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: 15-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 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 Officer J.S. Dixon ("Dixon"). The USCP suspended Dixon for five days without pay for insubordination when he failed to show up for work on Inauguration Day on January 21, 2013. On June 6, 2015, the Arbitrator found that Dixon was insubordinate, but reduced his suspension to a forfeiture of 24 hours of leave. The Arbitrator also found that Dixon was entitled to full back pay and benefits for the five-day suspension he served. The Arbitrator also granted Dixon's request for attorney fees. Finally, the Arbitrator retained jurisdiction for 60 days to decide any issues relating to his award or resolve any disputes regarding reasonable attorney fees.

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

Dixon has been working for the USCP as a private first class police officer for approximately 16 years. He generally works at the Library of Congress ("LOC") Library Division. Prior to 2013, Dixon had never been disciplined.

In early January 2013, Dixon alleged that he had diabetes and had been seeking medical assistance for his condition. He claimed that his condition made it difficult for him to stand for long periods of time. Dixon maintained that he was able to perform his patrol duties at the LOC because he had opportunities to sit if his feet hurt.

Inauguration Day was scheduled to take place on Monday, January 21, 2013. This would be the second Inauguration for President Barack Obama. The USCP describes Inauguration Day as the "Super Bowl" of events for the USCP. All employees are expected to work and generally leave requests would not be granted. Other agencies assist the USCP on Inauguration Day. Dixon was scheduled to work on Inauguration Day.

On January 17, 2013, the USCP informed Dixon that his assignment for Inauguration Day had changed from patrol work at the LOC to another post at the U.S. Capitol. Dixon became concerned about his new assignment because it would require him to stand for an extended period of time. Dixon initially advised the USCP that he would not be working on Inauguration Day. After meeting with his superiors, Dixon agreed that he would work on Inauguration Day.

On Sunday night, January 20, 2013, Dixon went to the emergency room at a hospital. At 10:58 p.m. that evening, a doctor gave Dixon a note, which stated he was to not work for two days. Dixon then called a Sergeant at approximately 11:00 p.m. Dixon informed the Sergeant that he would not be working on Inauguration Day and that he was requesting sick leave. The Sergeant responded that he did not have the authority to approve sick leave for Dixon. The Sergeant instructed Dixon to call Inspector Lloyd at 2:00 a.m. to request sick leave. Inspector Lloyd was the USCP official who could approve Dixon's sick leave request. Inspector Lloyd was scheduled to begin his duty at 2:00 a.m. The Sergeant gave Dixon several phone numbers to reach Inspector Lloyd.

Dixon called Inspector Lloyd two times around 11:30 p.m. on January 20, 2013, but received no answer.[1] Dixon did not call Inspector Lloyd at 2:00 a.m. The Sergeant called Dixon several times on January 21, 2013. Dixon did not return the calls. Dixon also did not report to work on Inauguration Day. Dixon returned to work on January 23, 2013. Upon his return, the USCP approved his request for sick leave for January 21 and 22, 2013. On January 24, 2013, Inspector Lloyd proposed charging Dixon with a forfeiture of 24 hours of leave for failing to work on Inauguration Day. The USCP investigated the charge.

On May 21, 2013, the USCP advised Dixon that he had violated the USCP Directive #2053.013, Rules of Conduct, Category A: Duty to Obey, Rule A6: Insubordination. Rule A6 provides that "[e]mployees will not refuse to obey, by words or actions, a lawful order of the supervisor, and

[1] Dixon maintains that the medication he was taking made him go to sleep after he attempted to contact Inspector Lloyd on January 20, 2013.

will not utter any disrespectful, rebellious, insolent, or abusive language to or toward a supervisor." The USCP suspended Dixon for five days without pay.

On June 14, 2013, Dixon and the Union appealed the five-day suspension. The USCP Chief Kim Dine ultimately denied the appeal on September 2, 2014. On September 18, 2014, the FOP requested arbitration. Dixon served the five-day suspension without pay before the arbitration hearing.

On January 12, 2015, the Arbitrator conducted the hearing. During the hearing, the USCP's counsel asked the Arbitrator if he was aware of the contractual deadline for him to issue his award. The Arbitrator noted that his award was due to the parties no later than 30 days following the close of the record. The Arbitrator also noted that if he could not meet the 30-day deadline, he must seek an extension from the parties. The record closed on February 17, 2015. Therefore, the Arbitrator's award was due no later than March 17, 2015.

The Arbitrator's Award

On June 5, 2015, the Arbitrator issued his award. The award was approximately 78 days late.[2] The Arbitrator found that Dixon was insubordinate. The Arbitrator reasoned that Dixon decided he would be absent on Inauguration Day and then notified the USCP of his decision. The Arbitrator stated that while Dixon may have been concerned about his health, his actions could have been viewed as "disrespectful." In addition, the Arbitrator noted that a Lieutenant stated Dixon told her that he was planning to call in sick and go on a doctor's appointment on January 21, 2013, but did not provide any details regarding the reason for his sick leave request. The Arbitrator stated that while employees have a right to privacy, Dixon's lack of candor could have given the impression that he did not want to work on Inauguration Day and that the decision was his.

The Arbitrator also stated that Dixon, despite a direct order from his Sergeant to contact Inspector Lloyd to request sick leave, unilaterally decided that he had fulfilled his obligations to provide notice and could treat the Sergeant's order as a non-mandatory directive. The Arbitrator noted that Dixon made no further effort to notify the Sergeant that he had been unable to reach Inspector Lloyd and he did not attempt to make another arrangement. The Arbitrator found that the USCP had provided sufficient evidence to show that Dixon was insubordinate.

Next, the Arbitrator stated that Section 31.0 of the parties' CBA indicates that the purpose of discipline is not solely to punish the employee and that the parties agree with "progressive discipline." Further, the Arbitrator noted that Section 31.0 does not require the USCP to use

[2] On April 10, 2015, the Arbitrator sent the parties an email indicating that he was still working on his award. The Arbitrator eventually issued his award on June 5, 2015. The Arbitrator later indicated that he was tending to a personal matter involving his daughter and did not get back to work full-time until May 2015.

progressive discipline in every case when fashioning a penalty. The Arbitrator also found that the CBA did not preclude an arbitrator from assessing the appropriateness of the penalty in accordance with the progressive discipline section of the CBA.

As a result, the Arbitrator focused on whether the penalty was appropriate in light of the parties' commitment to progressive discipline and the factors set forth in CBA Section 31.03(2), which states that in determining an appropriate penalty for an offense, the USCP 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.

The Arbitrator found that a Deputy Chief acknowledged during his testimony that another police officer called his supervisor an hour before he was scheduled to begin work on January 19, 2013, Inauguration Weekend, and reported he was ill and requested leave. The USCP denied the officer's leave request. When the officer failed to appear to work, the USCP charged him with insubordination and forfeited him 24 hours of leave. The Arbitrator also noted that on Inauguration Day, other employees were granted leave, and, in some situations, sent home if they arrived at work sick that day.

The Arbitrator also concluded that the USCP failed to properly consider all of the mitigating factors as required by the CBA. Specifically, the Arbitrator determined that Dixon's medical condition precluded him from calling the USCP at 2 a.m. on Inauguration Day; that the USCP forfeited 24 hours of leave of a similar comparator who did not work on Inauguration Weekend after his leave request was denied; and that Inspector Lloyd initially proposed that Dixon lose 24 hours of leave because of his conduct.

The Arbitrator replaced Dixon's five-day suspension with a forfeiture of 24 hours of leave. The Arbitrator also found that Dixon was entitled to receive full back pay and benefit for the five-day suspension he had served. The Arbitrator granted the FOP's request for attorney fees and retained jurisdiction for 60 days to resolve any issues with the award or attorney fees. On June 15, 2015, the USCP objected to the Arbitrator's award because it was issued late and the Arbitrator never sought an extension. On July 6, 2015, the USCP filed six exceptions to the Arbitrator's award. The FOP filed its opposition on August 5, 2015.

B. The USCP's Exceptions

The USCP exceptions argue that the Arbitrator's award should be overturned because: the award interferes with the USCP's exclusive right to discipline employees (Exception I); the Arbitrator improperly exceeded his CBA authority when he altered the discipline penalty (Exception II); the award fails to draw its essence from the CBA (Exception III); the Arbitrator failed to issue his award within the 30-day contractual period (Exception IV); the attorney fees' award is

contrary to law (Exception V); and the award is against public policy (Exception VI). On August 5, 2015, the Union filed its opposition.

C. 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.

D. Analysis

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

Right to Discipline

The USCP Exception I is denied because the Arbitrator did not interfere with the USCP's right to discipline. In resolving whether an arbitrator's award violates management rights, the Federal Relations Authority ("Authority") will first assess whether the award affects the exercise of the asserted management right. *See U.S. Envtl. Prot. Agency*, 65 F.L.R.A. 113, 115 (2010). If so, then, as relevant here, the Authority examines whether the award enforces a contract provision negotiated under § 7106(b). *Id.* Also, in determining whether the award enforces a contract provision negotiated under § 7106(b)(3), the Authority, assesses: (1) whether the contract provision constitutes an arrangement for employees adversely affected by the exercise of a management right; and (2) if so, whether the arbitrator's enforcement of the arrangement abrogates the exercise of the management right. *See id.* at 116-18. *See also U.S. Dep't of the Army, Fort Huachuca, Ariz. and AFGE Local 1662*, 65 F.L.R.A. 442, 445-46 (2011). When the Authority concluded that it would apply an abrogation standard to decide management right exceptions, the Authority clearly rejected continued application of an excessive interference standard. *Id.* at 445; *U.S. Envtl. Prot. Agency*, 65 F.L.R.A. at 118.

The USCP Exception I maintains that the Arbitrator's award is contrary to law because it interferes with the USCP's exclusive right to discipline employees. Here, the CBA does not restrict the Arbitrator's right to alter discipline when the Arbitrator finds that the USCP's discipline violates the CBA. The Arbitrator agreed with the USCP that Dixon was insubordinate. However, the Arbitrator determined that the USCP's penalty did not comply with the CBA. In reducing the penalty, the Arbitrator simply exercised his contractual authority to change a penalty to conform with the arrangement properly negotiated as part of the CBA. The Arbitrator's reduction of the USCP's penalty certainly did not abrogate the USCP's right to discipline its employees. *U.S. Dep't of the Army, Fort Huachuca, Ariz.*, 65 F.L.R.A. at 446 ("[b]ecause the Arbitrator was enforcing a provision that constituted an appropriate arrangement, the Agency has failed to show that the award is contrary to § 7106"). Exception I is denied.

Reducing the Discipline

The USCP Exception II is denied because the Arbitrator properly acted within the scope of his contractual authority when he reduced the penalty issued by the USCP. Arbitrators called upon to hear disciplinary actions are routinely tasked with determining whether discipline is warranted, "and, if so, whether the penalty imposed was appropriate." *Id.* at 444. Determining the appropriate penalty can necessitate that the arbitrator reduce the imposed penalty even where the arbitrator concludes that the employee's conduct was improper. *See, e.g., AFGE Local 2382 and U.S. Dep't of Veterans Affairs*, 58 F.L.R.A. 270, 271 (2002) (upholding an arbitrator's finding that an employee's misconduct did not warrant a suspension and instead reducing the penalty to a final warning with notice that similar conduct could lead to termination); *AFGE Local 22 and U.S. Dep't of the Navy Norfolk Naval Shipyard*, 51 F.L.R.A. 1496, 1498-99 (1996) (denying a union's exception challenging an arbitrator's finding that just cause existed to discipline the employee but nevertheless reducing the penalty from a suspension to a written reprimand). The USCP fails to cite to any provision of the CBA that expressly prohibits the arbitrator from altering the discipline imposed by the USCP. The Arbitrator appropriately exercised his authority to reduce the discipline assessed by the USCP in accordance with the mitigating factors set out in Article 31 of the CBA. Exception II is denied.

Sufficient Evidence

The USCP Exception III is denied because the Arbitrator relied upon sufficient evidence and his discretion to reduce the penalty. Where the excepting party alleges that an arbitrator made mistakes of fact, the Board has required that party to demonstrate that "a central fact underlying the award is clearly erroneous, but for which a different result would have been reached by the arbitrator." *U.S. Capitol Police Board v. Fraternal Order of Police, U.S. Capitol Police Labor Committee,* 99-AC-326 (DA) (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.* 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 *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)). 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.* 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.*

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*, 13-ARB-01 (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."); *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."); *U.S. Department of Treasury, U.S. Customs Service v. Federal Labor Relations Authority*, 43 F.3d 682, 686-687 (D.C. Cir. 1994) (Where arbitrator's award implicates only the collective bargaining agreement, the Authority's role of reviewing award is limited to that of federal courts in private sector labor-management relations).

The USCP maintains that the award fails to draw its essence from the CBA because the CBA did not provide the Arbitrator with authority to establish a basis for disciplinary action and yet change the penalty. Also, the USCP alleges that the change in penalty, which resulted because the Arbitrator allegedly "weighted" four penalty factors differently than the USCP, fails to draw its essence from the CBA and does not represent a plausible interpretation of the contract.

Here, the Arbitrator relied on the testimony of a Deputy Chief pertaining to an officer who lost 24 hours of leave because he failed to appear at work on Inauguration Weekend despite being denied leave. The Arbitrator found the officer's behavior to be comparable to Dixon. The Arbitrator also noted that the USCP acknowledged that on Inauguration Day, other employees were granted leave, and, in some situations, sent home if they reported to work sick.

In addition, the Arbitrator found that the responsible management officials failed to properly consider all the mitigating factors per the CBA. Particularly, the Arbitrator determined: that Dixon's medical condition precluded him from following instructions to call Inspector Lloyd at 2 a.m. on Inauguration Day; that there was a comparator who lost 24 hours of leave for failing to report to work on Inauguration Weekend; and that Inspector Lloyd initially proposed that Dixon's discipline be a loss of 24 hours of leave. Thus, the Arbitrator did not exceed his authority in reducing the five-day suspension in accordance with the factors set out in Article 31 of the CBA. *See Am. Federation of Government Employees, Local 3295 and U.S. Dep't of the Treasury, Office of Thrift Supervision, Washington, D.C.*, 51 F.L.R.A. 27, 32 (1995) (disagreement with an arbitrator's findings of fact and evaluation of evidence and testimony, including the credibility of witnesses and the weight to be given to their testimony, provide no basis for finding an award deficient). The Arbitrator's contractual interpretation is entitled to deference, as a matter of law. The Board denies Exception III.

The Thirty-Day Period for Issuing an Award

Exception IV is denied because the Arbitrator acted within his authority in rendering his 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). 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 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. Center*, 892 F.2d 1306, 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. 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.*

The USCP maintains that the award is untimely because the USCP never consented to receiving a late award. However, the CBA does not specify what happens if the award is not issued by the 30-day deadline. Also, the CBA does not state that time is of the essence regarding award issuance. As the CBA allows for extension by mutual agreement, it is reasonable to conclude that the time limit for rendering the Arbitrator's award was directory, not mandatory.

Likewise, the USCP failed to state in unequivocal language that it intended for the Arbitrator to lose jurisdiction when the March 7, 2013 deadline to issue the award passed. Moreover, the USCP first objected to the late issuance of the award only after it received the unfavorable award from the Arbitrator on June 5, 2015. Therefore, the Board may review whether the delay was unreasonable or resulted in prejudice to the USCP.

The delay is reasonable because the Arbitrator explained that he was tending to a personal matter with his daughter and did not start to work full-time on the award until May 2015. As for prejudice, the USCP has not specifically detailed any additional costs it has incurred as a result of the delay and the Board should not have to speculate what they may be. Furthermore, while approximately 78 days is not an immaterial delay, the USCP cannot show that it suffered prejudice as a result. *See, e.g., Bennett v. Consolidated Rail Corp.*, 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. v. Local 150 IBT*, 969 F.2d 831, 834 (9th Cir. 1992) (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); *see also FOP/U.S. Capitol Police Labor Committee v. The United States Capitol Police*, 14-ARB-01 (Dec. 12, 2014) (arbitration award upheld despite 2.5 month delay). Exception IV is denied.[3]

Contrary to Public Policy

Finally, Exception VI is denied because 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 v. Misco, Inc.*, 484 U.S. 29, 42-44 (1987). In *Misco,* the Supreme Court rejected the lower court's formulation of a public policy against the operation of dangerous machinery while under the influence of drugs. *Id.* at 44. "Although certainly such a judgment is firmly rooted in common sense, [the Court] explicitly 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." *Id.* 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).

The USCP argues that the Arbitrator's award violates public policy because the Arbitrator found that a police officer will receive a minimal penalty when he or she does not report to work on Inauguration Day. Here, the USCP has not provided sufficient evidence that the reduced penalty imposed by the Arbitrator violates a well-defined public policy. Instead, the USCP mistakenly relies only on general considerations of supposed public interests. *See e.g., Misco*, 484 U.S. at 44 (no public policy violation found despite the employer's speculation that the operation of dangerous machinery while under the influence of drugs precludes the reinstatement of an employee). Exception VI is denied.

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 23, 2015

[3] With regard to Exception V, the USCP argues that the Union is not entitled to attorney fees because Dixon was not a prevailing party in the case. The Arbitrator found that Dixon was entitled to full back pay for the five days and benefits. The Arbitrator also granted Dixon's request for attorney fees. The Arbitrator retained jurisdiction to decide any issues relating to his award or resolve any disputes regarding reasonable attorney fees. Therefore, the Board need not rule on this issue because the amount of attorney fees has not yet been decided by the Arbitrator and is not before the Board.