70 FLRA No. 57

UNITED STATES
DEPARTMENT OF THE AIR FORCE
4TH FIGHTER WING
SEYMOUR JOHNSON
AIR FORCE BASE, NORTH CAROLINA
(Agency)

and

NATIONAL ASSOCIATION
OF INDEPENDENT LABOR
LOCAL 7
(Union)

0-AR-5222

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DECISION

June 30, 2017

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Before the Authority: Patrick Pizzella, Acting Chairman and Ernest DuBester, Member
(Acting Chairman Pizzella concurring; Member DuBester concurring)

I. Statement of the Case

The Union filed a grievance alleging that the Agency unlawfully required Air Reserve Technicians (ARTs), who are members of the Air Force Reserve, to wear military uniforms while performing civilian duties. The Agency contended that this requirement was authorized under 10 U.S.C. § 772(j)(2) which, according to the Agency, allows it to require ARTs to wear military uniforms even when they are not on active military duty. Arbitrator Ellen S. Saltzman rejected the Agency's contention and found that requiring ARTs to wear military uniforms when they are not on active duty is contrary to law.

The question before us is whether the award is contrary to law. Because we find the award contrary to law, we set the award aside**.**

II. Background and Arbitrator's Award

ARTs are technicians with dual civilian and military status. They are full-time federal-civil-service employees who are also in the Air Force Reserve. Under the parties' agreement, ARTs wear civilian clothing while performing their civilian duties. The Agency proposed modifying the parties' agreement so that the Agency could require that ARTs wear a military uniform while performing civilian duties. The Union responded by submitting a proposal to allow bargaining-unit employees to wear a civilian uniform. The parties could not agree on the matter and the Union filed a negotiability appeal. The Authority found that the Union's proposal was "outside the duty to bargain."[1] The Authority, however, did not address the Union's allegation that the Agency's requirement violated 10 U.S.C. § 772 – which addresses when a person not on active duty is authorized to wear the uniform[2] – because "[s]uch an allegation is not appropriately presented to the Authority in the context of a negotiability proceeding."[3]

Subsequently, the Secretary of the Air Force issued Air Force Instructions directing ARTs to wear military uniforms while performing civilian duties. The Union filed a grievance asserting that the Air Force's requirement was unlawful under § 772. The parties could not resolve the matter and submitted it to arbitration.

As relevant here, the parties stipulated to the following issue for the Arbitrator to resolve: "Was the requirement that ARTs be required to wear their military uniforms while in a civilian employment status legal, or is it contrary to . . . § 772?"[4]

Before the Arbitrator, the parties disputed the meaning of § 772, and in particular, subsection (j)(2). Section 772 lists ten exceptions to the general rule found in § 771, which provides that "no person except a member of the Army, Navy, Air Force, or Marine Corps . . . may wear – (1) the uniform or a distinctive part of the uniform of the Army, Navy, Air Force, or Marine Corps; or (2) a uniform any part of which is similar to a distinctive part of the uniform of the Army, Navy, Air Force, or Marine Corps."[5] Section 772(j) provides:

> A person in any of the following categories may wear the uniform prescribed for that category:

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[1] *NAIL, Local* 7, 64 FLRA 1194, 1198 (2010) (*NAIL*), *rev'd on other grounds*, *U.S. Dep't of the Air Force v. FLRA*, 648 F.3d 841 (D.C. Cir. 2011).
[2] 10 U.S.C. § 772.
[3] *NAIL*, 64 FLRA at 1196 n.5.
[4] Award at 3.
[5] 10 U.S.C. § 771.

> (1) Members of the Boy Scouts of America.
> (2) Members of any other organization designated by the Secretary of a military department.[6]

The Union argued that the Agency may not require ARTs to wear a uniform while performing civilian duties because this requirement is not expressly authorized under § 772. The Union further argued that § 772(j)(2)'s reference to "any other organization"[7] is limited to organizations similar to the Boy Scouts, which is specifically listed in subsection (j)(1).

The Agency asserted that the uniform requirement falls within the scope of § 772(j)(2) "because Congress intended . . . § 772(j)(2) to authorize the Secretary of the Air Force to designate military organizations like the [ARTs]"[8] to wear the Air Force uniform. The Agency argued that as Air Force civilian employees and reservists, ARTs "must follow Air Force rules and regulations, regardless of the role in which they are serving at any particular time."[9]

The Arbitrator agreed with the Union. The Arbitrator determined that ARTs "must fit within one of the statutory exceptions [in § 772]" because they are not on active duty.[10] But the Arbitrator found that § 772 did not specifically list ARTs. Further, the Arbitrator found that the words "any other organization" in § 772(j)(2) could not properly be interpreted to apply to ARTs.[11] She noted that subsection (j) is the only provision of § 772 using the words "category" and "organization."[12] She reasoned that because there is only one example of an "organization" in this "category," and it is in (j)(1) – the Boy Scouts – it follows that any other organization exempted in (j)(2) "would be an organization that is substantially related to Title 36 in its purpose" – i.e., patriotic organizations.[13] In contrast, she found that the Air Force is an organization identified in Title 10, dealing with the Armed Forces.[14] She further found that the purpose of ARTs "bears no similarities to the Boy Scouts of America as an organization or to Title 36 as the category."[15] And she determined that if the intent of § 772 was to give "unconditional discretion to the Secretary of a military department," a separate subsection would exist and state just that.[16]

The Arbitrator supported her findings by comparing Army National Guard Technicians, another dual-status civilian/military position, with ARTs. She noted that unlike the Air Force, the Army National Guard asked Congress to enact a statutory requirement that its technicians wear the uniform while performing civilian work, and Congress enacted this express requirement.

For these reasons, the Arbitrator concluded that § 772 did not provide authority for the Agency to order ARTs to wear the uniform while performing civilian duties, and therefore found the Agency's uniform requirement contrary to law.

The Agency filed exceptions to the award, and the Union filed an opposition to the Agency's exceptions.

III. Analysis and Conclusion: The award is contrary to law.

The Agency argues that the award is contrary to law because the Arbitrator incorrectly interpreted § 772(j)(2). According to the Agency, § 772(j)(2) allows "military leadership to permit the military or quasi-military organizations they designate to wear the uniform."[17] 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.[18] 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.[19]

In her award, the Arbitrator narrowly interpreted § 772(j)(2) and found that "any organization" described in this subsection "would be an organization that is substantially related to Title 36" organizations, such as the Boy Scouts, which are authorized to wear their uniforms in subsection (j)(1).[20] She therefore concluded that § 772(j)(2) did not give the Agency the authority to require ARTs to wear the uniform while performing civilian duties because ARTs are not members of an organization "substantially related to Title 36 in its

[6] *Id.* § 772(j). The entire text of 10 U.S.C. § 772 is set forth in the appendix to this decision.
[7] *Id*. § 772(j)(2).
[8] Award at 16.
[9] *Id.*
[10] *Id.* at 17.
[11] *Id.* at 19.
[12] *Id.*
[13] *Id.* at 20 (citing 36 U.S.C § 30902).
[14] *Id.*; *see also* 10 U.S.C. § 8011.
[15] Award at 21.
[16] *Id.*
[17] Exceptions at 9.
[18] *U.S. Dep't of VA, Med. Ctr., Richmond, Va.*, 69 FLRA 427, 428 (2016) (*VA*); *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)).
[19] *VA*, 69 FLRA at 428; *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[20] Award at 20.

purpose."[21] We disagree with the Arbitrator's interpretation of § 772(j)(2).

Section 772(j)'s structure, as well as its plain language, contradicts the Arbitrator's finding that the words "any other organization" in subsection (j)(2) are modified or limited by "the Boy Scouts of America" in subsection (j)(1). As written, subsection (j)(1) and subsection (j)(2) operate independently from one another. Each is a separate clause, in a separate indented subpart. The clauses are not conjunctive; each ends in a period. And nothing in subsection (j)(1) explicitly connects "Boy Scouts" to the words in subsection (j)(2), or the reverse.[22]

We acknowledge the Arbitrator's assertion that if Congress intended to give the military broad authority to designate who may wear a uniform, it could have made this clear by creating an additional subsection to § 772, rather than one with a companion provision relating to the Boy Scouts. However, the statutory history of § 772(j)(2) explains the reference to the Boy Scouts in subsection (j)(1) and its juxtaposition to a broad delegation of authority to the "Secretary of the military department" in subsection (j)(2), and that explanation does not support the Arbitrator's conclusions.[23]

Accordingly, we find the award contrary to law.

IV. Decision

The award is contrary to law and we set it aside.

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[21] *Id.*; *see also id.* at 23.

[22] *See, e.g.*, *Jama v. ICE*, 543 U.S. 335, 344 (2005) (finding that subsection of statute does not modify earlier subsection because "[e]ach clause is distinct and ends with a period, strongly suggesting that each may be understood completely without reading any further"); *see also U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of America, Inc.*, 508 U.S. 439, 454 (1993) ("the meaning of a statute will typically heed the commands of its punctuation").

[23] National Defense Act, Pub. L. No. 64-85, § 125, 39 Stat. 166, 216 (1916).

APPENDIX

10 U.S.C. § 772

§ 772. When wearing by persons not on active duty authorized

(a) A member of the Army National Guard or the Air National Guard may wear the uniform prescribed for the Army National Guard or the Air National Guard, as the case may be.

(b) A member of the Naval Militia may wear the uniform prescribed for the Naval Militia.

(c) A retired officer of the Army, Navy, Air Force, or Marine Corps may bear the title and wear the uniform of his retired grade.

(d) A person who is discharged honorably or under honorable conditions from the Army, Navy, Air Force, or Marine Corps may wear his uniform while going from the place of discharge to his home, within three months after his discharge.

(e) A person not on active duty who served honorably in time of war in the Army, Navy, Air Force, or Marine Corps may bear the title, and, when authorized by regulations prescribed by the President, wear the uniform, of the highest grade held by him during that war.

(f) While portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a theatrical or motion-picture production may wear the uniform of that armed force if the portrayal does not tend to discredit that armed force.

(g) An officer or resident of a veterans' home administered by the Department of Veterans Affairs may wear such uniform as the Secretary of the military department concerned may prescribe.

(h) While attending a course of military instruction conducted by the Army, Navy, Air Force, or Marine Corps, a civilian may wear the uniform prescribed by that armed force if the wear of such uniform is specifically authorized under regulations prescribed by the Secretary of the military department concerned.

(i) Under such regulations as the Secretary of the Air Force may prescribe, a citizen of a foreign country who graduates from an Air Force school may wear the appropriate aviation badges of the Air Force.

(j) A person in any of the following categories may wear the uniform prescribed for that category:

(1) Members of the Boy Scouts of America.

(2) Members of any other organization designated by the Secretary of a military department.

Acting Chairman Pizzella, concurring:

The Authority currently has only two voting Members.

Thus, I join my colleague to find that the Arbitrator's award conflicts with 10 U.S.C. § 772 and that the Arbitrator's interpretation of what Congress intended is indeed fanciful.

However, it is important to note that, if the Authority had a full complement of Members, that is not where I would have begun my analysis of this case. It is obvious to me that this case should begin and end with the rationale that was applied by the United States Court of Appeals for the District of Columbia Circuit in *U.S. Department of the Air Force, 4th Fighter Wing, Seymour Johnson Air Force Base v. FLRA* (*Air Force*),[1] and *U.S. Department of the Air Force, Luke Air Force Base, Arizona v. FLRA* (*Luke AFB*).[2]

In *Air Force*, the Court ruled that the Authority's interpretation of Title 10 provisions − concerning the wearing of uniforms by dual-service technicians while in civilian status (the same provisions which are at issue in this case) − is entitled to "no deference."[3] Rather, the Court went back to the 1916 and 1958 versions of Title 10 to reaffirm that military matters, such as the requirement to wear uniforms, are left solely to the discretion – "permissible interpretation[s]" − of the Secretary of the Air Force.[4]

Therefore, it would be paradoxical indeed to conclude that an arbitrator could make a determination which the Authority itself is not entitled to make.

In December 2016 in *Luke AFB*, the Court once again rebuked the Authority when the then-majority interpreted other sections of Title 10 – concerning access to taxpayer-funded military commissaries − in a manner which undermined the unfettered discretion of the Secretary of the Air Force.[5] The Court made it unmistakably clear that the "starting point" of resolving such disputes is Section 113(b) of Title 10 "which gives the Secretary of Defense 'the authority, direction, and control over the Department of Defense'" and Section 8013 which "grant[s] the Secretar[y] of the . . . Air Force 'the authority necessary to conduct all affairs of [the] Department.'"[6] According to the Court, those sections give the Secretary of the Air Force full discretion "'to prescribe regulations to carry out its functions, powers, and duties under [Title 10]' ***subject only to*** 'the authority, direction, and control of the Secretary of Defense.'"[7]

For those same reasons, I would conclude that the Air Force has full and exclusive "authority to establish rules and regulations"[8] and is "empowered under Title 10" to determine how and when uniforms will be required.[9]

When the Air Force filed its exceptions in this case, it did not have the benefit of the Court's decision in *Luke AFB*. But we do. Therefore, I would analyze this case as did the Court in that case. Any other rationale is secondary and probably unnecessary.

Thank you.

[1] 648 F.3d 841 (D.C. Cir. 2011).
[2] 844 F.3d 957 (D.C. Cir. 2016).
[3] 648 F.3d at 846.
[4] *Id*. at 842, 848.
[5] 844 F.3d at 961.
[6] *Id.* (citing 10 U.S.C. §§ 113(b), 8013(b)).
[7] *Id.* (emphasis added).
[8] Exceptions at 11.
[9] *Id.* at 12.

Member DuBester, concurring:

For the reasons that follow, I agree that the award is contrary to law, and should be set aside.

In matters of statutory interpretation, the analysis begins with the statute's text.[1] The U.S. Supreme Court has stated that the first step "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case."[2] And "[w]hen the words of a statute are unambiguous, then, this first canon [of interpretation] is also the last."[3] Following that guidance, the analysis begins with § 772(j)(2)'s statutory wording.

Section 772(j)(2) permits members of "any other organization" that is "designated by the Secretary of a military department" to wear their "prescribed" uniform.[4] The parties agree that the Secretary of the Air Force "is the modern day equivalent of the Secretary of a military department," who may designate members of organizations to wear the uniform.[5] The parties, however, dispute the meaning of the word "organization" as used in § 772(j)(2).

The word "organization" is not defined in Title 10, Chapter 45 of the U.S. Code, which includes §§ 771-777a. Absent a prescribed definition, the words in a statute should be given their common meaning.[6] Webster's Third International Dictionary defines "organization" as "a group of people that has a more or less constant membership."[7] Thus, the term "organization" has a broad meaning that, reasonably interpreted, could include any distinct grouping of people. In short, applying the common meaning of "organization" supports finding that ARTs are members of an organization – the Air Force Reserve – within the U.S. Air Force. This expansive reading is also consistent with the broad use of the word "organization" elsewhere in Title 10[8] and the definition of "Air Force Reserve" in the Department of Defense Dictionary.[9]

To limit "any" organization under § 772(j)(2) to a specific category of organizations, as the Arbitrator did, is contrary to what the statute says. The Supreme Court held in *Ali v. Federal Bureau of Prisons*[10] that the word "any" – given its natural reading – "has an expansive meaning."[11] That case involved exemptions to the Federal Tort Claims Act.[12] The statute exempted claims arising from "the detention of any goods, merchandise, or other property by any officer of customs or excise or *any other law enforcement officer*."[13] The petitioner filed a tort claim against Federal Bureau of Prisons officers and argued that the phrase "any other law enforcement officer" did not apply to Federal Bureau of Prisons officers.[14] The Court disagreed, and determined that nothing in the statute required such a narrow construction, and that Congress could have easily written the law to limit "law enforcement officer" to those acting in a customs or excise capacity.[15] The Court stated that it would not "woodenly apply limiting principles [because] Congress include[d] a specific example along with a general phrase."[16] Concluding that a natural reading of "any" meant "law enforcement officers of whatever kind,"[17] the Court held that the exemption applied to Federal Bureau of Prisons law enforcement officers.[18] Here, as in *Ali*, we find that the word "any" means an

[1] *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979).

[2] *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41 (1989)).

[3] *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 462 (2002).

[4] 10 U.S.C. § 772(j)(2).

[5] Award at 19.

[6] *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407 (2011); *Assoc. of Civilian Technicians Razorback Chapter 17*, 56 FLRA 427, 430 (2000); *Smith v. United States*, 508 U.S. 223, 228 (1993); *see also* 2A Norman J. Singer & Shambie Singer, Statutes and Statutory Construction § 47.28 (7th ed. 2014) ("[W]ords are interpreted to take their ordinary, contemporary, common meaning.").

[7] Webster's Third International Dictionary (2002) (Webster's Third).

[8] *See, e.g.*, 10 U.S.C. § 8062(d)(3) ("The Air Force consist of . . . all Air Force units and other Air Force *organizations* . . . " (emphasis added)); *id.* § 8074 ("Except as otherwise prescribed by law or by the Secretary of Defense, the Air Force shall be divided into such *organizations* as the Secretary of the Air Force may prescribe" (emphasis added)); *id.* § 9565 ("*organizations* of the Air Force" (emphasis added)); *id.* § 10216(b) (" . . . the Secretary of Defense shall give priority to supporting authorizations for military technicians (dual status) in the following high priority units and *organizations*" (emphasis added)); *see also* Organization, Webster's Third (also defined as "a military command consisting of two or more units").

[9] Reserve Component, Department of Defense Dictionary of Military and Associated Terms, http://www.dtic.mil/doctrine/dod_dictionary/ (last accessed 6/29/17) (includes the "Air Force Reserve"); Component, *id.* ("One of the subordinate organizations that constitute a joint force.").

[10] 552 U.S. 214, 218-19 (2008).

[11] *Id.* at 219.

[12] 28 U.S.C. § 1346(b)(1).

[13] *Ali*, 552 U.S. at 218 (emphasis added).

[14] *Id.*

[15] *Id.* at 227.

[16] *Id.*

[17] *Id.* at 220.

[18] *Id.* at 227-28.

organization of "whatever kind,"[19] including the Air Force Reserve.

As the Authority's opinion holds, § 772(j)'s structure, as well as its plain language, contradicts the Arbitrator's finding that the words "any other organization" in subsection (j)(2) are modified or limited by "the Boy Scouts of America" in subsection (j)(1). Subsection (j)(1) and subsection (j)(2) are independent. Looking at their plain language, each is a separate clause, in a separate indented subpart. Subjections (j)(1) and (j)(2) are not conjunctive; each ends in a period. And looking again at their express wording, nothing in subsection (j)(1) connects "Boy Scouts" to the words in subsection (j)(2), or the reverse.[20]

The Arbitrator is correct that if Congress intended to give the military broad authority to designate who may wear a uniform, it could have been more explicit and created an additional subsection to § 772. But, the statutory history of § 772(j)(2) provides an explanation for the juxtaposition of subsection (j)(1)'s specific reference to the Boy Scouts, and subsection (j)(2)'s broad delegation of authority to the "Secretary of the military department."

The language of § 772 is derived from § 125 of the National Defense Act of 1916 (NDA),[21] that was later codified in Title 10, § 1393, of the first U.S. Code.[22] This provision was titled "Protection of the uniform," and made it "unlawful for any person not an officer or enlisted man of the United States" to wear a uniform of the armed forces, or a uniform "similar to a distinctive part" of a military uniform.[23] A proviso to this prohibition authorized certain individuals to wear a uniform, including "members of the organization known as the Boy Scouts of America, or the Naval Militia, or such other organizations as the Secretary . . . may designate."[24] The same year that Congress passed the NDA, exempting Boy Scouts from the bar to civilians wearing uniforms resembling those of the armed forces, it also gave the Boy Scouts of America a congressional charter, that still remains in effect.[25]

Title 10 was revised in 1956 to consolidate "laws affecting the Armed Forces, eliminat[e] duplicate provisions, and clarify[] statutory language."[26] The content of § 1393 was revised and codified in §§ 771 and 772, titled: "Unauthorized wearing prohibited" and "When wearing by persons not on active duty authorized," respectively. Congress struck any reference to "protecting" the uniform but retained the clause related to the Boy Scouts in subsection (j)(2).

Although § 772(j) continues to include special mention of the Boy Scouts, as relevant here, the statute's history reveals that significant aspects of the statute have changed. As noted, the purpose of this section is now expressly directed, as reflected in its title, at identifying when persons not on active duty may wear a uniform.[27] Where § 1393 referred to "Boy Scouts . . . *or such other organizations* as the Secretary . . . may designate,"[28] Congress amended the language in § 772 so that Boy Scouts and "other organizations" are in separate, independent clauses. The revised statute also eliminates the word "such" and inserts the word "any." These changes connote an intentional breadth to the statute's use of the word "organization" consistent with the statute's plain language: it is a broad authorization for the Secretary of the Air Force to designate the members of *any* organization, including technicians serving in the Air Force Reserve, to wear their military uniforms.[29] Even if the word "organizations" originally had some statutory connection with "Boy Scouts" – which it is unnecessary to resolve here – it is still necessary to interpret and apply the literal language of 772(j)(2).[30]

The Arbitrator's interpretation, asserted by the Union, should therefore be rejected, because it would require the Authority to override the literal terms of the statute.[31] Nothing on the statute's face indicates an intention to restrict "any other organization" to the same category of organizations as the Boy Scouts. There is no facial incompatibility between the narrow authorization – limited to Boy Scouts – in subsection (j)(1), and the broad meaning properly ascribed to subsection (j)(2).

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[19] *Id.* at 220.

[20] *See, e.g., Jama v. ICE*, 543 U.S. 335, 344 (2005) (finding that subsection of statute does not modify earlier subsection because "[e]ach clause is distinct and ends with a period, strongly suggesting that each may be understood completely without reading any further"); *see also U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of America, Inc.*, 508 U.S. 439, 454 (1993) ("the meaning of a statute will typically heed the commands of its punctuation").

[21] NDA, Pub. L. No. 64-85, § 125, 39 Stat. 166, 216 (1916).

[22] 10 U.S.C. § 1393 (1926).

[23] *Id.*

[24] *Id.*

[25] 36 U.S.C. Chapter 309.

[26] *Schacht v. United States*, 398 U.S. 58, 62 n.3 (1970).

[27] *See United States. v. Quality Stores, Inc.*, 134 S.Ct. 1395, 1402 (2014) (title of statue may be used as an aid in statutory interpretation); *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (same).

[28] 10 U.S.C. § 1393 (1926) (emphasis added).

[29] *See, e.g., United States v. Wells*, 519 U.S. 482, 492-93 (1997) (finding that statutory history confirms natural reading of statute).

[30] *See Smith*, 508 U.S. at 236-37 (finding that even if Congress intended a certain meaning when it passed the original version of a statute, the proper construction is from the face of the statute as later amended).

[31] *See Crandon v. United States*, 494 U.S. 152, 168 (1990) (departure from statutory language is warranted in only "rare and exceptional circumstances") (citation omitted).

Rather, accepting the Arbitrator's reading would lead to an implausible result: the Secretary of the Air Force would be permitted to designate Title 36 organizations – many of which are neither military nor quasi-military organizations – to wear uniforms, but would be barred from designating members of one of the Air Force's own Title 10 organizations to do the same.[32]

Finally, also unpersuasive is the Arbitrator's reliance on the National Guard Technician Act[33] (Technician Act) – which specifically requires National Guard technicians to wear a uniform while performing duties as a technician.[34] This statute has no bearing on interpreting the plain language of § 772. The Arbitrator errs by suggesting[35] that Congress' passage of an express requirement that National Guard technicians wear uniforms implies that there is no authority to impose a uniform requirement under § 772(j)(2).[36] And, contrary to the Union,[37] the canon of *expressio unius*[38] is inapplicable in this context and therefore provides no support for making this negative inference.[39] Moreover, if the Technician Act has any significance at all, it is to show Congress' approval of requiring dual-status employees to wear a military uniform while performing civilian duties.

For the foregoing reasons, the Arbitrator incorrectly interpreted § 772(j)(2). ARTs are members of an organization within the Air Force, and Congress expressly granted the Secretary of the Air Force authority to designate members of any organization, such as ARTs, to wear a uniform. Therefore, under § 772(j)(2), the Agency may implement a requirement that ARTs wear uniforms when performing civilian duties.

Accordingly, because the award is contrary to law, it should be set aside. And, therefore, it is unnecessary to address the Agency's remaining exceptions.[40]

[32] *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible."); *see also Davis v. Mich. Dep't. of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

[33] 32 U.S.C. § 709(b)(4); *see also* 110 Stat. 432 (1996) (amendments to the National Guard Technician Act, including a requirement that technicians wear a military uniform while performing technician duties).

[34] Award at 21-22.

[35] *Id.*

[36] *See NFFE, Local 1669*, 55 FLRA 63, 63 (1999) (The Technician Act's uniform requirement "codified a long-standing rule that technicians wear the military uniform while performing their duties.").

[37] Opp'n at 5.

[38] *See expressio unius est exclusio alterius, Black's Law Dictionary* (10th ed. 2014) ("A canon of construction holding that to express or include one thing implies the exclusion of the other.").

[39] *See, e.g., Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) ("[T]he canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an 'associated group or series' justifying the inference that items not mentioned were excluded by deliberate choice.") (citation omitted).

[40] *See U.S. DOD, DOD Dependents Schools, Europe*, 65 FLRA 580, 582, n.5 (2011).