OFFICE OF COMPLIANCE
LA 200, John Adams Building, 110 Second Street, S.E.
Washington, DC 20540-1999

| | | |
|---|---|---|
| FOP/US Capitol Police Labor Committee, Union, | ) | |
| v. | ) | Case Number: 14-ARB-01 |
| United States Capitol Police, Employing Office | ) | |

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

## DECISION OF THE BOARD OF DIRECTORS

This case involves eight exceptions filed by the U.S. Capitol Police ("USCP") to an arbitration award, arising out of a grievance submitted by the FOP/U.S. Capitol Police Labor Committee ("Union"), on behalf of Andrew Ricken ("Ricken"), who was terminated by the USCP on June 28, 2013, for alleged conduct unbecoming of an officer. On May 13, 2014, the Arbitrator issued an award which found the grievance sustained in part and denied in part. The Arbitrator reduced Ricken's firing to a 30-day suspension and granted him lost wages and benefits (less other payroll related earnings from the time of his discharge to the present).

The Board of Directors has reviewed this matter pursuant to the requirements of 5 U.S.C. 7122, as adopted by section 220(a) of the Congressional Accountability Act [2 U.S.C. 1351(a)], and Part 2425 of the Regulations of the Office of Compliance. For the reasons set forth below, we deny the USCP's exceptions to the Arbitrator's award.

### A. Background

***September 29 & 30, 2011***

In January 2007, Ricken began working for the USCP as a police officer. He was responsible for security-related duties both inside and around the U.S. Capitol Building.

On September 29, 2011, after Ricken finished his tour of duty, he drove his personal car to a Washington, D.C. restaurant to have food and drinks with two co-workers. Ricken was not in his police uniform, and remained at the restaurant for several hours after his co-workers left.

At approximately 12:30 a.m., Ricken left the restaurant with two female Catholic University ("CU") students. Ricken drove the two female students to CU's campus. After arriving at the campus, Ricken removed his loaded firearm from his car trunk and placed the firearm on his hip. Ricken alleged that one of the female students invited him to come to her dormitory room. He claimed that he left for his car after the female student gave him directions to leave campus. At or around this time, a male student called 911 because he saw Ricken on campus with his gun exposed. As Ricken began driving away, CU police in two marked CU police cars (with their emergency lights activated) began pursuing Ricken to stop him. Also, CU police initiated a campus-wide lockdown and directed students to shelter in place.

According to the CU police, Ricken evaded a blocking maneuver intended to prevent him from leaving CU, traveled at a high rate of speed, and eventually crashed his car into a traffic control gate owned by the Washington D.C. Department of Public Works ("DPW") waste facility. Ricken maintained he got out of his car to check for damage but saw no damage and drove home. He further maintained that he did not recall the CU police following him.

That night, Fairfax County, Virginia police officers went to Ricken's home but no one answered the door. The officers saw Ricken's car and found that it was "warm," with damage to the front of the vehicle and red paint consistent with the gate at the DPW waste facility.

The next morning, on September 30, 2011, Ricken did not attend his USCP roll call for work. Ricken's supervisor called him. Ricken advised his supervisor that his alarm clock did not go off and he planned to call out sick for the day. The USCP ordered Ricken to report to work. However, he was later directed to stay home. Ricken was never charged with criminal conduct for the above actions.

***Termination & Arbitration***

The USCP Office of Professional Responsibility ("OPR") conducted an investigation into Ricken's behavior. On August 13, 2012, the OPR issued a Request for Disciplinary Action, which charged Ricken for being in violation of the USCP Operational Directive, Rules of Conduct, and Conduct Unbecoming on five counts.

The OPR recommended that Ricken be fired. A USCP Disciplinary Review Board ("DRB") later found Ricken guilty of the charge of "conduct unbecoming" and also recommended discharge for Ricken. On December 12, 2012, the Union brought a grievance to appeal Ricken's discharge, under the parties' Collective Bargaining Agreement ("CBA").

On June 4, 2013, the USCP Chief of Police ("USCP Chief") submitted a letter to the Capitol Police Board ("CPB")[1] asking for approval to terminate Ricken. The CPB concurred with the firing. On June 26, 2013, the USCP sent Ricken a letter of termination, effective June 28, 2013.

On July 22, 2013, the Union invoked arbitration on behalf of Ricken. The USCP filed a motion to dismiss to challenge the request for arbitration. The USCP argued, among other things, that the CPB is a Congressional entity under Section 32.03J of the CBA and, therefore, its decisions are excluded from arbitration. The Arbitrator denied the USCP's Motion to Dismiss finding that there was no explicit exclusion in the CBA which made the grievance not subject to arbitration.

The Arbitrator conducted hearings on November 21 and 22, 2013. The hearing record formally closed on January 22, 2014. According to the CBA, the arbitration award was due no later than 30 days after the record closed, unless the parties agreed to extend the date for the award. Thus, the arbitration award was due not later than February 21, 2014. On March 12, 2014, the Arbitrator emailed the parties to ask for an extension to issue the award. The Arbitrator attributed the delay to personal and family related issues. The Union did not object to the extension but the USCP did object. The Arbitrator, via email, advised the USCP that "I am extremely disturbed by your reply" and that no party had ever denied him an extension.

On May 14, 2014, the Arbitrator submitted his award. The award reduced Ricken's termination to a 30-day suspension, and also mandated that the USCP make Ricken whole for back pay and lost benefits. The Arbitrator's award was submitted approximately 82 days after the due date.

### B. The Arbitrator's Decision

The Arbitrator found the preponderance of the evidence to support the following four counts[2] with Ricken's case: 1) He left his firearm in the trunk of his personal vehicle when he went into a bar to drink; (2) Ricken failed to bring his personal vehicle to a stop and instead fled from CU law enforcement officers who were pursuing and blocking him in marked police vehicles with emergency lights activated; (3) Ricken left the scene of a vehicular collision that caused (insignificant) damage to Washington D.C. Government property and (4) Ricken failed to report to duty as scheduled on the morning of September 30, 2011.

Next, the Arbitrator focused on whether the penalty imposed by the USCP was appropriate in light of the parties' contractual commitment to progressive discipline and the factors set forth in

[1] The CPB is comprised of the U.S. Senate Sergeant of Arms, the U.S. House Sergeant of Arms, and the Architect of the Capitol. The CPB maintains jurisdiction over the USCP. The USCP Chief also serves as a member of the CPB but in an ex officio status.

[2] The Arbitrator stated that while he did not find for the fifth count (Count 1) of being under the influence, there was no guidance from the CBA or the USCP policy which suggests or requires the dismissal of the "charge" if all associated counts are not sustained by preponderant evidence.

CBA Article 31.03(2), which states that in determining an appropriate penalty for an offense, the Department will consider relevant facts and circumstances, including (A) the nature and seriousness of the offense; (B) the employee's record; (C) penalties imposed on other employees for the same or similar offenses; and (D) any mitigating circumstances in the case.

First, the Arbitrator found that Ricken's misconduct was serious because he had caused damage (although minimal) to a swing gate on Washington D.C. property, had placed his firearm in the trunk of his car, and had failed to report to roll call the next morning. Second, the Arbitrator concluded that Ricken's record showed that he had a well-documented career of outstanding service and no evidence of past infractions or disciplinary actions before his termination. Third, the Arbitrator determined that the USCP had an established past practice of dealing with a long list of employees with DUI arrests, weapon violations, interference with criminal investigations, as well as taking lewd photos of civilian females in handcuffs, which have resulted in limited 5 to 30 day suspensions. Fourth, the Arbitrator found that the record supported that Ricken was truthful. And last, the Arbitrator determined that the CBA endorses progressive discipline and that Ricken had expressed considerable remorse.[3]

The Arbitrator found the grievance sustained in part and denied in part. He reduced Ricken's termination to a 30-day suspension, and instructed the USCP to make Ricken whole for lost wages and benefits (less other payroll related earnings from the time of his discharge to the present).

### C. The USCP's Exceptions

On June 12, 2014, the USCP filed with the OOC eight exceptions to the Arbitrator's award. The exceptions mainly allege that the Arbitrator's award should be overturned because the termination of employees from the USCP approved by the CPB are not subject to arbitration, the Arbitrator failed to issue his award within the 30-day contractual period, the award was against public policy, the award was not supported with sufficient evidence, and the Arbitrator was biased against the USCP. On July 14, 2014, the Union filed its opposition.

### D. Standard of Review

The Board's standard of review for appeals from a Hearing Officer's decision requires the Board to set aside a decision if the Board 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*

[3] Section 31.01 of the CBA states that "[t]he Parties agree that the purpose of discipline is solely not to punish the employee, but to affect an employee's behavior in ways positive for both the employee and the Department …. It is also recognized that removal of an employee from the federal service is the severest form of discipline that the Department can use. The Parties agree with the theory of 'progressive discipline.'"

*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).

**E. Analysis**

For the reasons that follow, the Board denies the USCP's exceptions to the Arbitrator's award.

***Arbitrability of Terminations Approved by the CPB***

The USCP Exception I is denied because the USCP has failed to establish that employee terminations approved by the CPB are not subject to arbitration. Nothing in the parties' contractually negotiated grievance arbitration procedure expressly excludes such terminations from arbitration. The FLRA has stated that it will find that a matter is specifically provided for by federal statute only to the extent that the governing statute leaves no discretion to the agency. *Int'l Ass'n of Machinist & Aerospace Workers Franklin Lodge No. 2135 and Dep't of Treasury Bureau of Engraving and Printing*, 50 F.L.R.A. 677, 682 (1995).

The USCP contends that the Technical Corrections Act of 2009 ("TCA") left no discretion to the USCP to approve terminations and that sole discretion belongs to the CPB. The USCP, however, 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. Furthermore, if the TCA intended to remove termination decisions made by the CPB from arbitration, it is reasonable to assume that the USCP would have raised the issue in 2010 in collective bargaining when the CBA was being finalized. Yet, the USCP did not seek a contractual provision excluding such terminations from arbitration, and did not alert the Union to this issue until after the CBA had been operating for three years.

With regard to Exception II, the USCP has failed to show that the Arbitrator exceeded his contractual authority, in violation of Section 32.031.J. of the CBA, which excludes decisions of Congressional entities from arbitration. The Arbitrator determined that the language in Section 32.031.J. is "both broad in scope and also leads to ambiguity over the definition or precise meaning of 'Congressional entities and Employing Office.'" An interpretation that excludes terminations from arbitration on this basis is unwarranted, as the CBA does not expressly state that termination decisions approved by the CPB are not subject to arbitration. Additionally, the USCP Chief, who has considerable discretion in recommending termination, is subject to the CBA and arbitration. Moreover, the USCP has failed to cite any legislative history of the TCA which indicates that discharges of USCP employees are not subject to arbitration. The USCP's Exceptions I and II are denied.

***The Thirty-Day Period for Issuing An Award***

The Arbitrator acted within his authority in rendering an untimely award. Limitations on the time in which an arbitrator may render an award are procedural, not jurisdictional. *McKesson Corp. v. Local 150 IBT*, 969 F.2d 831, 834 (9th Cir. 1992) (internal citations omitted). Without "an express agreement to the contrary, procedural questions are submitted to the arbitrator, either explicitly or implicitly, along with the merits of the dispute." *Id.* The question upon review then becomes whether the procedural ruling represents a 'plausible interpretation' of the contract." *Id.* An arbitrator may reasonably conclude that the contractual time limit is "a directory limitation, not a mandatory one." *Id.* Moreover, where a collective bargaining agreement allows for extension by mutual agreement, that "possibility of waiver of that requirement negates its being a jurisdictional prerequisite to an arbitrator's exercise of authority." *See Gunn v. Veterans Admin. Med. Ctr.,* 892 F.2d 1036, 1038 (Fed. Cir. 1990).

Parties have to state in unequivocal language whether they intend for arbitrators to lose their jurisdiction if they render a late award. *Jones v. St. Louis-San Francisco Ry. Co.*, 728 F.2d 257, 265 (6th Cir. 1984). If the parties do so, a late arbitration award is automatically invalidated. If they fail to make such provisions, "the authority of the arbitrator will expire after a reasonable time beyond the period originally fixed for the award has gone by." *Id.* The determination of reasonableness must be made giving consideration to the surrounding circumstances and any element of prejudice or harm either party suffers. *Id*. This reasonableness rule was developed to stop parties from waiting until an award is made and objecting to it on the basis of its untimeliness only after they receive an unfavorable decision. *Id*.

In this case, the CBA does not specify what happens if the award is not issued before the 30-day deadline, and that procedural issue was implicitly submitted to the Arbitrator. As the CBA does not divest the Arbitrator of contractual authority when the award is late, and as it expressly allows for extensions by mutual agreement, the Arbitrator reasonably concluded that the time limit for rendering his award was directory, not mandatory. Therefore, the Board may review whether the Arbitrator's delay was unreasonable or resulted in prejudice to the USCP. The award was delayed a total of approximately 82 days after the 30-day deadline.

The record reveals that Ricken has been working since his firing. Therefore, his damages would be reduced should the Arbitrator's decision be affirmed. While 82 days is not an immaterial delay, the USCP cannot show that it suffered prejudice as a result of the delay. *See, e.g., Bennett v. Consolidated Rail Corp.*, No. 88-3337, 1988 WL 94280, at fn.1 (E.D. Pa. Sept. 12, 1988) (arbitration award upheld despite 2.5 month delay after hearing closed*); see also McKesson Corp.*, 969 F.2d at 834 (upholding an arbitrator's decision to issue an award despite a five month delay); *Freed v. Oehmke*, 951 F.2d 349 (6th Cir. 1991) (unpublished) (arbitration award upheld despite 5.5 month delay). The USCP's Exceptions III and IV are denied.

***Contrary to Public Policy***

The USCP's assertion that the award is contrary to public policy is without merit. For an award to be found deficient on this basis, the asserted public policy must be "explicit," "well-defined," and "dominant," and a violation of the policy must be clearly shown. *United Paperworkers Int'l Union, AFL-CIO, et al., v. Misco, Inc.*, 484 U.S. 29, 42-44 (1987). Review of such public policy exceptions is extremely narrow. *U.S. Dep't of HUD v. AFGE Local 3956*, 66 F.L.R.A. 106, 108-109 (2011).

The USCP argued that Ricken's reinstatement violates public policy because of the seriousness of Ricken's misconduct and because police officers are held to a higher standard. Although we recognize the USCP's interest in holding police officers to a higher standard, the USCP has failed to cite a well-defined public policy that has been violated by the Arbitrator's award. Instead, the USCP's argument mistakenly relies on "general considerations of supposed public interests." *Misco*, 484 U.S. at 44. Exception V is denied.

***Sufficient Evidence***

The Arbitrator acted within his discretion when he reduced Ricken's firing to a 30-day suspension. When alleging that an arbitrator made mistakes of fact, the excepting party must demonstrate that "a central fact underlying the award is clearly erroneous, but for which a different result would have been reached by the arbitrator." *Capitol Police Board, Case No. 01-ARB-01 (CP)* (Feb. 25, 2002). To meet this burden, the excepting party cannot rely on any factual matter that the parties disputed during arbitration. *Id*. The arbitrator has authority to weigh the parties' evidence and conclude whether it constitutes "convincing information." *Aramark Facility Servs. v. Serv. Employees Int'l Union, Local 1877, AFL CIO*, 530 F.3d 817, 828 (9th Cir. 2008). When the arbitrator makes such factual findings, they are not debatable on review of the award. *Id*. The Board's scope of review of arbitration decisions in these circumstances is extremely narrow. *See, e.g., AFSCME v. The Office of the Architect of the Capitol*, Case No. 13-ARB-01(Feb. 26, 2014); *Misco, Inc.*, 484 U.S. at 36 ("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."); *Major League Baseball Players Ass'n. v. Garvey*, 532 U.S. 504, 509 (2001) ("When an arbitrator resolves disputes regarding the application of a contract… the arbitrator's 'improvident, even silly, factfinding' does not provide a basis for a reviewing court to refuse to enforce the award.")

Furthermore, 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. v. Serv. Employees Int'l Union, Local 285*, 260 F.3d 16, 21 (1st Cir. 2001) (citing *Misco, Inc.,* 484 U.S. at 38). Nonetheless, in entering into a collective bargaining agreement, parties effectively bargain for the arbitrator's construction of their agreement, thus

entitling the arbitrator's interpretation to great deference by the courts. *Id.* Therefore, 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.* Accordingly, where the plain language of a collective bargaining agreement requires "just cause" for a range of disciplinary responses, the arbitrator is free to conclude that certain misconduct lacked just cause for discharge, but warranted a lesser penalty. *Id.* at 21-22. The same deference is afforded to interpretations of progressive discipline. *See Local No. 7 United Food & Commercial Workers Int'l Union v. King Soopers, Inc.*, 222 F.3d 1223, 1228-29 (10th Cir. 2000).

Here, the Arbitrator found that the USCP had an established past practice of addressing employee misconduct involving DUI arrests, weapon violations, interference with criminal investigations, as well as taking lewd photos of civilian females in handcuffs, with limited 5 to 30 day suspensions. In Exception VI, the USCP argues that this finding relied on "nonfacts" by accepting as credible comparative discipline cases proffered by the Union. The USCP appears to assert that the Arbitrator's mistakes of fact were based on his reliance on unreliable or inapplicable comparative cases. The Arbitrator, however, acted within his discretion in weighing the credibility of the Union's evidence, noting that the parties lacked an identical comparator. He also recognized that Ricken had a good record as a police officer with no evidence of prior arrests or convictions, and no history of alcohol-related offenses. Further, while parts of the Union president's testimony were incomplete and speculative, the Arbitrator found the testimony to be credible regarding suspensions given to other employees who had DUI arrests or weapon violations.[4] The USCP fails to establish a clearly erroneous central fact but for which the Arbitrator would have reached a different result.

Likewise, contrary to Exception VII, the Arbitrator did not exceed his authority in ruling that a 30-day suspension more adequately reflected the progressive discipline under the CBA. This interpretation is entitled to deference. As there is no basis for finding the award deficient, Exceptions VI, and VII are denied.

[4] *See Sheehan v. Office of the Architect of the Capitol*, 08-AC-58 (CV, RP) (Jan. 21, 2011) (observing that "credibility determinations are entitled to substantial deference, because it is the Hearing Officer who 'sees the witnesses and hears them testify, while the Board and the reviewing court look only at cold records.'" (quoting *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962)); *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 220 (D.C. Cir. 2005) (observing that the court "will not disturb the Board's adoption of an ALJ's credibility determinations 'unless those determinations are hopelessly incredible, self-contradictory, or patently unsupportable.'" (quoting *United Servs. Auto. Ass'n v. Nat'l Labor Relations Bd.*, 387 F.3d 908, 913 (D.C. Cir. 2004) (internal quotations omitted)).

***Arbitrator Bias***

The USCP did not establish that the Arbitrator was biased against the USCP. The Arbitrator thanked both parties for their time and effort in arguing the case. Also, the Arbitrator agreed in part with the USCP that Ricken's conduct should be penalized, albeit not with discharge. The Arbitrator reasonably relied on the relevant facts and circumstances in issuing his award, and accordingly, was not biased. *AFGE Local 1061*, 63 F.L.R.A. 317, 320 (May 15, 2009) (where a union reported an arbitrator's delay in issuing her ruling to the Federal Mediation and Conciliation Service, the union failed to establish bias).

**ORDER**

For the foregoing reasons, the Board denies the USCP's exceptions to the Arbitrator's award.

It is so ORDERED.

Issued, Washington, DC, December 12, 2014