No. 22-

IN THE

Supreme Court of the United States

FRATERNAL ORDER OF POLICE, UNITED STATES PARK POLICE LABOR COMMITTEE,

Petitioner,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals for the Federal Circuit's interpretation of 5 U.S.C. § 7703(a)(1) is incorrect in finding that an employee's union, on the employee's behalf and with the employee's consent, does not have standing to seek judicial review under that statute?

PARTIES TO THE PROCEEDING

Petitioner, Fraternal Order of Police, United States Park Police Labor Committee, is a union representing sworn law enforcement officers, of which party in interest Vincent Fors is a member. Petitioner, with Mr. Fors' consent and on his behalf, filed an appeal of Mr. Fors' removal from employment.

Respondent, the Department of the Interior, is the employer who removed Mr. Fors' from his employment.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner, Fraternal Order of Police, United States Park Police Labor Committee, discloses the following: There is no parent or publicly held company owning 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

The proceedings in federal appellate courts identified below are directly related to the above-captioned case in this Court:

Fraternal Order of Police v. Interior, No. 21-1690, United States Court of Appeals for the Federal Circuit, order of dismissal filed June 8, 2022.[1]

Fraternal Order of Police v. Interior, No. 21-1690, United States Court of Appeals for the Federal Circuit, order denying petition for panel rehearing filed August 9, 2022.

1. As can be seen in the Appendix, the underlying appeal was incorrectly docketed with Petitioner listed as Fraternal Order of Police, United States Capitol Police Labor Committee, not Fraternal Order of Police, United States Park Police Labor Committee.

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I. PETITION FOR WRIT OF CERTIORARI

Petitioner, the Fraternal Order of Police, United States Park Police Labor Committee, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

II. OPINIONS BELOW

The decision by the Court of Appeals for the Federal Circuit dismissing Petitioner's appeal for lack of jurisdiction is attached at Appendix ("App.") A, pages 1a-3a, and is reported at 2022 WL 2068258. The Court of Appeals' order denying a petition for panel rehearing is attached at App. C, pages 24a-25a, and is not reported. The underlying arbitration decision between the parties is also attached at App. B, pages 4a-23a, and is not reported.

III. JURISDICTION

The Court of Appeals ordered the dismissal of Petitioner's case on June 8, 2022. *See* App. A. Petitioner then timely filed a petition for panel rehearing. On August 9, 2022, the Court of Appeals denied the petition for panel rehearing. *See* App. C. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). Petitioner timely filed this petition for writ of certiorari within ninety (90) days of the Court of Appeals' denial of the petition for panel rehearing, in accordance with Supreme Court Rule 13.1.

IV. STATUTORY PROVISIONS INVOLVED

This case involves the relationship between 5 U.S.C. § 7121(f) and 5 U.S.C. § 7703(a)(1). In pertinent part, 5

U.S.C. § 7121(f) provides that, with regard to appeals of adverse employment actions governed by 5 U.S.C. 7512 that "have been raised under the negotiated grievance procedure…section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the [Merit Systems Protection] Board." 5 U.S.C. § 7703(a)(1) then states that "[a]ny employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision."

V. STATEMENT OF THE CASE

Almost forty years ago, the Court of Appeals for the Federal Circuit held in Reid v. Department of Commerce that "Congress, in using the term 'employee' in § 7703(a)(1) and in defining that term to mean an individual, has exercised its legislative prerogative to impose a prudential limitation on the exercise of [that court's] jurisdiction over adverse decisions of the MSPB." 793 F.2d 277, 284 (1986). The Court of Appeals continued to state that "[t]he unequivocal language of the statute supports this position, and the position is not demonstrably contrary to the legislative policy of the [Civil Service Reform Act]." *Id*. That holding has remained the controlling law on this issue since 1986, and this Court has not rendered an opinion on the issue.

This case presents the question of whether an employee's union has standing to seek judicial review of an adverse employment action pursuant to 5 U.S.C. § 7703(a)(1) and 5 U.S.C. § 7121(f) when it does so on the employee's behalf and with the employee's consent.

1. The Termination and Arbitration.

On March 9, 2020, Mr. Fors was removed from his employment with the United States Park Police, National Park Service, Department of the Interior as a law enforcement officer for alleged misconduct while on-duty. Removal from employment is an adverse employment action enumerated in 5 U.S.C. § 7512 which Mr. Fors could have contested by either submission of an appeal to the Merit Systems Protection Board under 5 U.S.C. § 7701(a) or the negotiated grievance procedure between Petitioner and Respondent. *See* 5 U.S.C. § 7121(e)(1) ("[m]atters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both."). On this point, it is important to note that, in cases such as this where a federal employee challenges an adverse employment action through a negotiated grievance procedure, "any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency." 5 U.S.C. 7121(b)(1)(C)(iii). Therefore, even though Mr. Fors opted to challenge his removal through the negotiated grievance procedure, he could not invoke arbitration on his own accord. Rather, Petitioner had to agree to invoke arbitration on Mr. Fors' behalf and participate in that process.

As Mr. Fors chose to contest his removal through grievance arbitration, and Petitioner supported Mr. Fors' claim, Petitioner invoked arbitration and a hearing was

held. Ultimately, the arbitrator issued her award and sustained Mr. Fors' removal. The arbitrator's decision is attached hereto at App. B.

2. Direct Appeal.

Unsatisfied with the arbitrator's decision, Mr. Fors wished to appeal his removal to the Court of Appeals for the Federal Circuit as, pursuant to 5 U.S.C. § 7121(f), "[i]n matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under those same conditions as if the matter had been decided by the Board." Petitioner filed the appeal to the Court of Appeals because Petitioner was the party to the grievance arbitration, not Mr. Fors, and the arbitration decision was the subject of the appeal. The decision to file, though, was made by Mr. Fors and not Petitioner. Subsequently the Court of Appeals accepted the filing and briefs were submitted by both parties.

However, two days before oral argument, Respondent raised the issue of lack of standing for the first time. At oral argument the issue was discussed, and Petitioner informed the panel that Mr. Fors had consented to the appeal, had participated in every step of the process, and was more than willing to enter into the case as a party. Nonetheless, after oral argument, and *sua sponte*, the Court of Appeals issued an order dismissing the appeal for lack of jurisdiction. App. A. In that order of dismissal, the Court of Appeals reiterated its position in Reid v. Department of Commerce, stating that "Congress, in

using the term 'employee' in § 7703(a)(1) *and in defining that term to mean an individual*, has exercised its legislative prerogative to impose a prudential limitation on the exercise of this court's jurisdiction over adverse decisions of the MSPB." *Id.*; *see* Reid, 793 F.2d at 284 (Emphasis in original). Therefore, it concluded that "[b]ecause [Petitioner] is not an individual, it lack[ed] standing to appeal from the arbitrator's decision…[and] dismiss[ed] th[e] appeal for lack of jurisdiction." *Id.*

Petitioner then filed a motion for reconsideration, which the Court of Appeals construed as a petition for panel rehearing, which was denied.[1] App. C.

VI. REASONS FOR GRANTING THE WRIT

A. The Court of Appeals' interpretation of 5 U.S.C. § 7703(a)(1) deprives federal employees of their right to have their appeal heard on the merits when they choose to initiate an appeal through their exclusive representative.

When considering if a union has standing to be a petitioner in a case such as this, this Court has stated that there are both constitutional limitations and prudential

1. In their response to Petitioner's motion, Respondent also for the first time argued that Petitioner's initial appeal itself was not timely. Beyond that any argument as to lack of jurisdiction for failure to timely file the appeal should be considered waived as Respondent did not raise this issue until after oral argument and after the Court of Appeals had already issued its order dismissing the case, that issue was also not addressed by the Court of Appeals in either order and therefore could not properly be raised as an issue before this Court.

limitations. *See* Warth v. Seldin, 422 U.S. 490, 498, 95 S.Ct. 2197, 2204–05, 45 L.Ed.2d 343 (1975). As to constitutional limitations, although this Court has recognized that an association may have standing to assert a claim on behalf of its members, *see* Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 342, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977), the Court of Appeals in this case did not render an opinion as to whether Petitioner could meet that test. Rather, the Court of Appeals focused on whether Petitioner was "within the intendment of the jurisdictional statute in seeking to assert the legal rights or interests of third persons. Reid, 793 F.2d at 280.

In conducting statutory analysis, the first consideration is the express language of the statute:

> "[i]f it is plain and unequivocal on its face, there is usually no need to resort to the legislative history underlying the statute. United States v. Oregon, 366 U.S. 643, 648, 81 S.Ct. 1278, 1281, 6 L.Ed.2d 575 (1961). The function of the court is then limited to enforcing the statute according to its terms, Caminetti v. United States, 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1917)…, unless a literal interpretation would lead to an incongruous result. For example, if a literal reading of the statute would impute to Congress an irrational purpose, United States v. Bryan, 339 U.S. 323, 338, 70. S.Ct. 724, 734, 94 L.Ed. 884 (1950), or would thwart the obvious purpose of the statute, Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 643, 98 S.Ct. 2053, 2061, 56 L.Ed.2d 591 (1978), or would lead to a result at variance with the

> policy of the legislation as a whole, Trustee of Indiana University v. United States, 618 F.2d 736, 739, 223 Ct.Cl. 88, 94 (1980), then literal interpretation will be eschewed in favor of resort to the legislative history to ascertain the intent of Congress. United States v. Oregon, 366 U.S. at 648, 81 S.Ct. at 1281. *Id*. at 281-82.

However, the Court of Appeals has found that "a literal reading of the statute to require appeal by the individual employee does not produce an incongruous result, or frustrate the obvious purpose or the policy…as a whole." *Id*. at 282. Additionally, even when considering legislative history and the intent of Congress, it found that "[s]ince the right of appellate review under § 7703(a)(1) is phrased in terms of 'any employee or applicant for employment,' the logical conclusion is that Congress intended to narrowly circumscribe the party who may initiate appellate review." *Id*. at 283.

The Court of Appeals is incorrect in its literal reading of the statute because it produces an incongruous result, and clearly frustrates the obvious purpose of the policy. Congress intended the statute to allow an employee to appeal an adverse employment action and have that appeal heard on the merits. As stated by Judge Reyna of the Court of Appeals in an opinion on this very issue, "[t]he current statutory scheme produces an incongruous result." AFGE Local 3438 v. Social Security Administration, 2022 WL 1653177 (2022). "[T]he anomaly now is that a union has a right and an obligation to represent an employee in arbitration proceedings but does not have standing to appeal the result. Further, it is anomalous that an employee cannot invoke binding

arbitration but nevertheless has standing to appeal." *Id.* As Congress specifically created a form of judicial review for an employee, such as Mr. Fors, to appeal an adverse order or decision under 5 U.S.C. 7703(a)(1), the present case demonstrates how a technical interpretation of the statute effectively deprives an employee from obtaining that review.

Moreover, the present case vastly differs from situations where a union or exclusive representative intends to seek review without the employee's approval, or otherwise on matters that do not involve the employee. For example, in AFGE Local 3438, the union invoked arbitration on behalf of an employee to challenge a disciplinary action. *Id.* However, unlike this matter, the arbitrator ruled in favor of the employee and she was reinstated. *Id.* The union then sought attorneys fees pursuant to the Back Pay Act. *Id.* After the arbitrator denied that request, the union filed an appeal solely on the issue of attorneys fees. *Id.* The Court of Appeals then similarly dismissed that appeal for lack of jurisdiction. *Id.* Contrary to this matter, in that case the union sought attorney fees it had paid itself and did not seek any further relief for the employee. Therefore, the employee had no further interest in the merits of the appeal. In this case, Mr. Fors retained a direct interest in the outcome of the appeal as the only relief sought were to his benefit, i.e. his reinstatement, back pay, and continued employment. Moreover, the appeal was filed at Mr. Fors' request and on his behalf, and therefore should be construed as being filed by the employee and within the ambit of the statute. As well, that the Court of Appeals did not allow leave to amend the filing to include the employee demonstrates that intervention by this Court is necessary to prevent future injustice.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Federal Circuit.

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, FILED JUNE 8, 2022

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2021-1690

FRATERNAL ORDER OF POLICE, UNITED STATES CAPITOL POLICE LABOR COMMITTEE,

Petitioner,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Petition for review of an arbitrator's decision in No. FMCS 200318-04975 by Jane Rigler.

SUA SPONTE

Before NEWMAN, PROST, and STARK, *Circuit Judges.*

PER CURIAM.

ORDER

Fraternal Order of Police, United States Capitol Police Labor Committee ("FOP") appeals from an arbitration decision upholding a decision by the U.S. Park Police to remove an employee.

Appeals from arbitration decisions in this context are governed by 5 U.S.C. § 7121(f), which states that "section

7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the [Merit Systems Protection] Board ['MSPB']." The referenced section in turn states that "[a]ny employee or applicant for employment adversely affected or aggrieved by a final order or decision of the [MSPB] may obtain judicial review of the order or decision." 5 U.S.C. § 7703(a)(1).

We have held that "Congress, in using the term 'employee' in § 7703(a)(1) *and in defining that term to mean an individual*, has exercised its legislative prerogative to impose a prudential limitation on the exercise of this court's jurisdiction over adverse decisions of the MSPB." *Reid v. Dep't of Com.*, 793 F.2d 277, 284 (Fed. Cir. 1986) (emphasis added) (footnote omitted). We have therefore concluded that an organization (like FOP) lacks standing to appeal from an MSPB or arbitration decision because it is not an individual. *Id.* at 280, 283-84 (MSPB decision); *Senior Execs. Ass'n v. OPM*, No. 95-3460, 1997 U.S. App. LEXIS 10023, at *9-10 (Fed. Cir. Apr. 7, 1997) (nonprecedential) (MSPB decision); *AFGE Local 3438 v. Soc. Sec. Admin.*, No. 21-1972, slip op. at 2, 4-6 (Fed. Cir. May 25, 2022) (non-precedential) (arbitration decision). And we have accordingly dismissed organizations' appeals from MSPB or arbitration decisions for lack of jurisdiction. *Senior Execs. Ass'n*, 1997 U.S. App. LEXIS, at *9-10; *AFGE Local 3438*, slip op. at 6.[1]

1. Although previous panels considering this issue have sometimes addressed the prospect of the appellant organization satisfying the associational-standing test set forth in *Hunt v.*

Because FOP is not an individual, it lacks standing to appeal from the arbitrator's decision under 5 U.S.C. §§ 7703(a)(1) and 7121(f). We therefore dismiss this appeal for lack of jurisdiction.

IT IS ORDERED THAT:

FOP's petition for review is dismissed. Each party shall bear its own costs.

June 8, 2022
Date

For the Court

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

Washington State Apple Advertising Commission, 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977), we see no reason why—even assuming that FOP could satisfy the *Hunt* test here (which may be doubtful, *see Reid*, 793 F.2d at 279-80)—doing so would resolve the separate issue posed by 5 U.S.C. §§ 7703(a)(1) and 7121(f), which together limit the right to appeal from arbitration decisions to *individuals*.

APPENDIX B — OPINION IN THE MATTER OF THE ARBITRATION BETWEEN THE UNITED STATES PARK POLICE AND THE FRATERNAL ORDER OF POLICE, DATED DECEMBER 16, 2020

IN THE MATTER OF THE GRIEVANCE ARBITRATION BETWEEN THE U.S. PARK POLICE, NATIONAL PARK SERVICE, U.S. DEPARTMENT OF THE INTERIOR AND THE FRATERNAL ORDER OF POLICE, U.S. PARK POLICE LABOR COMMITTEE

FMCS Case No. 200318-04975 (V. Fors--discharge)

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For the Union:
Devon Miller, Esq.

December 16, 2020

Jane Rigler, Arbitrator

A hearing in the matter of the arbitration between the United States Park Police and the Fraternal Order of Police was held on October 13, 14, 2020 at 1901 Anacostia Drive, S.E., Washington, D.C. The hearing was recorded and a transcript prepared.[1] Both parties submitted post-hearing briefs dated November 30, 2020. In dispute is whether the Agency met its burden for removing Vincent

1. References to the transcript will be cited, herein, as "Tr. at p. ____"

Appendix B

Fors from his employment for failure to follow procedure and conduct unbecoming a law enforcement Officer.

FACTS

Vincent Fors began his employment with the United States Park Police in early January of 2009 in the official position of Police Officer (Private). In June of 2014, he was assigned to the Central District Police Station (D-1), in Washington, D.C., as a Patrol Officer. Fors, on April3, 2015, as a result of his conduct in November of 2014, was issued a Proposed Removal for "lack of candor" and "failure to report an accident". Jt. Ex. #23 at p. 1. Fors and the Agency entered into a settlement agreement and in March of 2016, the proposed penalty of removal was mitigated down to a 30-day suspension for failure to report an accident. *Id.* The Agency, in its Decision Regarding Proposed Removal, observed that Fors's offense was "extremely serious" and had "significantly reduced [his] supervisor's confidence in him and his judgment." *Id.* at p. 2.

The Agency proposed his removal a second time, on October 25, 2019, based on investigations of his behavior in the summer and fall of 2017. This proposed removal was for "lack of candor", "failure to follow procedure", and "conduct unbecoming a law enforcement Officer". Jt. Ex. #1 at p. 1. As a result, Fors was "place[d) in a paid administrative leave status." *Id.* at p. 18. He responded to the proposed action, both orally and in writing, with the last information offered on December 10, 2019. Jt. Ex. #18 at p. 1. Acting U.S. Park Police Chief Gregory Monahan,

after "evaluat[ing Fors's] written and oral replies" and "reviewing[ing] ... the entire record", by memorandum dated March 9, 2020, "sustain[ed] the subject removal action." *Id.* at p. 1-2.

A basis for Fors's March, 2020, removal stemmed from an "administrative complaint...initiated against [Fors]" in June of 2017. *Id.* at p. 3. The complaint, according to Monahan, alleged that Fors had "(1) Improperly Processed a Prisoner; (2) Improperly Handled Evidence; and (3) Improper[ly] Handled Property (Narcotics)". *Id.* Investigation of the complaint led to an August 30, 2017 recommendation, by Sergeant Jeffrey Bloch, that the allegations be "sustained". *Id.* at p. 4. Monahan found that the charges related to Fors's June, 2017, conduct regarding failure to follow procedure were supported. *Id.* at p. 13.

A second basis for Monahan's decision to remove Fors was the interactions he had with fellow Officer Jennifer Kingham. Those interactions, the first "[i]n approximately September 2017", *Id.* at p. 14, and the second, which occurred on October 30, 2017, *Id.*, resulted in a determination by Monahan that Fors had engaged in conduct unbecoming a police Officer.

Monahan characterized Fors's failure to follow procedure and engaging in conduct unbecoming a police Officer as "serious misconduct". *Id.* at p. 3. He found that Fors "failed to maintain the high level of integrity and professionalism demanded by the important position with which [he was] entrusted", and his "serious misconduct

irreparably harms [his] dependability and trustworthiness and reflects poorly on the reputation of the Department and USPP." *Id.*

Monahan wrote that in "determin[ing] what reasonable and appropriate penalty [was] warranted" for Fors's behavior, he "evaluated the charges and specifications... and the evidentiary record...[and had] given careful consideration to all twelve factors set forth in *Douglas v. Veteran's Administration*, 5 M.S.P.R. 280 (1981), and the aggravating and mitigating nature of those factors." *Id.* at p. 14. Fors, in response, exercised his right to have the removal action scrutinized by an independent arbitrator and the instant proceeding ensued.

Failure to Follow Procedure

United States Park Police Officers must "comply with all General Orders, Special Orders, memorandums or directives that may be issued by the Chief or a designee." Jt. Ex. #1 at p. 221. Among those orders, memorandums, and directives are ones specifically addressing the responsibility of Officers in conjunction with arrests.

Fors's shift, on June 18, 2017, was scheduled to end at 6 a.m.; he testified that that morning, he "wanted to get home sooner [rather] than later." Tr. at p. 349. About 5 a.m., Fors arrested a person who was alleged to have assaulted another person with a deadly weapon (a bicycle lock). He secured possession of the lock as well as the suspect's backpack containing a small amount of marijuana and took the suspect into custody. He did not

fingerprint or photograph the suspect, the bike lock was left on the floor in the administrative area of the police station, i.e., at the "100 Desk", and he did not appropriately process the backpack's contents. Tr. at p. 422.

Allegations were made that in his handling of the suspect, Fors had engaged in "Improper Prisoner Handling", "Improper Handling of Evidence", and "Improper Handling of Property (Narcotics)". Jt. Ex. #1 at p. 185. After an investigation, the investigating Officer determined Fors had "improperly handled the evidence and narcotics by leaving them unprocessed within the 100-desk area, and improperly processed the arrestee by not ensuring AFIS [Automated Fingerprint Identification System] was completed"; it was recommended that the charges be sustained. Jt. Ex. #1 at p. 199.

Conduct Unbecoming a Police Officer

Fors and Officer Jennifer Kingham met m early 2017. The two worked different, but overlapping, shifts, and Kingham approached Fors (at that time a Union representative) about a problem she was having dealing with an internal vest which she believed did not fit properly. Fors testified he "helped her out actually constructing and wording some of the ...complaint [about the vest] for her." *Id.* at p. 451. According to Fors, he was not the only Union representative who could have assisted Kingham. *Id.* at p. 367-8.

Fors and Kingham had occasion to converse, more than once, about Kingham's separation from her spouse

and difficulties Fors faced with his spouse and children. *Id.* at p. 78; p, 357. Fors testified he thought Kingham regarded him as "somebody at work that she felt comfortable talking with", and said he believed "at times she was flirting with me and stuff." *Id.* at 357. He also said that they "were good coworkers, almost to the point of friends." *Id.* at p. 433.

Fors characterized himself as a "jokester", said he "like[d] to have...a little bit of laughs around the workplace", and testified that Kingham "did, too". *Id.* at p. 358. In terms of his relationship with Kingham, Fors said "everything was always in a friendly basis. It was never anything more than that." *Id.*

Kingham testified that during the spring and summer of 2017, Fors once tried to remove the badge from the front of her external vest. *Id.* at p. 24. Kingham said she "pushed him away and ....said 'stop'". *Id.* Kingham, like other Officers, often had a pen or pens fastened to the outside, front, of her vest, near her breast. According to Kingham, as many as "maybe five times", Fors would "try to take the pens off [her] vest". *Id.* Kingham said she told him to "stop", and she "pushed him away", *Id.* at p. 25, or "hit him". *Id.* at p. 28.

Officer Jeru Fontaine testified he had seen Fors reach for Kingham's pen, located on her vest. Kingham, in response, had "smacked [Fors's] hand", and when Fors reached again, Kingham had "smacked" his hand a second time and said 'stop'". Tr. at p. 118.

Appendix B

Fors said it was "a common practice with all of us", if an Officer did not have a pen available, to "reach out and grab a pen." *Id.* at p. 358. He had no memory of ever having taken a pen from Kingham but said it was "certainly a possibility." *Id.* at p. 359.

Officer Luis Feliciano testified he had seen Fors "flick Kingham's badge". *Id.* at p. 195. According to Feliciano, Kingham responded by "slapp[ing Fors's] hand away." *Id.* 196. Fors's reaction was to "giggle" and flick the badge a second time; Kingham, said Feliciano, "slapped the hand away again." *Id.*

Fors testified that he had no memory that he had ever flicked Kingham's badge. *Id.* at p. 361. He said, however, that "we play with people's uniforms and stuff like that", asserted that "there's people that we've played pranks on each other", and said "it becomes a little bit more like a locker room joke sometimes." *Id.* He said that jokes and pranks were meant for Officers to have "a connection with each other" and regarded "even little joking-around stuff... [as meant to keep] things a little more lighter." *Id.* at p. 363.

Kingham's testimony was that on one occasion, Fors grabbed the back of her external vest and "pull[ed her] kind of backwards and down towards the ground." *Id.* at p. 26. From midsummer of 2017 until the end of October, 2017, according to Kingham, "approximately ....ten to fifteen times....as [she] was walking past [Fors], he would punch [her]in the arm... or...push [her]" and she would "tell him to stop doing it.". *Id.* at p. 27. Kingham said that Fors responded to her pushing him away and hitting him by

saying "things along the line of 'You can hit me anytime. I like that. You can do it again. I'll be a punching bag anytime.'" *Id.* at p. 28.

Fors said he had grabbed the back of the vests of "dozens of Officers" and described such conduct as "a common practice." *Id.* at p. 363-4. His testimony was that he could "not specifically" recall Kingham ever telling him to stop touching her. *Id.* at p. 364. He said, though, that "I think she hit my hands away, but then other times she randomly just playfully touched me...out of the clear blue sky." *Id.* He took that to be part of her flirting with him because she "did it with a smile". *Id.* at p. 444; *see also Id.* at p. 448. Kingham, according to Fors, never said to him anything like "I'm uncomfortable with you." *Id.* at p. 364-5. Fors acknowledged that he was "pretty sure" he told Kingham something like she could use him "as a punching bag." *Id.* at p. 450.

Kingham's last interaction with Fors occurred on October 30, 2017. Kingham was serving as the "100 Desk Officer", a position associated with handling administrative duties. Tr. at p. 169. Kingham said that Fors came into the office where she was seated at the desk, asked for the phone list, and she removed it from the wall where it was posted and handed it to him. Subsequently, she stood and faced away from Fors; she testified that, "All of a sudden I feel his body push my body up against the table....and I can feel him slowly rubbing his groin... along...the backside of my butt", from the right hand side to the left hand side. *Id.* at p. 37. Kingham said Fors put the phone list back on the wall and "he slowly again moves his

body from the left-hand side of my butt to the right-hand side of my butt with his groin." *Id.* Fors then left the office.

Shortly thereafter, Kingham left the desk area and encountered Officer Francie Bustamante. Bustamante testified that when she saw Kingham on October 30, Kingham had a "deer in the headlights" look, Tr. at p. 153, and was "pacing", and "bawling". *Id.* at p. 155. Bustamante said Kingham said, "I need to tell you something", *Id.* at p. 153, and, "You won't believe what happened in 100 to me". *Id.* at p. 154. Bustamante testified that Kingham told her that "Fors rubbed up against me", *Id* at p. 155, kept repeating the words "I can't believe this happened", *Id.,* and said, "I just don't know what to do about this." *Id.* at p. 156.

Officer Feliciano testified that when he saw Kingham on October 30, she summoned him with what he called a "frantic" wave. *Id.* at p. 199. Feliciano approached Kingham and observed that she was "crying" and "moving frantically". *Id.* Eventually, Kingham told him that Fors "rubbed his crotch on her butt". *Id.* at p. 200. Feliciano urged her to report Fors's conduct to Agency officials but Kingham said to him that she "needed time" and told Feliciano that "[I'll] take care of it." *Id.*

Officer Fontaine observed Kingham talking with Feliciano, on October 30, and saw that Kingham's face "was red and she was crying." *Id.* at p. 122. He testified that she was "distraught" and "shaking so violently". *Id.* at p. 123. Fontaine testified that, at some point in time, Kingham told him that she was working in 100, "her back

was turned as soon as he [Fors] entered the office and he pinned her up against the wall and grinded up on her". *Id.* at p. 124.

Feliciano took it upon himself to contact the Union about what Kingham had told him regarding her interaction, on October 30, with Fors. Shortly thereafter, the Agency began an investigation into the matter.

Fors testified he could recall no contact with Kingham, other than on a "normal basis" on October 30. Tr. at p. 369. According to Fors, on that date, "nothing happened". *Id.* at p. 385-6.

The investigation by the Agency was led by Detective Sergeant Janice Bindeman, and she issued her report on February 1, 2018. Jt. Ex. #1 at p. 22. Bindeman found there was "sufficient evidence to prove that ....Fors harassed... Kingham, by grabbing her external vest carrier and attempting to touch her while reaching for a pen located in her breast area when his touch was unwanted." Jt. Ex. #1 at p. 24. With regard to what might have happened on October 30, 2017, Bindeman described Kingham as having "alleged that....Fors made unwanted sexual contact with her by rubbing the front of his body against her back and buttocks" and concluded there "is not enough evidence to prove or disprove this allegation." *Id.* at p. 23.

Kingham began seeing a counselor, on a weekly basis, in November of 2017. Tr. at p. 45. According to her testimony, she was subsequently diagnosed as having PTSD and prescribed various mediations. *Id.* at p. 45; p.

48. She filed a petition for a civil protection order against Fors in April of 2018. After a proceeding in which both Kingham and Fors testified, Fors was found to have committed "misdemeanor sexual assault", and a one-year protection order was issued. Jt. Ex. #1 at p. 179.

DECISION

Because the Agency established that Vincent Fors followed to follow procedure and engaged in conduct unbecoming a police Officer, demonstrated there was a sufficient nexus between that serious misconduct and the efficiency of the service, and imposed an appropriate penalty for Fors's behavior, the removal must be upheld.

Analysis.

The collective bargaining agreement between the Agency and the Union, referred to as the Labor Management Agreement (LMA), provides that "[d]isciplinary actions taken...against Officers shall be consistent with applicable laws, rules and regulations and will be taken only for just cause and as will promote the efficiency of the service." Jt. Ex. #33 at Sect. 17.2. The Agency has the "burden of proof...to show that the action is supported by a preponderance of the evidence." *Id.*

The Union made four arguments: 1) the Agency has "lost its ability to discipline" Fors because it had not done so within the relevant time constraints; 2) the failure to follow procedure charge was merely a "technical violation"; 3) Fors's interactions with Kingham "were not out of malice

or an intent to harm", and there was "no evidence to prove" Fors had behaved improperly on October 30, 2017; and 4) the Agency "failed to adequately consider mitigating factors, such as Grievant's Performance Evaluations". Brief of Union at p. 5; p. 7; p. 8; p. 10. Those arguments are without merit and are addressed, in order, just below.

An Agency General Order, 32.04, provides that "investigations of administrative and personnel complaints are to be completed no later than 90 calendar days from the date of the initial reporting." Jt. Ex. #25 at p. 4. The LMA provides that "[d]iscipline shall be administered in a timely manner." Jt. Ex. #33 at Sect. 17.2

There can be no dispute that the failure to follow procedure investigation satisfied the 90 day requirement (subsequent to June 18, 2017 until August 30, 2017); whether the investigation into the charge that Fors engaged in conduct unbecoming a police Officer was completed in a timely manner is dependent on whether an investigation is incomplete until the subject of the investigation has affixed her or his signature to the investigative report. The record reflects that an incident report was filed on Nov. 8, 2017, Jt. Ex. #1 at p. 44, and Bindeman, the investigating Officer, signed her report on February 1, 2018, a date fewer than 90 days subsequent to the date on which the incident report was filed. Jt. Ex. #1 at p. 23; p. 24. Fors affixed his signature to the report on February 9, 2018, and if a "Report of Investigation was completed on February 9, 2018", as the Union argued, then the 90-day requirement was not satisfied. *See* Brief of Union at p. 5.

The Union presented no evidence or authority to support a finding that the parties had a mutual understanding that an Agency investigation is incomplete until the subject of the investigation has signed the investigative report. Such an approach to determining the date on which an investigation is "complete" would present real opportunity for abuse--subjects of investigation could easily cause the Agency to miss the 90-day deadline simply by refusing to sign the report until more than 90 days had elapsed.

The Union also seemed to suggest the investigation of this matter was not "complete" until the Proposed Removal Memorandum was issued in October of 2019. *See Id.* at p. 5-6. That interpretation of General Order 32.04 would mean the Agency would have the herculean task of not only investigating an incident(s) but also be required to determine and report to the subject of the investigation, within 90 days, whether any discipline was proposed. No evidence or authority was offered that the parties had ever so interpreted the General Order.

A bit more difficult matter is whether the Agency, as required by the LMA, administered discipline in a "timely manner". The Union offered a 2012 arbitration award which stated, in part, that *"[a]bsent evidence that substantially more than a one-year delay from the time of an alleged infraction to a disciplinary action based on that infraction has been acceptable to the Union",* a fifteen month delay did "not satisfy the contractual requirement for a timely response." *US. Park Police/FOP* (Strongin, 2012) (emphasis added). There is at least some reason

to think the Union, subsequent to the just-referenced award, has regarded as unobjectionable the imposition of discipline well more than one year from the time of the infraction--Fors's began a 30-day suspension in April of 2016 for conduct which occurred in November of 2014, i.e., a delay of 17 months.

Additionally, the Strongin award involved a far less complex set of issues than the instant dispute and the discipline involved only a letter of reprimand, not a removal from employment. Fors, himself, contributed to any delay in the timing of the administration of discipline when he requested a three-week extension of time within which to respond to the Agency's proposed action. Most importantly, there was no evidence that Fors was harmed or prejudiced by the amount of time it took the Agency to act.

The Union's second argument was that the charge regarding Fors's failure to follow procedure was only a "technical violation". Brief of Union at p. 7. Fors did not dispute that he failed to properly perform an AFIS search, failed to properly document and process the personal property of the person arrested, and failed to properly document and process evidence. Brief of Union at p. 7; p. 10. The Union argued that Fors's failures did not amount to "malicious or egregious action", the victim of the crime "did not want to prosecute", and, the following day, Fors "went to the District Attorney's Office...to complete the process." *Id.* at p. 8.

Appendix B

While there is no evidence Fors's behavior was the result of a conscious desire to subvert a criminal investigation, it was, nevertheless, seriously lacking in quality police work. Evidence which has not been properly documented and secured would most probably be inadmissible in a court of law. Whether an individual is prosecuted for a crime is a determination made by the prosecutor, not the arresting Officer, a fact known to Fors. Tr. at p. 481. It is not unheard of for a crime victim to assert she has no interest in pursuing the matter but, after a day or two of reflection, to reconsider and want the perpetrator prosecuted "to the full extent of the law".

Had criminal charges in the assault matter been initiated, Fors's failures would have made it much more difficult to obtain a conviction. His lackadaisical attitude toward his professional responsibilities is inexcusable, and the Agency proved Fors "failed to follow procedure".

The Union argued, thirdly, that, with regard to the allegation that Fors, without Kingham's permission, had removed a pen from her vest, "if [he] did, in fact, take a pen....that specification and offense should not rise to the penalty of termination of his employment". Brief of Union at p. 9. Such behavior, according to the Union, was a "common practice" among Officers, engaged in in order to "perform a job function", and "never done to harass or with any sexual intent." *Id.* at p.9

The record supports a conclusion that Fors did remove a pen from Kingham's vest and that such contact was not welcomed by Kingham. Fors did not deny he had

removed a pen from Kingham's vest (he acknowledged it was "certainly a possibility", Tr. at p. 359; *see also* Brief of Union at p. 10). Kingham's testimony about the removal was supported by that of Fontaine as was Kingham's testimony that when Fors tried to touch Kingham's pen she was not happy with him, and she let Fors know it. It is irrelevant that it may not have Fors's conscious desire to offend, bother, or intimidate—touching, or attempting to touch Kingham's person, after having been told not to do so, is an act that Fors knew Kingham would find objectionable.

The record also demonstrates that the Agency has proven, by a preponderance of the evidence, that on October 30, 2017, when Kingham was physically situated so that she could not readily avert contact, the groin area of Fors's body made contact with the buttocks and lower back of Kingham's body in a slow, right to left, and then left to right, motion. Given the protests she made to Fors about his touching her badge, pen, and vest, Fors had to have known that such contact, even more aggressive than that previously experienced by Kingham, would be repugnant to her.

Kingham's testimony with regard to what happened on October 30, 2017 is credible, and Fors's testimony not credible, for several reasons[2] Three Officers (Bustamonte,

2. The Union asserted that "Officer Kingham was no more credible than the Grivant" and pointed to Officer Bindeman's investigative report which concluded the Oct. 30 allegation was neither proven nor disproven. Brief of Union at p. 10. Although Bindeman determined the allegation was neither proven nor

Feliciano, and Fontaine) testified, without contradiction, about the extreme emotional disturbance evidenced by Kingham, and witnessed separately be each, shortly after Kingham left the 100-area on that date. There is nothing to support even a suggestion that Kingham might have anything to gain by telling lies about Fors. Indeed, Kingham refrained from reporting to higher ups her concern about, and objection to, her pre-October 30 interactions with Fors, and it was another Officer, not Kingham, who went to the Agency about the October 30 matter.

Fors's credibility about October 30, for several reasons, is suspect. Even the Union would acknowledge that, at least once during the arbitration, Fors lied. His direct testimony was that he had never had "any kind of complaint against [him] at any given time in [his] career or [his]life." Tr. at p. 391. Fors's April, 2016, 30-day suspension could not make that statement any more untrue. Because he was untruthful about his past discipline, it would hardly be surprising if, when his job is at stake, he would be untruthful about the events of October 30. Finally, that Fors made inappropriate and unwanted physical contact with Kingham on October 30 is not inconsistent with his other, earlier, behavior when he had "giggled" and told Kingham he was anxious to be her "punching bag"; such conduct makes it reasonable to think he would be desirous of additional physical contact with her, and that he sought that contact on October 30.

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disproven, her report contains no assessment of the credibility of either Kingham or Fors, assessments critical to the determination of what might have transpired on October 30.

Appendix B

The Agency proved that Fors "engaged in conduct unbecoming of a law enforcement Officer". His behavior toward Kingham was improper and reflected a disregard and disrespect for Kingham and her person. Such behavior would be unbecoming when engaged in by any person but even more unbecoming when manifested by a law enforcement Officer, a person obligated to abide by a high level of professional conduct.

Fors's failure to follow procedure, and his having engaged in conduct unbecoming a law enforcement Officer, are inconsistent with the efficient operation of the U.S. Park Police. A law enforcement Officer must be equipped to deal with a wide variety of individuals and carry out responsibilities with great attention to detail. Law enforcement Officers must be able to trust their fellow Officers and to count on each other to make choices unbiased by self-interest. His unwillingness to follow established protocols for the handling of prisoners and evidence, and his treatment of a fellow Officer without regard for her well-being and dignity, establish Fors's inability to carry out his duties in a fashion required to accomplish the Agency's mission.

The Union's final argument was that the Agency "failed to adequately consider mitigating factors, such as Grievant's Performance Evaluations." Brief of Union at p. 10. According to the Union, Fors had worked for the Agency for a significant period of time, had shown "he is more than capable of performing his duties and...does not take his position for granted." *Id.* at p. 11.

Appendix B

Fors's removal in the spring of 2020 was not the first time he had been faced with the possibility of an end to his employment with the Agency. Although he was not then removed, his supervisor, in March of 2016, expressed a "significantly reduced confidence in [Fors] and his judgment." Jt. Ex. #23 at p. 2. That assessment proved telling; not much more than a year after he had finished serving the suspension, Fors exhibited flawed judgment once again by his decision to fail to follow procedure. He continued to demonstrate an inability to make sound decisions when, despite knowing he was being investigated for his shortcomings with regard to the June, 2017 arrest, he interacted with Kingham in ways which he knew were not in accordance with the standard of conduct required of law enforcement Officers.

Nothing in the record suggests the discipline imposed on Fors was more severe than that imposed on similarly situated individuals, and it is consistent with the Table of Penalties. Rehabilitation, particularly given his failure to learn the lesson he should have learned from his suspension, and the fact he continues to seem to believe that it is acceptable, in a workplace, to contribute to what he called a "locker room" atmosphere, is unlikely. The Agency would be held in disrepute were Fors permitted to remain an Officer of the U.S. Park Police.

Conclusion

The Agency satisfied its burden to prove that Vincent Fors failed to follow procedure and engaged in conduct unbecoming a law enforcement Officer, demonstrated a

sufficient nexus between his misconduct and the efficiency of the service, and imposed an appropriate penalty. There was no violation of the Labor Management Agreement, and the decision to remove Fors is upheld.

/s/_____
JANE RIGLER
December 16, 2020

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, FILED AUGUST 9, 2022

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2021-1690

FRATERNAL ORDER OF POLICE, UNITED STATES CAPITOL POLICE LABOR COMMITTEE,

Petitioner,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Petition for review of an arbitrator's decision in No. FMCS 200318-04975 by Jane Rigler.

ON PETITION FOR PANEL REHEARING

Before NEWMAN, PROST, and STARK, Circuit Judges.

PER CURIAM.

ORDER

Fraternal Order of Police and United States Capital Police Labor Committee filed a motion for reconsideration, that the court construes as a petition for panel rehearing. A response to the petition was invited by the court and filed by the Department of the Interior.

Appendix C

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The mandate of the court will issue August 16, 2022.

August 9. 2022
Date

FOR THE COURT

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court