Congressional Accountability Office of Compliance
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FRATERNAL ORDER OF POLICE, U.S. CAPITOL POLICE LABOR COMMITTEE,	)	
Union,	)	
v.	)	Case No. 17-ARB-04
UNITED STATES CAPITOL POLICE,	)	
Employing Office.	)	

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

I. Statement of the Case

This matter is before the Board on exceptions to a May 1, 2017 grievance arbitration award ("Award") issued by Arbitrator Andree McKissick filed by the employing office, the United States Capitol Police ("USCP") pursuant to 5 U.S.C. § 7122(a), as applied by section 220(a) of the Congressional Accountability Act ("CAA"), 2 U.S.C. § 1351(a), and part 2425 of the Substantive Regulations of the Office of Compliance ("OOC"). The FOP/U.S. Capitol Police Labor Committee ("Union"), has filed an opposition to the USCP's exceptions.

For the following reasons, we deny the USCP's exceptions.

II. Background and Arbitrator's Award

The USCP is an "employing office" within the meaning of CAA sections 101(9) and 220(a)(1). The Union is a labor organization and is the duly-certified exclusive representative of the USCP's officers who are included in the relevant bargaining unit.

On November 6, 2015, the USCP issued a Request for Disciplinary Action for Officer Christopher Donaldson, a member of the bargaining unit covered by the parties' existing collective bargaining agreement ("CBA"). The Request indicates that the USCP sought to terminate Officer Donaldson based on his "wife's allegation that he pushed her and she was in fear for her and their child's life." The following facts underlying the Request, which are set forth in the instant arbitration award, are undisputed:

> Grievant, Officer Donaldson, was a long-term employee of the [USCP], for at least thirteen (13) years with a very good work record and was well-respected by his fellow officers. This was his first disciplinary offense. It was based upon Officer Donaldson's conduct on December 14, 2014. The record reflects that the catalyst which brought about the charge occurred after a party where both Officer Donaldson and his wife were drinking. Upon arriving home, both prepared to go to bed. A disagreement occurred thereafter based upon the wife's lack of desire to engage in a sexual encounter. Subsequently, the record reflects that his wife left the room. Upon returning, the mattress was off the bed foundation. She then left the room carrying the baby into its room. Subsequently, Officer Donaldson entered the locked room of the child by pushing in the door and breaking its hinges. Thereafter, the wife texted him regarding this altercation and later called the Anne Arundel Police.

USCP Exceptions, Exhibit ("Ex.") 10. Based on the foregoing, the USCP's Office of Professional Responsibility charged Officer Donaldson with "Conduct Unbecoming an Officer," a violation of Operational Directive PPF I.3, Rules of Conduct, Category C, Detrimental Conduct, which provides:

> Employees will conduct themselves at all times, both on and off duty, in such a manner as to reflect favorably on the Department. Conduct Unbecoming will include that which brings the Department into disrepute or reflects discredit upon the employee as a member of the Department; that which impairs the operation or efficiency of the Department or the employee; and conduct which is prejudicial to the reputation and good order of the Department.

Pursuant to Article 31.10 of the CBA, Officer Donaldson requested a hearing through the USCP's internal Disciplinary Review Board ("DRB") process. The DRB recommended that, in lieu of termination, Officer Donaldson be suspended for 45 days. On March 15, 2016, the Union filed a grievance in accordance with the procedures set forth in the CBA which challenged the Request for Disciplinary Action, but accepted the 45-day suspension recommended by the DRB.

By letter dated May 4, 2016, the USCP, through its Chief of Police, denied Officer Donaldson's grievance. Thereafter, the Chief requested approval of his recommendation to terminate Officer Donaldson from the Capitol Police Board ("CPB").[1] Because the CPB did

[1] The CPB, discussed below, 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

not disapprove the request for termination prior to the expiration of the 30-day period provided under the United States Capitol Police Administrative Technical Corrections Act of 2009 ("TCA")[2], it was deemed approved and became effective June 17, 2016.

On June 20, 2016, the Union notified the USCP of its intent to proceed with Officer Donaldson's grievance and that it desired to have the matter submitted to arbitration under the applicable provision of the CBA. On August 11, 2016, counsel for the USCP informed the Union of its position that Officer Donaldson's termination was not subject to arbitration, but stated that the USCP agreed to select an arbitrator to determine procedural and

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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).

[2] 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).

substantive arbitrability issues. In a November 28, 2016 decision, the Arbitrator denied the USCP's motion to dismiss, determining that the Union's grievance was arbitrable. Union Opposition, Ex. H.

Subsequently, after conducting a hearing on the merits, the Arbitrator sustained the grievance, mitigating the termination penalty. Specifically, the Award, dated May 1, 2017, provides:

> Officer Donaldson shall be reinstated, but subject to a thirty (30)-day suspension and a Last Chance Agreement with a two (2)-year duration. If the Last Chance Agreement is not breached, his disciplinary record shall be rescinded. In regards to back pay, he shall receive all except for thirty (30) days. In regards to attorney fees, it shall be ordered. Accordingly, this Arbitrator shall retain jurisdiction for implementation for at least sixty (60) days.

III. The USCP's Exceptions

The USCP seeks review of the Arbitrator's award on the following grounds: (1) the Award is contrary to law because clearly established law prevents the review of CPB termination decisions; (2) the Award is contrary to law because Congress did not give USCP employees the ability to grieve a termination action; (3) the Arbitrator exceeded her authority and violated federal law when she ordered the USCP to violate a CPB Order; (4) the Arbitrator exceeded her authority in compelling the USCP to participate in an arbitration hearing because the CBA's arbitration article is inconsistent with law; (5) the Award violates public policy because the CPB is not subject to the CAA; (6) the Award violates public policy because the CBA cannot regulate CPB action; (7) the Award fails to draw its essence from the CBA as the CPB is not party to the CBA; (8) the Arbitrator exceeded her authority by compelling the USCP to enter into an employment contract with the Union; (9) sovereign immunity prevents the Arbitrator from issuing an award of attorney fees; (10) the Arbitrator failed to conduct a fair hearing when material evidence was excluded from the hearing; and (11) the Award failed to draw its essence from the CBA, as section 32.03(M) of the CBA precludes all proposed disciplinary actions from arbitral review. The Union has filed a submission in opposition to the USCP's exceptions.

IV. Standard of Review

The standard for the Board's review of exceptions to an arbitration award is whether the award is deficient: (a) because it is contrary to any law, rule, or regulation; or (b) on other grounds similar to those applied by Federal courts in private sector labor-management relations. Substantive Regulations § 2425.3.

V. Analysis

In entering into a collective bargaining agreement with a binding grievance arbitration procedure, parties effectively bargain for the arbitrator's construction of their agreement, entitling the arbitrator's interpretation to great deference. *FOP/U.S. Capitol Police Labor Committee v. U.S. Capitol Police,* No.16-ARB-01, 2017 WL 2289114, *3 (OOC Mar. 1, 2017). Thus, courts set aside an arbitrator's interpretation only in rare instances, so as not to undermine the federal policy of settling labor disputes by arbitration. *Id.; FOP/U.S. Capitol Police Labor Committee v. U.S. Capitol Police,* No.14-ARB-01, 2014 WL 7215202 (OOC Dec. 12, 2014) ("*Ricken I*"); *Boston Med. Ctr. v. Serv. Employees Int'l Union, Local 285,* 260 F.3d 16, 21 (1st Cir. 2001). Accordingly, the scope of the Board's review of arbitration decisions is also extremely narrow. *See, e.g., AFSCME v. The Office of the Architect of the Capitol,* No. 13-ARB-01, 2014 WL 793368 (OOC Feb. 26, 2014); *United Paperworkers International Union, AFL-CIO v. Misco, Inc.,* 484 U.S. 29, 36 (1987) ("The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract."); *U.S. Customs Serv. v. FLRA,* 43 F.3d 682, 686-687 (D.C. Cir. 1994) (stating that where an arbitrator's award implicates only the collective bargaining agreement, the Authority's role in reviewing the award is limited to that of federal courts in private sector labor-management relations). Nonetheless, an arbitrator's interpretation of a collective bargaining agreement "must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice." *Boston Med. Ctr.,* 260 F.3d at 21.

A. The USCP is Collaterally Estopped from Re-Litigating its Contention that the TCA Constitutes "Clearly Established Law" Preventing Review of Termination Actions.

As stated above, the USCP contends that the Award is contrary to law because "clearly established law" prevents the review of CPB termination decisions. As it correctly notes, the Federal Labor Relations Authority ("FLRA") has found a limited exception to the rule that questions of arbitrability are solely for an arbitrator to decide where "clearly established law" precludes arbitrating a grievance, in which case an agency would not violate section 7116(a)(1) and (8) by refusing to arbitrate. *See Dep't of Homeland Sec., Immigration & Customs Enf't.,* 69 F.L.R.A. 72, 74 (2015) (stating that, "in order to justify a refusal to arbitrate, it is not enough to argue that a grievance is barred by statute; rather, it must be shown that the statutory bar is a matter of "clearly established law").

The gravamen of the USCP's position is that the TCA is the "clearly established law" that precludes arbitrating the instant grievance. The Board, however, rejected this very proposition in *U.S. Capitol Police & FOP/U.S. Capitol Police Labor Comm.,* No.

16-LMR-01 (CA), 2017 WL 4335144, *5 (OOC Sep. 26, 2017) ("*Donaldson I*"), an unfair labor practice proceeding arising from the USCP's initial refusal to arbitrate the instant grievance. Thus, the USCP is collaterally estopped from re-litigating that issue.

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. *Id.; see also Macon v, Office of Compliance*, 694 Fed. App'x 789, 2017 WL 2533509, *3 (Fed. Cir. Jun. 12, 2017). The issue whether the TCA is "clearly established law" that precludes arbitrating the instant grievance is identical to the issue raised and decided by this Board in *Donaldson I*. Further, that issue was actually litigated and was necessary to the resulting judgment in *Donaldson I*. Finally, the USCP had a full and fair opportunity to litigate the issue in the prior proceeding. Accordingly, the USCP is collaterally estopped from re-litigating this issue in this proceeding.[3]

We therefore reject the USCP's first exception.

B. The USCP is Collaterally Estopped from Re-Litigating its Contention that Congress Did Not Give USCP Employees an Ability to Grieve a Termination Action.

The USCP contends in its second exception that the Award is contrary to law because Congress denied USCP employees the ability to grieve termination actions. Citing *U.S. Dep't of Veterans Affairs Veterans Canteen Serv.*, 66 F.L.R.A. 944, 948-49 (2012), it argues that where Congress has denied government employees statutory rights to appeal a termination to the Merit Systems Protection Board under chapter 75 of title 5, they cannot attain those rights through a negotiated grievance procedure. It contends that USCP employees are precluded from appealing their terminations as a matter of law and that any

[3] The USPC continues to make this statutory argument, notwithstanding this Board's prior holding that it is collaterally estopped from doing so. In *Donaldson I*, the Board rejected the USCP's contention that the TCA is "clearly established law" precluding arbitration of disciplinary terminations because the gravamen of its position, i.e., that the TCA removed the USCP as an "employing office" by giving the CPB approval authority over terminations of USCP employees, had previously been litigated and rejected in *FOP/U.S. Capitol Police Labor Comm. v. U.S. Capitol Police*, No. 14 ARB-01, 2014 WL 7215202, at *4 (OOC Dec. 12, 2014) (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). Moreover, in *FOP/U.S. Capitol Police Labor Comm. v. U.S. Capitol Police*, No. 15-LMR-02 (CA) (OOC Sep. 25, 2017) ("*Ricken II*"), this Board squarely determined, *inter alia*, that the USCP is collaterally estopped from re-litigating the issue whether the TCA precludes CPB-approved termination decisions from arbitration. The USCP's current attempt fares no better.

provision of the parties' CBA purporting to grant these employees the right to grieve their terminations is therefore unenforceable.

Again, the Board rejected this very claim in *Ricken II*, and in *Donaldson I*, the Board determined that the USCP is collaterally estopped from re-litigating that issue. Because the USCP is once again collaterally estopped, we reject the USCP's second exception.[4]

C. The USCP is Collaterally Estopped from Re-Litigating its Contention that the Arbitrator Exceeded Her Authority Because the Award would Require it to Violate a CPB Order.

The USCP contends in its third exception that the Award "violates federal law because [it] undermines the CPB's exclusive authority to terminate USCP officers, exclusive of any other law." The Board rejected this same contention in *Ricken II*, 2017 WL 4335143, **8-9:

> 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.
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> We disagree. Under the TCA, CPB approval is merely a condition precedent to the Chief's exercise of his statutory authority to terminate.
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> * * *
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> Upon enactment, the TCA . . . 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.

[4] In so ruling, we reject the USCP's reading of our holding in *Ricken II* as limited to the facts of that case.

* * *

> 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.

Because the USCP is collaterally estopped from re-litigating this issue, the Board's determination in *Ricken II* is dispositive.

Accordingly, we reject the USCP's third exception.

D. The USCP is Collaterally Estopped from Re-Litigating its Contention that the Grievance Arbitration Provision of the CBA is Inconsistent with Law.

The USCP contends in its fourth exception that the Arbitrator exceeded her authority in compelling the USCP to arbitrate a termination action because section 32.12 of the CBA, which provides for arbitration, is inconsistent with law. Specifically, it contends that section 32.12 "represents an unenforceable contract provision because all terminations of USCP officers are not subject to the CAA and never have been." We disagree.

In *Donaldson I*, the Board rejected the contention "that USCP employees are 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 therefore unenforceable." Moreover, in *FOP/U.S. Capitol Police Labor Comm. v. U.S. Capitol Police*, Case No. 16-LM-02 (NG) (OOC Sep. 26, 2017) the Board rejected the USCP's contention that the Union's proposal that the scope of the CBA's grievance arbitration procedures should continue to include terminations was non-negotiable:

> [The USCP's] arguments depend upon an interpretation of Congressional intent regarding enactment of the TCA that is unpersuasive, *i.e.*, that the TCA left no discretion to the USCP to approve terminations and that sole discretion belongs to the CPB. The Board has already addressed essentially the same contention in [*Ricken I*]. While that case arose in a different context—USCP exceptions to a grievance arbitrator's award reducing the termination of a bargaining unit employee to a 30-day suspension—our conclusion remains the same: the USCP has failed to cite to any part of the TCA or its legislative history which clearly states that termination decisions approved by the CPB are not subject to arbitration. As the Union points out, the legislative history supports the opposite conclusion that the TCA was

intended to make no change to terms and conditions of employment, and certainly not one as far-reaching as claimed by the USCP.

Because the USCP is collaterally estopped from re-litigating this issue, we reject the USCP's fourth exception.

E. We Reject the USCP's Contentions that the Award Violates Public Policy.

In its fifth exception, the USCP contends that the award violates public policy because the CPB is not subject to the CAA, and that "the arbitrator erred in concluding that the USCP and CPB are joint employers for purposes of arbitration termination matters." In its sixth exception, the USCP contends that the Award violates public policy because the CBA cannot regulate CPB action. Both exceptions lack merit.

As an initial matter, we note that the Award contains no discussion or finding of a "joint employer" relationship between the USCP and the CPB, and it does not appear that any party contends that such a relationship exists. In any event, we have no occasion to inquire in this case whether the USCP and the CPB might comprise a joint employer under the CAA. The National Labor Relations Board ("NLRB") may find that two or more entities are "joint employers" of a single workforce under the National Labor Relations Act when the entities are both employers under the meaning of the common law and they have actually exercised joint control over essential terms of employment, such as pay, schedules, and job duties. *See Hy-Brand Indus. Contractors, Ltd.*, 365 NLRB No. 156 (2017). The FLRA has never adopted the NLRB's "joint employer" theory. Rather, under the Federal Service Labor Management Relations Statute ("FSLMRS"), the inquiry is not whether an entity is an "employer", but whether it is an "agency" under 5 U.S.C. § 7103. Specifically, under the FSLMRS, a labor organization can only represent "employees" who, by definition, are employed by an "agency." Unlike the test for "employer" status under the NLRA, whether an entity is an "agency" under the FSLMRS does not turn on a common law test. Instead, the FSLMRA itself defines "agency" as "an Executive agency" and lists several entities in the executive branch as exceptions. 5 U.S.C. § 7103(a)(3).

Similar to the FSLMRS, the issue under the CAA is not whether an entity is an "employer", but whether it is named as an "employing office" under section 101(9)(D) of the statute. Section 101(9)(D) makes clear that the USCP is an employing office and the CPB is not.[5] The instant arbitration Award contains no finding to the contrary. Although the

[5] Although the language creating the CPB is quite sparse, 2 U.S.C. § 1961 provides that "[t]he Capitol Police shall police the United States Capitol Buildings and Grounds under the direction of the Capitol Police Board." This suggests that Congress intended the CPB to act somewhat like a board of directors.

Arbitrator stated in her decision denying the USCP's motion to dismiss that the CPB "functions as an employer," *see* Union Opposition, Ex. H at 12, for the reasons stated above we find that this statement is immaterial to the analysis under the CAA and provides no basis for disturbing the Award.

Furthermore, we find no merit to the USCP's contention in its sixth exception that the Award "violates the longstanding, and firmly engrained, policy that safeguards the autonomy and independence of the CPB." The USCP appears to contend that Award violated public policy because it improperly interferes with the CPB's exercise of its independent authority to provide "support and oversight" of the USCP, and its independent investigatory authority under the Inspector General Act. There is no indication that the USCP raised this argument to the arbitrator below. Under the OOC's governing regulations, an excepting party generally may not raise issues before the Board that it could have but did not raise before the arbitrator. OOC Substantive Regulations, § 2429.5. This includes any evidence, factual assertions, arguments (including affirmative defenses), requested remedies, or challenges to an awarded remedy if the party reasonably should have known to raise these matters before the arbitrator.

In any event, we reject the USCP's public policy challenge to the Award. For an award to be found deficient on public policy grounds, the asserted public policy must be "explicit," "well-defined," and "dominant," and a violation of the policy "must be clearly shown." *FOP/U.S. Capitol Police Labor Committee v. U.S. Capitol Police,* No.15-ARB-01, 2015 WL 10719053 (OOC Dec. 23, 2015) (citing *Misco*, 484 U.S. at 42-44). In *Misco,* the Supreme Court held that a formulation of public policy based only on "general considerations of supposed public interests" is not the sort that permits a court to set aside an arbitration award that was entered in accordance with a valid collective-bargaining agreement." Such public policy exceptions are reviewed extremely narrowly by the FLRA. *United States HUD v. AFGE Local 3956,* 66 F.L.R.A. 106, 108-109 (2011).

Here, the Award in no way implicates the autonomy or independence of the CPB because the CPB has no statutory authority to initiate or impose discipline; only the Chief can terminate a USCP employee on behalf of the agency.[6] Indeed, as the Board recognized

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Boards of directors generally do not have a separate legal identity apart from the corporations they direct. *Lopez-Rosario v. Programa Seasonal Head Start*, No. 14-1713 (FAB), 2017 WL 1173754, at *6 (D.P.R. Mar. 29, 2017), *appeal docketed*, No. 17-1435 (1st Cir. May 3, 2017); *Heslep v. Ames. for African Adoption Inc*., 890 F. Supp. 2d 671, 678-79 (N.D.W. Va. 2012); *Willmschen v. Trinity Lakes Improvement Ass'n*, 840 N.E.2d 1275, 1280–81 (Ill. App. Ct. 2005) (corporate board of directors not distinct and separate legal entity); *see also Flarey v. Youngstown Osteopathic Hosp*., 783 N.E.2d 582, 585 (Ohio Ct. App. 2002) (nonsensical to hold board of directors liable as collective entity).

[6] The TCA provides that "*[t]he Chief of the Capitol Police* . . . is authorized to . . . discipline, [and] discharge . . . employees of the Capitol Police, subject to and in accordance with applicable laws and

in *Ricken II*, questions about CAA subject matter jurisdiction over CPB action are irrelevant to the legal issues at hand. In that case, as here, the arbitrator found that the Chief had violated the CBA when he terminated a USCP Officer, and thus ordered the USCP to reinstate the employee. As we observed, the arbitration award and order of reinstatement impacted the employment relationship between the Officer and the USCP, not any alleged relationship between the Officer and the CPB. Once the arbitrator determined that the Chief's termination action violated the CBA, there was no role for the CPB. Therefore, for the reasons set forth in *Ricken II*, we reject the USCP's contention that the Award violates public policy, improperly subjects the CPB to the provisions of the CBA or the CAA's labor-management provisions, or violates or improperly regulates CPB action.

Accordingly, we reject the USCP's fifth and sixth exceptions.

F. The USCP's Remaining Exception Concerning the CPB also Lacks Merit.

In its seventh exception, the USCP contends that the Award fails to draw its essence from the CBA because it conflicts with section 32.03.1.J of the agreement, which excludes policies, decisions or directives from congressional authorities and entities from arbitration. The CPB is a congressional entity, the USCP reasons, and when it did not disapprove the Chief's request for termination prior to the expiration of the 30-day period provided under the TCA, it effected a "decision" excluded from arbitration under section 32.03.1.J.

We disagree with the USCP's position. Generally, an arbitration award fails to draw its essence from the CBA when it is expressly contrary to the terms of the CBA. Such is not the case here. As we recognized in *Ricken II*, the TCA expressly provides 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 parties' CBA—which postdates the enactment of the TCA[7]—expressly contemplates arbitration of disciplinary terminations ordered by the Chief. 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.

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regulations." 2 U.S.C. § 1907(e)(1)(A) (emphasis added). Although CPB approval is a condition precedent to the Chief's exercise of his statutory authority to terminate a USCP employee under the TCA, only the Chief possesses that termination authority.

[7] The CBA went into effect on June 8, 2010. The TCA was passed on March 4, 2010.

As stated above, in ordering the reinstatement of Officer Donaldson, the Award modifies and mitigates the termination decision made by the Chief in the exercise of his statutory authority under the TCA. Once the arbitrator determined that the Chief's action had to be rescinded, there was no role for the CPB. The Award does not improperly contravene any CBP decision excluded from arbitration under section 32.03.1.J of the CBA.

Accordingly, we reject the USCP's seventh exception.

G. The Arbitrator Did Not Exceed Her Authority by Directing the Parties to Enter into a Last Chance Agreement.

In its eighth exception, the USCP contends that the Arbitrator exceeded her authority when she directed it to enter into a last chance agreement with Officer Donaldson as part of her order of reinstatement. Again we disagree.

Arbitrators are assigned the task of using their informed judgment to resolve disputes, and "[t]his is especially true when it comes to formulating remedies." *Misco*, 484 U.S. at 41 (quoting *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)). Therefore, the Authority has consistently emphasized the broad discretion to be accorded arbitrators in the fashioning of appropriate remedies. *See Dep't of the Interior, Geological Survey, Nat'l Mapping Div.*, 55 F.L.R.A. 30, 33 (1998); *AFGE Local 916 & Def. Distrib. Depot, Okla. City, Okla.*, 50 F.L.R.A. 244, 246-47 (1995). Although the parties to a negotiated agreement may limit an arbitrator's otherwise broad remedial authority by including in the CBA express language to that effect, *see Misco*, 484 U.S. at 41, the USCP identifies no such limiting language here.

In our view, the award, including the remedy, is not only well within the Arbitrator's authority and consistent with the contractual terms, but directly responsive to the issues raised at arbitration. Section 31.03 of the CBA sets forth the "relevant facts and circumstances" to be considered in determining an "appropriate penalty" for employee misconduct. Upon consideration of all relevant factors, the Arbitrator found the penalty of termination to be too severe for the misconduct at issue, and ordered the reinstatement of Officer Donaldson, subject to a 30 day suspension and a 2-year last chance agreement. In so doing, the Arbitrator exercised her broad remedial authority to fashion a remedy which she considered appropriate. Indeed, a suspension coupled with a last chance agreement is a more severe penalty than a suspension alone. Consequently, the USCP has failed to demonstrate that the Arbitrator exceeded her broad discretionary authority by issuing this remedial order. *Cf. Eastern Assoc. Coal Corp. v. UMWA*, 531 U.S. 57 (2000) (public policy did not preclude enforcement of an arbitration award that overturned the grievant's termination and instead required him, inter alia, to provide the employer with a signed, undated letter of resignation,

to take effect if the grievant again tested positive for illegal drug use within the following 5 years).

Accordingly, the USCP's eighth exception lacks merit.

H. Sovereign Immunity Does Not Prevent the Arbitrator from Issuing an Award of Attorney Fees.

In its ninth exception, the USCP contends that sovereign immunity prevents the Arbitrator from issuing an award of attorney fees.

It is true, of course, that the Federal government is not liable for monetary awards unless its immunity has been waived, and a waiver of sovereign immunity must be expressed unequivocally in statutory text. *AFSCME Council 26 & Office of the Architect of the Capitol*, No. 00-LMR-03, 2001 WL 36175209, *2 (OOC Jan. 29, 2001) (finding that the Back Pay Act is incorporated by reference through the CAA). When Congress enacted the CAA in 1995, it expressly extended the rights, protections, and responsibilities contained in section 7122 of the FSLMRS to the USCP and its employees. 2 U.S.C. § 135l(a). Section 7122 explicitly authorizes the payment in grievance cases of back pay by covered Federal government entities:

> An agency shall take the actions required by an arbitrator's final award. The award may include the payment of back pay (as provided in section 5596 of this title).

5 U.S.C. 7122(b). 5 U.S.C. § 5596(b)(l)(A)(ii), in turn, expressly permits an employee to recover his or her reasonable attorney fees related to challenging the personnel action. Therefore, by applying section 7122 of the FSLMRS to employing offices in the legislative branch, Congress made its intention clear to subject the employing offices to the obligations therein in the same manner as the Federal agencies covered by the FSLMRS, thereby effectively and unambiguously waiving sovereign immunity. *See U.S. Capitol Police Bd. & FOP, U.S. Capitol Police Labor Committee,* Case No. 01-ARB-01 (CP), 2002 WL 34461687, *6 (OOC Feb. 25, 2002) (holding that sovereign immunity does not obtain because the CAA incorporated the scope of grievance/arbitration from chapter 71 of the FSLMRS). Thus, we conclude, the Arbitrator was authorized to award attorney fees in this case.

Accordingly, the USCP's ninth exception lacks merit. [8]

[8] The threshold requirement for entitlement to attorney fees under the Back Pay Act is a finding that the grievant was affected by an unjustified or unwarranted personnel action, which resulted in the withdrawal

I. The Arbitrator Conducted a Fair Hearing.

In its tenth exception, the USCP contends that the Arbitrator failed to conduct a fair hearing when material evidence was excluded from the hearing. We disagree.

An award is deficient on the ground that an arbitrator failed to conduct a fair hearing when a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole. *E.g.*, *AFGE, Local 2152*, 69 F.L.R.A. 149, 152 (2015). Arbitrators are required only to grant parties a fundamentally fair hearing that provides adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator. *AFGE, Local 3979, Council of Prisons Locals*, 61 F.L.R.A. 810, 813-14 (2006). As such, an arbitrator has considerable latitude in conducting a hearing, and the fact that an arbitrator conducts a hearing in a manner that a party finds objectionable does not, by itself, provide a basis for finding an award deficient. *Pension Benefit Guar. Corp.*, 68 F.L.R.A. 916, 922-23 (2015). In this connection, arbitrators may allow the liberal admission of testimony and other evidence. *Id.* Further, an arbitrator's limitation on the submission of evidence does not, by itself, demonstrate that the arbitrator failed to provide a fair hearing. *AFGE, Council of Prison Locals, Local 3828*, 66 F.L.R.A. 504, 505 (2012).

Here, the Arbitrator determined that Officer Donaldson engaged in the charged misconduct but mitigated the penalty. The USCP contends that, in doing so, the Arbitrator improperly failed to consider its Report of Investigation and supporting evidence. There is no dispute, however, that such investigative report included certain evidence that became subject to a legally binding expungement order issued prior to the arbitration hearing. On December 8, 2016, the presiding judge from the District Court for Anne Arundel County, MD, issued an "Order for Expungement of Records" finding that Officer Donaldson was

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or reduction of the grievant's pay, allowances, or differentials. *AFSCME Council 26 v. Office of the Architect of the Capitol*, 17-ARB-03, 2017 WL 3229178, *2 (OOC Jul. 26, 2017). Once such a finding is made, the Act requires that an award of fees must be: (1) in conjunction with an award of back pay to the grievant on correction of the personnel action; (2) reasonable and related to the personnel action; and (3) in accordance with the standards established under 5 U.S.C. § 7701(g). *Id.* Section 7701(g), in turn, requires that: (1) the employee must be the prevailing party; (2) the award of fees must be warranted in the interest of justice; (3) the amount of the fees must be reasonable; and (4) the fees must have been incurred by the employee. *Id.* An award resolving a request for attorney fees under section 7701(g) must set forth specific findings supporting determinations on each pertinent statutory requirement and must state the specific reasons for approving or denying the request. *Id.* Here, the Arbitrator's award retains jurisdiction and states that, "[i]n regards to attorney fees, it shall be ordered." It does not, however, contain the requisite findings on each pertinent statutory requirement. We assume that the Arbitrator will make these findings in her addendum proceedings on back pay and attorney fees.

entitled to the expungement of police records pertaining to his arrest on December 14, 2014 in that county. As the Arbitrator recognized in her ruling on the USCP's motion to permit the introduction of those expunged records, under Maryland Criminal Code § 10-108(a), "a person may not . . . disclose to another person any information from that record." USCP Exceptions, Ex. 9 at 2. A disclosure of information from such expunged data is deemed a misdemeanor punishable by a fine or imprisonment of up to one year. The USCP has identified no statutory exception that would permit such a disclosure for purposes of the arbitration hearing. Thus, we disagree with the USCP that "there is no rational justification for the arbitrator's refusal to exclude [sic] former Officer Donaldson's criminal records into evidence."

Moreover, as the Union notes, the Arbitrator attempted to allow the USCP to introduce as much of its Report of Investigation and other evidence as possible, given the legal constraints that resulted from the judge's expungement order. *See, e.g.*, USCP Exceptions, Ex. 1, Hearing Transcript (Tr.) at 69:3-19 (FOP counsel agreeing to redact non-expunged materials); *id.*, Ex. 4 Tr. at 4:13-35:14 (addressing USCP efforts to introduce expunged materials). Moreover, the Arbitrator invited the USCP to redact the Report of Investigation and exhibits to eliminate expunged materials, Tr. at 4: 13-35:14, but it failed to do so. Under these circumstances, the Arbitrator's limitation on the submission of evidence does not, by itself, demonstrate that she failed to provide a fair hearing. *AFGE, Council of Prison Locals, Local 3828*, 66 F.L.R.A. at 505.

We therefore deny the USCP's tenth exception to the Award.

J. The USCP Failed to Establish that the Award Fails to Draw its Essence from the CBA on the Ground that it Precludes all Proposed Disciplinary Actions from Arbitral Review.

Finally, in its eleventh exception, the USCP contends that the Award fails to draw its essence from the CBA, as section 32.03(M) of the CBA precludes all "proposed disciplinary actions" from arbitral review. We find no merit in this exception.

As stated above, the CBA expressly allows employees to contest terminations through the grievance arbitration process set forth in section 31.05. Because Officer Donaldson followed these requirements, the resulting Award drew its essence from the CBA.

Accordingly, the USCP's eleventh exception is denied.

ORDER

The employing office's exceptions are denied.

It is so ORDERED.

Issued, Washington, DC, February 15, 2018.