OFFICE OF COMPLIANCE
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Fraternal Order of Police, District of Columbia Lodge No. 1, U.S. Capitol Police Labor Committee Petitioner, and United States Capitol Police Employing Office	)	Case No. 16-LM-02 (NG)

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

DECISION OF THE BOARD OF DIRECTORS

This petition for review, involving three proposals, was filed by the Fraternal Order of Police, District of Columbia Lodge No. 1, U.S. Capitol Police Labor Committee (Union) after the United States Capitol Police (USCP or Department) alleged they were outside its duty to bargain. The petition for review comes before the Office of Compliance Board of Directors (the Board) pursuant to § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (FSLMRS), as applied by § 220(c)(1) of the Congressional Accountability Act (CAA), 2 U.S.C. § 1351(c)(1).[1] The Union is the certified representative of a unit of police officers employed by the USCP. The parties are governed by a collective bargaining agreement (CBA) that was slated to expire on June 9, 2013, but remains in effect until superseded by a successor CBA.

I. Statement of the Case

The three proposals were submitted to the Employing Office during the parties' successor CBA negotiations over Article 32, Grievance/Arbitration Procedures. They would modify subsections of draft provisions for the new Grievance/Arbitration Procedures article presented to the Union by the USCP during the negotiations. The proposals address the scope of those

[1] When deciding negotiability issues, we have been guided by cases decided by the Federal Labor Relations Authority (Authority), which is the executive branch agency responsible for resolving issues arising under the FSLMRS. See, *e.g.*, *Plumbers Local 5, United Ass'n of Journeymen & Apprentices and Office of the Architect of the Capitol*, 2002 WL 34661693, 02-LMR-03,-04,-05 & -06 (CAOC 10/7/2002); *Int'l Brotherh'd of Electrical Workers, Local 26 and Office of the Architect of the Capitol*, 2001 WL 36175211, 01-LMR-02 (CAOC 11/23/01).

procedures, specifically, whether decisions by the USCP to terminate the employment of bargaining unit employees should be excluded from the grievance procedure, as proposed by the USCP, or should continue to be included as a grievable and arbitrable subject, as proposed by the Union.

II. Proposals In Dispute

Section 32.03.J:

> The following matters are excluded from coverage of this grievance procedure ... J. Policies, decisions, or directives of Congressional authorities and entities, *including approving of terminations of employees by the Capitol Police Board,* provided that the impact and implementation of those policies by the Department will be negotiable to the extent permitted by law.

The Union would eliminate the italicized wording from Section 32.03.J.

Section 32.03.P:

> The following matters are excluded from coverage of this grievance procedure ... P. Any [] termination of employment of a bargaining unit employee.

The Union proposes to eliminate Section 32.03.P in its entirety.

Section 32.12:

> The Union may, within thirty (30) days following receipt of the Chief's, or designee's, final decision, notify the Chief of police by facsimile that it desires the matter to be submitted to arbitration. *For the purposes of termination of employment, the date of the final decision is the date the employee is removed from USCP payroll.* Within seven (7) days after notification, the Union will request a panel of arbitrators from the Federal Mediation and conciliation Service (FMCS) in accordance with FMCS procedures. Within fourteen (14) days from receiving a list of arbitrators from FMCS, the Parties will meet to select an arbitrator. If the panel is unacceptable to either Party, one additional panel may be requested. If the Parties cannot agree upon an arbitrator, they will strike one **(1)** name from the list alternately and then repeat this procedure until only one name remains. The striking process shall be conducted on the same date that it is commenced. The person whose name remains will be selected as the arbitrator. The Party striking the first name from the list in each case will be chosen by a coin toss or any other agreed upon procedure. Consistent with 5 USC 7121(b)(l)(C)(iii) and Section 32.08 above, the Department may invoke arbitration for unresolved grievances in accordance with this Section and will request a panel of arbitrators from FMCS.

> When the Step 4 grievance arises from a disciplinary matter involving the imposition of a suspension, the action shall be considered ripe for arbitration on the date the Chief issues a final decision. *In cases where the Chief determines that removal is an appropriate penalty under the circumstances, the Chief shall notify the employee as soon as possible of this determination. However, the Disciplinary removal shall not be ripe for arbitration until the day after the employee is removed from the Department's payroll.*

The USCP contends that the italicized portions of the Union's proposal are nonnegotiable.

III. Positions of the Parties

A. Employing Office

The USCP alleges that the Union's proposals are nonnegotiable because they concern matters specifically provided for by federal law and, therefore, are not conditions of employment under Section 7103(a)(l4) of the FSLMRS, as incorporated by Section 220 of the CAA.[2] According to the USCP, the Union's proposals directly implicate the issue of whether final approval of terminations by the Capitol Police Board (CPB), "where the CPB is not an employing office under the CAA, is subject to grievance and arbitration procedures." In its view, Congress specifically provided for the review and approval of termination recommendations as to USCP employees in 2 U.S.C. § 1907(e) (1) (B), (C), which states:

> 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.
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> 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 –
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> (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.

In other words, "no employee of the USCP may be terminated without notice to the CPB and

[2] Under 5 U.S.C. § 7103(a)(14) of the FSLMRS, the term "conditions of employment" means "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." In accordance with 5 U.S.C. § 7103(a)(14)(C), the term does not include policies, practices and matters "to the extent such matters are specifically provided for by Federal statute."

CPB approval of the termination" and, "absent a CPB decision explicitly or implicitly approving the termination, the Chief of Police has no discretion to terminate any employee." Most, importantly, the USCP contends, 2 U.S.C. § 1907(e) (1) (B), (C) "does not provide for any further review once the CPB has determined to approve the termination." Because the Union's proposals involve a matter that is specifically provided for by Federal statute, it is not a condition of employment under Section 7103(a)(14). Accordingly, the USCP contends that the proposals are non-negotiable.

Moreover, the USCP claims that under the above-referenced statutory provisions, the Chief of Police only has the discretion to recommend an employee for termination; Congress provided the CPB with the sole authority to review and approve any termination recommendation. Thus, the fact that the Chief of Police has discretion to recommend a unit employee's termination "does not change the conclusion that the Union's proposals do not concern a condition of employment." In addition, the USCP asserts that, under 5 U.S.C. § 7103(a)(14)(C), the statutory provisions it is relying upon "do[] not need to expressly exclude CPB termination decisions from review by an arbitrator" for the matter to be specifically provided for by Federal statute. To the contrary, the USCP claims that it is sufficient that the provisions state that recommendations for termination of USCP employees must be presented to the CPB and approved or denied by that entity. Since Congress did not provide for review of CPB decisions by any other entity, and the CBP reports only to the Committee on Rules and Administration of the Senate and the Committee on House Administration of the House of Representatives, the USCP avers that "it is unreasonable to require Congress to expressly state that CPB decisions are not reviewable by an arbitrator under the parties' CBA."

The USCP also argues that, by excluding the CPB as an employing office under the CAA, Congress expressly excluded the CPB from any obligations or rights under the CAA, including the obligation to collectively bargain.[3] Of further significance, Congress did not confer CBP with the authority to review and approve termination recommendations "until *after* the CPB was removed as an employing office under the CAA in March 2010." Prior to March 2010, Congress invested such authority in the oversight committees rather than the CPB. According to the USCP, "this context makes it clear that Congress specifically intended for the CPB's termination decisions not to be subject to the obligations of the CAA," further supporting its position that the statute's silence as to whether CPB decisions on terminations may be reviewed by an arbitrator "is irrelevant where the statute specifically provides for only the CPB to review and approve any termination decisions."

Additionally, the USCP contends that the Union's proposals are nonnegotiable because they are inconsistent with 2 U.S.C. § 1907(e) (l) (B), (C),[4] *i.e.*, they "would subvert Congress' mandate that the CPB have the final word as to whether a USCP employee will be removed from employment" by permitting a third party to review and reverse the decisions of the CPB, a right

[3] The USCP cites the enactment of the United States Capitol Police Administrative Technical Corrections Act of 2009, Pub. L. No. 11 1-145 (2010) (hereinafter TCA) and 2 U.S.C. § 1301(9)(D), to support its position in this regard.

[4] The USCP cites 5 U.S.C. § 7117(a), which states that no duty to bargain exists where a proposal is "inconsistent with any Federal law or any Government-wide rule or regulation."

not granted by the statute. In this regard, it asserts that the Authority "has deemed proposals nonnegotiable under similar circumstances."[5] The non-negotiability of the Union's proposals is further supported by the CPB's own interpretation of Section 1907 in CPB Order 15.03, which confirms that the statute does not permit any review of its decisions on termination by stating:

> [U]nder 2 U.S.C. § l907(e) authorizing the Capitol Police Board to approve termination actions forwarded by the Chief of Police, the Capitol Police Board hereby orders that any termination approved by the Capitol Police Board is a final decision of the Capitol Police Board and Capitol Police Board approval decisions are not reviewable or appealable in any manner. Notwithstanding any Office of Compliance Board of Directors decision, which has no applicability to Capitol Police Board's approval of termination determinations, the United States Capitol Police is directed to comply with the Capitol Police Board's approval of all termination decisions by the Capitol Police Board.

Finally, the USCP alleges that the Union's proposals are also contrary to law "as they would improperly extend the coverage of the CBA and the jurisdiction of the CAA and [the Board] over the CPB, an entity that is not an employing office under the CAA and not a party to a CBA." In its view, the CPB has no obligations under the labor-management relations provisions of the CAA and "no basis exists to improperly extend the CAA to require an entity to which it does not apply to comply with its obligations." While Congress could have allowed bargaining unit employees to challenge termination actions, as it does with lesser disciplinary penalties, "it expressly declined to do so when it conferred the authority to approve terminations on the CPB after removing the CPB as an employing office subject to the CAA." According to the Department, the decision by Congress to continue the ability of USCP employees to negotiate as to all other disciplinary matters, but expressly "carve[] out" terminations as solely within the purview of the CPB, indicates that Congress intended the CPB's termination decisions to be the final determination and not reviewable.

B. Union

The Union asserts that the USCP's nonnegotiability claims concerning the grievability and arbitrability of terminations "reads too much" into Congress' enactment of the TCA. With respect to its first argument, although matters that are "specifically provided for by federal statute" are not "conditions of employment" under 5 U.S.C. § 7103(a)(14)(C), and are therefore beyond an agency's duty to negotiate, the Union stresses that this exception is a narrow one and is "no bar to the Union's proposals." As the USCP itself admits, section 1907 "does not provide for any further review once the CPB has determined to approve the termination." Indeed, "the statute is silent on *post-termination* review of any kind." Thus, to the extent that section 1907 establishes a procedure whereby the Chief must seek pre-approval of termination decisions from the CPB, the Union contends that such a procedure does not concern a negotiable condition of employment because it is specifically provided for by law. Because the Union's proposals

[5] *Police Ass'n of the Dist. of Columbia and Dep't of Interior, Nat. Park Serv.,U.S. Park Police,* 18 F.L.R.A. 348 (1985) *(Park Police)*; *U.S. Dep't of Veterans Affairs, Veterans Canteen Serv. and AFGE AFL-CIO,* 66 F.L.R.A. 944 (2011) *(VCS)*; and *U.S. Dep't of the Air Force, Luke Air Force Base, AZ,* 65 F.L.R.A. 820 (2011) are the Authority decisions cited by the USCP to support its position.

address only post-termination grievance and arbitration, however, it contends that they fall outside of the "provided for" exception.

In addition, the Union notes that the Board has confirmed that the "provided for" exception applies "only to the extent that the governing statute leaves no discretion to the agency."[6] In this regard, the USCP argues that the Chief has discretion only to *recommend* termination, because the Chief must first obtain CPB approval before an employee is terminated. Section 1907, however, "states clearly that '*the Chief may terminate* an . . . employee only after the Chief has provided notice of the termination to the [CPB] . . . and the [CPB] has approved the termination'." 2 U.S.C. § 1907 (emphasis added). According to the Union, the statute "does not call for termination by the CPB, or for termination by operation of law." Instead, it requires certain conditions to be met and, once they are, "vests the Chief with discretion to terminate an employee." Therefore, because the governing statute grants the USCP discretion in its termination decisions, the Union concludes that the "provided for" exception does not apply.

The Union also states that Congressional intent "favors preservation of the USCP employees' right to grieve and arbitrate their terminations." Contrary to the USCP's position, "there is no reason to conclude . . . that Congress specifically intended for the CPB 's termination decisions not to be subject to the obligations of the CAA." In this regard, the Union states that there is nothing in the plain wording of the statute that indicates such an intention, such as any restrictive clauses, nor does the statute rest authority "solely" with the CPB or "exclusively" with the CPB. Indeed, the Union continues, as the Board noted in *FOP v. USCP*, "the USCP has failed to cite any legislative history of the TCA which indicates that discharges of USCP employees are not subject to arbitration." Rather, the legislative history of the TCA "demonstrates only Congress' intent to maintain *the status quo*."[7] Thus, the Union claims that the USCP is ignoring Congress' stated intent, rather than adhering to it, when it contends that, by removing the CPB as an employing office and placing it in the position to approve the Chief's terminations under Section 1907, "Congress has demonstrated its intent to place the terminations beyond the reach of negotiated grievance and arbitration." As referenced above, "the CPB's status as an employing office has no bearing on whether termination of employees can be subjected to arbitration because it is not the CPB that actually terminates USCP employees under Section 1907; it is the Chief." Thus, the Union contends that, as an agent of the employing office, it is the Chief's decision that would be subjected to review under the parties' negotiated grievance procedure.

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[6] In this connection, the Union cites *FOP/U.S. Capitol Police Labor Committee v. United States Capitol Police*, 14-ARB-01, at 5 (OOC, Dec. 12, 2014) (*FOP v. USCP*) (citing *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)) to support its position.

[7] To support its contention, the Union cites H.R. REP. No. 111-66 (2009), which states:

> The [TCA] makes technical corrections to existing laws by repealing obsolete or duplicate provisions and correcting drafting errors in others in order to clarify their meaning. As such the bill *makes no change to terms and conditions of employment. (*emphasis added).

Turning to the USCP's second argument, the Union asserts that Section 1907 does not vest exclusive authority to review terminations with the CPB. Rather, "it grants the CPB a limited role in approving terminations that in no way forecloses negotiated, post-hoc review of the Chief's terminations. In this regard, the Authority has held that a law granting an agency sole and exclusive discretion over a matter removes that matter from its obligation to bargain.[8] The two primary Authority decisions cited by the USCP to support its position that the Union's proposals in the instant case are nonnegotiable involve such laws. In *Park Police*, the Authority found that the union's proposals were inconsistent with federal law because the pertinent statute "provides that *'notwithstanding . . . any other law'* the decision of the Secretary of the Interior as to the fines and suspensions within his authority under the law will be *'final and conclusive'*."[9] Significantly, the Authority also noted legislative history that included the explicitly declared intent to limit the available grievance procedures because failing to do so "could create serious morale problems within the force, involve long delays, and cause unnecessary expense." Similarly, in *VCS*, the Authority found that permitting VCS employees to negotiate grievance procedures would be inconsistent with federal law because the "VCS Act," at the time it was passed, expressly excepted those employees from appealing adverse actions. Specifically, it provided that "[p]ersonnel . . . shall be . . . removed by the Administrator *without regard to civil-service laws."*[10] Indeed, in *VCS* and each of the cases on which it relies, the employees in question were excluded from the appeals process by a statute reflecting Congress' deliberate intent to exclude that class of employees from appealing major adverse employment actions.

According to the Union, the Authority decisions cited by the USCP are easily distinguishable from the circumstances in this case, and provide no support for its position, because "no such [sole and exclusive] language exists in [Section] 1907 and no such intent appears in the applicable legislative history." As the Authority has also held, "the absence of wording that expressly preempts the [FSLMRS] or other laws is a 'strong indication that Congress did not intend the [agency] to have unfettered discretion' over the matter."[11] Applied to the current context, Congress' choice of language in the CAA and the TCA "is therefore a strong indication that it did not intend to commit terminations to the sole and exclusive discretion of the CPB." Moreover, "this choice of language was no oversight" because, in another section of the same chapter, Congress enacted a provision that states that "[t]he [CPB] and the Chief of the Capitol Police *shall have the sole and exclusive authority* to determine the rates and amounts for each of the following for members of the Capitol Police." 2 U.S.C. § 1921(a) (emphasis added). Thus, when drafting the USCP's enacting legislation, Congress "demonstrably knew how to commit certain matters to the sole and exclusive discretion of the USCP and the CPB, did so in at least one place, and declined to do so in § 1907." The Union's

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[8] The Union cites the Authority's decision in *U.S. Dep't of the Int., BIA, Southwestern Indian Polytechnic Inst., Albuquerque, NM*, 58 F.L.R.A. 246, 248 (2002) to support its position.

[9] *Park Police*, 18 F.L.R.A. at 352-53 (emphasis added).

[10] *VCS*, 66 FLRA 944 (2011) at 948-49 (emphasis added). The Union also points out that, in contrast to the Administrator's explicitly unfettered authority to terminate VCS employees "without regard to civil-service laws," the power to terminate USCP employees was vested in the Chief of the USCP "*subject to and in accordance with applicable laws and regulations*," 2 U.S.C. § 1907(1)(A) (emphasis added).

[11] *U.S. Dep't of Homeland Sec., U.S. Immigration & Customs Enforcement*, 67 F.L.R.A. 501, 503 (2014).

proposals are therefore entirely consistent with federal law.

The Union also contends that the Board should disregard the CPB "order" from which the USCP has quoted in its statement of position. While it is granted the authority to issue rules and regulations on a range of subjects, *see, e.g.*, 2 U.S.C. § 1969 (providing that the CPB may promulgate traffic regulations for the Capitol), "the CPB has no authority to issue orders or regulations regarding the post-hoc review of the Chief s terminations." *See generally* 2 U.S.C. §§ 1901, *et seq.* Even if the CPB did have the authority to issue such an order - which the Union asserts it does not - this particular order would have no force because "it has never been published or circulated in any forum except, apparently, between the CPB and counsel for the USCP." Finally, with respect to the USCP's final argument that Congress' removal of the CPB from its status of "employing office" places the CPB beyond the reach of any provision of the CBA, "the USCP has again read too much into the CPB's role under Section 1907." As discussed above, it is the Chief and not the CPB that terminates a USCP employee. Consequently, the CPB would not be subjected to the authority of any arbitrator because it is the Chief whose termination decisions will be arbitrated.

IV. Analysis and Conclusions

When Congress enacted the CAA in 1995, it expressly extended the rights, protections, and responsibilities contained in section 7121 of the FSLMRS to the USCP and its employees. Indeed, the parties in this case agree that their CBA must provide a negotiated grievance procedure, including binding arbitration. Their dispute essentially involves the issue of whether the USCP has an obligation to negotiate over the Union's proposals that the provisions of the current CBA, which permit the Union to grieve and, if necessary, arbitrate termination decisions, should continue in their successor CBA.

Preliminarily, it is instructive to review the legal precedent established by the Authority and the courts concerning the kind of grievance procedure Congress intended when it enacted the FSLMRS in 1978. In this regard, the Authority has held that "the scope of the negotiated grievance procedure is a matter affecting working conditions of bargaining unit employees and, as a condition of employment, is a mandatory subject for collective bargaining under the [FSLMRS]."[12] It also reiterated that:

> [T]he language and legislative history of section 7121 demonstrate that Congress clearly intended that the scope and coverage of a negotiated grievance procedure shall extend to all matters which, "under the provisions of law," could be covered unless the parties agreed through the collective bargaining process to a procedure having a narrower coverage.

This means that, except for the five matters specifically excluded from coverage as grievances under Section 7121(c) of the FSLMRS,[13] including suspensions or removals of employees by the

[12] *Vermont Air National Guard, Burlington, Vermont and ACT, Inc.*, 9 FLRA 737, 742 (1982) (*Vermont ANG*).

[13] 5 U.S.C. § 7121(c) states as follows:

head of an agency deemed necessary in the interests of national security, pursuant to 5 U.S.C. § 7532, the exclusion of any other matters is subject to negotiations between the parties. Moreover, if a collective bargaining impasse is reached, the Authority has stated that the party seeking to narrow the scope of the negotiated grievance procedure bears the burden of justifying such exceptions before the Federal Service Impasses Panel. The Court of Appeals for the District of Columbia Circuit later affirmed the Authority's decision in *Vermont ANG.*[14]

Given the foregoing Authority case law, there is a *prima facie* assumption that union proposals concerning the scope of the grievance procedure are fully negotiable, provided they do not involve any of the five topics specifically excluded under Section 7121(c) of the FSLMRS. As the Union in this case is merely proposing to maintain a broad-scoped grievance procedure which includes grievances over the termination of bargaining unit employees, the burden on the USCP to demonstrate otherwise is substantial. In our view, it has failed to meet that burden. Its 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 *FOP v. USCP*, 14-ARB-01 (Dec. 12, 2014). 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. In addition, the Authority decisions cited by the USCP in support of its position involved specific findings that the applicable statutory provisions in question provided management with sole and exclusive authority to terminate employees notwithstanding the provisions of any other laws. As there is no evidence presented by the USCP that the TCA provides such exclusive authority to the CPB, those cases are inapposite. Finally, because CPB Order 15.03 merely repeats the unsubstantiated interpretation of Section 1907 and the CTA set forth by the USCP, it fails to support the non-negotiability of the Union's proposals.

In summary, we conclude that Union's proposals involve negotiable conditions of employment.

> (c) The preceding subsections of this section shall not apply with respect to any grievance concerning—
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> > (1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);
> > (2) retirement, life insurance, or health insurance;
> > (3) a suspension or removal under section 7532 of this title;
> > (4) any examination, certification, or appointment; or
> > (5) the classification of any position which does not result in the reduction in grade or pay of an employee.

[14] *American Federation of Government Employees v. FLRA*, 712 F.2d 640 (D.C. Cir. 1983). The court went on to state that "we would expect the Panel . . . to rule against a proponent of a limited scope procedure who fails to establish convincingly that, in the particular setting, its position is the more reasonable one." *Id.* at 649.

V. ORDER

The USCP shall, upon request, or as otherwise agreed to by the parties, bargain on the proposals concerning the grievability and arbitrability of decisions to terminate bargaining unit employees and other applicable provisions of the grievance and arbitration procedure.[15]

Issued, Washington, D.C., March 20, 2017.

[15] In finding the proposals to be negotiable, we make no judgment as to their merits.