Office of Compliance
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UNITED STATES CAPITOL POLICE, Respondent, and FRATERNAL ORDER OF POLICE, DISTRICT OF COLUMBIA LODGE NO. 1 U.S. CAPITOL POLICE LABOR COMMITTEE, Charging Party.	)	Case No. 15-LMR-02 (CA)

Before the Board of Directors: Barbara Childs Wallace, Chair; Susan S. Robfogel; Alan V. Friedman; Roberta L. Holzwarth; Barbara L. Camens, Members.

DECISION OF THE BOARD OF DIRECTORS

This case is before the Board pursuant to a petition for review ("PFR") filed by the United States Capitol Police ("Respondent or USCP") of the Hearing Officer's November 17, 2016 Decision on Motions for Summary Judgment, which found that the Respondent committed an unfair labor practice in violation of section 220(a) of the Congressional Accountability Act ("CAA") (2 U.S.C. § 1351) and 5 U.S.C. §§ 7116(a)(1) and (8) when it failed to fully implement a May 13, 2014 Arbitration Award, as supplemented and clarified by the Arbitrator's June 17, 2015 Order.

Upon due consideration of the Hearing Officer's Decision, the parties' briefs and filings, and the record in these proceedings, the Board affirms the Hearing Officer's Decision.[1]

I. Statement of the Case

Unless otherwise indicated, the following facts, as set forth in the Hearing Officer's Decision, are undisputed:

[1] On January 16, 2017, the USCP filed a motion to exceed the page limit of its brief. The Board grants the USCP's motion.

The USCP is an "employing office" within the meaning of CAA sections 101(9) and 220(a) (1). The Charging Party, FOP/U.S. Capitol Police Labor Committee ("Union"), is a labor organization and is the duly-certified exclusive representative of the Respondent's officers who are included in the relevant bargaining unit. On July 22, 2013, the Union filed a grievance in accordance with the procedures set forth in the governing collective bargaining agreement (CBA), which challenged the termination of USCP Officer Andrew Ricken.

The Arbitrator issued an Award on May 13, 2014, which reduced Officer Ricken's termination to a 30-day suspension and granted him lost wages and benefits. The USCP filed eight exceptions to the Award with the Board, which were denied. *FOP/U.S. Capitol Police Labor Comm. v. U.S. Capitol Police,* No. 14-ARB-01, 2014 WL 7215202 (OOC Dec. 12, 2014). Thereafter, by letter dated December 16, 2014, the Arbitrator informed the parties that he was removing the stay on the implementation of the Award. The Arbitrator directed the USCP to reinstate Officer Ricken and provide the Union with documentation in response to its earlier May 22, 2014 information request concerning remedy.

By letter dated January 26, 2015, the Arbitrator asked the parties whether the USCP had complied with the May 13, 2014 Award. The Union responded, informing the Arbitrator that Officer Ricken had not been reinstated or compensated and that the USCP had ignored all the information requests regarding damages owed. By email dated February 18, 2015, the Arbitrator directed the USCP to comply with the Award by reinstating Officer Ricken and promptly providing the Union with the information that it had requested.

On March 13, 2015, the USCP sent an email to the Union that it would not comply with the May 13, 2014 Award because the USCP believed that the Arbitrator "did not retain jurisdiction over the matter." The Union thereafter informed the Arbitrator on March 19, 2015 that the USCP would neither supply the requested information nor comply with the Award.

On June 17, 2015, the Arbitrator issued an Order clarifying and supplementing the Award. He directed the USCP to reinstate Officer Ricken immediately, and he determined that Officer Ricken was entitled to $340,487.70 in back pay, less offsets and interest, $648.60 for expenses; and attorney fees in the amount of $265,183 and expenses for $8,723.84. The Arbitrator stated that back pay and expenses would increase if Officer Ricken were not reinstated within 30 days of that Order. The USCP did not file exceptions to the Arbitrator's June 17, 2015 Order.

On July 28, 2015, the Union filed a Charge with the Office of Compliance ("OOC") alleging that the USCP violated 5 U.S.C. §§ 7116(a)(1) and (8) when it failed to implement the May 13, 2014 Award, as supplemented and clarified by the Arbitrator's June 17, 2015 Order, and on August 31, 2015, the OOC General Counsel ("OOCGC") issued a Complaint based on the Union's unfair labor practice charge. On September 29, 2015, the Hearing Officer granted the USCP's motion to dismiss the Complaint on the ground that the Union's charge was untimely filed. By Order dated September 27, 2016, the Board reversed the

dismissal of the complaint and remanded the case for further proceedings. *FOP/U.S. Capitol Police Labor Comm. v. U.S. Capitol Police*, No. 15-LMR-02, 2016 WL 5943737 (OOC Sep. 27, 2016).

On October 11, 2016, the Hearing Officer issued a Preconference Hearing Order indicating the parties agreed that no genuine issue existed as to any material fact in the case, and that the matter was appropriate for decision on motions for summary judgment.[2]

On November 17, 2016, the Hearing Officer granted summary judgment in favor of the OOCGC and the Union, and he denied the USCP's cross-motion for summary judgment. The USCP's PFR followed.

II. Standard of Review

The Board's standard of review for appeals from a Hearing Officer's decision requires it to set aside a decision if it determines the decision to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; (2) not made consistent with required procedures; or (3) unsupported by substantial evidence. 2 U.S.C. § 1406(c). *Katsouros v. Office of the Architect of the Capitol*, Case Nos. 07-AC-48 (DA, RP), 09-AC-10 (DA, FM, RP), 2011 WL 332311, at *3 (Jan. 21, 2011).

We review a decision granting a motion for summary judgment *de novo*. *Patterson v. Office of the Architect of the Capitol*, No. 07-AC-31 (RP), 2009 WL 8575129, at *3 (OOC Apr. 21, 2009).

III. Analysis

When Congress enacted the CAA in 1995, it expressly extended the rights, protections, and responsibilities contained in section 7121 of the Federal Service Labor Management Relations Statute ("FSLMRS") to USCP employees. 2 U.S.C. § 1351(a)(1). In this regard, section 7121(b)(1)(C)(iii) of the FSLMRS requires that CBAs contain procedures for the settlement of grievances and provides that any grievance not satisfactorily settled under the procedure be subject to binding arbitration. *U.S. Dep't of Homeland Sec., U.S. Immigration and Customs Enf't*, 69 F.L.R.A. 72 (2015). An agency must take the action required by an arbitrator's award when that award becomes final and binding. *U.S. Dep't of Transp., Fed. Aviation Admin., N.W. Region*, 55 F.L.R.A. 293, 296-97 (1999). The refusal of an agency to comply with a final arbitration award, even in termination cases, constitutes an unfair labor practice under 5 U.S.C. §§ 7116(a) (1) and (8). *U.S. Army Adjutant Gen. Publ'ns Ctr.*, 22 F.L.R.A. 200 (1986). Once an award has become final and binding, either through the denial of exceptions, the failure to file exceptions, or the denial of a petition for judicial review, the merits of the award are not subject to review in an unfair labor practice proceeding. *Id.*

[2] Nonetheless, the parties did not submit a joint statement of material facts not in dispute.

The USCP does not dispute the Hearing Officer's finding that it has not reinstated Officer Ricken or provided the Union with documentation in response to its earlier May 22, 2014 information request, as required by the Arbitrator's May 13, 2014 Award; nor has it provided the backpay, attorney fees or expenses set forth in the Arbitrator's June 17, 2015 Order. The USCP contends on review, however, that its failure to implement the Award does not constitute an unfair labor practice because: (1) the Hearing Officer failed to reconsider whether the Complaint and Unfair Labor Practice Charge were untimely filed; (2) the Hearing Officer misapplied the legal framework for considering motions for summary judgment; (3) the Award is not valid because the termination grievance was not arbitrable; (4) the provision of the parties' CBA purporting to grant these USCP employees the right to grieve their removals is unenforceable because it is inconsistent with law; and (5) it properly refused to provide the Union the information it had requested concerning remedy, as required by the Arbitrator, because the Union failed to establish a particularized need for the information and the information request did not comply with section 7 of the CBA.

As we discuss below, these contentions lack merit.

A. The Charge and Complaint were Timely Filed.

As stated above, the Board, taking the allegations of the General Counsel's Complaint as true and drawing all reasonable inferences in his favor, previously reversed the Hearing Officer's Order granting the USCP's motion to dismiss the Complaint and Charge as untimely filed. The Respondent now contends that the Hearing Officer erred in failing to reconsider this issue on summary judgment taking the facts in the light most favorable to the USCP, but it did not raise the timeliness issue in its summary judgment motion. The Board does not consider issues raised for the first time on appeal. *Sir Leander Gamble v. Office of the Architect of the Capitol,* No. 08-AC-55 (RP), 2010 WL 3827468 at *4 n.3 (OOC Nov. 9, 2010). Accordingly, we agree with the OOCGC that the USCP's argument on this point has been waived.

In any event, we find, based on the undisputed facts, that the Charge and Complaint were timely filed. Under the CAA, an unfair labor practice charge must be filed within 180 days of the occurrence of the alleged unfair labor practice. 2 U.S.C. § 1351(c)(2). As the Board previously held in its remand order of September 27, 2016, and consistent with precedent of the Federal Labor Relations Authority ("FLRA"), the statutory period for filing an unfair labor practice charge based on a failure to comply with an arbitration award may be triggered in one of two ways: (1) when a party expressly notifies a party that it will not comply with the obligations required by an award, or (2) when an award establishes a deadline for implementing obligations required by the award and the deadline passes without the party taking any action to implement the award. *FOP/U.S. Capitol Police Labor Comm. v. U.S. Capitol Police,* No. 15-LMR-02, 2016 WL 5943737 (OOC Sep. 27, 2016); accord, *U.S. Dep't of the Treasury, Internal Revenue Serv.,* 61 F.L.R.A. 146, 150 (2005).

Here, it is undisputed that, after the USCP's exceptions to the Award had been denied, the Arbitrator ordered the USCP to comply with his Award within 30 days, i.e., by March 17, 2015. On March 13, 2015, the USCP advised the Union in writing that it would not comply with the Award. Thus, the Union's Charge was timely filed on July 28, 2015, a date within 180 days of both the USCP's date of express notice to the Union that it would not comply, as well as within 180 days of the 30-day deadline for compliance set by the Arbitrator.

B. The Hearing Officer Complied with Required Procedures in Granting the OOCGC's Motion for Summary Judgment.

Summary judgment is appropriate if there are no genuine issues of material fact and the movant is entitled to summary judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); OOC Procedural Rule 5.03(d). In determining whether the nonmoving party has raised a genuine issue of material fact, the Board must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in that party's favor. *Talavera v. Shah*, 638 F.3d 303, 308 (D.C. Cir. 2011).

On review, the USCP contends that the Hearing Officer erred in granting the OOCGC's motion for summary judgment because he ignored undisputed facts, failed to view the evidence in the light most favorable to the USCP, and failed to draw all reasonable inferences in its favor. PFR at 13-20. Specifically, the USCP contends that the Hearing Officer erred in failing to accept as undisputed fact the statements in the declaration of Timothy Blodgett, a representative of the Capitol Police Board ("CPB")[3], to the effect that the CPB has statutory approval of all USCP termination recommendations, that "[a] USCP employee's employment can only be terminated with the approval of the CPB, [and] that if the CPB disapproves of the termination recommendation, the Chief of Police cannot terminate that employee." PFR at 15. Further, the USCP contends that the Hearing Officer ignored the undisputed fact that the CPB issued an Order pursuant to its statutory authority that specifically states that any termination approved by the CPB "is a final decision of the [CPB]" and that such decisions "are not reviewable or appealable in any manner." ("CPB Order 15.03"). The Respondent also asserts that the Hearing Officer ignored the declaration of USCP Chief Matthew Verderosa, which stated, *inter alia*, that he cannot terminate USCP employees without receiving approval from the CPB, and that once he makes a recommendation to the CPB, he has no discretion over the termination matter and he has no vote as to whether the CPB will approve the termination. Finally, the USCP contends that, in failing to conclude that the termination decision in this case was not arbitrable, the Hearing Officer failed to defer to its interpretation of the CBA or to its interpretation of the United

[3] The CPB is comprised of the Sergeant at Arms of the House of Representatives, Sergeant at Arms of the Senate, the Architect of the Capitol, and in an ex officio non-voting capacity, the Chief of Police. The CPB has statutory responsibility "to oversee and support the [USCP] in its mission and advance the coordination between the [USCP] . . . and the Congress." 2 U.S.C. § 1901, notes (a)(1)-(2).

States Capitol Police Administrative Technical Corrections Act of 2009 ("TCA")[4], which it asserts removes CPB-approved terminations from the grievance arbitration procedures in the CBA. *Id.* at 15-20.

We disagree. Although the USCP correctly states that all reasonable inferences should be drawn in favor of the nonmoving party when reviewing a motion for summary judgment, *see Washington Post Co. v. U.S. Dep't of Health and Human Servs.,* 865 F.2d 320, 325 (D.C. Cir. 1989), such legal deference does not extend to legal conclusions couched as facts, s*ee Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Although the USCP characterizes the above assertions from the Blodgett and Verderosa Declarations as undisputed facts, it states elsewhere in its PFR that "USCP employees are precluded from grieving their terminations as a matter of law." PFR at 33. Because the undisputed facts to which the USCP refers are more accurately regarded as legal conclusions, the Hearing Officer did not err in failing to adopt them or construe them in the light most favorable to the USCP. *See Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1212–13

[4] Pub. L. No. 111-145, 124 Stat. 49 (Mar. 4, 2010), 2 U.S.C. §1901, note. The TCA provides, in relevant part:

(e) Hiring authority; eligibility for same benefits as House employees

(1) Authority

(A) In general
The Chief of the Capitol Police, in carrying out the duties of office, is authorized to appoint, hire, suspend with or without pay, discipline, discharge, and set the terms, conditions, and privileges of employment of employees of the Capitol Police, subject to and in accordance with applicable laws and regulations.

(B) Special rule for terminations
The Chief [of Police] may terminate an officer, member, or employee only after the Chief has provided notice of the termination to the Capitol Police Board . . . and the Board has approved the termination, except that if the Board has not disapproved the termination prior to the expiration of the 30-day period which begins on the date the Board receives the notice, the Board shall be deemed to have approved the termination.

(C) Notice or Approval
The Chief of the Capitol Police shall provide notice or receive approval, as required by the Committee on Rules and Administration of the Senate and the Committee on House Administration of the House of Representatives, as each Committee determines appropriate for -

* * *

(ii) the establishment of any new position for officers, members, or employees of the Capitol Police, for reclassification of existing positions, for reorganization plans, or for hiring, termination, or promotion for officers, members, or employees of the Capitol Police.

2 U.S.C. § 1907(e)(1).

(D.C. Cir. 1997) (testimony consisting of legal conclusions will not be permitted because such testimony merely states what result should be reached).

Moreover, as we discuss below, the USCP may not contest the validity of the Award in the context of this unfair labor practice proceeding, and it is collaterally estopped from re-litigating the issue whether employee terminations approved by the CPB are subject to arbitration. Therefore, even assuming, *arguendo*, that the matters at issue are averments of fact rather than legal conclusions, they are not issues of fact that are *material* to this unfair labor practice proceeding. The Hearing Officer did not err in concluding that there were no genuine issues of material fact in dispute in this case and that the OOCGC was entitled to summary judgment as a matter of law.

C. The Hearing Officer Correctly Determined that the USCP is Estopped from Contesting the Validity of the Final Arbitration Award in the Context of this Unfair Labor Practice Proceeding.

Throughout its PFR, the USCP challenges the validity of the Arbitrator's Award as contrary to law. It also contends that the Arbitrator was *functus officio*[5] and did not retain any jurisdiction following his May 14, 2014 Award. We review the Award, however, only to determine whether an unfair labor practice was committed. *U.S. Marshals Serv. v. FLRA*, 778 F.2d 1432, 1435-1436 (9th Cir. 1985). The FLRA has consistently held that a party cannot collaterally attack an arbitration award during the processing of an unfair labor practice proceeding brought to enforce the award when that party has failed to file timely exceptions, *Air Force, Air Force Logistics Command, Wright–Patterson AFB, Ohio*, 15 F.L.R.A. 151, 153–54 (1984), *aff'd sub nom. Dep't of the Air Force v. FLRA*, 775 F.2d 727 (6th Cir.1985), or when issues could have been, but were not, raised as exceptions to an award, *U.S. Dep't of Justice v. FLRA*, 792 F.2d 25, 28-29 (2d Cir. 1986); *U.S. Marshals Serv. v. FLRA*, 778 F.2d 1432, 1435-1436 (9th Cir. 1985); *U.S. Dep't of Veterans Affairs Med. Ctr. Allen Park, Michigan*, 49 F.L.R.A. 405, 426 (1994), or where the moving party raises issues that have been previously raised in exceptions and rejected, *AFGE Local 3511*, 23 F.L.R.A. 556, 558-59 (1986). Further, arguments that an award is contrary to law and to the parties' negotiated agreement cannot be raised again in unfair labor practice proceedings. *Id.*[6]

[5] Pursuant to the doctrine of *functus officio*, once an arbitrator resolves the matter submitted to arbitration, the arbitrator is generally without further authority. *Fed. Aviation Admin. Nw. Mountain Region, Renton, Wash. & Nat'l Air Traffic Controllers Ass'n,* 64 F.L.R.A. 823, 825 (May 28, 2010).

[6] We express no view on the merits of the underlying grievance in this case, which are not before the Board in the instant unfair labor practice proceeding. As we earlier observed in denying the USCP's exceptions to the May 13, 2014 Arbitration Award, *FOP/U.S. Capitol Police Labor Comm. v. U.S. Capital Police*, No. 14-ARB-01 (OOC Dec. 12, 2014), the question whether the USCP violated the CBA in terminating Officer Ricken's employment is for the Arbitrator; it is the Arbitrator's construction of the CBA that was bargained for; and, as such, the Board could not overturn the Award even if its view on the merits were different from that of the Arbitrator. *See United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 599 (1960).

Thus, in this unfair labor practice proceeding regarding the USCP's failure to comply with a final arbitration award, the only issues properly before the Hearing Officer were ones of compliance. *Dep't of Veterans Affairs, Dwight D. Eisenhower Med. Ctr.*, 44 F.L.R.A. 1362, 1369 (1992). The May 13, 2014 Award cleared the hurdles suggested by the USCP when the Board considered and rejected its exceptions in Case No. 14-ARB-01, and the USCP did not file exceptions to the Arbitrator's subsequent June 17, 2015 Order. If the USCP believed that the Arbitrator was *functus officio* in issuing the latter Order, it was required to file exceptions to that Award so asserting. Having failed to do so, the USCP may not now challenge the Award on that basis. *U.S. Dep't of Veterans Affairs Med. Ctr., Allen Park, Michigan*, 49 F.L.R.A. at 426 (because an argument that the arbitrator was *functus officio* and had no authority to continue his jurisdiction could have been heard on exceptions to the award, the issue was not litigable in an unfair labor practice proceeding); *Dep't of the Air Force, Griffiss Air Force Base & AFGE Local 2612*, 38 F.L.R.A. 276 (1990) (the power of an arbitrator to proceed ex parte can be raised in exceptions to the award); *U.S. Dep't of Veterans Admin. Med. Ctr., Leavenworth, Kansas*, 38 F.L.R.A. 232, 238–39 (1990).[7] If we were to agree with the USCP in this case, then final arbitration awards could be rendered non-final by the simple election to defy the final award and then challenge its merits in an unfair labor practice proceeding. *See U.S. Marshals Serv.* 778 F.2d at 1435. Finding that the USCP has committed an unfair labor practice in its refusal to comply with the May 13, 2014 Arbitration Award, as supplemented and clarified by the Arbitrator's June 17, 2015 Order, we decline to again review the Award and Order for deficiencies.

D. The Hearing Officer Correctly Determined that the USCP is Collaterally Estopped from Re-litigating the Issue Whether Employee Terminations Approved by the CPB are Subject to Arbitration.

The USCP's "primary assertion" in this case is that, with the enactment of the TCA, "Congress precluded USCP terminations from being subject to arbitrations." PFR at 24. Specifically, the USCP contends:

> When Congress enacted the TCA, it made two fundamental changes. First, it provided special rules for termination of employees, giving final approval authority to the CPB. 2 U .S.C. § 1907(e)(1)(B). Second, it removed the CPB from coverage under the CAA by removing it as an "employing office." 2 U.S.C. § 1301(9)(0). Thus, Congress precluded CPB approval decisions from being subject to arbitration by removing it as an "employing office" and, in the same statute, giving the CPB approval authority over terminations of USCP employees.

[7] *See also Gen. Serv. Admin. & AFGE Local 2600*, 34 F.L.R.A. 1123 (1990) (applying the doctrine of *functus officio* in reviewing exceptions to an arbitration award); *Overseas Fed'n of Teachers, AFT & Dep't of Def. Dependents Sch.*, 32 F.L.R.A. 410 (1988) (same).

Id. at 24-25. As the Hearing Officer correctly noted, however, the Board rejected this very proposition when it denied the USCP's exceptions to the Arbitrator's May 13, 2014 Award. Hearing Officer's Decision at 12 n.7; *see FOP/U.S. Capitol Police Labor Comm. v. United States Capitol Police*, 2014 WL 7215202 at *4 (determining, inter alia, that the USCP failed to establish that employee terminations approved by the CPB are not subject to arbitration by virtue of the enactment of the TCA).

This Board has previously applied the doctrine of collateral estoppel, or issue preclusion, in matters before it. *See Halcomb v. Ass'n & Exec. Bd. of Comm. of Correspondents Radio & Television Press Gallery of U.S. Senate*, No. 03-SN-45, 2005 WL 6236946, at *7 (OOC Apr. 20, 2005). Under that doctrine, judgment in a prior proceeding precludes re-litigation of issues actually litigated and necessary to the outcome of the first action. *Id.* Accordingly, a party that has litigated the question of subject matter jurisdiction may not reopen that question in a collateral attack on an adverse judgment. *Turner v. U.S. Dep't of Justice,* 815 F.3d 1108, 1113 (8th Cir. 2016) (because a court in a prior action had decided the issue of subject matter jurisdiction on the basis that the Administrative Procedure Act does not apply to claims alleging violations of the Civil Service Reform Act, the appellant was collaterally estopped from re-litigating that issue in a subsequent action).

In *Halcomb*, the Board adopted a four-part test set forth by the U.S. Court of Appeals for the Federal Circuit for applying collateral estoppel in the context of adjudication before administrative tribunals:

> Collateral estoppel requires four factors: (1) the issues are identical to those in a prior proceeding, (2) the issues were actually litigated, (3) the determination of the issues was necessary to the resulting judgment, and (4) the party defending against preclusion had a full and fair opportunity to litigate the issues.

Banner v. United States, 238 F.3d 1348, 1354 (Fed. Cir. 2001); *see also Macon v. Office of Compliance,* __ Fed. App'x __, 2017 WL 2533509, *3 (Fed. Cir. 2017). Here, the issue whether employee terminations approved by the CPB are subject to arbitration is identical to the issue raised and decided by this Board in Case No. 14-ARB-01. Indeed, because that case concerned the same grievance and the same grievant, the issue whether the TCA removed *this grievance* from arbitration under the CBA was also raised and decided. These issues were actually litigated and were necessary to the Board's resulting judgment on the USCP's exceptions to the Award. Finally, the USCP had a full and fair opportunity to litigate the issue now before us. Accordingly, we agree with the Hearing Officer that the USCP was collaterally estopped from re-litigating these issues in this unfair labor practice proceeding.

Even if the USCP were not estopped from relitigating this issue, we find no basis for disturbing our legal ruling in Case No. 14-ARB-01 that the TCA does not remove employee terminations approved by the CPB from the negotiated grievance/arbitration process. As it did in Case No. 14-ARB-01, the USCP stresses that only "employing offices" under the

CAA are required to submit grievances to binding arbitration under the FSLMRS as incorporated by section 220 of the CAA. 2 U.S.C. § 1351(a); 5 U.S.C. § 7121. It notes that, prior to the enactment of the TCA, the CPB had been designated as an "employing office" under section 101 of the CAA, 2 U.S.C. § 1301(9)(D). Following the TCA, however, the USCP, rather than the CPB, was designated as an "employing office" under section 101. According to the USCP, because section 1907(e)(1) of the TCA gives the CPB the "final say" as to whether a USCP employee's employment will be terminated, and because the CPB is no longer an "employing office" under section 101 of the CAA, it follows that any termination action that the CBP approves is not subject to challenge through the grievance/arbitration process.

We continue to find the USCP's position unpersuasive. The USCP has failed to cite to any part of the TCA or its legislative history to support its position that Congress intended "to preserve the CPB's discretion to terminate employees unqualified to continue as USCP officers without giving such employees the right to appeal those decisions to a non-law enforcement third party." Although the USCP contends that "the CPB is eminently more qualified than an arbitrator with no law enforcement background or statutory responsibility to safeguard the Capitol Complex to determine whether an employee is unsuitable for continued employment with the USCP," it is for Congress—not the Board—to craft an additional exclusion from arbitration coverage based on such policy considerations.

We conclude that Congress has not done so in the TCA. Section 1907 of the TCA provides, in relevant part, that "[t]he Chief of the Capitol Police . . . is authorized to appoint, hire, . . . discipline, [and] discharge . . . employees of the Capitol Police, *subject to and in accordance with applicable laws and regulations*." 2 U.S.C. § 1907(e)(1)(A) (emphasis added). The TCA goes on to include a special rule for terminations in the USCP. That is, the Chief may exercise his statutory authority to terminate an officer, member, or employee only after giving notice to the CBP and obtaining the CBP's approval for the termination. The USCP cites to the special rule to argue that the CPB has the final say on a termination and since the CPB is not a covered employer under the CAA, arbitration could not be required.

We disagree. Under the TCA, CPB approval is merely a condition precedent to the Chief's exercise of his statutory authority to terminate. Indeed, prior to the TCA, 2 U.S.C. § 1907(e)(1)(B) stated:

> (B) Review and approval
>
> In carrying out the authority under this paragraph, the Chief of the Capitol Police shall be subject to the following requirements: (i) The . . . termination of any officer, member, or employee shall be subject to the approval of the Committee on House Administration of the House of Representatives and the Committee on Rules and Administration of the Senate."

Upon enactment, the TCA substituted the CPB for the aforementioned House and Senate Committees and set a 30 day time limit, after which USCP termination decisions are deemed approved absent CPB action. The CPB, however, has no statutory or other right to unilaterally terminate an employee of the USCP. Rather, its role in a termination is solely to approve or disapprove a dismissal initiated by the Chief on behalf of the employing office, the USCP.

In this case, the Arbitrator found that the Chief violated the CBA when he terminated Officer Ricken, and he ordered the USCP to reinstate him. The arbitration award thus concerned termination of the employment relationship between Officer Ricken and the USCP, not any relationship between the Officer and the CPB. Once the Arbitrator determined that the Chief's action had to be rescinded, there was no role for the CPB. Therefore, questions about subject matter jurisdiction over CPB action are irrelevant.

Furthermore, the TCA contains no explicit language precluding arbitral review of termination decisions. Had Congress intended to exempt CPB-approved terminations from the grievance/arbitration mandates of section 7121 of the FSLMRS and CAA section 202, it could have done so expressly and explicitly, as it did elsewhere in the statute. Thus, for example, 2 U.S.C. § 1921(a) codifies the CPB's and Chief's "sole and exclusive" authority to determine the pay rates and amounts for basic pay and cost of living adjustments for members of the Capitol Police. Subsection (b), entitled "No Review or Appeal Permitted" provides that "the determination of a rate or amount described in subsection (a) of this section may not be subject to review or appeal in any manner." 2 U.S.C. § 1921(b). It is a general principle of statutory construction that when one statutory section includes particular language that is omitted in another section of the same Act, it is presumed that Congress acted intentionally and purposely. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 439-440 (2002). Accordingly, rather than operating as a clear and unequivocal manifestation of Congress's intent that USCP employees should have no post-termination appeal rights, we find that the grant of authority to the Chief in 1907(e)(1)(A) to discharge USCP employees "subject to and in accordance with applicable laws and regulations" reflects the opposite congressional intent.[8]

Indeed, as the OOCGC and the Union point out, the TCA's legislative history supports the conclusion that the statute was intended to make no change to terms and conditions of employment, and certainly not one as far-reaching as claimed by the USCP.[9] Thus, as the House Committee Report accompanying the TCA states, "[t]he [TCA] makes technical corrections to existing laws by repealing obsolete or duplicate provisions and

[8] Furthermore, because CPB Order 15.03 postdates our decision in Case No. 14 ARB 01 and merely repeats the USCP's unsubstantiated interpretation of section 1907, it fails to support the USCP's position on review.

[9] As we discuss below, the Authority decisions cited by the USCP are inapposite as they involve statutory provisions which, unlike the TCA, provide management with sole and exclusive authority to terminate employees—notwithstanding the provisions of any other laws.

correcting drafting errors in others in order to clarify their meaning. As such *the bill makes no change to terms and conditions of employment.*" H.R. REP. No. 111-66 (2009), OOCGC Ex. 1 (emphasis added). Moreover, in introducing the bill that became the TCA in the House, Rep. Brady described it as follows: "As its title suggests, H.R. 1299 is not intended to make substantive policy changes for the Capitol Police. It corrects drafting errors, modernizes outdated terms, and repeals redundant and inconsistent provisions already on the books." 155 Cong. Rec. H4190-01, 2009 WL 837945 (daily ed. Mar. 31, 2009).

We find no indication that Congress, in enacting the TCA, intended to alter the terms and conditions of employment of USCP employees by removing CPB-approved terminations from the scope of the grievance/arbitration provisions of the parties' CBA and the FSLMRS. Indeed, we note that the parties' CBA—which postdates the enactment of the TCA[10]—expressly contemplates arbitration of disciplinary terminations like the one at issue in this case. Thus, Article 32, Section 32.12 provides:

> Where the Chief determines that removal is an appropriate remedy under the circumstances, the Chief shall notify the employee as soon as possible of the determination. However, the disciplinary removal shall not be ripe for arbitration until the day after the employee is removed from the payroll.

Therefore, even assuming, *arguendo*, that the USCP were not collaterally estopped from re-litigating this issue, we reject its position on review.

E. The USCP Failed to Demonstrate that Permitting USCP Employees to Grieve Terminations is Inconsistent with any Law that Expressly Excepts such Employees from Appealing Adverse Actions.

The USCP, citing *U.S. Dep't of Veterans Affairs Veterans Canteen Serv.*, 66 F.L.R.A. 944, 948-49 (2012) ("*VCS*"), also argues that where Congress has denied government employees statutory rights to appeal a termination to the Merit Systems Protection Board ("MSPB") under chapter 75 of title 5, they cannot attain those appeal rights through a negotiated grievance procedure. In *VCS*, the FLRA ruled that permitting executive branch Canteen Service employees at the Department of Veterans' Affairs to negotiate grievance procedures would be inconsistent with federal law because the governing statute at the time expressly excepted those employees from appealing adverse actions. 66 F.L.R.A. at 949. Specifically, the statute at issue provided that Canteen Service employees "*shall be . . . removed by the Administrator without regard to civil-service laws.*" The FLRA determined that, although Canteen Service appointees were "part of the personnel system which is applicable to civil service employees and is governed by Title 5," the governing statutory language nonetheless precluded them from grieving their removals. To permit otherwise, the FLRA reasoned, "would undermine Congress' intent to deny statutory appeal rights to these employees and to . . . create uniformity between MSPB and arbitration decisions concerning adverse actions." 66 F.L.R.A. at 949. The USCP contends that, like the Canteen Service

[10] The CBA went into effect on June 8, 2010. OOCGC Ex. 1. The TCA was passed on March 4, 2010.

employees at issue in *VCS*, USCP employees are also precluded from appealing their terminations as a matter of law and that any provision of the parties' CBA purporting to grant these employees the right to grieve their terminations is likewise unenforceable.

To the extent that the USCP contends that the TCA is the law that precludes USCP employees from appealing their terminations, it is collaterally estopped from re-litigating that issue, and, as discussed above, its argument provides no basis for disturbing the Hearing Officer's decision. To the extent that the USCP contends that other laws preclude USCP employees from appealing their terminations, it is raising an impermissible collateral attack on the Award. *U.S. Dep't of Justice v. FLRA*, 792 F.2d 25, 28-29 (2d Cir. 1986)(party cannot collaterally attack award based on issues that could have been, but were not, raised as exceptions to an award); accord, *U.S. Marshals Serv. v. FLRA*, 778 F.2d 1432, 1435-1436 (9th Cir. 1985); *U.S. Dep't of Veterans Affairs Med. Ctr. Allen Park, Michigan*, 49 F.L.R.A. 405, 426 (1994).

In any event, *VCS* is inapposite. First, unlike the Canteen Service employees at issue in that case, USCP officers, as legislative branch appointees, are not part of the comprehensive personnel system applicable to executive branch employees governed by title 5. The USCP provides no support for its position that the absence of its employees from the comprehensive MSPB appellate scheme set forth in title 5 is a manifestation of considered congressional judgment that they should have no post-termination appeal rights. Rather, their absence from the MSPB statutory scheme appears to be a mere consequence of the limited scope of title 5[11] and reflects Congress's separation of powers concerns. *See, e.g.*, 141 Cong. Rec. 439-40 (Jan. 5, 1995) (statement of Sen. Grassley) (stating that the CAA was enacted as a response to some Senators' concerns that to authorize executive branch agencies to enforce antidiscrimination and employment laws against Congress would create a dangerous entanglement between these two branches of government); *cf. Hartman v. MSPB*, 77 F.3d 1378 (Fed. Cir. 1996) (MSPB lacked jurisdiction over petitioner's appeal of her removal from a position in the judicial branch; section 7511(a) definition of "employee" requires service in an "Executive agency" and "[o]n its face . . . does not include the Judiciary.").[12]

Second, the FLRA determined that the statutory language at issue in *VCS*, which expressly granted the Administrator the authority to remove Canteen Service appointees "without regard to civil-service laws," operated as a clear and unequivocal manifestation of Congress's intent that those appointees should have no post-termination appeal rights. As

[11] Indeed, although individuals employed in the private sector are also not part of the personnel system applicable to civil service employees governed by title 5, this obviously does not lead to the conclusion that Congress intended to bar them from challenging their terminations through a negotiated grievance/arbitration procedure.

[12] As discussed below, we find that the clearest indication of congressional intent concerning the appeal rights of legislative branch employees is not their lack of MSPB appeal rights, but the "applicable laws and regulations" referred to in section 1907(e)(1)(A), including the CAA itself.

discussed above, however, section 1907(e)(1)(B) contains no comparable language precluding review of termination decisions, and its grant of authority to the Chief to discharge USCP employees "subject to and in accordance with applicable laws and regulations" reflects the opposite congressional intent.[13]

Finally, the FLRA's decision in *VCS* concerns a statutory election of remedies provision in title 5 that has no counterpart in the CAA. Section 7121(e) of title 5 provides, in relevant part, that:

> Matters covered under . . . title [5] which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both.

The FLRA determined that, because the plain language of section 7121(e) requires that covered employees make an election of remedies between filing an MSPB appeal or filing a grievance under any available grievance procedure, allowing VA Canteen Service appointees to grieve their removals would undermine Congress's intent in enacting title 5 to "create uniformity between MSPB and arbitration decisions concerning adverse actions." 66 F.L.R.A. at 949; *see also United States v. Fausto*, 484 U.S. 439, 449 (1988) ("[T]he primacy of the MSPB for administrative resolutions of disputes over adverse personnel action . . . enables the development . . . of *a unitary and consistent Executive Branch position* on [such] matters . . . .") (emphasis added). By contrast, the CAA grants covered legislative branch employees—including USCP officers—the right to appeal a termination to the OOC only insofar as it concerns an alleged violation of a law made applicable under 2 U.S.C. §§ 1311-17, and the statute contains no requirement that employees make an election between filing a Board appeal or filing a grievance under any available grievance procedure. Accordingly, even if the USCP were not collaterally barred from raising the foregoing contentions, its reliance on *VCS* is misplaced, and it has failed to demonstrate that permitting

[13] Under these circumstances, the U.S. Circuit Court of Appeals for the Federal Circuit's analysis in *Lal v. MSPB*, 821 F.3d 1376 (Fed. Cir. 2016), is instructive. In *Lal*, the MSPB dismissed, for lack of jurisdiction, an employee's appeal of her removal from her position as an employee of the Centers for Disease Control and Prevention, because she had been appointed pursuant to 42 U.S.C. § 209(f), which provides that consultants "may be appointed without regard to the civil-service laws." *Lal*, 821 F.3d at 1377. The Federal Circuit reversed and remanded. Noting that the statute did not include an explicit reference to removal or to 5 U.S.C. § 7511, the Court declined to find an additional implicit exemption to section 7511(a)'s definition of "employee" ordinarily entitled to MSPB appeal rights. Id. at 1378-79. Here, as in *Lal*, the governing statute is silent on the issue of post-termination appeal rights.

USCP employees to grieve their CPB-approved terminations is otherwise inconsistent with congressional intent or any applicable law.[14]

F. The Hearing Officer Correctly Determined that USCP's Failure to Provide the Information Requested by the Union, as Required by the Arbitrator's February 18, 2015 Order, was an Unfair Labor Practice.

The USCP has consistently maintained that the grievance/arbitration provisions in the parties' CBA do not apply to this dispute. Nonetheless, it contends that it did not commit an unfair labor practice when it refused to provide the Union the information it had requested concerning remedy, as required by the Arbitrator, because the Union allegedly failed to establish a particularized need for the information and did not comply with section 7 of the CBA establishing the procedures for requesting information.

The USCP's position lacks merit. As the Hearing Officer found, the CBA authorizes the arbitrator to dispose of procedural requests, motions or similar matters, retain jurisdiction of the case to resolve implementation issues and for other appropriate purposes, and address the necessity/or relevancy of information requests. Here, the Union's request was directly related to the question of the USCP's compliance with the Award. Further, there is no dispute that the Union made the request on the form required by the CBA and that it submitted a signed authorization from Officer Ricken for this purpose. OOCGC Exs. 1, 5 at 3. The USCP's contentions on review provide no basis to disturb the Hearing Officer's determination that the USCP's noncompliance with that information request constituted an unfair labor practice.

G. The Hearing Officer Correctly Concluded the USCP's Failure to Implement the Arbitration Award is an Unfair Labor Practice.

To date, the USCP has failed and refused to comply with the Arbitrator's May 13, 2014 Arbitration Award, reinstating Officer Ricken with backpay, notwithstanding the Board's denial of the USCP's exceptions to that Award. On June 17, 2015, the Arbitrator entered an Order to supplement the Award which specified the amount of back pay, damages, and associated fees and costs awarded and directed the USCP to reinstate Officer Ricken immediately. The USCP chose not to file any exceptions to that Order. To date, the USCP has not taken any actions to comply. The failure to do so constitutes an unfair labor practice. The Hearing Officer thus properly determined that the USCP violated 5 U.S.C. §§7116(a)(1) and (8) as applied by Section 220 of the CAA by refusing to implement the May 13, 2014 Award, as supplemented by the June 17, 2015 Order.

[14] The OOCGC further argues that the lack of appeal rights to the MSPB does not necessarily foreclose the availability of grievance rights under a negotiated agreement where, as here, the employee is part of an "other personnel system" within the meaning of 5 U.S.C. § 7121(e). In light of our disposition, it is unnecessary to reach this issue.

ORDER

The Board clarifies the Hearing Officer's Order as follows:

The Respondent, United States Capitol Police, Washington, DC, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to fully implement the Arbitrator's May 13, 2014 Award, as supplemented by the June 17, 2015 Order including the immediate reinstatement of Officer Ricken, the payment of back pay, damages, and associated fees and costs awarded, and the requirement to furnish data and information, and to respond to reasonable information requests.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under 5 U.S.C. Sections 7102, 7106, 7111-7117, 7119-7122 and 7131.

(c) Engaging in similar conduct in future USCP termination actions.

2. Take the following affirmative action necessary to effectuate the policies of the CAA.

(a) Proceed to fully implement the May 13, 2014 Award, as supplemented by the June 17, 2015 Order, including the immediate reinstatement of Officer Ricken, the payment of back pay, damages, and associated fees and costs awarded, and the requirement to furnish data and information, and to respond to reasonable information requests;

(b) Within 14 days after service, post at its facilities in Washington, D.C. copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Office of Compliance, after being signed by the Respondent's authorized representative, shall be posted immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with their employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Within 21 days after service, file with the Office of Compliance a sworn certification of a responsible official attesting to the steps that the Respondent has taken to comply.

It is so ORDERED.

Issued, Washington, DC, September 25, 2017.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
Office of Compliance
An Agency of the United States Government

The Office of Compliance has found that we violated the Congressional Accountability Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to fully implement the May 13, 2014 Arbitration Award, as supplemented by the June 17, 2015 Order including the immediate reinstatement of Officer Ricken, the payment of back pay, damages, and associated fees and costs awarded, and the requirement to furnish data and information, and respond to reasonable information requests.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce bargaining-unit employees in the exercise of the rights assured them by the CAA.

WE WILL fully comply with the May 13, 2014 Arbitration Award, as supplemented by the June 17, 2015 Order including the immediate reinstatement of Officer Ricken, the payment of back pay, damages, and associated fees and costs awarded, and the requirement to furnish data and information, and respond to reasonable information requests.

United States Capitol Police
Employer

Dated _____ By _____
Representative Title