

65 FLRA No. 167

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
KANSAS CITY, MISSOURI
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 910
(Union)

0-AR-4171

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DECISION

May 5, 2011

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

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Anthony Redwood filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions. Both parties filed supplemental submissions.

The Union filed a grievance alleging that the Agency violated the parties' collective bargaining agreement (CBA) when it reassigned the grievant from his position as head of the Nephrology Section at the Kansas City Veterans Administration Medical Center (KC VAMC). The Arbitrator sustained the grievance. For the reasons set forth below, we set aside a portion of the award and deny the Agency's remaining exceptions.

II. Background and Arbitrator's Award

This case arises out of a grievance resulting from the grievant's reassignment from his position as head of the Nephrology Section at KC VAMC to that of a staff Nephrologist. According to the Chief of the Medical Subspecialties (Chief), the grievant's

reassignment to a staff Nephrologist position was warranted due to the grievant's frequent public contradictions of the Chief, his public posting of notes about their discussions, his infrequent rounds on the dialysis unit, and the Chief's lack of confidence in the grievant's leadership abilities. Award at 5. Prior to reassigning the grievant, the Chief asked that a Board of Investigation (the Board) be convened to investigate what he believed to be research improprieties on the part of the grievant. Subsequent to the reassignment, the Board exonerated the grievant, finding that the Chief's allegations were unsubstantiated. *Id.*

The Arbitrator framed the issues to be decided at arbitration as follows:

1. As the grievant is a Title 38 employee, and as it is alleged that the grievance relates in part to professional conduct and to compensation, is the grievance arbitrable?
2. If yes, was the management right to reassign the grievant by removing him from the position of section head of [N]ephrology exercised in a manner consistent with the [CBA]? If not, what is the remedy?

Id. at 6.

The Arbitrator made two determinations on the arbitrability issue. First, the Arbitrator rejected the Agency's claim that, because the grievance dealt with professional conduct or competence, it was not arbitrable under 38 U.S.C. § 7422. The Arbitrator determined that the Agency's allegations concerning the grievant's professional conduct or competence did not involve the level of hands-on patient care or clinical competence required for its exclusion from arbitration under 38 U.S.C. § 7422(b).¹ *Id.* at 11; (citing 38 U.S.C. § 7422(b) & (c) and Article 42, Section 2(c), Note 1 of the parties' CBA).² The

1. 38 U.S.C. § 7422(b) precludes physicians and other selected medical professionals from filing grievances over matters concerning (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation under this title. The relevant language of 38 U.S.C. § 7422(b) is set forth in the appendix to this decision.

2. The relevant language of Article 42, Section 2(c), Note 1 of the CBA as provided in the arbitration award and the relevant language of 38 U.S.C. § 7422 (c) are also set forth in the appendix.

Arbitrator further found that no evidence was presented at arbitration supporting any claim that the grievant failed to conduct himself professionally or lacked competence. The Arbitrator also noted that the Board of Investigation “totally exonerated” the grievant of allegations of professional incompetency. *Id.*

Second, the Arbitrator rejected the Agency’s claim that, because the grievance dealt with employee compensation, it was not arbitrable under 38 U.S.C. § 7422. The Arbitrator determined that the grievance had more to do with the grievant’s reputation than with compensation. *Id.* Accordingly, the Arbitrator found that the grievance should not be excluded from arbitration under 38 U.S.C. § 7422. As such, the Arbitrator concluded that the grievance was arbitrable. *Id.*

Turning to the grievance’s merits, the Arbitrator first addressed the Agency’s argument that the grievant’s reassignment was within management’s statutory right to assign work. *Id.* at 11. The Arbitrator noted that, although the Agency has the right to assign employees to duties and positions and “suspend, remove, reduce in grade or pay or take other disciplinary action against . . . employees[,]” that right is not absolute and must be exercised consistent with the negotiated provisions of the CBA. *Id.* at 11-12. As such, the Arbitrator considered whether the Agency’s reassignment of the grievant from his position was in accordance with the CBA.

In determining whether the Agency was acting in accordance with the CBA when it reassigned the grievant from his position as head of the Nephrology Section to that of a staff Nephrologist, the Arbitrator considered the record. The Arbitrator found that the relationship between the Chief and the section heads, including the grievant, began deteriorating soon after the Chief joined KC VAMC’s staff. *Id.* at 12. The Arbitrator noted that the Chief became “testy, confrontational, and ultimately retaliatory” when the grievant and other section heads presented him with input and suggestions. *Id.* Specifically, the Arbitrator determined that the Chief harassed the grievant and damaged his reputation by referring unfounded charges to the public Board of Investigation. *Id.* at 13. The Arbitrator further found that the Chief removed the grievant from his position before the Board of Investigation concluded its inquiry. *Id.* The Arbitrator also determined that the grievant was reassigned without any prior warning or counseling. *Id.* at 12.

The Arbitrator determined that the Agency’s reassignment of the grievant violated several provisions of the CBA that were intended to limit the Agency’s right to assign and reassign work, and its right to discipline employees. *Id.* at 11-12. First, the Arbitrator found that the Agency violated Article 12, Section 10, which provides that “reassignments shall not be used as punishment, harassment, or reprisal.” *Id.* at 12-13, 15. Second, the Arbitrator concluded that the Agency’s reassignment of the grievant violated Article 13, Section 4 of the CBA, providing that “administrative reassignments will not be used as discipline against any employees, unless appropriate procedures are followed.” *Id.* at 13. Third, the Arbitrator determined that the Agency violated Article 13, Section 6 of the CBA, requiring that discipline be applied fairly and equitably and not be used to harass employees. *Id.* Lastly, the Arbitrator found that the Agency’s reassignment of the grievant violated Article 16 of the CBA, which gives employees the right to (1) not be subjected to disciplinary or adverse action based on rumors or gossip; (2) receive instructions in such a manner that will avoid public embarrassment; and (3) be free from intimidation, coercion, harassment, or unreasonable working conditions, such as reprisal. *Id.* at 13-14. The Arbitrator concluded that the reassignment was neither fair nor reasonable, that it failed to meet due process standards and follow disciplinary process procedures, and that it was arbitrary and capricious. *Id.*

The Arbitrator sustained the grievance and granted the grievant both compensatory damages and equitable relief. Regarding compensatory damages, the Arbitrator found that working in a supervisory role was one factor considered in determining which physicians should be moved to a higher pay tier. *Id.* at 15. The Arbitrator further found that, had the grievant not been reassigned, he probably would have been placed in a higher pay tier, given the longevity of his service, his research and leadership record, and his status in the academic community. *Id.* Based on these facts, the Arbitrator concluded that the grievant’s reassignment from his position as head of Nephrology foreclosed his consideration for higher compensation. *Id.* Consequently, the Arbitrator ordered the Agency to pay the grievant the difference between the actual compensation that the grievant received and the compensation that he would have received had he remained head of the Nephrology Section and, as a result, been placed in a higher pay tier. The Arbitrator also awarded the Union attorney fees. *Id.* at 16.

In addition, the Arbitrator awarded the grievant equitable relief. Noting that the parties agreed that the Arbitrator had full remedial authority, including the authority to reinstate the grievant, the Arbitrator ordered the reinstatement of the grievant to his former position as head of Nephrology or an equivalent leadership position. *Id.* at 15-16. The Arbitrator also determined that the grievant suffered harm to his reputation. As such, he ordered the Agency to publicly acknowledge, as agreed to by the Union, that the grievant had been “vindicated” by the arbitration and that his reassignment from head of Nephrology was unwarranted. *Id.* The Arbitrator also ordered that this public acknowledgement be made known to the appropriate officials at the University of Kansas Medical Center, where the grievant is a tenured professor.

III. Preliminary Matters

- A. The Authority will not consider the parties’ supplemental submissions.

Each party filed supplemental submissions concerning matters that arose after the Arbitrator issued the arbitration award. After submitting its exceptions to the Authority, the Agency requested the Secretary of Veterans Affairs (the Secretary) to make a determination as to whether the Arbitrator’s award infringed on the Secretary’s exclusive authority to make decisions on issues relating to (1) employee professional conduct or competence and (2) compensation, under 38 U.S.C. § 7422(d).³ Title 38 Decision Paper (Decision Paper) at 1-3.⁴ The Secretary’s designee, the Under Secretary of Health (USH), addressed the Agency’s request.⁵ The

3. 38 U.S.C. § 7422(d) provides:

An issue of whether a matter or question concerns or arises out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation under this title shall be decided by the Secretary and is not itself subject to collective bargaining and may not be reviewed by any other agency.

4. The Agency raised the same issues in its exceptions. Exceptions at 2.

5. Because the USH’s decision bears upon the disposition of the § 7422(d) issue involved in this case, we take official notice of it. *See* 5 C.F.R. § 2429.5 (Authority may take official notice of such matters as would be proper); *AFGE, Council 238*, 64 FLRA 223, 223 n.1 (2009) (official notice taken of documents submitted in arbitration appeal as

parties each filed supplemental submissions with the Authority concerning the USH’s decision on the issues raised by the Agency.

Although the Authority’s Regulations do not provide for the filing of supplemental submissions, 5 C.F.R. § 2429.26 provides that the Authority may, in its discretion, grant a party leave to file “other documents” as deemed appropriate. *E.g.*, *Cong. Research Emps. Ass’n, IFPTE, Local 75*, 59 FLRA 994, 999 (2004) (*Cong. Research*). A filing party must demonstrate why its supplemental submission should be considered. *NTEU, Chapter 98*, 60 FLRA 448, 448 n.2 (2004). For example, the Authority has granted leave to file other documents where the supplemental submission responds to issues raised for the first time in an opposing party’s filing. *See Cong. Research*, 59 FLRA at 999. Parties have also been granted leave to address the applicability of court decisions that issued while the parties’ dispute was pending before the Authority. *E.g.*, *U.S. Dep’t of Justice, Fed. Bureau of Prisons, Metro. Corr. Ctr., Chi., Ill.*, 63 FLRA 423, 423 n.1 (2009) (*Metro. Corr. Ctr.*) (citing *U.S. Customs Serv.*, 46 FLRA 1080, 1080 n.1 (1992)).

Here, neither party requested leave to file supplemental submissions addressing the merits of the Secretary’s decision. Therefore, we decline to consider those submissions. *See* 5 C.F.R. § 2429.26.

- B. A portion of the award is set aside based on the USH decision.

The USH addressed several issues raised in the Agency’s exceptions to the arbitration award. The Secretary has the “exclusive authority” to make 38 U.S.C. § 7422 determinations. *See AFGE, Local 2145*, 61 FLRA 571, 575 (2006) (Secretary has authority to make § 7422 determination even after arbitration award resolves grievance pertaining to such matters) (*AFGE*) (citing *U.S. Dep’t of Veterans Affairs, Veterans Affairs Med. Ctr., Asheville, N.C.*, 57 FLRA 681, 683 (2002)). These determinations are not reviewable by the Authority. *See Veterans Admin., Long Beach, Cal.*, 48 FLRA 970, 975 (1993) (*VA, Long Beach*).

First, the USH determined that the grievant’s reassignment was not a matter pertaining to professional conduct or competence within the meaning of § 7422(b). Decision Paper at 7.

relevant to resolution of negotiability case involving same parties where documents were relevant to disposition of negotiability determination).

Accordingly, the USH did not address the portion of the Arbitrator's award requiring the Agency to: (1) reinstate the grievant as head of Nephrology and (2) publicly acknowledge that the grievant had been vindicated by the arbitration. *Id.* As the USH found that the grievance did not address matters concerning professional conduct or competence, issues raised in the Agency's exceptions concerning the grievant's reassignment in this regard are not excluded from the Authority's review under § 7422(d). Accordingly, we will address the Agency's exceptions pertaining to those matters.

Second, the USH concluded that a portion of the award pertained to matters regarding compensation within the meaning of § 7422. *Id.* Accordingly, the USH invalidated the portion of the award regarding compensatory damages and attorney fees. Decision Paper at 6-7. As the Secretary has authority to make § 7422 determinations even after an arbitration award resolves a grievance pertaining to such matters, *see AFGE*, 61 FLRA at 575, we set aside that portion of the award. *See U.S. Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Amarillo, Tex.*, 49 FLRA 1511, 1516 (1994) (setting aside award where Chief Medical Director determined under § 7422(d) that the grievance concerned the peer review process and, therefore, was not arbitrable).

IV. Positions of the Parties

A. Agency's Exceptions

The Agency excepts to the arbitration award on several grounds. First, as relevant here, the Agency argues that reinstating the grievant to his former position as head of Nephrology affects management's right to assign work under the Statute. Exceptions at 6-7. According to the Agency, the CBA cannot be enforced so as to improperly deny the Agency the authority to exercise its management rights. *Id.* at 6. Thus, in the Agency's view, even if it violated the CBA by reassigning the grievant, an award reinstating the grievant to that position is unenforceable as violating management's right to assign work. *Id.* at 7, 20. As such, the Agency contends that the Authority should apply the two-prong test set forth in *United States Department of the Treasury, Bureau of Engraving & Printing, Washington, D.C.*, 53 FLRA 146, 153-54 (1997) (*BEP*) and conclude that the award violates management's rights. *See* Exceptions at 10.

The Agency contends that the award does not satisfy prong I of *BEP* because the Arbitrator failed to find that the CBA provisions addressing employee

reassignments were negotiated under § 7106(b) of the Statute. *Id.* at 7-8. In addition, the Agency argues that the Arbitrator failed to establish that the reassignment of the grievant violated any applicable law. In this respect, the Agency argues that the Arbitrator erroneously found that the Agency violated provisions of Title 5, which are inapplicable in this case. Rather, the Agency claims, the Arbitrator should have looked at whether its actions were consistent with the provisions of Title 38, since the grievant was appointed under 38 U.S.C. § 7401(d). *Id.* at 8. The Agency further argues that the award does not satisfy prong II of *BEP* because the Arbitrator failed to reconstruct what action the Agency would have taken in the absence of its alleged contractual violation. *Id.* at 10.

Second, the Agency argues that the Arbitrator exceeded his authority. The Agency claims that the Arbitrator's order requiring it to publicly acknowledge, "*as agreed to by the Union,*" that the grievant has been vindicated by the arbitration impermissibly delegates the Arbitrator's authority to award appropriate remedies to the Union. *Id.* at 18-19. According to the Agency, the Union has no statutory, regulatory, or other right to exercise such authority. *Id.* at 19. In addition, the Agency contends that the Authority should not require it to provide notice to officials at the University of Kansas Medical Center that the grievant was vindicated at arbitration. According to the Agency, that institution is not involved in this case, and the Arbitrator does not have the authority to order the Agency to publicly acknowledge this result. *Id.*

Third, the Agency argues that the award is too ambiguous to implement because the Arbitrator did not provide any guidelines regarding what constitutes an appropriate "public acknowledgment." *Id.* The Agency contends that the Union could demand any number of things to be included in the public acknowledgement that the Arbitrator did not contemplate. Consequently, the Agency claims, the award is so ambiguous as to make implementation impossible and asks that that the Authority set it aside. *Id.*

Fourth, the Agency contends that all of its exceptions collectively demonstrate that the award fails to draw its essence from the CBA. *Id.* at 19-20.⁶

6. The Agency does not provide any specific arguments supporting its claim that the award fails to draw its essence from the agreement. When a party fails to provide any arguments or authority to support its exception, the Authority will deny the exception as a bare assertion. *See*

Therefore, the Agency asks that the Authority set aside the award.

B. Union's Opposition

The Union presents several arguments responding to the Agency's exceptions. First, the Union argues that the grievance does not involve the grievant's professional conduct or his competence as a physician under 38 U.S.C. § 7422. Opp'n at 5. Thus, the Union argues, the grievance is arbitrable. *Id.*

Second, the Union contends that the award does not violate management rights. *Id.* at 6-7. The Union argues that the right to assign work encompasses the right to determine particular duties to be assigned to employees and that the award does not preclude the Agency from determining the grievant's future duties. *Id.* at 9.

Third, the Union argues that the Arbitrator did not exceed his authority because, under the CBA, arbitrators have full authority to award appropriate remedies. *Id.* at 9 (citing CBA, Art. 40, Sect. 2(G)).

Fourth, the Union argues that the award draws its essence from the CBA because the Arbitrator did not exceed the broad remedial powers implicitly granted in the CBA. Opp'n at 15. The Union claims that arbitration awards are afforded a deferential standard of review. *Id.* at 16. As such, the Union argues, the award should be upheld.

V. Analysis and Conclusions

A. The award is not contrary to law.

The Agency claims that the award is contrary to its right to assign work under § 7106(a)(2)(B) of the Statute. When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA

U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., Port of Seattle, Seattle, Wash., 60 FLRA 490, 492 n.7 (2004). As such, we reject this claim as a bare assertion.

37, 40 (1998) (*Army*). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

With regard to the Agency's contention that the award violates its right to assign work, we note that the Authority recently revised the analysis that it will apply when reviewing management-rights exceptions to arbitration awards. *See U.S. EPA*, 65 FLRA 113, 115 (2010) (Member Beck concurring) (*EPA*); *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 106-07 (2010) (Chairman Pope concurring) (*FDIC, S.F. Region*). Under the revised analysis, the Authority will first assess whether the award affects the exercise of the asserted management right.⁷ *EPA*, 65 FLRA at 115. If so, then the Authority examines whether the award provides a remedy for a violation of either an applicable law, within the meaning of § 7106(a)(2) of the Statute, or a contract provision that was negotiated pursuant to § 7106(b) of the Statute. *Id.* Also under the revised analysis, in determining whether the award enforces a contract provision negotiated under § 7106(b)(3), the Authority assesses: (1) whether the contract provision constitutes an arrangement for employees adversely affected by the exercise of a management right, and (2), if so, whether the arbitrator's enforcement of the arrangement abrogates the exercise of the management right. *Id.* at 116-18. In concluding that it would apply an abrogation standard, the Authority rejected continued application of an excessive-interference standard. *Id.* at 118. Furthermore, in setting forth its revised analysis, the Authority specifically rejected the continued application of the "reconstruction" requirement set forth in prior case law. *FDIC, SF Region*, 65 FLRA at 106-07.

7. For the reasons articulated in his recent concurring opinion and footnotes, Member Beck would conclude that it is unnecessary to assess whether the award affects the exercise of the asserted management right. The appropriate question is simply whether the remedy directed by the Arbitrator enforces the provision in a reasonable and reasonably foreseeable fashion. *See EPA*, 65 FLRA at 120 (Concurring Opinion of Member Beck); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Terre Haute, Ind.*, 65 FLRA 460, 462-63 n.2 (2011); *Soc. Sec. Admin., Dallas Region*, 65 FLRA 405, 408 n.5 (2010); *U.S. Dep't of the Air Force, Air Force Materiel Command*, 65 FLRA 395, 398 n.7 (2010); *U.S. Dep't of Health & Human Servs., Office of Medicare Hearings & Appeals*, 65 FLRA 175, 177 n.3 (2010); *U.S. Dep't of Transp., Fed. Aviation Admin.*, 65 FLRA 171, 173 n.5 (2010). Member Beck would conclude that the Arbitrator's award is a plausible interpretation of the parties' agreement and deny the exception.

The right to assign work under § 7106(a)(2)(B) of the Statute includes the right to determine the particular duties to be assigned, when work assignments will occur, and to whom, or what positions, the duties will be assigned. *E.g.*, *U.S. Dep't of Commerce, PTO*, 65 FLRA 13, 15 (2010) (Member Beck dissenting on other grounds). As the award requires the Agency to assign the duties of the head of the Nephrology Section to the grievant, we find that the award affects management's right to assign work. *See U.S. Dep't of Veterans Affairs, Med. Ctr., Detroit, Mich.*, 61 FLRA 371, 373 (2005) (*VA Med. Ctr.*) (award returning grievant to previous position requires agency to assign certain duties to grievant and thus, affects management's right to assign work). We must therefore determine whether the Arbitrator enforced a contract provision negotiated pursuant to § 7106(b) of the Statute. *EPA*, 65 FLRA at 116.

The Arbitrator found that several provisions in the CBA are intended to limit the Agency's rights to assign and reassign work, and its right to discipline employees. Award at 11-12. The Arbitrator applied these provisions in finding that the Agency violated the CBA when it reassigned the grievant from his position as head of Nephrology to that of a staff Nephrologist. Specifically, the Arbitrator found that the Agency violated provisions of the CBA prohibiting reassignments from being used as punishment, harassment, or reprisal; provisions prohibiting reassignments from being used as discipline against employees without use of appropriate procedures; and provisions providing that discipline be applied "fairly and equitably" to employees. *Id.* at 12-15 (citing CBA Articles 12, 13 and 16).

The Authority has held that contractual provisions limiting the use of employee reassignments for disciplinary purposes are enforceable § 7106(b) provisions. *See, e.g., VA Med. Ctr.*, 61 FLRA at 372-74 (finding that contract provisions limiting the use of reassignments for disciplinary purposes were negotiated under § 7106(b)). In this connection, the Authority has held that such contract provisions constitute arrangements within the meaning of § 7106(b)(3) of the Statute. *U.S. Dep't of the Treasury, U.S. Customs Serv., N.Y., N.Y.*, 39 FLRA 278, 283 (1991) (*Treasury*) (contract provision setting forth limitations on reassignments found to be an arrangement); *IRS, Austin Dist.*, 9 FLRA 672, 674 (1982) (contract provision providing that reassignments would not be used in lieu of discipline constituted arrangement). Consequently, we find that the Arbitrator's direction

to the Agency to reinstate the grievant to the position from which he was improperly reassigned enforces an arrangement negotiated pursuant to § 7106(b)(3) of the Statute. *See EPA*, 65 FLRA at 115.

Next, we must determine whether the Arbitrator's award reinstating the grievant abrogates the Agency's right to assign work to employees. *See EPA*, 65 FLRA at 116-18. The Authority has previously described an award that abrogates the exercise of a management right as an award that "precludes an agency from exercising" that right. *U.S. Dep't of the Air Force, Seymour Johnson Air Force Base, N.C.*, 55 FLRA 163, 167 (1999) (quoting *Dep't of the Treasury, U.S. Customs Serv.*, 37 FLRA 309, 314 (1990)). The CBA provisions, as interpreted and applied by the Arbitrator, do not prevent the Agency from assigning work to the grievant. By reinstating the grievant, the Arbitrator merely enforced the Agency's negotiated limitations on reassignments and discipline in the CBA as set forth above. Management still retains the right to assign work to employees within the limitations of the contractual provisions that it negotiated with the Union. Given these findings and that the Authority has concluded that similar CBA provisions constitute arrangements, *see, e.g., Treasury*, 39 FLRA at 283-84, we find that the provisions are enforceable under § 7106(b)(3) of the Statute and that Agency has not demonstrated that the award impermissibly affects management's right to assign work under § 7106(a)(2)(B). We therefore, deny the exception.⁸

B. The Arbitrator did not exceed his authority.

The Agency contends that the Arbitrator exceeded his authority for two reasons. First, it claims that the Arbitrator impermissibly delegated his authority to award appropriate remedies to the Union

8. Given this determination, we need not address the Agency's claim that the Arbitrator failed to establish that the reassignment of the grievant violated any applicable law. Further, we find it unnecessary to address the Agency's argument that the award is deficient under *BEP* because the Arbitrator failed to reconstruct what management would have done had it complied with the parties' agreement since the Authority no longer requires that an arbitrator's remedy reconstruct what management would have done had it not violated the contract provision. *FDIC*, 65 FLRA 179, 181 (2010). In addition, for the reasons set forth in her concurring opinion in *FDIC, S.F. Region*, 65 FLRA at 112, Chairman Pope agrees that the Agency provides no basis for finding the Arbitrator's remedy deficient because the remedy is reasonably related to the contract provisions at issue and the harm being remedied.

by allowing it to approve or disapprove the Agency's public acknowledgment of the arbitration's outcome. Second, the Agency argues that the Arbitrator does not have the authority to order the Agency to provide such public notification to the University of Kansas Medical Center.

An arbitrator exceeds his or her authority when the arbitrator fails to resolve an issue submitted to arbitration, resolves an issue not submitted to arbitration, disregards specific limitations on his or her authority, or awards relief to persons who are not encompassed within the grievance. *See U.S. Dep't of Def., Army & Air Force Exch. Serv.*, 51 FLRA 1371, 1378 (1996).

The Agency has not demonstrated that the Arbitrator exceeded his authority when he ordered the parties to agree on an appropriate public announcement acknowledging that the grievant had been vindicated at arbitration and to publicly inform the officials at the University of Kansas Medical Center of the grievant's vindication. *U.S. Dep't of Transp., Fed. Aviation Admin., Airways Facility Serv., Nat'l Airway Sys. Eng'g Div., Okla. City, Okla.*, 60 FLRA 565, 569 (2005) (exception claiming arbitrator exceeded authority denied where there was no violation of express limitation on authority). The Arbitrator found that the grievant's damages as a result of the Agency's breach of contract were largely to his reputation. *See* Award at 11. Thus, a public announcement of the arbitration's outcome at the grievant's longtime place of employment is directly responsive to any damage that may have occurred to the grievant's reputation as a result of the unsubstantiated accusations regarding the grievant's clinical research.

As the Agency has not demonstrated that the Arbitrator failed to resolve an issue submitted to arbitration, resolved an issue not submitted to arbitration, disregarded specific limitations on his authority, or awarded relief to persons who are not encompassed within the grievance, we deny the Agency's exception that the Arbitrator exceeded his authority.

C. The award is not too ambiguous to implement.

The Authority will find an award deficient when it is incomplete, ambiguous, or so contradictory as to make implementation of the award impossible. *See U.S. Dep't of Labor, Mine Safety & Health Admin. Se. Dist.*, 40 FLRA 937, 943 (1991). For an award to be found deficient on this ground, the appealing party

must show that implementation of the award is impossible because the meaning and effect of the award are too unclear or uncertain. *See U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 56 FLRA 1057, 1074 (2001).

The Agency argues that the award is ambiguous because, in directing the Agency to publicly acknowledge the grievant's vindication at arbitration, the Arbitrator did not provide any guidelines regarding what constitutes an appropriate "public acknowledgment." Exceptions at 19. However, the Agency does not demonstrate that making such a public acknowledgment is impossible simply because it must issue the acknowledgment "in an appropriate public manner, as agreed to by the Union[.]" Award at 16. Accordingly, as there is no basis for finding that the award is impossible to implement, we find that the award is not deficient in this regard, and deny the exception. *See U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 65 FLRA 373, 377 (2010).

VI. Decision

The portion of the award related to the grievant's compensation under 38 U.S.C. § 7422 is set aside and the Agency's remaining exceptions are denied.

APPENDIX

38 U.S.C. § 7422

§ 7422. Collective bargaining

....

(b) Such collective bargaining (and any grievance procedures provided under a collective bargaining agreement) in the case of employees described in section 7421(b) of this title [38 USCS § 7421(b)] may not cover, or have any applicability to, any matter or question concerning or arising out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation under this title.

(c) For purposes of this section, the term "professional conduct or competence" means any of the following:

- (1) Direct patient care.
- (2) Clinical competence.

....

Article 42, Section 2, Grievance Procedure/Definition

C. Under Title 38 Section 7422, the following exclusions also apply:

1. Any matter or question concerning or arising out of professional conduct or competence such as direct patient care or clinical competence,
3. Any matter or question concerning or arising out of the establishment, determination, or adjustment of employee compensation under this Title.

Note 1: Any questions concerning . . . the exclusions in Paragraphs C1-C3 shall be resolved in accordance with the VA Partnership Council's Guide to Collective Bargaining . . . , which provides that these exclusions will be applied narrowly and only to those matters clearly and unequivocally involving direct hands-on patient care or clinical competence.

....

Award at 4.