In re Federal Mediation and Conciliation Service Case #04-53970-A

American Federation of Government Employees, National Veterans Affairs Council; and the
United States Department of Veterans Affairs

Hearing on September 13 and 14, 2004 Before Donald S. Wasserman, Arbitrator

Representing the Union: Jacqueline Sims, Esq. Staff Counsel AFGE

Representing the Employer: Meghan Serwin Flanz, Esq., Office of the General Counsel

Prologue

According to Elkouri and Elkouri: How Arbitration Works, Sixth Edition (American Bar Association, Section of Labor and Employment Law, Bureau of National Affairs, Inc, pages 1282-85): In both the private and public sectors the primary function of grievance arbitration is "to ensure compliance with the collective bargaining agreement." In the federal sector a second major function is "to review and police compliance…with controlling law, rules and regulations." The Federal Service Labor-Management Relations statute therefore defines a grievance very broadly as (in part) "any complaint" … "by any employee labor organization, or agency concerning – any claimed violation, misinterpretation, or misapplication of any law, rule or regulation affecting conditions of employment." (5 U.S.C. § 7103 (a)(9)(c)(ii).

I. Introduction

This grievance concerns the eligibility of some Department of Veteran Affairs employees to receive a 25 percent premium for work performed on Saturday. During the September 13 and 14, 2004 hearing, the parties had ample opportunity to make opening statements, introduce exhibits and present and cross examine witnesses. Additionally, the employer earlier submitted a pre-hearing brief. At the conclusion of the hearing the parties elected to submit post-hearing briefs rather than make a closing statement. The briefs were submitted on a timely basis.

The terms Veterans Affairs (VA), Veterans Health Administration (VHA), agency, employer and management may be used interchangeably throughout this document, as are the terms AFGE, AFGE-VA Council and union. Similarly, the terms (job) title, position and occupation are also used interchangeably.

II. Background and Facts

The Department of Veterans Affairs (VA) employees almost 225, 000 people in three distinct administrative agencies, the largest of which is the Veterans Health Administration (VHA), employing somewhat over 200,000 in hundreds of hospitals and health care facilities throughout the U.S. Soon after World War II ended, Congress

established a separate personnel system, commonly referred to as Title 38, to more effectively respond to the medical needs of the thousands of wounded military returning from the war. In large measure it was designed to recruit and retain qualified medical staff to attend to these needs by offering competitive compensation beyond that paid under Civil Service.

During the past (almost) 60 years Congress has amended Title 38 literally dozens of times. Many VHA health care professionals are appointed and paid entirely under Title 38; others are so-called "hybrid" employees whose conditions and compensation are established by both Title 5 (Civil Service) and Title 38. Other VHA employees continue to work under conditions established entirely by Title 5. This latter group (Title 5 only) are both General Schedule (GS) and Federal Wage System (FWS) employees (also known as wage board or wage grade or blue collar workers. These terms too are used interchangeably throughout). Over the years many Title 5 General Schedule positions or titles of VHA health care employees have been moved to hybrid titles through amendments to Chapter 74 of Title 38. Health care employees are defined by the United States Code (5 USC § 5371 (2)) as those who provide "direct patient-care services or services incident to direct patient-care services."

A few of the amendments to Title 38 serve as background to this grievance, and are cited by the agency as part of the legislative history. This grievance, however, directly arose subsequent to a very recent amendment adopted in December 2003, Public Law 108-170. Section 301 amended section 38 USC § 7401 (3) by expanding the "Positions Treatable as Hybrid Status Positions", thereby adding some 22 positions or occupations to the hybrid category, and entitling these employees to Title 38 compensation benefits not heretofore enjoyed. Essentially these positions or titles are professional, technical, para professional and administrative. All are GS positions. Although this section is not in dispute it is addressed by both parties to support their position. Section 303 of P.L. 108-170 amended section 7454 by adding sub section (b)(3) and became effective "the first pay period beginning on or after January 1, 2004." Congressional committee and conference meetings and debate prior to its enactment are cited by the union as part of the legislative history.

Federal employees typically have been entitled to a 25 percent differential or premium of their basic wage rate for work performed on Sunday – "as such." This is not overtime work but rather when Sunday is part of the normal or regular (40 hour) work week. Premium pay for Saturday work "as such" however, has not been common. Relevant exceptions are VHA Title 38 health care employees who did receive the Saturday differential, at least since the early 1990s. Beginning in 2002 hybrid employees were also included (§ 7454 (b)(2)). In 2003 P.L. 108-170 added that Title 5 VHA "employees appointed under section 7408 of this title (38) shall be entitled to additional pay on the same basis as provided for nurses in section 7453 (c) of this title." Section 7453 is headed "Nurses: additional pay" and sets forth the several differentials that nurses are eligible to receive; sub-section 7453 (c) covers Saturday and Sunday differentials. Other sub-sections (not in dispute here) include call-in pay, night shifts, holidays, and overtime.

According to the VA briefs, subsequent to enactment of P.L. 108-170 the agency "interpreted the new law to require payment of Title 38 Saturday premium pay to VHA's Title 5 General Schedule employees who provide patient care or services incident to direct patient-care services. Under this interpretation, the new law applies to the same occupations as 38 USC § 7455, 38 USC § 7457, and 38 USC § 7408 (b), which authorize VA, on a permissive basis, to provide certain aspects of Title 38 pay to GS employees providing direct patient-care or service incident thereto. VA's interpretation of the new law is also consistent with 5 USC § 5371 which authorizes the Office of Personnel Management (OPM) to delegate to other agencies the right to use some of the specialized Title 38 authorities to compensate Title 5 GS employees in patient care operations." VA extended Saturday premium pay to all of the occupations that had been eligible for Title 38 compensation in the past under Title 38 authority (7408 (b), 7455, 7457) or authority delegated by OPM (5 USC § 5371).

On January 30, 2004 the AFGE National VA Council (AFGE-NVAC) filled a National Level Grievance in accord with Article 42, Section 11 of the Master Agreement between VA and AFGE. This grievance is being arbitrated under Article 40 of that Master Agreement. Originally the basis of the grievance was that VA excluded "many Title VHA employees from the expanded list of occupations under P.L. 108-170…" The grievance letter stated that subsequent to the legislation providing Saturday premiums pay to hybrids the union lobbied throughout 2002 and 2003 to expand "Saturday premium pay to all other VHA employees who must work weekends." Further communications between the parties was conducted in accord with Article 42.11. VA responded to the union on March 4 and the union replied to this letter on March 19. VA's final letter, again denying the grievance, was written on April 2. The union's March 19 letter maintained a narrow focus on the exclusion of many titles or positions from VA's list of those entitled to a 25 percent premium or differential for working on Saturdays. Most exclusions are FWS or wage grade positions, and no FWS positions are included. According to the union "all other (excluded) non-hybrid health care workers" are entitled to be included. The union contends that VA is so narrowly interpreting the law that it is "unfair, arbitrary and wrong" and that no title 5 VHA employee who provides essential hospital services should be excluded from eligibility of the Saturday differential.

The union specifically "requested that the arbitrator sustain its grievance, and grant back pay for all of those VHA employees who are eligible for Saturday Premium Pay as a result of this National Grievance and who have worked on Saturdays" since the effective date of P.L. 108-170, as well as grant attorney's fees and other appropriate remedies.

The parties introduced nine joint exhibits; the union six exhibits; the agency introduced three exhibits in addition to the text of seven cases cited in its pre hearing brief; both parties also proffered a number of documents intended to further inform aspects of the case; and both parties wrote post hearing briefs. All documents were carefully reviewed by the arbitrator and are part of the record of this case, even if not specifically addressed by this Decision and Award.

III. Discussion, Evidence, Testimony and Argument

A. Interpretation

The agency stated that Section 303 of P.L. 108-170 amended 38 USC § 7454 by adding a sub section (3) to § 7454 (b) and that this case centers on the ambiguity of this section. Further, that its interpretation of § 303 is reasonable and it deserves deference in accord with Chevron.[1] Section 303 states:

> Sec. 303 ADDITIONAL PAY FOR STAURDAY TOURS OF DUTY FOR ADDITIONAL HEALTH CARE WORKERS IN THE VETERANS HEALTH ADMINISTRATION.
>
> (a) In General.—Section 7454 (b) is amended by adding at the end the following new paragraph:
> "(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."
>
> (b) Applicability.—The amendment made by subsection (a) shall take effect with respect to the first pay period beginning on or after January 1, 2004.

The revised § 7454 now reads:

> § 7454. Physician assistants and other health care professionals: additional pay
>
> (a) Physician assistants and expanded-function dental auxiliaries shall be entitled to additional pay on the same basis as provided for nurses in section 7453 of this title.
>
> (b) (1) When the Secretary determines it to be necessary in order to obtain or retain the services of individuals in positions listed in section 7401 (3)[2] of this title, the Secretary may, on a nationwide, local, or other geographic basis, pay persons employed in such positions additional pay on the same basis as provided for nurses in section 7453 of this title.
>
> (2) Health care professionals employed in positions referred to in paragraph (1) shall be entitled to additional pay on the same basis as provided for nurses in section 7453 (c) of this title.
>
> (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.
>
> (c) The Secretary shall prescribe by regulation standards for compensation and payment under this section.

The agency maintained that the ambiguity is largely created by virtue of the fact that "no employees are appointed under 38 USC § 7408." Thus, "consistent with the

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[1] Chevron v. National Defenses Resource Council, 467 U.S. 837 (1984).

[2] 7401 (3) Includes several specific titles or occupations. A few examples are: Psychologist, Licensed Practical Nurse, Occupational Therapist.

legislative history of § 7454 (b)(3) and related provisions of Title 38, VA has interpreted and implemented § 7454 (b)(3) to provide additional pay for VHA's Title 5 employees who provide direct patient-care services, or services incident to direct patient-care services, on Saturdays." Section 7408 states:

> § 7408. Appointment of additional employees
> (a) There shall be appointed by the Secretary under civil service laws, rules, and regulations, such additional employees, other than those provided under 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.].
> (b) The Secretary, after considering an individual's existing pay, higher or unique qualifications, or the special needs of the Department, may appoint the individual to a position in the Administration providing direct patient-care services or services incident to direct patient-services at a rate of pay above the minimum rate of the appropriate grade.

The agency's position with respect to 7408 is two fold. It argues that "section 7408 (a) is not an appointment authority, as VHA's Title 5 workers are now, and were in 1946, appointed under Title 5 'civil service laws, rules and regulations', not under section 7408 (a)." It is therefore ambiguous. It points to the legislative history in stating that in enacting 7408 (a) "Congress merely clarified not all employees' included within the VHA personnel system were to receive Title 38 appointments." For example some of these "other" employees "...shall receive original appointments...in their present civil service status." Section 7408 (a) was "simply to afford the VA Secretary administrative authority over general civil service employees, as well as specialized Title 38 medical professionals...." Also, "section 7408 (a) simply authorizes VHA to make civil service appointments, but those appointments are made under the Title 5 civil service rules, not under 38 US § 7408 (a)."

VA also argues that no employees are appointed under section 7408 (b) either; this section merely "authorizes the VA Secretary to make VA appointments at a rate of pay above the minimum rate of the appropriate grade...." Appointments are made under Title 5. The VA pre hearing brief continues that sub sections (a) and (b) of 7408 "describes two very different groups of employees: 7408 (a) covers all Title 5 workers while 7408 (b) applies only to employees involved in direct patient-care." Thus even if either or both sub sections "were properly viewed as an appointing authority" the provision in 7454 (b)(3) referring to employees appointed under section 7408 "fails to distinguish between the larger group governed by 7408 (a) and the smaller group covered by 7408 (b)" and therefore "would still be ambiguous." The brief concluded, "It is thus inherently unclear from the wording of the statute what Congress intended the scope of the new Saturday premium pay to be." Hence VA's reliance on Chevron, discussed below.

At this point it might be noted that different sections of Chapter 74 give the VA Secretary various degrees of authority in making appointments:

7401:	"there may be appointed by the Secretary such personnel...."
7405:	The Secretary...may employ, without regard to civil service or classification laws, rules or regulation, (temporary) personnel as follows:
7408 (a):	"there shall be appointed by the Secretary under civil service laws, rules, and regulations, such additional employees..."
7408 (b):	"The Secretary...may appoint the individual to a position...at a rate of pay above the minimum rate...."

The union states that the agency's arguments are "meritless" with respect to its claim that 7408 is not an appointment authority and that 7408 is ambiguous at best, especially when taken together with 7454. It refers to the clear language of 7408 (a). It also points to a letter that the VA Secretary wrote to the Chairman of the House Veteran Affairs Committee in August, 2003 concerning his objections to aspects of H.R. 2433, one of the bills that preceded and led to the enactment of P.L. 108-170 later that year. The Secretary referred to the "appointment authority of 38 USC § 7408." Moreover, the union argues that the agency used PL 108-170 "to appoint and include many of VHA's Title 5 employees who did not provide direct patient-care services in the new Twenty-Two occupations that it determined were eligible for Saturday Premium Pay, i.e. housekeeping management, chaplains, quality assurance, computer specialist, etc." Further, that the use of this appointment authority, "clearly shows that the agency could, and should have, included all Title 5 and other VHA employees as eligible for Saturday Premium Pay as Congress had intended in Public Law 108-170 and now in 38 USC § 7453 (b)(3)." (sic. likely intended § 7454 (b)(3)

B. Statutory Background and Legislative History

Some relevant aspects have been reviewed above. VA also emphasizes that Chapter 74 "afford(s) the Secretary great flexibility in appointing, promoting, and compensating VHA's medical professionals." Since its 1946 enactment "Congress has expanded many of the Secretary's compensation authorities...." Doctors, nurses and other health care employees have become eligible to: receive recruitment and relocation bonuses (7410, 7458), receive increased compensation in specialties that are difficult to recruit or retain (7431, 7432), receive adjusted (higher) basic pay (7451, 7452, 7455), and nurses have been paid a premium to work nights, weekends, holidays or overtime or when on call (7453).

Over time Congress extended some of these Title 38 compensation benefits to Title 5 employees. Section 7408 (b) was the first such amendment. Section 7455 also authorized the Secretary to increase the basic pay of Title 5 health care employees and section 7457 authorized call back pay. In each case the Secretary's discretion was limited to employees who provide "direct patient-care services or services incident to direct patient-care." Section 7455 specifically exempted "administrative, clerical, and physical plant maintenance and protective service employees", and limited coverage to General Schedule employees (thereby excluding wage grade employees), but did include separately certain VHA police officers among those eligible. According to VA briefs,

Congress has never included Federal Wage System employees in any Title 38 pay authority. Prior to P.L. 108-170, these amendments to Chapter 74 affecting Title 5 employees gave discretionary authority to the Secretary; none mandated action.

With respect to Section 7455, however, a 1992 Presidential Executive Order gave OPM a significant role when the Secretary determined that it was necessary to raise the basic rate of pay to any employees. The President designated the OPM Director to exercise the President's authority under § 7455 (d)(2)-(3) "to review and approve or disapprove the increases in rates of basic pay proposed by the Secretary...." Such increases must be in the best interests of the Federal Government and in accord with certain standards. The Secretary is also obliged to provide the OPM Director "such information as the Director may request."

Beyond this Title 38 legislative evolution, both VA and AFGE briefs discussed a similar Title 5 provision, specifically 5 USC § 5371 which authorizes OPM to extend to Title 5 health care employees some portion of Title 38 compensation benefits. VA points out that this too applies only to GS employees and does not include FWS employees. In each situation only GS health care employees are included. According to VA, "OPM has implemented its authority under 5 USC § 5371 by entering into delegation agreements with DOD, HHS, and DOJ." HHS is the only agency that has implemented the delegation and it has excluded FWS employees from Title 38 premium pay benefits.

The union concentrated on reviewing the events and legislative proposals leading to the enactment of P.L. 108-170. It cited a provision from H.R. 1951 which was also included in H.R. 2433 and the amended S. 1156 which had the identical heading as Section 303 of P.L. 108-170. The text was also identical, as it was to section 7454 (b)(3). The heading and text were included in S. 1156 which served as the basis of P.L. 108-170. According to the union the House approved S. 1156 as did the Senate as part of a conference agreement that the union cited: "The reported bill (H.R. 2433) reflects the Committee's consideration of two bills in the 108th Congress, to include H.R. 2433 and certain provisions of H.R. 1951...." The union further referred to H.R. 1951 as the "genesis legislation" for Saturday premiums and cited the Findings of Fact of H.R. 1951 which supported the union's contention that Congress intended Saturday premiums be applied to all VHA health care workers, regardless of whether GS or FWS.

This is supported by an affidavit by the Assistant Director of AFGE's Legislative Department who was responsible for the union's lobbying activities during Congress' consideration of this legislation. Among other details of the legislative process, the affidavit states that the Chairman of the Senate Veterans Affairs Committee submitted into the November 19, 2003 Congressional Record a statement to the effect that agreements reached between the Senate and House amended S. 1156 and were incorporated into that bill. Originally S. 1156 had no provision on Saturday premium pay but that the compromise agreement duplicates Section 4 of H.R. 2433, as amended, and that the premium pay language of S. 1156 is identical to the language of H.R. 2433 which is in turn identical to the language of H.R. 1951. On November 19, 2003 the Senate passed the amended S. 1156. Two days later the House passed S. 1156 as amended and

this legislation had identical language on Saturday premium pay as H.R. 2433 and H.R. 1951, both of which eventually died.

AFGE also notes that the Congressional Budget Office (CBO) was unable to estimate the costs of the Saturday premium because it did not have sufficient information on the number of employees likely to be affected. The union maintains CBO inability to cost out this provision, despite estimating costs for most other provisions, is "because the legislators had indeed intended to make many more VHA health care occupations eligible for Saturday Premium Pay than the limited twenty VHA occupations determined by the Agency, and in light of the vast and extensive number of eligible VHA employees contemplated by the legislation, a cost estimate was not possible." In report 108-213 accompanying H.R. 2433 the CBO cost estimates were attached. The union cited the section on Saturday premium pay to support its position.

> *Saturday Pay*
>
> Currently, many health care workers employed by VA do not receive a pay premium when they work on weekends, although nurses and some other specialized workers do receive that premium. Section 4 would require that all employees providing direct patient-care services or services incident to direct patient-care services receive premium pay equal to 25 percent of their hourly wage, for all hours worked from midnight on Friday through midnight on Sunday. According to VA, these workers are already receiving premium pay for working on Sunday, so the only effect of implementing this section would be to increase the pay they would receive on Saturday. CBO cannot estimate the budgetary impact of implementing this provision, however, since VA has not yet been able to provide information about the amount of premium pay VA currently pays for Saturday and Sunday work.

The union also introduced letters written by two members of Congress, one a Senator who wrote to the VA Secretary. The other letter was from a Representative to a constituent. Both letters supported the union's position. These letters were written subsequent to the enactment of the legislation and complained that VA's interpretation was contrary to the intent of Congress as well as the language of the law. They were especially objecting to the exclusion of all FWS occupations. The union again raised the aforementioned August 2003 letter from the VA Secretary to the Chairman of the House Veteran Affairs Committee to rebut the agency's claim that section 7408 does not constitute an appointing authority because no one is appointed under 7408. The Secretary's letter "strongly opposes four provisions added at markup to H.R. 2433...." With respect to Section 4 of H.R. 2433 the Secretary wrote in part:

> Section 4. Additional Pay for Saturday Tours of Duty for Additional Health Care Workers in the Veterans Health Administration
>
> Section 4 would amend section 7454 (b) of title 38 to require that title 5 employees appointed under 38 U.S.C. § 7408 receive additional pay

> for weekend work on the same basis as provided for nurses in 38 U.S.C. § 7453 (c).
>
> VA strongly opposes Section 4. The title 5 pay system is entirely separate and distinct from the title 38 compensation authorities, and there is neither logic nor merit to combining the two. Moreover, this provision is overly broad. The appointment authority in 38 U.S.C. § 7408 includes all of VHA's title 5 workers, including those in the Senior Executive Service (who do not receive premium pay) and those in non-patient care positions. There is no basis to treat these employees as title 38 solely for the purpose of Saturday premium pay.

The Secretary's concern is clear: "Moreover, this provision is overly broad. The appointment authority in 38 U.S.C. § 7408 includes all of VHA's title 5 workers,…."

In its review of 7408 (b) the union concentrated on the meaning of the phrase "or services incident to direct patient-services." Given the language and the purpose of the statute the union is convinced that the narrow application by the agency was unwarranted, improper and contrary to the intent of Congress. The purpose of P.L. 108-170 was to enhance compensation benefits to VHA health care employees whose assigned schedule called for them to work on Saturdays, and to assure that sufficient capable staff would be available for Saturday work. It was another step by Congress to improve compensation to employees who were required to work at inconvenient times in order to fully staff an essential 24 hour - 365 day operation—health care facilities for veterans. Over the years Congress has expanded the purposes for which premiums are paid to VHA employees as well as the number of occupations eligible for such premiums. P.L. 108-170 was simply another such extension: eligibility for Saturday premium pay to a significant number of additional positions, or so the legislation intended.

The union claims that a very significant number of employees who are in positions or titles that provide "services incident to direct patient-care" have been excluded by VA's overly narrow interpretation and implementation. Examples used by the union include:

- Housekeeping Managers are eligible; housekeeping staff are not.
- Dietitians are eligible; food service workers are not.
- Employees who operate diagnostic and other medical equipment are eligible; Employees who maintain and calibrate the equipment are not.
- Medical illustrators are eligible; VA police officers are not. Interestingly, police officers are included among VHA employees eligible for special (higher) pay rates within the Secretary's discretion under section 7455.

In some instances the agency has maintained that the work provided by excluded titles does not involve "services incident to direct patient-care"; in other cases VA has claimed the titles are not covered by the statute because they are not GS titles and the statute excludes FWS titles. Both assertions are unjustified by any reasonable reading of P.L. 108-170 according to the union.

Citing outside sources expert in general health care and hospital matters the union's brief argues that all GS and FWS titles and classifications (not including the Senior Executive Service) are involved in providing services incident to direct patient-care with specific emphasis on food service and housekeeping classifications.

The union's brief also claims that under 5 U.S.C § 5371 OPM has the authority to apply provisions of Chapter 74 (including 7453 (c) – Saturday premiums) "to any (GS) employee holding a position…which involves health care responsibilities." Under OPM authority Saturday premium pay, for example, may be extended to employees who are not direct patient caregivers. Nor must they be exclusively performing services incidental to direct patient-care services. The union then reviews OPM's special rate authorities for FWS employees under 5 U.S.C. § 5341 and also makes the point that the Secretary has discretionary authority under Title 5 to include all VHA employees as eligible for Saturday premium pay. This authority also exists under section 7408.

VA makes the point that section 7454 (b)(3) must be interpreted "within this larger, statutory scheme" of Title 38 and Chapter 74." Consistent with these related authorities and with the legislative history of the new law itself, VA has interpreted Section 7454 (b)(3) to apply only to GS employees providing direct patient-care or services thereto.

C. Implementation

Through its witnesses at the September 13 and 14 hearing, and in its briefs, the agency explained the process it used to implement P.L. 108-170 as codified in section 7454. In summary, it "created a list of all the health care occupations to which it had extended Title 38 compensation" under the amendments mentioned above. Its specialists worked "to ensure that all occupations providing direct patient-care services and services incident to direct patient-care were included." It then revised its regulations to provide that these employees were eligible to receive premium pay for Saturday. During this process VHA compensation and classification personnel did confer informally by telephone on a limited basis with OPM. Conversations were conducted with Congressional staffers who inquired and with an AFGE legislative representative. Internal discussions within VHA were also held.

The Deputy Assistant Secretary for Human Relations Management and Labor Relations gave an overview of the implementation process and of those involved. Although he has been in his current position for only nine months, he is a 32 year veteran of VA who was most previously the Director of Management Support for almost 15 years.

A more detailed explanation was presented at the hearing by the Director of Compensation and Classification who had been in the job for about six months, but with the agency for 23 years and directly working on compensation matters for 14 years. She worked on and developed the list of titles or positions that would be eligible for Saturday premium pay. Such employees must provide direct patient-care or services incident thereto. She also was guided by Chapter 74 and the amendments thereto, understanding

that they applied to GS employees only, not to FWS employees. Nor were FWS employees included in the authority delegated by OPM under 5 U.S.C. § 5371. She looked first at the Occupational Series Manual, then at the General Health Series and then at occupations. It was decided that all titles listed in the OPM "0600 Series" (Hospital and Medical) would be eligible for Saturday premium pay. Her conversation with OPM did not include discussions about specific titles.

The third agency witness was the Associate Chief of Patient Care Services who had this title for about 18 months. She previously was assigned to Human Resources and has been at the agency for 20 years. She indicated a general familiarity with P.L. 108-170 and was somewhat involved in its implementation. There were many discussions about VHA health care employees. Her discussions with the AFGE Legislative representative mostly concerned hybrid employees. Some Congressional staff who inquired as to implementation initially thought VHA was too narrowly interpreting the new law. They were subsequently reassured that the agency was reasonable in light of its consistent interpretation of terms and language and reasonable application of legislative and statutory history.

The union objected that management "had not consulted with or sought any guidance from OPM for their determination of which VHA occupations to include or exclude. Indeed, Agency officials noted that while occupations within the "0600 series" were automatically included, there was no clearly defined procedure for selecting the other VHA occupational series for inclusion for eligibility for Saturday Premium Pay. Indeed, one Agency official stated she made phone inquiries and utilized her previous work relationships to aid her in formulating which VHA occupations to include." Furthermore, "the Agency was negligent for utilizing, in part, an "ad hoc" and unsubstantiated approach in making its determination." The union brief continues that, "Agency officials related that they were unable to ascertain, the number or occupational series of VHA employees who work on Saturday." The union, however, "obtained information from many Union locals regarding the number and occupational series of VHA employees in the individual bargaining units." As a result the union brief on page 28 and again on page 35 contends that "all employees who work in the Veterans Health Administration medical centers, clinics, nursing homes and domicilaries would meet the threshold of being in a position that involves either direct patient-care responsibilities or services incidental to direct patient-care services and are eligible for Saturday Premium Pay."

The union's brief also presents a review of responsibilities of some occupational series or job families not included as eligible for Saturday premium pay in order to show their relationships to patient care. It also points to VHA Directive 2003-048 in which the agency outlines policy and guidance for the proper use of Patient Record Flags (PRFs). According to the Directive: "PRF alerts VHA employees to patients whose behavior or characteristics may pose a threat either to their safety, the safety of other patients, or compromise the delivery of quality health care. PRF helps ensure the rights of all patients to receive confidential, safe and appropriate health care and provides a safe work environment for employees." Examples of titles of VHA staff who have "direct patient

contact" and who therefore need to be aware of the PRFs are listed in the Directive. However, some of the titles listed are not eligible for Saturday premium pay. The union maintains this supports their contentions that those employees actually "do provide services incident to direct patient-care and should have been included as eligible under 38 U.S.C. § 7454 (b)(3) for Saturday Premium Pay.

D. Deference and Other Matters: Chevron and Other Cases

The agency's major points are that the new law is ambiguous because no employees are appointed under section 7408. Consistent with all prior legislative history of Title 38 generally and section 7454 (b)(3) specifically VA did "provide additional pay to VHA's Title 5 employees who provide direct patient-care services, or services incident to direct patient-care services on Saturdays. Its interpretation and implementation of the statue was reasonable in light of statutory ambiguity and therefore should be given Chevron deference. The administrative or implementing agency must interpret the ambiguous statute and if reasonable, "it will not be overturned." The union's requested remedy is contrary to VA's reasonable interpretation of section 7454 (b)(3) and therefore also contrary to law. The grievance should be denied. Further, the union is seeking relief from the wrong forum. VA can expend appropriated funds only as authorized by Congress. "While the agency is sympathetic to the union's assertion that providing Saturday premium pay only to health care workers is unfair to non-health care workers working beside them, it is within Congress' authority, not the Agency's to address that inequity." The issues raised here "are more properly resolved by Congress than through the negotiated grievance procedure."

The union rejects the statement that 7408 is not an appointing authority and again referred to the Secretary's August 2003 letter discussed above. The statute's language is clear and unambiguous and VA's "meritless" contention that no employees are appointed under section 7408 does not render section 7454 (b)(3) ambiguous. Nor does the agency's distinction between the employees covered by 7454 (b)2 and (b)(3). These arguments merely attempt to obscure the fact that the legislative evolution of P.L. 108-170 demonstrated Congress' unequivocal intent "for all Title 5 and other VHA healthcare workers to be covered by…this new amendment." Furthermore, "the Agency's contentions are spurious and not reasonable as argued by the Agency, in light of the fact, that it used this very statute to appoint and include many of VHA's Title *employees who did not provide direct patient-care services* in the new twenty-two occupations that it determined were eligible for Saturday Premium Pay, i.e., housekeeping management, chaplains, quality assurance, computer specialist, etc."

VA also argued that it looked to the legislative history for clues to Congress' intent because the law was not clear. This helped to inform them that "Congress intended the new law to extend Title 38 Saturday premium pay only to those Title 5 workers who provide direct patient-care services or services incident to direct patient-care." Section 303 – (or Section 7454 (b)(3)) – was enacted as part of a larger law, P.L. 108-170 entitled "The Veterans Health Care, Capital Asset, and Business Improvement Act of 2003." Section 303 was entitled "Additional pay for Saturday tours of duty for additional health

care workers in the Veterans Health Administration." "The new law did not create a new statute but simply amended the pre-existing 38 U.S.C. § 7454 – entitled "Physicians Assistants and other health care professionals: additional pay" – within another sub Chapter, (IV of Chapter 71, Title 38). According to the agency the point is that, "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)." The union counters these citations by citing Evangelical Lutheran Church in America v. Immigration and Naturalization Service and United States Department of Justice, 288 F. Supp. 2d 32, 41 (D.C.C. 2003). (The title of a statute or statutory section generally cannot be used to constrict a statute's plain language); *see also* Holland v. Williams Mountain Coal Co., 256 F. 3d 819, 822 (D.C. Cir. 2001) (noting that courts are reluctant to give "great weight to statutory headings"); National Ctr. For Mfg. Sciences v. Dep't of Def., 199 F. 3d 507, 511 (D.C. Cir. 2000) ("[t] the plain meaning of a statute cannot be limited by its title").

At least as important, the agency argues, is that section 7454 (b)(3)(S. 1156 amended by S. 2203) originated in the Senate Veterans Affairs Committee (SVAC). This and the House Veterans Affairs Committee have jurisdiction only over "legislation pertaining to…bills impacting VA health care workers – legislation impacting VA employees beyond the health care arena falls outside HVAC and SVAC jurisdiction and must be acted on by the Senate Government Affairs Committee (SGAC) and/or the House Committee on Government Reform (HCGR)." In light of the limited jurisdiction of the committee of origin, "VA properly interpreted section 7454 (b)(3) to apply only to…employees providing health care services or services incident thereto", the employees within the jurisdiction of the Veterans Affairs Committees.

Furthermore, the law requires that statutory provisions be interpreted not in isolation, but in the context of a larger statutory scheme of which they are part. Here VA was relying on Branch v. Smith, 538 U.S. 254, 281 (2003). It then pointed to three provisions in Title 38 and one in Title 5 that authorize the extension of some aspects of Title 38 pay to Title 5 employees. All of these, 38 U.S.C. § 7408 (b), 7455 and 7457 and 5 U.S.C. § 5371, are applied only to GS health care employees. All non-health care and FWS employees are excluded. These four provisions previously enacted by Congress all deal with "the same general subject."

The agency argues that the interpretation is entitled to Chevron deference. It also cites Bernhart v. Thomas, 540 U.S. 20 (2003). In essence, "when a statute clearly conveys the intent of Congress, courts must give effect to the unambiguously expressed intent of Congress; but when a statute is silent or ambiguous, courts must defer to a reasonable construction by the agency charged with its implementation." Specifically:

> The power of an administrative agency to administer a congressionally created…program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of

> authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. (Chevron, supra at 843-844 as cited on page 19 of the agency's pre-hearing brief).

Provided that the statute is unclear and the agency's interpretation is reasonable, the union's interpretation may not be substituted here. The agency also reviews the different levels of Chevron deference to different types of agency interpretation. At a minimum, courts will defer "to the extent that its interpretation has the power to persuade." In this case the agency claims it is entitled to full Chevron deference, "even though that interpretation was reached through means less formal than 'notice and comment' rulemaking." Never-the-less "even minimal deference precludes substituting the Union's interpretation where the agency is reasonable." The agency has authority to interpret an ambiguous statute if the interpretation is reasonable and has the power to persuade. VA's interpretation of 7454 (b)(3) is reasonable and it is persuasive and must be upheld. On the other hand, the Union's interpretation to apply the law to "all Title 5 VHA employees who work on Saturday's" is inherently unreasonable and inconsistent with legislative history. Not only would it include FWS employees it would include the Senior Executive Service (SES) and therefore be illegal, according to the agency's argument. (SES employees are excluded from receiving premium pay by statute). Further agency argument states that some of the titles the union wants included are specifically excluded from other Title 38 pay benefits or enhancements discussed above, such as in Section 7455. In sum, "the union's broad interpretation of section 7454 (b)(3) is thus implausible in light of the actual legislative history."

IV. Issues

The parties unsuccessfully attempted to stipulate to the issues in this case. The union states the issue as:

Whether the Department of Veteran Affairs incorrectly applied 38 U.S.C. § 7454 (b)(3) (formerly Public Law 108-170, Section 303) and excluded many Title 5 and other Veterans Health Administration employees from eligibility for Saturday Premium Pay?

VA frames the issue as: (1) Whether Congress' intent is unclear from the wording of the new law; and, if so, (2) whether VA's interpretation of the new law is based upon a reasonable construction of the statute.

The arbitrator initially raises the question of (1) whether section 7408 is or is not an appointing authority (or whether any employees are appointed under 7408). Then (2) whether the answer to this question affects the ambiguity or clarity of 7454 (b)(3); and, if so, how. Depending on the outcome of these questions, (3) whether 7454 (b)(3) is

limited to GS employees who provide patient-care. Finally, considering all of the above, the last question would be a combination of the agency's and the union's version of the issues: (4) Whether VA's interpretation of the new law is based on a reasonable construction of the statute and/or whether VA incorrectly applied 7454 (b)(3) by excluding too many VHA titles or positions from eligibility for Saturday premium pay. The agency's initial issue with respect to the lack of clarity of Congress' intent is subsumed in the above stated questions.

IV. Analysis and Decision

In one form or another, the language of section 7408 (a) has been part of Title 38 since its enactment almost 60 years ago. Nothing in the record suggests that it has ever been questioned with respect to being an appointing authority until now. The plain meaning of the words state clearly that employees are appointed under 7408 (a). The Secretary of Veterans Affairs, as recently as August 2003, complained that the language that was to become section 303 of P.L. 108-170 "is overly broad" at least in part because, "The appointing authority in 38 U.S.C. § 7408 includes all of VHA's Title 5 workers including those in the Senior Executive Service...and those in non-patient care positions." No amount of explanation of Civil Service laws or rules or appointments under Title 38 dilutes the clarity of the language. As repeated in Chevron, "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress." Congress spoke in 1946; the language has withstood almost 60 years and dozens of amendments to Chapter 74. The union brief also cites examples of appointments under 7408 (a). The fact is that appointments are made under section 7408 (a); some may be original appointments while others may be made subsequently. That the appointments are made "under Civil Service laws, rules, and regulations" does not dilute the Secretary's appointing authority or make the appointments less real. If the agency had any question as to the validity of the words it should have formally raised this with OPM, the agency with expertise in all personnel matters.

The agency brief distinguishes between the two different groups of employees covered by 7408 (a) and (b). All Title 5 VHA employees are covered by (a), while (b) applies to employees who are only involved in patient-care (direct or incident to direct care). Footnote 7 (on page 6) of the agency pre-hearing brief states in part, that, "even if one – or both – subsections of 7408 were properly viewed as an appointment authority, Section 7408 (b)(3)'s reference to "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)." For purposes of the decision and award in this case that statement may be a distinction without a difference.

Section 7408 has only two sub-sections – (a) and (b) under one general heading: Appointment of Additional Employees. Sub-section (a) addresses the appointment of "such additional employees other than those provided in section(s) (of chapter 74 that address professional technical, paraprofessional and administrative employees, as well as

doctors and nurses, all of whom provide direct patient-care or care incident thereto) as may be necessary...." Sub-section (b) authorizes the Secretary under specific conditions to appoint an individual to a direct patient-care (or incident to direct care) positions at a rate of pay above the minimum rate of the grade. Sub-sections (b) complements sub-section (a) by providing Title 38 compensation benefits to employees appointed to a patient-care position. The sub-sections are neither ambiguous nor contradictory; they are simply complementary. A "reasonable" reading of section 7454 (b)(3) clearly applies it to both 7408 (a) and (b). Such an application is not ambiguous.

Next to be answered is the two part question of whether sub-sections 7454 (a) and (b) are limited to (1) those who provide patient-care services, and (2) who are also GS employees. The agency's position throughout has been that the new law applies only to GS employees who provide patient care. It has persuasively demonstrated that the entire history of Title 38 and its amendments are irrevocably tied to patient care. Chapter 74's sub chapters are replete with compensation incentives to attract, recruit, retain, promote, and move employees; and otherwise reward staff connected to patient care who work inconvenient hours such as weekends, nights, holidays, overtime or who are required to remain on-call. Some sections, 7455 for example, even specifically exclude classifications of employees who appear, at least on the surface, not to be involved directly in patient care. (This is the section that authorizes the Secretary, when deemed necessary, to "increase the minimum, intermediate or maximum rates of basic pay" in order to recruit and retain health care workers who provide patient care).

In order to dramatically demonstrate the legal soundness of its position, VA apparently believed it necessary to show the union's interpretation in its most "illogical", "illegal", "inherently unreasonable" and "unworkably broad" light. One minor example is that because the union did not specifically exclude the Senior Executive Service (SES) from its initial position that Congress intended that all VHA employees who work on Saturdays are eligible for premium pay, the union was including SES employees. The record, however, does not reveal that the union made such a claim. In fact the union brief (page 23 & 24) states the legal exclusion of SES. Perhaps if the parties had engaged in more extensive discussions and/or consultations prior to the commencement of formal proceedings such misunderstandings could have been avoided. Similarly, the agency appears to ignore the sub-text of the union's claim that, "all employees who work in the Veterans Health Administration medical centers, clinics, nursing homes, and domicilaries would meet the threshold of being in a position that involves either direct patient-care services or services incidental to direct patient-care services and are eligible for Saturday Premium Pay."

The agency, for example, proclaims (or acknowledges) "That, at the hearing counsel for the union conceded that VA had properly interpreted the new Saturday premium pay to apply only to employees in occupations providing direct patient-care services or services incident thereto, but argued that VA had too narrowly tailored its list of such occupations." (VA post-hearing brief, page 3, footnote 4). Perhaps, this too, is a distinction without a difference, but a "reasonable" interpretation of the union's claim is that all (non SES) occupations, titles, or positions assigned to Saturday work are engaged

in direct patient-care or duties incident to direct patient-care and therefore eligible for Saturday premium pay, including both Wage Grade and General Schedule titles. It is therefore clear that irrespective of any position it may have taken initially, the union agrees (at least tacitly) that under the new law Saturday premiums will be paid only to those who are employed in health care positions defined as: "direct patient-care service or services incident to direct patient-care."

The agency accurately pointed out at the hearing and in it briefs that the "Findings" in bills that the union maintained supported its interpretation of inclusion all died in committee. Therefore, any provision of H.R. 1951 or H.R. 2433 not amended to S. 1156 died along with those House bills. Similarly, letters written by Members of Congress after enactment do not necessarily inform as to the meaning of the legislation.

It is not now possible for the arbitrator to determine whether the agency too narrowly interpreted P.L. 108-170, Section 303, aside from declaring all FWS workers ineligible. Had not the agency eliminated all wage grade employees from consideration at the outset, some FWS positions or occupations would, without a doubt, have been found eligible for Saturday premium pay. That can be said safely after a review of some GS titles also found eligible. The record reveals only those occupations (GS only) or occupational groups that the agency did declare to be providing health care. Nothing in the record reveals those GS positions or job families that the agency decided were not health care related – except of course all FWS titles.

VA also argues that FWS or wage grade employees are excluded from the new law by virtue of their exclusion from 5 U.S.C. § 5371 and all of Title 38, including Chapter 74 and its amendments. It states without contradiction that these statues have never included FWS employees. The post-hearing brief further states that "the new law does not exist in a vacuum but must be interpreted in light of a number of pre-existing statutory provisions that extended other aspects of Title 38 compensation to Title 5 employees." All prior amendments apply to GS workers only. Again, a distinction is that previous statutes amending Chapter 74 are permissive, whereas P.L. 108-170 is mandatory in extending Title 38 compensation benefits. The agency argues it followed precedent and was guided by its experience in implementing three prior amendments to Title 38: sections 7408 (b), 7455, 7457 and 5 U.S.C. § 5371 as well as the experience of OPM and HHS, all of which were determined not to apply to FWS workers. "VA thus interpreted the new law to be consistent with its long-standing interpretation of related provisions." Further, "it must be interpreted in light of reason, legislative history, and other provisions in the same statutory scheme." The agency cites Branch v. Smith, 538 U.S. 254, 281 (2003) ("The correct rule of interpretation is, that if divers(e) statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them…").

Following that line of reasoning each of the sub-chapters of Chapter 74 cited by VA in its briefs or the hearing deals with discrete aspects of Title 38 compensation benefits. They are discrete in the sense that each covered either specific occupations by adding benefits, or specific benefits by adding new occupations, or a combination thereof.

All prior amendments or new or revised sections are discretionary or permissive while P.L. 108-170 is mandatory. For example section 7401 covered specific titles as mentioned earlier; Section 7453 applies only to nurses while section 7457 specifically provides on-call pay. Section 7455 authorizes the Secretary to pay above minimum, intermediate or maximum rates where necessary for recruitment and retention for specific GS health care workers and police officers. Even Section 301 of the recently enacted P.L. 108-170 which added more than 20 Titles to the hybrid list of employee titles and provided specific promotional opportunities to these classes of employees is discretionary. This amendment to section 7401 through section 301 is completely different from other Chapter 74 provisions in that it proscribed the Secretary's discretion by mandating that a system of promotion and advancement be developed. "Each such system shall be planned, developed, and implemented in collaboration with, and with the participation of, exclusive employee representatives of such occupational category of employees." The Secretary is also mandated to "notify the Congressional veterans' affairs committees of the recommendations…." Furthermore, "at the election of the Secretary, or of a majority of such exclusive employee representatives who are participating in negotiations on such matters, employ the services of the Federal Mediation and Conciliation Services." Certainly these mandates are unique within Chapter 74 (see P.L. 108-170, Section 301(h) (1)-(4)). Returning to Section 7455 another "unique" feature is found. Presidential Executive Order 12797 of April 3, 1992 states in part that, "The Director of the Office of Personnel Management is designated to exercise the authority the President by section 7455 (d) (2)-(3) of Title 38, United States Code, to review and approve or disapprove the increases in rates of basic pay proposed by the Secretary…."

Thus, taking into consideration the so-called "statutory scheme", the diverse nature of these amendments to chapter 74 leads to the inescapable conclusion that Congress has consistently used a rifle, not a shotgun, to address specific problem areas as they were called to their attention. In doing so, while each amendment to chapter 74 dealt with compensation matters each amendment was unique unto itself as to the benefit and the employees covered or excluded, and in some cases how the amendment would be administered. Clearly Congress made a pointed exclusion in enacting Section 303 of P.L. 108-170. The exclusion was limited to VHA employees who do <u>not</u> provide health care services, be they GS or FWS workers.

There are any number of unique, and seemingly out of character features found in Chapter 74. Every amendment does not necessarily fit precisely into a previous conception or legislative scheme. Rather each amendment was enacted to address a specific and unique problem. The matter addressed in Section 303 is very narrow – Saturday differential payments. This incentive appears to have a dual purpose: one is to encourage staff willingness to work on a weekend day; the other is to reward them for doing so. If Congress desired to limit this incentive to only GS employees it could easily have so stated, just as it did in Section 7455. Similarly it specifically limited the application of on-call premium pay under section 7457. And section 301 of the new law is limited to employees already included under section 7401(3) and those positions specified in section 301 (a) (1)-(3) of P.L. 108-170. In Section 303 the only limitation on inclusion is that the entitlement to Saturday premium pay is "on the same basis as

provided for nurses in section 7453 (c) of this title" i.e. employees providing direct patient-care services or services incident to direct patient-care services.

Therefore this decision finds that Congress intends for P.L. 108-170, Section 303 to include FWS or wage board employees who provide direct patient-care or services incident thereto as eligible for Saturday premium pay. This also neutralizes VA's argument with respect to Congressional Committee jurisdiction inasmuch as health care workers only are included within the scope of Section 303 of P.L. 108-170.

The arbitrator finds, in consideration of all of the above, and the entire record that neither the language of the new law nor its codification in § 7454 is ambiguous. Congressional intent to include FWS as well as GS employees is also clear. Chevron deference is therefore not an issue. Congress did speak clearly and its intent is clear.

However, even if one were to assume that the new law is ambiguous, VA's insistence that its interpretation is "reasonable" and warrants Chevron deference is not persuasive. The agency's implementation procedure leaves much to be desired. Initially, the agency gives every appearance of having made a decision to oppose Section 303 (then Section 4 of H.R. 2433) prior to its enactment. One need look no farther than the Secretary's letter of August 2003. Next the agency's action upon the enactment of Section 303 appears designed to limit its financial impact. It assumed, based on its interpretation of legislative history, that FWS employees were excluded from eligibility. The record is absent of inquiry or serious effort to evaluate this issue. It has the appearance of taking a position a priori and then attempting to justify it. There is no record evidence that the issue was ever seriously examined, either internally or with OPM or any other entity.

VA's implementation process lacks credibility. In essence agency witnesses testified that the initial steps were to examine "comparable provisions in Title 38 and Title 5." For reasons written above there is certainly as much non-comparability as there is comparability with prior legislative changes. They also "compiled a list of occupations providing direct patient-care services or services incident to direct patient-care." And VA did also review OPM's index of health care occupations and included the 0600 healthcare series as well as several internal VHA occupations. Slightly less than one-third of the titles were outside of the 0600 series. There were also informal telephone conversation with both OPM and HHS representatives. Irrespective of job responsibility, VA testimony was that, "wage grade employees were excluded from the list because they had never been subject to Title 38 compensation in the past, either at VA or HHS."

VA witnesses "testified that the reason that Hospital Housekeeping Management employees in occupation series 0673 were included on the list, while housekeeping aides were not, was that the 0673 series is paid under the General Schedule while the aids are wage grade employees and therefore historically excluded—by HHS and OPM as well as VA – from Title 38 compensation. There is no acknowledgement from VA witnesses or briefs that the difference between Section 303 and other Title 38 legislation should warrant a more critical review than simply an a priori automatic exclusion of wage grade

employees. One might be tempted to ask whether the motivation for exclusion might include the sheer number of blue collar wage grade employees at VHA, some of whom might be involved in patient care and be assigned to Saturday work. According to the union brief, food service and housekeeping services alone account for roughly 13,000 VHA workers.

A "reasonable" interpretation by VA would have included a thoughtful examination of whether Congress intended to exclude or include FWS employees engaged in patient care on Saturdays. After resolving that issue a much more detailed review of specific occupations, positions and/or job titles should have been done. It may be that an occupational series is too broad standard to use. Before excluding an entire occupational series, the VA list compilers should be certain that specific positions or occupations or titles within that series do not also provide patient care.

Given that OPM is the lead agency and the considered expert in this area it is "unreasonable" that that there was not more formal as well as informal consultation involved in the process. Formal consultation implies more than a phone call. It would likely include face to face meetings and perhaps even a letter from the Secretary seeking an "advisory" opinion on some of these matters. A careful reading of section 7455 reveals the role that OPM is assigned to assume with respect to somewhat similar types of issues such as which VHA employees are entitled to Title 38 compensation benefits. While VA has no such obligation under the new law, formal consultation would certainly legitimize the "reasonableness" of their interpretation. Even without a "notice and comment" rule making procedure, it would also lend credibility to a process that up to now has been "arbitrary" with respect to its interpretation and implementation activities and "manifestly contrary to the statute" with respect to Section 7408.

This discourse on the agency's request for Chevron deference and its interpretation and implementation process does not affect my decision that Congress' intent and the language used to express that intent are clear. The new law is unambiguous and therefore VA is not entitled to deference under Chevron and the request for such is denied.

The following is a summary of the various part of this decision.

1. 38 U.S.C. § 7408 is an appointment authority and employees are appointed under this section.
2. The new law is not ambiguous. Section 7408 expresses the intent of Congress in clear and unambiguous language. VA is therefore not entitled to Chevron deference.
3. In order to be eligible for Saturday premium pay an employee must provide direct patient-care services or service incident to direct patient-care services.
4. Congress did not exclude FWS or wage board employees from being eligible for Saturday Premium Pay. To the contrary, the intention was to include them similarly to GS employees, provided of course that they are involved in patient care as described above in 3.

5. Aside from the agency's automatic elimination of wage grade employees from eligibility for Saturday premium pay, the arbitrator cannot determine whether, as the union argued, VA too narrowly determined GS occupations with respect to eligibility. Even if the implementation process was not flawed there is insufficient record evidence to make this determination.

V. Award

Except for the elimination of wage board or wage grade employees from the list of employees eligible for Saturday premium pay, the arbitrator cannot determine if any GS employees have been eliminated due to an improper interpretation and/or flawed implementation of the new law. The agency must therefore assure that no GS employee's position is ineligible as a result of an improper personnel action, specifically that his or her position was not carefully reviewed instead of being eliminated as part of an entire class series. The agency must also assure that wage grade or wage board employees are also treated as P.L. 108-170 intended, rather than being declared ineligible en blanc with no review. The arbitrator therefore orders the agency to perform the following steps to assure a more reliable result.

VA must reconstruct the implementation process. This includes developing a methodology and reducing it to writing. At a minimum the new process should include a careful review of all titles, positions or occupations within every occupational series omitted from the current eligible list of GS employees. This review must also include wage grade occupational series. If any position is unique and stands alone and does not fall within a classification series, it too must be reviewed. The same standard must be used for both FWS and GS series and titles. It is critical that no title be ignored simply because the occupational series to which it belongs is considered ineligible as not being health care related. It is important to be aware that it is the employee in a specific position who provides patient care. Further, VA is urged to seek appropriate assistance from, and formally consult with, OPM in accomplishing those efforts. VA may also find it beneficial to consult with other organizations or entities, perhaps even AFGE.

If this review results in additional GS and/or FWS VHA employees being made eligible for Saturday premium pay, such eligibility shall be effective retroactively to the first pay period beginning on or after January 1, 2004 in accord with P.L. 108-170. Similarly, any such employee (added to the eligibility list as a result of this review) who has worked on any Saturday since the effective date of their eligibility shall be paid premium pay for all work performed on Saturdays subsequent to the effective date stated above. Such retroactive payment shall be made in accordance with the Back Pay Act (5 U.S.C. § 5596) to redress an unjustified personnel action, specifically the denial of eligibility which caused such employees to be denied the payment of a 25 percent premium for all hours worked on Saturdays subsequent to the first pay period beginning on or after January 1, 2004.

The union requested attorney fees. In order for such a request to be considered the union must submit a detailed account of, and a jurisdiction for, all such expenditures for which it believes the union should be reimbursed. This accounting and justification should be submitted to the arbitrator expeditiously.

The arbitrator shall return jurisdiction over this matter for a period of 30 days (ending C.O.B. March 18, 2005) in the event clarification of this award is required.

Donald S. Wasserman
February 16, 2005