

74 FLRA No. 37

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
EASTERN COLORADO HEALTH CARE SYSTEM
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2241
(Union)

0-AR-5979

DECISION

March 27, 2025

Before the Authority: Colleen Duffy Kiko, Chairman,
and Susan Tsui Grundmann and Anne Wagner, Members
(Chairman Kiko concurring)

I. Statement of the Case

Arbitrator Ezio E. Borchini issued an award finding the Agency violated the parties' collective-bargaining agreement and law by failing to timely and equitably conduct a salary-review survey (survey) and increase certain employees' (the grievants') pay. As a remedy, the Arbitrator awarded the grievants backpay with interest. The Agency filed exceptions on nonfact and contrary-to-law grounds. For the reasons explained below, we find the award contrary to law, and set it aside.

II. Background and Arbitrator's Award

The grievants are pharmacists employed by the Agency under Title 38 of the United States Code (Title 38). On March 4, 2022, the Union filed a grievance alleging, in pertinent part, that the Agency failed to conduct the survey, as required under 38 U.S.C. § 7451 (§ 7451) and Article 2 of the parties' agreement (Article 2). On March 21, 2022, the Agency denied the grievance. The Union invoked arbitration on March 22, 2022. While the grievance was pending, the Agency

conducted the survey and, on May 10, 2022, approved salary increases. The salary increases took effect on May 22, 2022.

The parties did not stipulate an issue. The Arbitrator framed the issues, in relevant part, as whether the Agency violated the parties' agreement, "Agency policies," or law "related to conduct[ing] salary surveys . . . and any corresponding salary adjustments" for the pharmacists and, "[i]f so, what shall the remedy be?"¹

At arbitration, the Union asserted that the competitive-pay provisions set forth in § 7451 apply to the grievants. The Agency disagreed, and claimed that the pharmacists were covered by 38 U.S.C. § 7455 (§ 7455), a separate provision which sets forth "[s]pecial [s]alary [r]ates" for the positions it covers.² Therefore, the Arbitrator addressed whether the pharmacists are in a position covered by § 7451.

In relevant part, § 7451(a)(2)(C) defines positions covered by § 7451's pay-setting provisions to include "[s]uch positions referred to in paragraphs (1) and (3) [38 U.S.C. §] 7401 . . . as the Secretary [of Veterans Affairs (the Secretary)] may determine upon the recommendation of the Under Secretary for Health."³ Section 7401, in relevant part, states that "[t]here may be appointed by the Secretary such personnel as the Secretary may find necessary for the health care of veterans . . . as follows: (3) . . . pharmacists . . ."⁴

Before the Arbitrator, the Agency argued that the pharmacist position was not covered by § 7451 because this position's coverage was made subject to the Secretary's determination, and the Secretary had not made such a determination. The Arbitrator found that "[t]he phrase, 'as the Secretary may determine,'" as set forth in § 7451(a)(2)(C), "indicates that the Secretary may determine it to be so, but it does not require the Secretary to do so affirmatively."⁵ The Arbitrator further concluded that "[e]vidence that the Secretary has done so is shown by the construction of the statutes,"⁶ finding that the "identical" reference to § 7401(3) in both § 7451 and § 7455 was "persuasive evidence that pharmacists are covered" under § 7451.⁷ Based on this interpretation, the Arbitrator concluded the grievants were covered by § 7451 because the Agency had "not presented evidence that pharmacists are not a covered position, and there is no evidence that the Secretary has excluded them."⁸

Next, the Arbitrator addressed whether the Agency violated § 7451. He found that § 7451(d)(3)(A)

¹ Award at 9.

² *Id.* at 19.

³ *Id.* at 21-22 (quoting 38 U.S.C. § 7451(a)(2)(C)).

⁴ *Id.* at 22 (quoting 38 U.S.C. § 7401(3)) (internal quotation marks omitted).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

requires the Agency's facility director to review wage surveys conducted by the Bureau of Labor Statistics (BLS) corresponding to the relevant occupation and labor market, and to use that information "as the basis for making adjustments in rates of pay under [§ 7451(d)(3)]."⁹ He further found that § 7451 requires any determination regarding a pay adjustment to be made thirty days after the release of the relevant BLS survey. The Arbitrator concluded that the facility director's failure to make such a determination within thirty days would violate § 7451 because "[i]t is the BLS release of data that starts the clock on the deadline to determine whether pay rates should be adjusted."¹⁰

Applying these principles, the Arbitrator found that the grievants "approached management about conducting a salary survey in April 2021" and that, upon completing the survey in May 2022, the Agency approved increases in the grievants' pay based on BLS data.¹¹ However, the Arbitrator found that because the BLS published its wage-survey results for the grievants' labor-market areas on March 31, 2021, the Agency should have made its pay-increase determination by April 30, 2021. He determined that the Agency raised the grievants' pay "beyond the statutory timeline," and that "[twenty-eight] pay periods elapsed" between when the pay increase should have become effective and when it actually took effect.¹² Therefore, the Arbitrator concluded the Agency violated § 7451. The Arbitrator also found that, by violating § 7451, the Agency also violated Article 2, which provides that the parties are governed by "applicable federal statutes."¹³

As a remedy, the Arbitrator directed the Agency to make the grievants whole "for losses caused by the Agency's delay" in conducting the survey and effectuating the pay increases.¹⁴ Consequently, he awarded the grievants backpay with interest for the twenty-eight pay periods between May 9, 2021, and May 22, 2022.

On August 1, 2024, the Agency filed exceptions to the award, and on August 30, 2024, the Union filed an opposition.

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

The Agency argues the Arbitrator's conclusion that it violated § 7451 is contrary to law because "pharmacist" is not a position covered by that provision.¹⁵ Specifically, the Agency asserts that the Arbitrator misinterpreted the phrase "as the Secretary may determine," as set forth in that provision, to mean that all of the positions listed in § 7401(3) are covered by § 7451 unless the Secretary excludes them.¹⁶

When resolving a contrary-to-law exception, the Authority reviews any question of law raised by the exception and the award de novo.¹⁷ Applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.¹⁸ In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.¹⁹

In support of its exception, the Agency asserts the plain language of § 7451 must be interpreted to mean that it "only applies to positions listed in § 7401(3) as the Secretary may determine" and, therefore, "the Secretary must affirmatively indicate whether any positions listed in § 7401(3) are covered."²⁰ We agree.

Section 7451(a)(2) states that the "health-care personnel positions" covered by its provisions are "(A) Registered nurse[;] (B) Physician assistant[; and] (C) Such positions referred to in paragraphs (1) and (3) of [§] 7401 of . . . [T]itle [38] (other than the positions of physician, optometrist, dentist, registered nurse, physician assistant, and podiatrist) as the Secretary may determine upon the recommendation of the Under Secretary for Health."²¹ Section 7401 authorizes the Secretary to appoint certain personnel "as the Secretary may find necessary for the health care of veterans," including "pharmacists" under § 7401(3).²²

Unlike the positions of registered nurse and physician assistant, which are unconditionally covered under § 7451 by operation of § 7451(a)(2)(A) and (B), respectively, the positions referenced in § 7451(a)(2)(C) –

⁹ *Id.* at 23 (quoting 38 U.S.C. § 7451(d)(3)); *see also id.* at 22, 25.

¹⁰ *Id.* at 25.

¹¹ *Id.* at 24.

¹² *Id.* at 25 (stating "As a result, [twenty-eight] pay periods elapsed between May 9, 2021, the first day of the first pay period after the statutory period ended on April 30, 2021, and May 22, 2022, when pay adjustments went into effect.").

¹³ *Id.* at 10 (quoting Art. 2); *see also id.* at 27 (finding the Agency violated Article 2 by failing to meet the timelines in § 7451).

¹⁴ *Id.* at 25.

¹⁵ Exceptions at 3-6.

¹⁶ *Id.* at 3-4.

¹⁷ *USDA, Food & Nutrition Serv.*, 73 FLRA 822, 825 (2024) (citing *U.S. Dep't of the Navy, Naval Med. Ctr. Camp Lejeune, Jacksonville, N.C.*, 73 FLRA 137, 140 (2022)).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Exceptions at 4-5.

²¹ 38 U.S.C. § 7451(a)(2)(A)-(C).

²² *Id.* § 7401(3).

specifically, positions referenced in § 7401(1) and (3), including pharmacists – are covered by § 7451 only to the extent as the Secretary may determine, upon the recommendation of the Under Secretary for Health.²³

As noted, the Arbitrator concluded that the pharmacist position was covered by § 7451 because both that provision and § 7455 reference § 7401(3), which lists pharmacists as a position the Secretary is authorized to appoint. However, this conclusion ignores the language in § 7451(a)(2)(C) expressly limiting § 7451's coverage of § 7401(3) positions to those positions which the Secretary has determined should be covered. As such, we find that the Arbitrator's conclusion is contrary to § 7451.²⁴

In reaching this conclusion, we reject the Arbitrator's rationale that the pharmacist position is covered under § 7451 because § 7451(a)(2)(C) and § 7455 contain "identical" provisions identifying, as covered positions, the positions referenced in § 7401(3). As noted, this interpretation fails to account for the limitations set forth in § 7451(a)(2)(C). Thus, these provisions are not identical, insofar as § 7455 does not contain the same qualifying language regarding § 7401(3) positions as is contained in § 7451(a)(2)(C).²⁵ Indeed, the absence of the qualifying language from § 7455 further supports the conclusion that Congress intended to limit § 7451's coverage of § 7401(3) positions to the Secretary's discretion.²⁶

As such, we conclude the Arbitrator erred by finding that the pharmacist position was covered by § 7451 despite the absence of an affirmative determination made

by the Secretary under § 7451(a)(2)(C).²⁷ Further, because the Arbitrator's finding that the Agency violated Article 2 is based on this error,²⁸ we also set aside that finding.

We grant the Agency's exception and set aside the award. Accordingly, we find it unnecessary to resolve the Agency's remaining exceptions.²⁹

IV. Decision

We set aside the award.

²³ See *id.* §§ 7451(a)(2)(A)-(C), 7401(1), (3).

²⁴ See, e.g., *U.S. DHS, U.S. CBP*, 66 FLRA 838, 843 (2012) (*CBP*) (Member DuBester dissenting in part) (finding award contrary to law where arbitrator's interpretation of statute disregarded certain requirements contained in the relevant statutory provision); *U.S. Dep't of the Interior, U.S. Park Police*, 64 FLRA 763, 767 (2010) (arbitral finding that employees were covered by particular statute contrary to law where statute excluded those employees from coverage).

²⁵ Compare 38 U.S.C. § 7451(a)(2)(C) (defining "covered positions" as "[s]uch positions referred to in [§ 7401(1) and (3)] . . . as the Secretary may determine upon the recommendation of the Under Secretary for Health"), with *id.* § 7455(a)(2)(A) (stating, without qualification, that the provision's pay rates apply to "[i]ndividuals employed in positions listed in [§ 7401(1) and (3)]").

²⁶ See *U.S. Dep't of VA, Veterans Health Admin.*, 64 FLRA 961, 965 (2010) (Member Beck dissenting in part on other grounds) (holding that "[t]he presence of express language" in certain Title 38 provisions "and the absence of such language" in another part of the statute "established that the exclusion . . . was intentional" (citing *EEOC*, 53 FLRA 465, 482-83 (1997))); *GSA*, 46 FLRA 494, 500 (1992) (*GSA*) (stating that "when Congress has intended to exclude certain types of remuneration from a pay statute it has done so with clarity" (quoting *Lanehart v. Horner*, 818 F.2d 1574, 1582 (Fed. Cir. 1987))).

²⁷ See *GSA*, 46 FLRA at 501 (finding award contrary to law where the arbitrator's interpretation of a statute was erroneous); see also *CBP*, 66 FLRA at 843 (granting contrary-to-law exception because the arbitrator's award was contrary to a statute); *U.S. DHS, Immigr. & Customs Enf't*, 66 FLRA 13, 16 (2011) (same).

²⁸ See Award at 27 (finding Agency violated Article 2 when it failed to act "in conformity with" § 7451).

²⁹ See Exceptions at 3-8 (arguing the award is based on a nonfact and violates management's rights); see, e.g., *U.S. Dep't of VA, Robley Rex Med. Ctr.*, 73 FLRA 468, 470 n.27 (2023) (finding it unnecessary to resolve remaining exceptions after setting aside award as contrary to law); *U.S. Dep't of VA, Zablocki VA Med. Ctr., Milwaukee, Wis.*, 66 FLRA 806, 808 n.6 (2012) (Member DuBester dissenting) (finding it unnecessary to address additional exceptions challenging portion of award that was set aside (citing *U.S. Dep't of Transp., FAA, Nashua, N.H.*, 65 FLRA 447, 450 n.3 (2011))).

Chairman Kiko, concurring:

In *U.S. Department of VA, John J. Pershing VA Medical Center, Poplar Bluff, Missouri*, I wrote that “advocates must do better at educating arbitrators about not only the law under the Federal Service Labor-Management Relations Statute . . . , but also the more mundane details of how the federal personnel machinery works.”¹ In this case, the Agency more than satisfied this responsibility by thoroughly briefing the Arbitrator about the statutory standards that apply to its employees’ compensation. For his part, the Arbitrator ignored the portion of those standards that was most important for resolving the parties’ dispute.

As explained in our decision, pharmacists are covered by 38 U.S.C. § 7451’s pay-setting provision only “*as the Secretary* [of Veteran Affairs (the Secretary)] *may determine* upon the recommendation of the Under Secretary for Health.”² When the Agency drew the Arbitrator’s attention to this crucial phrase, the Arbitrator dismissed its importance.³ He found that “the Secretary may determine [that pharmacists are covered by § 7451], but it does not require the Secretary to do so affirmatively.”⁴ Instead, the Arbitrator explicitly “shift[ed] the burden” to the Agency to show that § 7451 *did not* cover pharmacists.⁵ The Arbitrator effectively read the provision backwards, finding that § 7451 covered pharmacists unless the Secretary proved otherwise.

I agree with setting aside the award because the Agency has shown that it is clearly contrary to § 7451. I write separately merely to express my frustration that the Arbitrator’s basic interpretative error made an appeal in this matter necessary.

¹ 74 FLRA 163, 169 (2025) (Concurring Opinion of then-Member Kiko).

² Majority at 2 (alteration in Majority) (emphasis added) (quoting 38 U.S.C. § 7451(a)(2)(C)).

³ See Award at 22.

⁴ *Id.*

⁵ *Id.* (“The Agency has not presented evidence that pharmacists are not a covered position, and there is no evidence that the Secretary has excluded them.”).