Office of Compliance
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UNITED STATES CAPITOL POLICE, Respondent, and FRATERNAL ORDER OF POLICE, DISTRICT OF COLUMBIA LODGE NO. 1 U.S. CAPITOL POLICE LABOR COMMITTEE, Charging Party.	)	Case No. 17-LMR-01 (CA)

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

DECISION OF THE BOARD OF DIRECTORS

This case is before the Board of Directors ("Board") pursuant to a petition for review ("PFR") filed by the Office of Compliance General Counsel ("General Counsel") which seeks review of the Hearing Officer's April 27, 2017 Order that granted the U.S. Capitol Police's ("USCP") motion to dismiss for failure to state a claim upon which relief can be granted.

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

I. Statement of the Case

The USCP is an "employing office" within the meaning of the Congressional Accountability Act ("CAA"). The Charging Party, FOP/U.S. Capitol Police Labor Committee ("Union"), is a labor organization and is the duly-certified exclusive representative of the Respondent's officers who are included in the relevant bargaining unit.

On April 14 and December 5, 2016, the Union filed the consolidated Unfair Labor Practice ("ULP") charges that form the basis for the General Counsel's Complaint in this case. The charges alleged that the USCP violated the Federal Service Labor Management

Relations Statute ("FSLMRS"), 5 U.S.C. §§ 7116(a)(l) and (8), as applied by section 220 of the CAA, 2 U.S.C. §1351, by failing to comply with arbitration awards issued on June 5 and October 27, 2015 ("2015 Arbitration Awards"), which required the USCP to pay the grievant, Officer J.S. Dixon, $2509.65 in backpay and interest. Specifically, the General Counsel's Complaint alleged that:

(1) Sometime before December 14, 2016, the USCP paid Dixon $1800.41 of the $2509.65 backpay award, and on December 19, 2016, the USCP sought reimbursement for that payment from the Office of Compliance ("OOC").

(2) Former OOC Executive Director Barbara Sapin advised the USCP on December 23, 2016 that, per OOC procedures, the OOC would reimburse the USCP for the backpay payment to Dixon only after the USCP paid Dixon the full backpay amount.

(3) In response to the USCP's February 14, 2017 second request for reimbursement of its partial payment of $1800.41, current OOC Executive Director Susan Tsui Grundmann notified the USCP, on February 15, 2017, that she would follow the OOC reimbursement procedure set forth by her predecessor. Sometime on or after March 10, 2017, the USCP deducted the $1800.41 partial backpay payment from Dixon's lump sum annual leave payment upon Dixon's retirement.

(4) In a letter to the USCP dated March 13, 2017, Executive Director Grundmann further explained that the method for paying awards identified as "pay, wages or backpay" under section 415 of the CAA "was specifically established by OOC [procedure on August 8, 2005] in response to an Internal Revenue Service inquiry and subsequent guidance." That method provides that:

> If funds being disbursed pursuant to section 415(a) are identified as pay, wages, or backpay, OOC will utilize the following procedure: the employing office of the taxpayer calculates the withholding and FICA payments required for the amount so identified for the period identified in the settlement, award, or judgment. We will then require that the total amount be disbursed by the employing office so as to ensure that the employer and employee FICA, and the income tax withholding are withheld or disbursed, as appropriate, as part of that amount. We will reimburse the employing office, or its payroll disbursing agent (such as the NFC) on our receipt of the appropriate documentation.

(5) To date, the USCP has not paid Dixon the $2509.65 backpay required by the October 2015 Arbitration Award.

(6) The USCP committed unfair labor practices in violation of CAA § 220(a) and 5 U.S.C. §§ 7116(a)(l) & (8) by failing to take the actions required by the October 2015

Award when it became final and binding on November 28, 2016, contrary to 5 U.S.C. § 7122(b).

The USCP thereafter filed a motion to dismiss the Complaint on April 10, 2017, on the grounds that the Union's April 14 ULP Charge was untimely and that the Complaint failed to state a claim upon which relief could be granted. In support of its contention that the General Counsel's Complaint failed to state a claim upon which relief can be granted, the USCP asserted that the OOC's backpay payment and reimbursement process is contrary to the plain language of section 415(a) of the CAA, which provides, in relevant part, that "only funds which are appropriated to an account of the [OOC] in the Treasury of the United States for the payment of awards and settlements may be used for the payment of awards and settlements under this chapter." Based on this argument, the USCP asserted that the OOC's method for paying awards identified as "pay, wages or backpay" violates clearly established law, sovereign immunity, and the Constitution's Appropriations Clause.

On April 27, 2017, the Hearing Officer granted the USCP's motion, concluding that, although the consolidated ULPs were timely filed, the Complaint failed to state a claim upon which relief could be granted. Although the Hearing Officer recognized that the refusal to comply with a final and binding arbitration award is an unfair labor practice, he concluded that the USCP's refusal here was excused by "clearly established law." Specifically, the Hearing Officer cited *AFSCME Council 26 and Office of the Architect of the Capitol,* No. 00-LMR-03, 2001 WL 36175209 (OOC Jan. 29, 2001), in which the Board ruled that a union bargaining proposal requiring the employing office to pay arbitration awards and settlements from its own appropriated funds was inconsistent with law and therefore nonnegotiable. Moreover, the Hearing Officer concluded that because the language of OOC Procedural Rule § 9.04 (which concerns payments required pursuant to decisions, awards, or settlements under section 415(a) of the Act) does not address the 2005 reimbursement procedure, it "specifically adopts and follows" the Board's 2001 *AFSCME Council 26* decision.

The Hearing Officer also found, with respect to OOC rulemaking procedures, that "it does not appear" that the OOC followed either CAA section 303 or 304 rulemaking processes when adopting the payment and reimbursement process directed by the former and present Executive Directors. The Hearing Officer concluded that because the OOC did not follow CAA Section 303 or 304 rulemaking procedures before implementing its 2005 reimbursement procedure, this "payment procedure is null and void." Further, the Hearing Officer found that "it does not appear that the provisions of § 9.04 or § 9.05 [of the OOC's Final Procedural Rules] were followed." Finally, the Hearing Officer found that "the record does not establish whether the OOC, when it consulted the IRS in 2005, provided [the IRS] with a copy of the [*AFSCME Council 26* decision] that addressed the Section 415 issue."

The General Counsel's PFR followed. In it, the General Counsel contends that the Hearing Officer's Order is arbitrary, capricious, and inconsistent with law and not supported by substantial evidence. The General Counsel requests that the Board reverse the Order and remand the case for further proceedings. The USCP has filed a Brief in Opposition to the

General Counsel's PFR, to which the General Counsel has filed a Reply. The Union has filed a Brief in support of the General Counsel's PFR.

II. 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 of the Architect of the Capitol,* Case Nos. 07-AC-48 (DA, RP), 09-AC-10 (DA, FM, RP), 2011 WL 332311, at *3 (OOC Jan. 21, 2011).

In this appeal, we have before us a decision of the Hearing Officer to grant a motion to dismiss for failure to state a claim upon which relief can be granted. This is a question of law, which we review *de novo. See Greenlee County, Ariz. v. United States,* 487 F.3d 871, 877 (Fed. Cir. 2007); *Amoco Oil Co. v. United States,* 234 F.3d 1374, 1376 (Fed. Cir. 2000); *see also Solomon v. Office of the Architect of the Capitol,* No. 02-AC-62 (RP), 2005 WL 6236948, at *2 (OOC Dec. 7, 2005) (recognizing that the Board's review of the legal conclusions that led to the hearing officer's determination to grant a motion to dismiss is *de novo*).[1]

III. Analysis

A. Motions to Dismiss under the CAA

Rule 5.03(a) of the OOC's Procedural Rules provides, in relevant part, that:

> A Hearing Officer may, after notice and an opportunity to respond, dismiss any claim that the Hearing Officer finds to be frivolous or that fails to state a claim upon which relief may be granted.

In considering the USCP's motion to dismiss, the Board is guided by the liberal allowances accorded to pleadings under the Federal Rules of Civil Procedure. *See U.S.*

[1] Both the General Counsel and the USCP suggest in their briefs that the Hearing Officer's Order should be reviewed under the "substantial evidence" standard. We disagree. As we discuss below, a motion to dismiss for failure to state a claim is a peremptory challenge that concerns the facial validity of a complaint. That is, it concerns whether a complaint, on its face, sufficiently alleges facts in support of a claim that would entitle the pleader to relief. It generally precedes the introduction of any evidence, and, as such, is not a proper vehicle for the consideration of evidence or facts outside of the complaint. *See, e.g., Washington v. Official Court Stenographer,* 251 F. Supp. 945, 947 (E.D. Pa. 1966). Therefore, it would be improper for the Board to review an order granting such a motion to determine whether it is supported by substantial evidence in the record. In our appellate review, we disregard any factual findings made by the Hearing Officer in his decision and restrict our factual review to the allegations of the Complaint.

Capitol Police v. FOP/U.S. Capitol Police Labor Comm. Lodge No. 1, No. 15-LMR-02 (CA), 2016 WL 5943737, at *3 (OOC Sep. 27, 2016). Federal Rule 8(a)(2) provides that a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief." Thus, in a motion to dismiss, all well-pleaded factual allegations contained in the complaint must be accepted as true and all reasonable inferences drawn in the complainant's favor. *Duncan v. Office of the Architect of the Capitol,* Case No. 02-AC-59 (RP), 2004 WL 5658956, *2 (OOC Aug. 5, 2004) (*citing In re Burlington Coat Factory Sec. Litig.,* 114 F.3d 1410, 1424-25 (3d Cir. 1997)). Further, the Board has held that a complaint may only be dismissed for failure to state a claim "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Solomon,* 2005 WL 6236948, at *2 (quoting *Hishon v. King & Spaulding,* 467 U.S. 69, 73 (1984)).

Drawing all inferences in a light most favorable to General Counsel, we conclude as a matter of law that the General Counsel has failed to state a claim upon which relief may be granted.

B. The Hearing Officer Properly Dismissed the Complaint.

This case presents the novel legal issue of whether the OOC's 2005 backpay and reimbursement process violates section 415 of the CAA. If it does, the General Counsel's complaint must be dismissed as a matter of law, as the USCP cannot be found to have committed an unfair labor practice in refusing to follow that process in regard to the fulfillment of the 2015 Arbitration Awards.[2]

[2] The General Counsel's Complaint alleges that the USCP violated the CAA in its failure to abide by an arbitration award requiring payment of backpay to an aggrieved employee. When Congress enacted the CAA in 1995, it expressly extended the rights, protections, and responsibilities contained in section 7121 of the FSLMRS to USCP employees, including its provisions regarding negotiated grievance-arbitration procedures. 2 U.S.C. § 1351(a)(1). As the Hearing Officer correctly noted, in circumstances where an employer is alleged to have violated the FSLMRS in its failure to submit to arbitration, the Federal Labor Relations Authority 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 such a 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 Hearing Officer's reliance on this doctrine is misplaced here, as the Authority has rarely applied this exception, and only in cases involving questions of arbitrability which are generally contractually reserved to an arbitrator for decision in the first instance.

We see no need to extend this unique doctrine to the context of this case, which involves the USPC's alleged refusal to abide by an award resulting from an arbitration proceeding in which it voluntarily participated. In any event, this case involves novel legal issues of statutory construction under the CAA, as explained further above.

Section 415(a) of the CAA, 2 U.S.C. § 1415, provides in relevant part that:

> only funds which are appropriated to an account of the Office in the Treasury of the United States for the payment of awards and settlements may be used for the payment of awards and settlements under this chapter. There are appropriated for such account such sums as may be necessary to pay such awards and settlements.

The OOC, through its Executive Director, prepares and processes requisitions for disbursements from the Treasury account established pursuant to section 415(a) when qualifying final decisions, awards, or approved settlements require the payment of funds. See 2 U.S.C. § 1414; Procedural Rules at § 9.04. The Department of the Treasury disburses the funds from the section 415(a) account pursuant to the OOC's requisition.[3]

The parties do not dispute that the 2015 Arbitration Awards constitute an award under the CAA, and that funds appropriated to the section 415(a) Treasury account must therefore be used to pay the award. The General Counsel contends in its Complaint, however, that the USCP committed unfair labor practices by failing to pay Dixon the backpay required by the 2015 Arbitration Awards, subject to reimbursement from the Treasury account pursuant to the OOC's 2005 procedures. As discussed above, those procedures require that the employing office first disburse from its appropriated funds the total amount of any settlement or award identified as pay, wages, or backpay so as to ensure that income tax is withheld, FICA taxes are withheld and matched, and the requisite taxes are disbursed to the applicable governmental agencies. The OOC then processes requisitions for reimbursement from the section 415(a) Treasury account to the employing office, or its payroll disbursing agent (such as the National Finance Center) on receipt of appropriate documentation of the total amount disbursed.

The USCP contends that it cannot comply with the OOC's procedure requiring it initially to use its appropriated funds to satisfy an award that is ultimately payable through the fund established by section 415(a) because such a practice is contrary to the plain language of that statute. For the reasons discussed below, we agree.

The fundamental statute governing the use of appropriated funds is 31 U.S.C. § 1301(a), also known as the purpose statute, which provides: "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." The concept embodied in section 1301(a) is known as the "necessary expense rule."

[3] The section 415(a) Treasury account is separate and distinct from the OOC's general appropriation for its operations and expenses. Thus, references in the Hearing Officer's Decision to payment from the "OOC fund" are to the section 415(a) Treasury account, not to the OOC's general appropriation.

The necessary expense rule embodies a three-step analysis: First, the expenditure must bear a logical relationship to the appropriation sought to be charged. In other words, it must make a direct contribution to carrying out either a specific appropriation or an authorized agency function for which more general appropriations are available. Second, the expenditure must not be prohibited by law. Third, the expenditure must not be otherwise provided for; that is, it must not be an item that falls within the scope of some other appropriation or statutory funding scheme. *See, e.g., In re Army,* B-303170 (Comp. Gen. Apr. 22, 2005); *In re Stephen M. Bodolay,* B-240365.2 (Comp. Gen. Mar. 14, 1996); *In re Hon. Robert W. Kastenmeier,* B-230304 (Comp. Gen. Mar. 18, 1988); *In re Hon. Bill Alexander,* 63 Comp. Gen 422, 427–28 (1984).

In essence, the USCP's contention is that the OOC's process is invalid because compliance with it would require the USCP to violate the second and third prongs of the necessary expense rule. We agree. First, the use of funds from the USCP appropriation to satisfy the awards in this case would contravene the express language of section 415(a) of the CAA, which, as noted above, provides that "*only* funds which are appropriated to" the section 415(a) Treasury account "may be used for the payment of awards . . . under this chapter."[4] Clearly, the OOC backpay and reimbursement process requires the initial use of USCP appropriated funds in violation of the plain language of the CAA.

Second, even if the expenditure were not deemed to be prohibited by the express language of section 415(a), it would still violate the third prong of the necessary expense rule because the expenditure is "otherwise provided for" by the establishment of the section 415(a) Treasury account. As a rule, an appropriation for a specific object is available for that object to the exclusion of a more general appropriation that might otherwise be considered for the same object. *In re District of Columbia – Auth. to Pay Settlements & Judgments,* B-318426, 2009 WL 3725002 (Comp. Gen. Nov. 2, 2009). The General Counsel does not allege that an appropriation for the USCP specifies that its funds are available for the payment of settlements and judgments under the CAA. Thus, USCP operating funds are not available for such payments. *See id.,* 2009 WL 3725002, at *5. Instead, only section 415(a) Treasury account funds may be used to pay the settlements and judgments under the CAA. *Id.*

The General Counsel appears to contend on review that the CAA reimbursement procedure is consistent with section 415(a) because it ensures that the Treasury account is the "*sole*" or "*ultimate*" source of awards and settlements under the CAA, including backpay awards such as the one at issue here, while also ensuring that awards paid from the section 415(a) account are compliant with payroll tax withholding and reporting requirements. We reject this argument as contrary to the plain language of the statute, which expressly states

[4] Indeed, where Congress intended that funds to correct violations of the CAA be paid from employing offices' appropriations, it expressly so provided. *See* 2 U.S.C. § 1415(c) (only employing office appropriations may be used to correct violations of the OSH Act and the accommodation and access provisions of the Americans with Disabilities/Rehabilitation Acts).

that "only" funds appropriated to the section 415(a) Treasury account may be used for the payment of awards.

Here, the OOC procedure would initially charge the USCP appropriation in a manner that does not appear to be statutorily authorized, and this flaw is not cured by its provision for reimbursement. "[D]eliberately charging the wrong appropriation for purposes of expediency or administrative convenience, with the expectation of rectifying the situation by a subsequent transfer from the right appropriation" violates the purpose statute. *In re A.R. Pilkerton, Gov't of the District of Columbia*, B-137894, 1958 WL 1788 (Comp. Gen. Nov. 21, 1958); *see also In re Maj. Arthur A. Stiefel, Dep't of the Army,* B- 97772, 1951 WL 1323 (Comp. Gen. May 18, 1951). Transfer of appropriations between two agencies is appropriate only where statutorily authorized and used for the purpose of the transferred appropriation. 31 U.S.C. § 1301; 31 U.S.C. § 1532; *In re Denali Comm'n - Transfer of Funds Made Available through the Fed. Transit Admin.'s Appropriation,* B-319189, 2010 WL 4631284 (Comp. Gen. Nov. 12, 2010). This is true "even where reimbursement is contemplated," when the transfer is "intended as a temporary expedient," and when the transfer may actually be more efficient and economical. *In re Reconsideration of MSPB's Authority to Accept Reimbursement for Hearing Officers Travel Expenses,* B- 195348, 1982 WL 26629 (Comp. Gen. May 26, 1982).[5] Moreover, an unauthorized transfer is an improper augmentation of the receiving appropriation. *E.g., In re Lowell Weicker, Jr.,* B-206668, 1982 WL 28066 (Comp. Gen. Mar. 15, 1982). Because the General Counsel's Complaint alleges that the USCP failed to comply with the 2015 Arbitration Awards when it failed to comply with the OOC's reimbursement process, and the OOC reimbursement process is not permitted under the statute, we conclude that the Hearing Officer properly dismissed the Complaint in this case.

In light of our conclusion that the OOC's backpay and reimbursement procedure is inconsistent with the express language of section 415(a), we need not consider the Hearing Officer's other conclusions of law. Furthermore, it is unnecessary for us to reach the USCP's contentions that the reimbursement process is unconstitutional or that it violates sovereign immunity.

Finally, we stress the limited scope of this decision, which concerns only the source of the funds to be used to satisfy the 2015 Arbitration Awards, and which is derived from the express language of section 415(a) as it is currently written. We recognize that the OOC's procedures reflect the practical reality that only the USCP, as Dixon's employing office, is in possession of the information necessary to satisfy the 2015 Arbitration Awards. That is, only the USCP can provide the payroll and accounting information necessary to ensure compliance with payroll tax and reporting requirements when payments are made from the section 415(a) fund to satisfy the Awards. Further, only the USCP possesses the documentation required by National

[5] Although the General Counsel states that it consulted with the Internal Revenue Service in 2005 regarding the design of the OOC section 415(a) payment and reimbursement process, it further states that the fact of that consultation is "of no consequence to the issue presented in this case." In any event, the General Counsel does not allege that the payment and reimbursement process was *required* by the IRS in order to comply with payroll tax withholding and reporting requirements.

Finance Center to process payments and adjustments in back pay cases, including employee identifying information; valid agency accounting; interest to be included; copies of SF–50's (Personnel Actions) or lists of salary adjustments/changes and amounts; forms for FEGLI, FEHBA, or TSP deductions.[6]

Indeed, the CAA contemplates that employing agencies such as the USCP have an obligation to act in good faith and to diligently supply the OOC with any information necessary for compliance, as section 415(b) "authorizes to be appropriated such sums as may be necessary for administrative, personnel, and similar expenses of employing offices which are needed to comply with" the Act. Such is the case here. The Authority has long recognized that an employer's delay or lack of diligence in gathering the information necessary to calculate and enable timely payment of back pay owed pursuant to the Back Pay Act and its regulations constitutes a violation of the FSLMRS. *See e.g. Dep't of Treasury Internal Revenue Serv.,* 45 F.L.R.A. 525 (1992) (agency is responsible for calculating back pay consistent with the Back Pay Act and its regulations; delay in doing so constitutes statutory violation).

Therefore, nothing in this decision should be misconstrued to excuse the USCP from its statutory obligation to timely provide the OOC and the NFC with all documentation necessary to process payments and adjustments resulting from these arbitration awards so that payment can be made. Quite unfortunately it is 2018, and Mr. Dixon has yet to receive the backpay owed pursuant to awards issued in 2015. We certainly expect the USCP and the OOC Executive Director to work diligently and cooperatively to now ensure immediate payment.

Accordingly, although we affirm the Hearing Officer's Decision and Order dismissing the General Counsel's Complaint as a matter of law, we fully expect the USCP promptly to discharge its statutory obligations by cooperating with the OOC so that the 2015 Arbitration Awards may be properly paid.

ORDER

The Hearing Officer's Order affirmed.

It is so ORDERED.

Issued, Washington, DC, September 12, 2018

[6] *See* attached *National Finance Center Checklist for Back Pay Cases*.

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD–343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD–343 for Restoration:
   a. Employee name and social security number.
   b. Detailed explanation of request.
   c. Valid agency accounting.
   d. Authorized signature (Table 63)
   e. If interest is to be included.
   f. Check mailing address.
   g. Indicate if case is prior to conversion. Computations must be attached.
   h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD–343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF–50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1–7 above. The following information must be included on AD–343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

   a. Must provide same data as in 2, a-g above.
   b. Prior to conversion computation must be provided.
   c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504–255–4630.