the same group of employees. However, the Majority also concedes that § 7408(b) refers only to "*certain* individuals[.]" Maj. Op. at 6 (emphasis added). Thus, even the Majority appears to acknowledge that subsection (b) addresses a limited -- and therefore different -- group of employees.

The Majority alternatively contends that, even if §§ 7408(a) and (b) refer to different groups of employees, § 7454(b)(3) is not ambiguous because it discusses "appointment under § 7408 generally[;]" as such, it would apply to both groups. *Id.* But the Majority is unable to cite any language in § 7454(b)(3) that proves this proposition. In order to reach its proffered interpretation, the Majority finds itself reading an unwritten requirement into what it has characterized as an unambiguous statute. This sort of interpretive gap-filling is not necessary when statutory language is truly unambiguous.

Finally -- and hardly least of all, the Majority's interpretation of § 7454(b)(3) contradicts the Arbitrator's conclusions. The Majority ends its analysis by stating: "Thus, we conclude that 7454(b)(3) is unambiguous: It applies to *all employees* appointed under § 7408." Maj. Op. at 7 (emphasis added). In contrast, the Arbitrator, although agreeing that § 7454(b)(3) was unambiguous, determined it was limited to employees who "provide direct patient-care services or service incident to direct patient-care services[.]"[4] Original Award at 20. The Majority has created an odd situation indeed: It upholds the Arbitrator's conclusion that § 7454(b)(3) is unambiguous and has a "plain meaning," yet it jettisons the Arbitrator's "plain meaning" in favor of a completely different, broader "plain meaning." The Majority and the Arbitrator have managed to arrive at completely different plain meanings. I can think of no better demonstration of § 7454(b)(3)'s ambiguity. *See Webster's Third New International Dictionary* at 66 (3rd ed. 1986) (defining "ambiguity" as "the condition of admitting of two or more meanings [or] of being understood in more than one way").

I would find that § 7454(b)(3) is ambiguous. Consequently, I would engage in the second inquiry under *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), i.e., whether the Agency's interpretation of § 7454(b)(3) is reasonable and, therefore, entitled to deference. I would conclude that it is.

In interpreting § 7454(b)(3), the Agency first determined that § 7454(b)(3) applied only to positions that provide "direct patient care or services incident to direct patient-care services." Supp. Award at 10 (quoting 5 U.S.C. § 5371(a)). It then defined the phrase "direct patient care services or services incident to direct patient-care services" as: "(1) [c]linical care services to patients such as

4. The Majority contends that it is improper to address the Arbitrator's "narrow" interpretation of § 7454(b)(3) because neither party has excepted to it. Maj. Op. at 7 n.5. The Agency, in its exceptions, argues that the Arbitrator's supplemental award "erroneously construes and fails to afford deference to the Agency's interpretation of . . . § 7454(b)(3)[.]" Exceptions at 1; *see also id.* at 5 (stating that one of the issues presented by the Agency was whether Arbitrator's interpretation of § 7454(b)(3) was erroneous). The Agency's arguments directly concern the Arbitrator's interpretation of § 7454(b)(3). *Id.* at 11. Consequently, it is entirely appropriate to address the above finding.

Moreover, were the Majority correct, it would have no basis to proffer *its* expansive interpretation of § 7454(b)(3). Although the Majority contends that it is merely "governed by the arguments before [it,]" Maj. Op. at 7 n.5, neither the Agency nor the Union has argued for the Majority's broad interpretation. To the contrary, the Agency *and* the Union agree, at a minimum, that § 7454(b)(3) is limited to positions that provide "direct patient care services or services incident to direct patient-care services[,]" *see, e.g.*, Exceptions at 2 (stating that Union conceded that § 7454(b)(3) applied only to those Title 5 employees who provide "direct patient-care services, or services incident to direct patient-care services"); Original Award at 17 (same); *see also* Opp'n at 13 (referring to original and supplemental awards, wherein Arbitrator limited scope of § 7454(b)(3), as "sound and reasoned decisions"); they disagree only on the proper definition of this term. *See* Exceptions at 11 (asserting that Arbitrator was "precluded from supplanting [the Agency's] construction" of "direct patient-care services or services incident to direct patient-care services" with his own definition).

diagnosis, treatment, prevention, follow-up, patient counseling, etc.; (2) [m]edical support of health care delivery to patients; and/or (3) [h]ealth care administration of the services described in 1 and 2[.]" *Id*. at 4. Nothing in § 7454(b)(3) indicates that the Agency was prohibited from limiting Saturday premium pay to employees that provide "direct patient care services or services incident to direct patient-care services." Similarly, nothing in § 7454(b)(3) indicates that the Agency's definition of this phrase conflicts with the statute or is otherwise impermissible. Accordingly, I believe that the Agency's interpretation of § 7454(b)(3) is reasonable; as such, the Arbitrator was not permitted to substitute his judgment for that of the Agency's. *See, e.g., GSA v. FLRA*, 86 F.3d 1185, 1187 (D.C. Cir. 1996) (holding that Authority was required to afford opinion letter *Chevron* deference where letter set forth agency's interpretation of statute governing employee practices); *AFGE, Local 1978*, 56 FLRA 894, 896 (2000) (citing *Chevron*, 467 U.S. at 843-44) (stating that reviewing authority may not substitute its own construction of a statutory provision for an agency's reasonable statutory construction).