DEPARTMENT OF VETERANS AFFAIRS
Office of the General Counsel
Washington DC 20420

June 29, 2007

In Reply Refer To:

Gail D. Reinhart
Director, Case Control Office
Federal Labor Relations Authority
Docket Room, Suite 201
1400 K Street, N.W.
Washington, D.C. 20424-0001

Re: American Federation of Government Employees, National Veterans Affairs Council, and United States Department of Veterans Affairs, Case No. 040422-53970-A

Dear Ms. Reinhart:

Enclosed please find the Agency's Exceptions to Arbitration Award in the above-captioned matter.

Respectfully submitted,

Gia M. Chemsian
Attorney for Agency

Enclosures:

Agency's Exceptions to Arbitration Award
Exhibit List
Exhibits A - I
Certificate of Service

CC:

Jacqueline M. Sims

IN THE MATTER OF

ARBITRATION BETWEEN

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL VETERANS AFFAIRS COUNCIL,	
Complainant,	**FMCS Case No. 040422-53970-A**
and	
DEPARTMENT OF VETERANS AFFAIRS,	**Arbitrator: Donald S. Wasserman Award Date: 5/30/2007**
Respondent.	

AGENCY'S EXCEPTIONS TO ARBITRATION AWARD

The Department of Veterans Affairs (hereinafter VA or Agency) files this exception to the May 30, 2007, arbitration decision of Arbitrator Donald S. Wasserman[1] on the grounds that the award is contrary to law and that the award fails to draw its essence from the collective bargaining agreement. More specifically, the Agency alleges:

1. that the subject award erroneously construes and fails to afford deference to the Agency's interpretation of a new Title 38 compensation statute, 38 U.S.C. § 7454(b)(3), as required by *Chevron v. NRDC*, 467 U.S. 837 (1984); *Dept. of the Interior, National Park Service, Pictured Rocks National Lakeshore, Munising, MI and NFFE Local 2192*, 61 FLRA 404, 61 FLRA No. 74 (2005); and related cases; and,

2. that the award imposes upon the Agency an obligation of pre-decisional consultation with the Union above and beyond any such obligation provided for in the parties' agreement.

FACTUAL BACKGROUND AND SUMMARY OF THE AWARD

This case involves a grievance filed by AFGE over VA's interpretation of a new Federal statute authorizing Saturday premium pay for some VA employees.

[1] Arbitrator Wasserman's business address is care of AIL, 1000 Connecticut Avenue, NW, Suite 1106, Washington, DC 20036.

The new statute – Section 303 of Public Law 108-170, *Additional Pay for Saturday Tours of Duty for Additional Health Care Workers in the Veterans Health Administration* (hereinafter Section 7454(b)(3) or the new statute) – amended 38 U.S.C. § 7454 to extend Title 38 Saturday premium pay to "[e]mployees appointed under section 7408" of Title 38.[2]

The new statute is ambiguous on its face, both because no employees are appointed under 38 U.S.C. § 7408 and because that statute refers, in its two subsections, to markedly different groups of people. Subsection 7408(a) broadly and generally clarifies VA's authority to use the Title 5 civil service appointment authorities to staff Veterans Health Administration (VHA) facilities, stating that "[t]here shall be appointed by the [VA] Secretary *under civil service laws, rules, and regulations*,[3] such additional employees ... as may be necessary to carry out the provisions of this chapter." By contrast, subsection 7408(b) affords VA a specific and narrow compensation enhancement authority, allowing the Secretary to set pay above the minimum rate for the appropriate grade for newly-appointed employees in VHA positions "providing direct patient-care services or services incident to direct patient [care] services." Given the differences in scope between these two subsections, the new statute's reference to "employees appointed under section 7408" is inherently ambiguous. In light of that ambiguity, and consistent with the legislative history of the new statute and related provisions of Title 38, VA interpreted the new statute to authorize additional pay for VHA's General Schedule (GS) employees who provide direct patient-care services, or services incident to direct patient-care services, on Saturdays, and implemented that interpretation in a personnel regulation listing the positions that would be subject to the new Saturday pay authority.[4]

On January 30, 2004, the Union filed a national grievance asserting that VA's interpretation of the new statute was too narrow and that all of VHA's GS and Federal Wage System (FWS) workers should receive Saturday premium pay under the new law, even those who are not involved in direct patient care. In its response to the grievance, the Agency explained that its interpretation of the new statute was consistent with the statute's legislative history and with related provisions of Title 38.[5] At the arbitration hearing in the matter, the Union conceded that the new statute did apply only to employees in positions providing direct patient-care services or services incident to direct patient care, not to all Title 5 VHA employees. However, the Union argued that VA had defined such positions too narrowly and had erred in excluding FWS employees from the new statute's scope. VA argued that the new statute was inherently ambiguous; that its interpretation of the statute was reasonable; and that its interpretation

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[2] For ease of reference, copies of Public Law 108-170 and of the newly-amended 38 U.S.C. § 7454 are attached as Exhibits A and B, respectively.

[3] Emphasis added.

[4] The personnel regulation, codified in VA Directive and Handbook 5007, Part V, Chapter 6, Paragraph 3, is attached as Exhibit C.

[5] The Agency's position in this regard is explained *infra* at pages 5 – 8.

therefore was entitled to deference under the U.S. Supreme Court's ruling in Chevron v. NRDC, 467 U.S. 837 (1984), and related cases.[6]

In a decision and award issued on February 16, 2005 (the February 2005 decision)[7], Arbitrator Wasserman determined the following:

1. that "38 U.S.C. § 7408 is an appointment authority and employees are appointed under this section" (February 2005 Decision, p. 20);

2. that "the new law [Public Law 108-170, Section 303, amending 38 U.S.C. § 7454(b)(3)] is not ambiguous [because] Section 7408 [sic] expresses the intent of Congress in clear and unambiguous language," and that "VA is therefore not entitled to Chevron deference" (*id.*);

3. that the new statute required VA to extend Title 38 Saturday premium pay to all employees who "provide direct patient care-services or services incident to direct patient-care services" (*id.*); and

4. that Congress did not exclude FWS employees from the coverage of the new statute, but in fact intended "to include them similarly to GS employees, provided ... that they are involved in patient care" (*id.*).

Arbitrator Wasserman further stated in the February 2005 decision that he could not determine from the record whether VA had properly determined which GS employees were eligible for Saturday premium pay under the new statute. (*Id.* at 21.) The Arbitrator ordered the Agency to reconstruct its implementation process using a written methodology and to carefully review all GS and FWS positions to determine which positions provide direct patient-care services or services incident to direct patient-care services. (*Id.*) To develop a definition of "direct patient-care services or services incident to direct patient-care services" – which phrase does not appear in the new statute but did appear in section 7408(b) – the Arbitrator "urged [VA] to seek appropriate assistance from, and formally consult with, OPM," and further stated that "VA may also find it beneficial to consult with other organizations or entities, perhaps even AFGE." (*Id.*)

Upon receiving Arbitrator Wasserman's initial decision, VA proceeded to reconstruct its implementation process. To do so, VA prepared a written methodology and sent letters to the Office of Personnel Management (OPM), the Department of Defense (DOD), and the Department of Health & Human Services (HHS) inquiring as to how those agencies interpreted the phrase "direct patient care services or services incident to direct patient-care services" in 5 U.S.C. § 5371, which Congress had enacted in 1990 to extend to OPM (and, by

[6] The Agency's Pre- and Post-Arbitration Briefs are attached hereto as Exhibit D.
[7] The February 2005 decision is attached hereto as Exhibit E.

delegation, from OPM to other Federal agencies) certain Title 38 compensation authorities that had previously been afforded to VA. Both DOD and OPM responded that they had not defined that term, while HHS provided its working definition to VA. The Agency also requested AFGE's input. Based on the information received from HHS, on related Medicare billing information, and on VA's own prior interpretation of related Title 38 compensation authorities, the Agency defined "direct patient care services or services incident to direct patient care services" to mean:

1. Clinical care services to patients such as diagnosis, treatment, prevention, follow-up, patient counseling, etc.;

2. Medical support of health care delivery to patients; and/or

3. Health care administration of the services described in 1 and 2 above.[8]

Having so defined the eligibility term, VA determined that 38 U.S.C. § 7454(b)(3)'s authorization of Title 38 Saturday premium pay for "[e]mployees appointed under section 7408 of this title" applies to VHA's GS employees in positions that provide services within the definition. VA again determined that FWS employees were excluded from the new statute's coverage, both because no Title 38 compensation statute has ever applied to wage grade employees and because the Senate Veterans Affairs Committee, which introduced the new statute, lacks jurisdiction to enact legislation pertaining to FWS employees without the involvement and approval of the Senate Government Affairs Committee.[9] Applying the clarified definition of "direct patient care services or services incident to direct patient care services" to each of VHA's GS occupations, VA determined that 635 of those occupations were covered by the new statute and 863 occupations were not. VA communicated the results of its re-implementation process to AFGE in a letter dated February 16, 2006; AFGE challenged that re-implementation in a March 2, 2006, letter to Arbitrator Wasserman, asserting that VA had failed to comply with the Arbitrator's February 16, 2005 decision.

On May 30, 2007, the Arbitrator issued a supplemental Decision and Award (the May 2007 decision)[10] declaring VA's re-implementation process to be non-compliant with his February 2005 decision. More specifically, the Arbitrator ordered as follows:

1. VA "shall not use the 'definition' of 'the term' that it wrote specifically for this case" but must use the definition of "incident"

[8] See November 25, 2006, letter from R. Allen Pittman to Alma Lee (attached hereto as Exhibit F), quoted in Arbitrator Wasserman's May 30, 2007, decision at p. 2.
[9] See discussion of Congressional committee jurisdiction at pages 12-13 below.
[10] The May 2007 decision is attached hereto as Exhibit G.

found in Black's Law Dictionary, Sixth Edition, 1991, and/or Webster's Third New International Dictionary (1964).[11]

2. VA "must also assure that wage grade or wage board employees are treated as [the statute] intended, rather than being declared ineligible en bloc."

3. "The union must be involved on a pre-decisional basis throughout the [re-interpretation] process, on all determinations including those on inclusion/exclusion [of specific occupations from the statute's coverage]. The parties are encouraged to discuss whether it would be beneficial to invite outside assistance in their deliberations, either governmental or private."[12]

In support of the third component of his award, Arbitrator Wasserman cited Articles 3 (Partnership), 4 (Labor-Management Training), 5 (Labor-Management Committee), 6 (Alternative Dispute Resolution), 7 (Total Quality Improvement), and 46 (Rights and Responsibilities) of the VA-AFGE Master agreement for the proposition that VA was obligated to involve AFGE pre-decisionally in the Agency's determination of 38 U.S.C. § 7454(b)(3)'s meaning and scope.

STATEMENT OF ISSUES PRESENTED

(1) whether, as a matter of law, VA's interpretation of 38 U.S.C. § 7454(b)(3) is entitled to deference;

(2) whether Arbitrator Wasserman's May 2007 award failed to afford VA's interpretation of the new statute the required deference;

(3) whether Arbitrator Wasserman's interpretation of 38 U.S.C. § 7454(b)(3) is erroneous; and,

(4) whether Arbitrator Wasserman unreasonably interpreted Articles 3, 4, 5, 6, 7 and 46, of the VA-AFGE Master agreement to require VA to engage in pre-decisional consultation and/or alternative dispute resolution with AFGE in this case.

STATUTORY BACKGROUND

A. VHA and the Title 38 Personnel System

Congress created the separate Title 38 personnel system for VHA (then called the Department of Medicine and Surgery (DM&S)) in 1946, when it became clear that the general civil service rules were unworkable for a

[11] The May 2007 decision and award, pp. 12, 20 (attached as Exhibit G hereto).
[12] Id. at 20-21.

professional medical corps of the size and scope necessary to care for the flood of wounded soldiers coming home from WWII. Over the years, the Title 38 personnel system has evolved to include various categories of personnel: doctors, nurses and others appointed under 38 U.S.C. § 7401(1) and compensated entirely under the provisions of Title 38, Chapter 74; so-called "hybrid" employees, health care professionals in specified occupations appointed under 38 U.S.C. § 7401(3) and compensated partly under Title 38 and partly under Title 5; and Title 5 employees, who are appointed and, for the most part, compensated under Title 5.

B. Title 5 "Additional Employees" Within VHA

Congress authorized VHA to employ Title 5 personnel – that is, general civil service employees – from the inception of the Title 38 system. In 1946, Congress enacted a statutory provision, now section 7408(a) of Title 38, which 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 this title and those specified in sections 7405 and 7406 of this title, as may be necessary to carry out the provisions of this chapter [38 USCS §§ 7401 et seq.].

38 U.S.C. § 7408(a). Both the language and the legislative history of this provision make it clear that what is now section 7408(a) is not an appointment authority, as VHA's Title 5 workers are now, and were in 1946, appointed under the Title 5 "civil service laws, rules and regulations," not under section 7408(a). Rather, in enacting what is now section 7408(a), Congress merely clarified that not all employees included within the VHA personnel system were to receive Title 38 appointments. *See* U.S. Code Congressional Service, 79th Cong. (1st Sess.), Ch. 658 – Pub. Law 293, pp. 655 and 958 (explaining text of P.L. 293, Sec. 11 [predecessor to 38 U.S.C. § 7408(a)] to mean that "additional employees [other than DM&S administrators, medical professionals, and employees with other than full-time permanent for-compensation appointments] ... shall receive original appointments to the DM&S in their present civil-service status.") In simplest terms, section 7408(a) authorizes VHA to make civil service appointments, but those appointments are made under the Title 5 civil service rules, not under 38 U.S.C. § 7408(a).[13]

[13] Nor are any employees appointed under section 7408's other segment, section 7408(b). As is discussed at length at pages 6-7 below, section 7408(b) authorizes the VA Secretary to make Title 5 appointments at a rate of pay above the minimum rate of the appropriate grade on the General Schedule for Title 5 employees providing direct patient care services or services incident thereto. This provision merely authorizes the higher pay, however, not the appointments; those are made under Title 5. What is more, sections 7408(a) and 7408(b) describe two very different groups of employees: 7408(a) covers all Title 5 workers employed by VHA, while 7408(b) applies only to employees involved in direct patient care. As a result, even if one – or both – subsections of 7408 were properly viewed as an appointment authority, Section 7454(b)(3)'s reference to

C. The Title 38 Compensation Scheme

The Title 38 personnel statutes (38 U.S.C. §§ 7401 through 7464) afford the Secretary of Veterans Affairs great flexibility in appointing, promoting, and compensating VHA's medical professionals. As noted above, Congress created this statutory scheme in 1946 to empower the Secretary to recruit and retain the best doctors and nurses available to provide care for returning WWII veterans. Since that time, Congress has expanded many of the Secretary's compensation authorities so that VA doctors' and nurses' pay might remain competitive with the salaries offered to private sector medical professionals. Thus, VA has authority to pay its doctors and nurses recruitment and relocation bonuses (38 U.S.C. §§ 7410, 7458); to set the compensation of physicians and dentists at competitive market rates (38 U.S.C. § 7431); to adjust the basic pay of doctors, nurses, and others as necessary to allow VHA facilities to remain competitive in their respective labor market areas (38 U.S.C. §§ 7451, 7452, 7455); and to pay a premium to nurses who work nights, weekends, holidays or overtime or are on call (38 U.S.C. § 7453).

D. Statutory Provisions Extending Title 38 Compensation to Title 5 Workers

Over the past several decades, Congress has extended some of the Title 38 compensation authorities to allow VHA to remain competitive in recruiting and retaining health care workers appointed under Title 5. Numerically, the first such extension comes in 38 U.S.C. § 7408(b), which provides that the Secretary may enhance the compensation of a Title 5 employee "providing direct patient-care services or services incident to direct patient-care services" by appointing such employee "at a rate of pay above the minimum rate of the appropriate grade." The complete text of 38 U.S.C. § 7408(b) reads:

> 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-care services at a rate of pay above the minimum rate of the appropriate grade.

The pivotal phrase in section 7408(b) – "direct patient care services or services incident to direct patient care services" – has defined eligibility for enhanced compensation under that statute since 1983. [14] The same phrase exists in 38 U.S.C. § 7455(a)(2)(B)(iii), which authorizes the VA Secretary to increase basic pay for VHA employees in positions that "are determined by the Secretary to be providing either direct patient-care services or services incident to direct patient-care services" and has been part of VA's Title 38 personnel statutes since at least 1982. While Arbitrator Wasserman focused in his two awards on the same

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"employees appointed under section 7408" would still be ambiguous because it fails to distinguish between the larger group governed by 7408(a) and the smaller group covered by 7408(b).

[14] See Public Law 98-160.

phrase in a Title 5 compensation statute, 5 U.S.C. § 5371, which authorizes OPM to extend VA's Title 38 personnel authorities to GS employees in positions to which Chapter 51 of Title 5 applies and which provide "direct patient-care services or services incident to direct patient-care services," the OPM authority was not enacted until 1990, years after the same phrase appeared in VA's compensation statutes.

All of these provisions – 38 USC 7408(b), 38 USC 7455, and 5 USC 5371 – authorize the extension of Title 38 compensation to Title 5 employees only when the recipients provide direct patient care services or services incident to direct patient care. What is more, all of these provisions apply only to GS employees, not to FWS employees. 5 USC 5371 does not apply to FWS employees because subsection 5371(c) of that statute limits its application to employees covered by chapter 51 of Title 5, and FWS employees are not covered by that chapter. 38 USC 7455 does not apply to FWS employees because subsection 7455(a)(2)(B)(ii) provides that the compensation enhancement authority in subsection (a)(1) only applies to GS employees. Although 38 USC 7408(b) does not expressly limit its application to GS employees, VA has interpreted that provision since its enactment in 1983 to apply only to GS occupations because the FWS occupations -- electrician, plumber, machinist, boilermaker, etc. – are inherently unrelated to direct patient care, and also because section 7408(b) originated in the House Veterans Affairs Committee, which has jurisdiction only over VA's Title 38 and GS health care employees, not the Agency's wage grade personnel.

It is against this larger statutory scheme, and consistent with it, that VA interpreted the new compensation authority afforded to it by 38 USC 7454(b)(3).

ARGUMENT

A. VA's Interpretation of 38 U.S.C. § 7454(b)(3) is Entitled to Deference as a Matter of Law.

1. Congress' intent is unclear from the wording of section 7454(b)(3).

The wording of the section 7454(b)(3) – "Employees appointed under section 7408 of this title shall be entitled to additional pay on the same basis as provided for nurses in section 7453(c) of this title" -- is simple, but inherently unclear. The inherent ambiguity arises out of the fact that no employees are appointed under section 7408 of Title 38.

Chapter 74 of Title 38 is entitled "Veterans Health Administration – Personnel." Section 7408, entitled "Appointment of additional employees," provides, in subsection (a) 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." As is noted above, both the language of this section and its legislative history make clear that the

"additional employees" contemplated by section 7408(a) are appointed under Title 5. Congress enacted what is now section 7408(a) in 1946 simply to afford the VA Secretary administrative authority over general civil service employees, as well as specialized Title 38 medical professionals, in the then-newly created Veterans Health Administration. *See* U.S. Code Congressional Service, 79th Cong. (1st Sess.), Ch. 658 – Pub. Law 293, pp. 655 and 958 (explaining predecessor to 38 U.S.C. § 7408(a) to mean that "additional employees ... shall receive original appointments to the DM&*S in their present civil-service status*" (emphasis added)).[15]

As noted above, Subsection 7408(b) -- a compensation enhancement that was added to what is now 7408(a) in 1983 -- broadens the administrative authority provided in the original statute, but again does not provide for the appointment of any personnel. Subsection 7408(b), on its face, reads more like an appointment authority than does subsection 7408(a), providing that "[t]he Secretary ... may appoint [an "additional employee"] to a position in the Administration providing direct patient-care services or service incident to direct patient-care services at a rate of pay above the minimum rate of the appropriate grade." However, as with subsection 7408(a), the appointments contemplated by section 7408(b) are actually made under Title 5; section 7408(b) authorizes only the compensation enhancement. Thus, there are no employees "appointed under" either 7408(a) or 7408(b).

It must also be noted that subsections 7408(a) and 7408(b) differ significantly in their scope. While 7408(a) refers broadly to all of the Title 5 occupations that may be necessary to carry out the work of the Veterans Health Administration, 7408(b) refers more narrowly only to those Title 5 employees who provide direct patient care services or services incident thereto. This discrepancy between the two provisions only heightens the ambiguity in section 7454(b)(3), which purports to extend Title 38 Saturday premium pay to "[e]mployees appointed under section 7408 of this title" – without distinguishing between the broader group of employees covered subsection 7408(a) and the more limited group covered by subsection 7408(b). It is thus inherently unclear from the wording of the statute what Congress intended the scope of the new Saturday premium pay authority to be.

2. Because Congress' intent is unclear from the wording of 38 U.S.C. § 7454(b)(3), VA is responsible for interpreting and applying that statute.

In *Chevron v. NRDC*, 467 U.S. 837 (1984), and related cases, the U.S. Supreme Court has consistently held that "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." *National Cable & Telecommunications Assoc. v. Brand X Internet Services*, 545 U.S. 967, 980, 125 S. Ct. 2688 (2005). If a statute is ambiguous, and if the implementing agency's construction is

[15] As noted above, this legislative history material accompanies this brief as Exhibit E.

reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation. *Chevron*, supra, 467 U.S. at 843-844 & n. 11; *National Cable*, supra, 545 U.S. at 980. Similarly, an arbitrator must defer to an agency's reasonable construction of a provision of its authorizing statute. *Dept. of the Interior, National Park Service, Pictured Rocks National Lakeshore, Munising, MI and NFFE Local 2192*, 61 FLRA 404, 61 FLRA No. 74 (2005); *See GSA v. FLRA*, 86 F.3d 1185, 1187 (D.C. Cir. 1996) (holding FLRA "must grant an agency the same deference to its interpretation of an authorizing statute that we would"). An agency's interpretation is reasonable if "neither the plain language of the statute, nor the holding of any court, nor any unexplained change in agency precedent prohibit the Department's interpretation." *See SABRE, Inc. v. DOT*, 429 F.3d 1113 (D.C. Cir. 2005), *citing Pennsylvania Dep't of Corrections v. Yeskey,* 524 U.S. 206, 212, 118 S. Ct. 1952, 141 L. Ed. 2d 215 (1998); *Chevron,* 467 U.S. at 843-44; and *Barnhart v. Walton,* 535 U.S. 212, 220, 122 S. Ct. 1265, 152 L. Ed. 2d 330 (2000).

3. VA's interpretation of the new statute is permissible, and Arbitrator Wasserman's refusal to defer to VA's interpretation was contrary to law.

(a) VA's definition of "direct patient care services or services incident to direct patient care services" is reasonable.

VA has interpreted 38 U.S.C. § 7454(b)(3) to apply only to VHA's Title 5 employees who provide direct patient care services or services incident to direct patient care services. This interpretation was consistent with the legislative history of the new statute[16] and with VA's interpretation of other Title 38 statutes in which the same eligibility phrase appears.[17] In response to Arbitrator Wasserman's February 2005 award ordering VA to re-construct its interpretation

[16] As noted above, Section 7454(b)(3) was enacted as part of a larger law, Public Law 108-170, entitled "The Veterans Health Care, Capital Asset, and Business Improvement Act of 2003." Within that larger law, what is now section 7454(b)(3) was Section 303, entitled "Additional pay for Saturday tours of duty for additional health care workers in the Veterans Health Administration." What is more, the new law did not create a new statute, but simply amended the pre-existing 38 U.S.C.§ 7454 – entitled "Physician Assistants and other health care professionals: additional pay – within the subchapter of Title 38 (Chapter 71, Subchapter IV) entitled "Pay for Nurses and Other Health-Care Personnel." From a legal perspective, these chapter and section headings are useful "tools available for the resolution of a doubt" about the meaning of a statute. *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-29 (1947); see also *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991).

[17] The law requires that statutory provisions be interpreted not in isolation, but in the context of the larger statutory scheme of which they are a part. "[I]f divers[e] statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them . . . . If a thing contained in a subsequent statute, be within the reason of a former statute, it shall be taken to be within the meaning of that statute.' . . . That is to say, the meaning of [one provision within a statutory scheme] sheds light upon the meaning of [another statute within the same scheme]." *Branch v. Smith*, 538 U.S. 254, 281 (2003), *quoting United States v. Freeman*, 44 U.S. 556 (1845).

process and provide a written methodology, VA defined "direct patient-care services or services incident to direct patient-care services" as follows:

> Positions that provide direct patient-care services or services incident to direct patient-care services are those that provide/perform:
>
> 1. Clinical care services to patients such as diagnosis, treatment, prevention, follow-up, patient counseling, etc.,
> 2. Medical support of health care delivery to patients, and/or
> 3. Health care administration of the services described in 1 and 2 above.[18]

This definition does not conflict with the plain language of either 38 U.S.C. § 7454(b)(3) or 7408(b). It is not prohibited by any court holding. It is consistent with VA's prior interpretations of section 7408(b) and of the same phrase in other Title 38 statutes. It is even consistent with OPM's interpretation of 5 U.S.C. § 5371, not that *Chevron* or its progeny require that an agency interpret its own enabling statutes consistently with later-enacted statutes of another agency. *Chevron* and related cases clearly establish that where there is an explicit or implicit delegation to an agency on a particular question, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S., at 844, 104 S. Ct. 2778, 81 L. Ed. 2d 694. Moreover, ". . . the agency remains the authoritative interpreter (within the limits of reason) of [ambiguous] statutes." *National Cable & Telecommunications Assoc.*, 545 U.S. at 983, 125 S. Ct. 2688 (2005). Therefore, because VA's definition of "direct patient-care services or services incident to direct patient-care services" was reasonable, Arbitrator Wasserman was precluded from supplanting VA's construction with his own alternative construction. *Id.* at 843-844, and n 11. As a result, VA's interpretation of section 7454(b)(3) to authorize Title 38 Saturday premium pay for employees whose positions met this definition was entitled to deference. Arbitrator Wasserman's order that VA not use this definition and that VA involve AFGE "on a pre-decisional basis throughout the process"[19] of re-defining and applying the eligibility term is contrary to law.

Even assuming, *arguendo,* that Arbitrator Wasserman could replace VA's statutory construction of section 7454(b)(3) with his own interpretation based on the definition of "incident to" found in Black's Law and Webster's Dictionaries, and 5 U.S.C. § 5371, his determination that section 7454(b)(3) "clearly" and "unambiguously" required VA to extend Title 38 Saturday premium pay to all employees who "provide direct patient care-services or services incident to direct

[18]Letter of November 25, 2005 from R. Allen Pittman to Alma Lee (attached as Exhibit F hereto).
[19] The May 2007 decision and award, page 20 (attached as Exhibit G hereto).

patient-care services" was unreasonable. As discussed *supra* in Section A.1, even though section 7454(b)(3) states that "[e]mployees appointed under section 7408 of this title shall be entitled to additional pay," no employees are actually appointed under section 7408 of Title 38 and FWS and GS employees are appointed under Title 5. In addition, FWS employees are not covered by 38 U.S.C. § 7454(b)(3) because they have never been covered by a Title 38 compensation statute. Further, the Senate Veterans Affairs Committee could not have enacted legislation pertaining to FWS employees without the involvement or approval of the Senate Government Affairs Committee, discussed *infra*, which did not occur. Also, Arbitrator Wasserman's overbroad construction of the term "incident to" would allow for almost any hospital employee to be eligible for Saturday premium pay.[20] As such, Arbitrator Wasserman's construction was still unreasonable.

(b) VA's interpretation of the new statute to apply only to GS employees, not FWS employees, is also reasonable and, thus controlling.

As noted above, none of the Title 38 compensation authorities has ever been applicable to FWS employees. For this reason[21], and as a result of the new statute's legislative history, VA interpreted 38 U.S.C. § 7454(b)(3) to apply only to GS employees, not to wage grade employees.

The new statute originated (as S. 1156, amended by S. Amdt. 2203) in the Senate Veterans Affairs Committee (SVAC), which – like all Congressional committees – has limited subject matter jurisdiction. SVAC has jurisdiction over the following matters: (1) Compensation of veterans; (2) Life insurance issued by the Government on account of service in the Armed Forces; (3) National cemeteries; (4) Pensions of all wars of the United States, general and special; (5) Readjustment of servicemen to civil life; (6) Soldiers' and sailors' civil relief; (7) Veterans' hospitals, medical care and treatment of veterans; (8) Veterans' measures generally; and, (9) Vocational rehabilitation and education of veterans. *Standing Rules of the Senate*, Rule XXV, Section 1.(p). Although the House (HVAC) and Senate Veterans Affairs Committees have the power to act on legislation pertaining to VA's benefits and health care systems – including bills impacting VA health care workers – legislation impacting VA employees *beyond* the health care arena falls outside HVAC's and SVAC's jurisdiction and must be acted on by the Senate Governmental Affairs Committee (SGAC) and/or the House Committee on Government Reform (HCGR). In contrast, SGAC has jurisdiction over the following matters: (1) Archives of the United States; (2)

[20] The May 2007 decision and award, page 11-12, states: "Your arbitrator readily acknowledges that he was not immune from thinking about this case when he read about the horror stories...at Walter Reed Hospital in Washington, D.C....This is not intended as a criticism of VA's concern for veterans' healthcare. Rather it demonstrates the direct connection between patient' (veterans) health care and the work of employees in positions who may be somewhat removed from "direct patient-care services." A failure by employees who provide "services incident to direct patient-care services," the so-called support people...." (attached as Exhibit G hereto).

[21] See footnote 17 above.

Budget and accounting measures, other than appropriations, except as provided in the Congressional Budget Act of 1974; (3) Census and collection of statistics, including economic and social statistics; (4) Congressional organization, except for any part of the matter that amends the rules or orders of the Senate; (5) Federal Civil Service; (6) Government information; (7) Intergovernmental relations; (8) Municipal affairs of the District of Columbia, except appropriations therefore; (9) Organization and management of United States nuclear export policy; (10) Organization and reorganization of the executive branch of the Government; (11) Postal Service; and, (12) Status of officers and employees of the United States, including their classification, compensation, and benefits. *Standing Rules of the Senate*, Rule XXV, Section 1.(k). Thus, while SGAC has jurisdiction over legislation pertaining to Federal Civil Service, SVAC has jurisdiction over legislation pertaining to "veterans' hospitals, medical care and treatment of veterans) *Standing Rules of the Senate*, Rule XXV, Sections 1.(k)(5) and 1.(p)(7). Further, while HCGR has jurisdiction over legislation pertaining to "Federal civil service, including intergovernmental personnel; and the status of officers and employees of the United States, including their compensation, classification, and retirement", HVAC has jurisdiction over "veterans' hospitals, medical care, and treatment of veterans"). *Rules of the House of Representatives* (108th Congress), Rule X, Sections 1.(h)(1) and 1.(r)(8). [22]

In light of section 7454(b)(3)'s committee of origin – and that committee's limited jurisdiction – VA interpreted section 7454(b)(3) to apply only to those employees over whom SVAC has jurisdiction – that is, to employees providing health care services or services incident thereto. Neither the plain language of section 7454(b)(3), nor any court decision, nor any Agency precedent prohibits this interpretation. As a result, the Agency's interpretation was entitled to deference under *Chevron*, *National Cable, SABRE,* and related cases, and Arbitrator Wasserman's refusal to defer to that interpretation was contrary to law.

The VA Secretary's Title 38 regulations are legislative regulations that have the full force and effect of law. "Congress intended that the VA [Secretary] determine the content of those regulations", and that the Secretary's authority be "exclusive" and "unhampered by the range of federal personnel statutes and regulations that might otherwise constrain his authority". *Colorado Nurses Ass'n v. FLRA*, 851 F.2d 1486, 1489 (D.C. Cir. 1988); *Urie v. Thompson*, 337 U.S. 163, 191 (1949); *United States v. Penn Foundry and Manufacturing Co.*, 337 U.S. 198, 216 (1949) (concurring opinion); *2 Davis, Administrative Law Treatise* § 7.8 (2d ed. 1979) and Supplement (1989), "The Distinction Between Interpretative Rules and Legislative Rules: Current Law." *See* 36 Op. Att'y Gen. 456 (1931) (VA insurance regulations promulgated by VA Administrator pursuant to Congressional directive have force and effect of law). 38 U.S.C. Section 7454(b)(1) states that "[w]hen the Secretary determines it to be necessary...the

[22] For ease of reference, copies of the pertinent sections of the House and Senate Rules accompany this brief as Exhibit I.

Secretary may, on a nationwide, local, or other geographic basis, pay persons employed in such positions additional pay...." Similarly, 38 U.S.C. Section 7454(c) directs the Secretary to "prescribe by regulation standards for compensation and payment under this section." Therefore, the regulations and VA Directives regarding Saturday premium pay are not merely authorized by Congress, they are mandated by the statutory directive that the Secretary "shall prescribe" them. 38 U.S.C. § 7454(c). As a result, OPM lacks the legal authority to authorize Saturday premium pay for Title 38 employees covered by 38 U.S.C. § 7454 and Arbitrator Wasserman lacks the authority to require VA to abide by OPM's interpretation of 5 U.S.C. § 5371.

B. The Arbitrator's Award Fails to Draw Its Essence from the Parties' Collective Bargaining Agreement.

Section 5 of the arbitrator's award fails to draw its essence from the agreement because it is not in any rational way derived from the agreement. "For an award to be deficient as failing to draw its essence from the collective bargaining agreement, it must be established 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 agreement as to manifest an infidelity to the obligation of an arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement." *Dept. of Justice, Bureau of Prisons, Guaynabo PR*, 58 FLRA 553, 553 (2003). In his May 2007 decision and award, Arbitrator Wasserman ordered VA to "involve[AFGE] on a pre-decisional basis throughout the process [of re-defining "direct patient care services or services incident to direct patient care services" and implementing the new definition], on all determinations including those on inclusion/exclusion."[23] In this section of the award, Arbitrator Wasserman referred to a number of provisions of the parties' 1997 collective bargaining agreement -- Articles 3, 4, 5, 6, 7 and 46 – which do provide for pre-decisional consultation between VA and AFGE. Article 3 provides that "[m]anagement and Labor shall be committed to work at all appropriate levels to establish and improve effective Partnerships...[and be guided by the principle of] pre-decisional involvement..."[24] Article 4 provides that "each field facility will have a joint LMR training program" with "equal representation between labor and management" and that "decisions will be made by consensus consistent with interest-based bargaining principles."[25] Article 5 states that "[t]here shall be a joint Labor-Management Relations Committee" that will meet biannually.[26] Article 6 states that "[a]ny ADR process must be jointly designed by Union and Management", that "ADR shall be a process available to Partnerships", and that "[t]he parties at all levels shall jointly adopt an ADR problem-solving method that

[23] The May 2007 decision and award, page 21 (attached hereto as Exhibit G).
[24] Article 3 "Partnership", Section 2 "Principles", of the VA and AFGE Master collective bargaining agreement (attached hereto as Exhibit J).
[25] Article 4 "Labor Management Training", Section 3 "Joint Labor Management Training", of the VA and AFGE Master collective bargaining agreement (attached hereto as Exhibit K).
[26] Article 5 "Labor Management Committee", of the VA and AFGE Master collective bargaining agreement (attached hereto as Exhibit L).

will include mutually agreed upon third parties." [27] Article 7 states the parties should "strive for open communication, developing teamwork, sharing of information, integration and acceptance of the Union/Management role" with regard to Total Quality Improvement."[28] And, Section 46 states "The parties recognize that a new relationship between the Union and the Department as full partners is essential for reforming the Department into an organization that works more efficiently and effectively and better serves customer needs, employees, Union representatives, and managers."[29] However, each of those Articles is limited to the particular subject matter described within the Article.

The concept of pre-decisional involvement derives from the now rescinded Executive Order 12871, which established The National Partnership Council and required Federal agencies to form labor-management partnerships for management purposes. *Exec. Order No.* 12871 (1993)(revoked by *Exec. Order No.* 13203 (2001). Previously, the Authority held that VA was not required to abide by an Article term adopted pursuant to Executive Order 12871, where the language of the Article stated the following: "In the event Executive Order 12871 is rescinded...either party may reopen this Article....However, agreements reached during the effective term of this Master Agreement will remain in effect unless changes are negotiated." *US Department of Veterans Affairs Consolidated Mail Outpatient Pharmacy Leavenworth, Kansas v. AFGE AFL-CIO, Local 85*, 60 F.L.R.A. 844, 849 (FLRA 2005). The Authority determined that because nothing in the Article expressly required mutual assent by the parties, it was reasonable for VA to interpret the Article to allow it to initiate bargaining on the MOUs. *See id.* at 850 ("Where the meaning of a particular agreement term is unclear and a party acts in accordance with a reasonable interpretation of that term, that action will not constitute a clear and patent breach of the terms of the agreement.") The authority also noted that the Administrative Law Judge failed to evaluate the plain meaning of the provision, which indicated that the parties' existing agreements could be modified during the term of the master agreement. *Id.* Similarly, it was reasonable for VA not to engage in pre-decisional consultation with AFGE because a plain reading of the parties' Master collective bargaining agreement reveals no express requirement of pre-decisional consultation with AFGE in the context of VA's interpretation of an ambiguous provision of its authorizing statute. Moreover, as noted *supra*, VA did invite and consider input from AFGE. As highlighted by R. Allen Pittman in his letter to Alma Lee, dated November 25, 2006, "AFGE will be given the opportunity to comment on the reconstructed list of covered positions prior to implementation."[30]

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[27] Article 6 "Alternative Dispute Resolution", Section 2 "Definitions and Intentions" and Section 4 "Implementation" of the VA and AFGE Master collective bargaining agreement (attached hereto as Exhibit M).

[28] Article 7 "Total Quality Improvement", Section 2 "General", of the VA and AFGE Master collective bargaining agreement (attached hereto as Exhibit N).

[29] Article 46 "Rights and Responsibilities", Section 1 "Introduction", of the VA and AFGE Master collective bargaining agreement (attached hereto as Exhibit O).

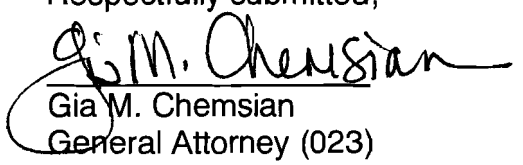
[30] November 25, 2006, letter from R. Allen Pittman to Alma Lee (attached hereto as Exhibit F)

Arbitrator Wasserman's May 30, 2007, order requiring VA to involve AFGE on a pre-decisional basis regarding its new definition of "direct patient care services or services incident to direct patient care services" was clearly an attempt to dispense his "own brand of industrial justice." *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S. Ct. 1358 (1960) (when an arbitrator strays from interpretation and application of the agreement and effectively "dispenses his own brand of industrial justice", the arbitrator's decision may be unenforceable); *see also United States Dep't of the Navy, Naval Sea Logistics Center, Detachment Atlantic, Indian Head, Md.*, 57 FLRA 687, 688 (2002) (NSLC) (quoting *Veterans Admin.*, 24 FLRA 447, 450 (1986) (VA) (citations omitted)). While the May 30, 2007, decision acknowledged that VA developed a methodology and reduced it to writing, wrote to DOD, HHS, and OPM, invited and considered input from AFGE, and wrote a decision paper in its efforts to reconstruct the implementation process in compliance with the February 16, 2005, award, Arbitrator Wasserman was not satisfied with VA's efforts and fashioned a pre-decisional consultation requirement in a situation that the parties intentionally omitted from their Master collective bargaining agreement. As there is no contractual or statutory requirement that requires VA to pre-decisionally involve AFGE in its definition of statutory terms, Arbitrator Wasserman's award failed to draw its essence from the parties' Master collective bargaining agreement.

CONCLUSION

For the reasons set forth above, the Agency respectfully requests that Arbitrator Wasserman's May 30, 2007, decision and award be vacated.

Respectfully submitted,



Gia M. Chemsian
General Attorney (023)
810 Vermont Avenue, NW
Washington, DC 20420
(202) 273-6334

CERTIFICATE OF SERVICE

I certify that on this date, the original AGENCY'S EXCEPTIONS TO ARBITRATION AWARD, including all attachments, as well as four additional copies, in the case of American Federation of Government Employees, National Veterans Affairs Council and United States Department of Veterans Affairs, Case No. 040422-53970-A, was served by certified mail, return receipt requested, on:

Director, Case Control Office (Certified No. 7002 0860 0004 7293 1728)
Federal Labor Relations Authority
Docket Room, Suite 201
1400 K Street, N.W.
Washington, D.C. 20424-0001
Phone: 202-482-6540
Fax: 202-482-6657

and that a copy was served by certified mail, return receipt requested, on:

Jacqueline M. Sims (Certified No. 7002 0860 0004 7293 1711)
Staff Counsel, AFGE-NVAC
80 F Street, NW
Washington, DC 20001

Gia M. Chemsian
Attorney for Agency

July 2nd, 2007
Date

EXHIBIT LIST

A. Public Law 108-170

B. 38 U.S.C. § 7454

C. VA Directive and Handbook 5007, Part V, Chapter 6, Paragraph 3.

D. Agency's Pre-Arbitration and Post-Arbitration Briefs

E. Arbitrator Wasserman's February 16, 2005, Decision

F. November 25, 2006, letter from R. Allen Pittman to Alma Lee

G. Arbitrator Wasserman's May 30, 2007, Decision

H. 38 U.S.C. § 7408, U.S. Code Congressional Service, 79th Cong. (1st Sess.), Ch. 658, and Pub. Law 293

I. House and Senate Rules (selected)

J. VA and AFGE Master collective bargaining agreement, Article 3 "Partnership".

K. VA and AFGE Master collective bargaining agreement, Article 4 "Labor Management Training".

L. VA and AFGE Master collective bargaining agreement, Article 5 "Labor Management Committee".

M. VA and AFGE Master collective bargaining agreement, Article 6 "Alternative Dispute Resolution".

N. VA and AFGE Master collective bargaining agreement, Article 7 "Total Quality Improvement".

O. VA and AFGE Master collective bargaining agreement, Article 46 "Rights and Responsibilities".