IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 23-0669

CITY AND COUNTY OF BUTTE-SILVER BOW, MONTANA,

Applicant/Appellant

-v-

BUTTE POLICE PROTECTIVE ASSOCIATION,

Respondent/Appellee.

Appellee's Response Brief

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STATEMENT OF THE ISSUE

Whether the District Court properly denied BSB's Rule 60(b)(6) motion.

STATEMENT OF THE CASE

Appellee, Butte Police Protective Association ("BPPA"), is party to a collective bargaining agreement ("CBA") with Butte-Silver Bow County ("BSB"). On August 24, 2020, BSB terminated Detective Rhonda Staton, a member of BPPA. The Union grieved Staton's discharge through the process outlined in the CBA. BSB denied the grievance, which ended in arbitration. Pursuant to the contract, the parties selected an arbitrator, and a hearing was held by Zoom before Arbitrator Arthur "Ray" McCoy on April 27 and May 3, 2021. The parties filed post-hearing briefs. On August 9, 2021, Arbitrator McCoy issued his Opinion and Award. *Doc. 1, Ex. B., Opinion and Award ("Decision")*. Arbitrator McCoy sustained the grievance, awarded Detective Staton lost wages and benefits, and reinstated her to her position within the Butte Police Department. *Id.* at 31.

BSB did not reinstate Detective Staton. Instead, it filed an Application to Vacate or, in the alternative, Modify Arbitration Award on October 22, 2021. *Doc. 1*. The parties fully briefed the matter and entered oral argument. On July 28, 2023, Judge Whelan issued his Order Remanding Matter Back to Arbitrator and Denying Application to Vacate or Modify Arbitration Award. *Doc. 16*. On August 23, 2023, BSB filed its Motion for Relief under Rule 60(b). *Doc. 18*. The matter

was fully briefed by the parties. Judge Whelan did not issue a ruling within 60 days, and the motion was deemed denied. BSB filed this appeal in response and submitted its Opening Brief on March 22, 2024. This is BPPA's Response Brief.

STATEMENT OF THE FACTS

From the outset, we must make clear that "(c)ourts are strictly barred from engaging in fact-finding when they review labor arbitration awards." *City of Livingston v. Mont. Pub. Emps. Ass'n ex rel. Tubaugh,* 2014 MT 314, ¶ 28, 377 Mont. 184, 192, 339 P.3d 41, 48 *(citing Stead Motors v. Automotive Machinists Lodge 1173,* 886 F.2d 1200, 1212 (9th Cir. 1989)(per curiam)*)*. Thus, the only facts that are relevant for this Court to review are those found by the Arbitrator.[1]

The facts as found by the Arbitrator are recited here. Butte-Silver Bow hired Rhonda Staton as a police officer on December 10, 2001. *Decision* at 16. BSB promoted Staton to detective on July 7, 2008, a position she performed adequately for the next decade. *Id.* After her promotion, Staton primarily handled child and sex abuse cases. BSB terminated Staton in August 2020.

[1] BSB has taken great liberties in its attempt to expand the facts properly before this Court. For example, BSB claims that "(i)t is undisputed that Staton does not meet, and has not met, the qualifications for employment as a police officer in Montana." *Opening Brief, 18*. This is simply not true. BSB's brief makes no reference to the record before Arbitrator McCoy to substantiate this assertion. Instead, it refers to a civil litigation record conducted well after the Arbitrator's Decision. The only examination performed for the purpose of determining Staton's fitness for duty under § 7-32-303(2)(g), MCA, was done so by George Watson, and the Arbitrator found Watson's report "completely unreliable." *Decision* at 30. The fact is that no licensed, qualified person has found that Staton is not compliant with the law, and certainly the only factual findings that are relevant for this Court's review are those found by the Arbitrator. BSB makes numerous attempts to color the record with facts not found by the Arbitrator without the legal authority to do so.

Detective Staton's employment was governed by the terms of a collective bargaining agreement between the parties. The contract includes a multi-step grievance procedure that culminates in final and binding arbitration. *Doc. 1, Ex. A, CBA (hereafter, "CBA"),* at 8-9. Article 17, Section 2 defines a grievance as an unresolved complaint regarding treatment received from supervisory personnel, dissatisfaction with working conditions, or an allegation of a breach of the CBA. *Id.* at 8. The contract also provides that non-probationary employees may not be disciplined or discharged without just cause. *Id.* at 3.

The CBA also contains an unusual provision at Article 13, Section 5. The section acknowledges that behavioral health problems are inherent in police work due to "stress, burn-out, post-traumatic stress syndrome, depression, etc." *Id.* at 6; that those problems "can be and most often are correctable through intervention, treatment and/or counseling" *Id.*; that employees who seek assistance in dealing with those problem "shall not have job security … jeopardized" *Id.*; and that "(a)ssistance and rehabilitation will be given the utmost priority." *Id.*

BPPA engaged in the grievance process after Staton's termination, and the issue ended in binding arbitration. The arbitration hearing took place before a mutually selected arbitrator by Zoom over the course of two days, at the end of which the parties filed post-hearing briefs. The Arbitrator issued his Opinion and Award on August 9, 2021. *Decision,* at 1-2.

Arbitrator McCoy found that Staton "adequately performed her duties between 2001 and 2017." *Id.* at 16. In 2018, Staton received a verbal reprimand that expired six months later. *Id.* Thereafter, while there were "issues raised regarding Detective Staton's performance, "none of those issues resulted in discipline." *Id.* at 18. Accordingly, her record was "free of discipline" from 2001 to 2020 when she was ordered by Sheriff Ed Lester to report to a fitness of duty examination. *Id.*

The Arbitrator found that in 2018, due to Detective Staton's work on a difficult child abuse case, "Sheriff Lester and almost every other person in a position of leadership within BSBLED knew and understood that Detective Staton was suffering from some kind of severe emotional issues that were in fact interfering with her job performance." *Id.* In 2019, Staton was "feeling overwhelmed enough to give up her detective position and return to patrol." *Id*. Arbitrator McCoy also found that in early 2019 Staton's immediate supervisor stated that Staton was "manic," "overwhelmed," and "fall[ing] apart." *Id.* at 13. By the end of 2019, Sheriff Lester noted that during a call with Staton, she was distraught and crying. *Id.* at 18. By 2020, Sheriff Lester wrote that Staton "does not seem to be the same person she was when I was lieutenant in the division." *Id.* at 17. At the time Staton was ordered to take the fitness for duty evaluation, BSB

was "convinced she was suffering from some sort of emotional or mental problem that was interfering with her ability to do her job." *Id.* at 19.

Arbitrator McCoy concluded, too, that during this same time period "Detective Staton requested help directly and indirectly." *Id.* at 25. Rather than following the contract's requirement to prioritize "assistance and rehabilitation" and to make "every effort … to assist the Employee through such difficult times," BSB told Staton that "most detectives feel overwhelmed at times and that sometimes things look different after you have a few days to think." *CBA* at 6; *Decision* at 25. The Arbitrator concluded that when Staton requested help, "Sheriff Lester failed to resort to the Agreement as source of direction for his next steps in assisting Detective Staton." *Decision* at 25. Instead, Sheriff Lester placed Staton on administrative leave and ordered her to submit to a fitness for duty evaluation. *Id.* That evaluation was "the only investigation relied upon in making the discharge decision." *Id.*

The fitness for duty evaluation was performed by Bozeman psychologist George Watson. *Id.* at 19. After reviewing Watson's written report and hearing his testimony, Arbitrator McCoy concluded that the evaluation was "unfair, insufficient and lacked objectivity." *Id.* at 25. According to the Arbitrator, Watson failed to recognize the difference between an 18-year veteran and a new hire, *Id*.; ignored Staton's work history, *Id.* at 26; dismissed the idea that Staton suffered any

workplace trauma, *Id.*; failed to conclude whether Staton suffered from an ailment and whether it was temporary or permanent, *Id.* at 27; "for some strange reason" concluded that Staton took no responsibility for her work performance, *Id.* at 27-28; "ignored her concerns but punished her for raising them," *Id*. at 29; and created "out of thin air the notion that Staton lied on the personality inventories in an attempt to make herself look bad and be declared unfit for duty." *Id.* at 30. Arbitrator McCoy concluded that Dr. Watson's report "cannot be used to make the case that the Employer's discharge decision is supported by just cause." *Id.*, 29-30. The Arbitrator read Watson's report, listened to Watson's testimony, and concluded that Watson's evaluation "must be rejected as completely unreliable support for the Employer's discharge decision." *Id.*, 30.

Arbitrator McCoy found that BSB also violated its own policy for its handling of employees suffering from mental health issues that interfere with the employee's work. The policy, Policy 302, requires the convening of a board of review tasked "to consider all available information concerning the employee's ability to perform the full duties of the position" and that requires the board to make "the final determination concerning the employee's ability to perform the full duties of the position." *Id.* at 24. BSB failed to convene a board, failed to consider "all available information," and made no determination of Staton's health issues

that affected her ability to perform her duties as a detective. In short, "the Sheriff failed to follow Policy 302." *Id.*

The Arbitrator held that BSB failed to follow the CBA. He found that BSB had a duty under the CBA to make "assistance and rehabilitation" the "utmost priority" and make "every effort" to assist Detective Staton "through such difficult times." Instead of providing that assistance to Detective Stanton, BSB sent her to a fitness for duty evaluation that was "completely unreliable."

As a result, Arbitrator McCoy ordered Staton's reinstatement with back pay, including benefits, the right to return to a patrol position, and a psychological and mental health evaluation "to determine what rehabilitation strategies might be available to her as called for in the Agreement." *Id.*, at 31.

BSB did not reinstate Staton and has not paid her any back pay or benefits. It did arrange for another evaluation by Dr. William Patenaude, who explained that the purpose of the evaluation was to identify "rehabilitative strategies that might be available to Ms. Staton that would help her meet the qualifications for employment as a law enforcement officer." *Doc. 3, Exhibit 2, Patenaude Evaluation ("Evaluation")* at 8. Patenaude noted, "I emphasized to Ms. Staton that this was not a Fit for Duty evaluation. Rather, this evaluation was being conducted so as to offer opinions around what psychological strategies or activities might be offered

to Ms. Staton that would facilitate her resumption to service as a law enforcement officer." *Id.* at 4.

Patenaude's evaluation did not identify Staton as being out of compliance with state law, which says that peace officers must "be free of any mental condition that might adversely affect performance of duties of a peace officer." § 7-32-303(2)(g), MCA. Instead, Patenaude concluded that Staton is "impotent to execute any self-driven/self-initiated action that would allow her to legitimately participate in remedial or corrective action." *Evaluation, 9*. In short, Patenaude's evaluation was an attempt to comply with Arbitrator McCoy's order to determine rehabilitation strategies but failed to do so. To date, Rhonda Staton has not been determined by anyone qualified to provide an evaluation to be out of compliance with § 7-32-303, MCA.[2]

STANDARD OF REVIEW

"As a general rule, the district court's ruling [on a Rule 60(b) motion] is reviewed for abuse of discretion." *Essex Ins. Co. v. Moose's Saloon, Inc.*, 2007 MT 202, ¶ 16, 338 Mont. 423, 166 P.3d 451, 455. A district court abuses its discretion if it "act[s] arbitrarily without employment of conscientious judgment or exceed[s] the bounds of reason resulting in substantial injustice." *Jarvenpaa v. Glacier Elec.*

[2] When Staton was hired in 2001, the law required that she be "examined by a licensed physician, who is not the applicant's personal physician, appointed by the employing authority to determine if the applicant is free from any mental or physical condition that might adversely affect performance by the applicant of the duties of a peace officer." § 7-32-303(2)(g), MCA (2001).

Co-op., Inc., 1998 MT 306, ¶ 13, 292 Mont. 118, ¶ 13, 970 P.2d 84, 86. "The scope of judicial review of an arbitration award is strictly limited to the statutory provisions governing arbitration." *Duchscher v. Vaile*, 269 Mont. 1, 4, 887 P.2d 181, 183 (1994). Appeals of labor arbitration decisions are uncommon and the governing law is an unusual in that review of arbitration decisions is "extremely limited." *Livingston* at ¶ 14.

SUMMARY OF ARGUMENT

Courts that review arbitration awards give great deference to the arbitrator's decision. The scope of review is extremely limited to those instances where, among other things, an arbitrator consciously disregards the contract. Here, Arbitrator McCoy based his decision on the contract, and he fashioned a remedy that complies with the contract. In doing so, McCoy considered Montana law. Specifically, he explains his view of Section 7-32-303, MCA, and its relevance to the contract. McCoy found that BSB violated the contract because it based its discipline of Detective Staton on a fit for duty evaluation that was completely unreliable. *Decision* at 30. In short, McCoy found that Staton was not in violation of the law. Instead, he found that BSB was in violation of the contract. The Arbitrator then fashioned a remedy that sought to bring BSB into compliance with the contract, a completely appropriate action. BSB's partial act of complying with McCoy's order raises an issue as to whether further action must be taken. The

parties agreed that McCoy would retain jurisdiction to determine the outcome of that issue. At no time during this case has Detective Staton been found to be out of compliance with the statute. In any event, such issues of compliance are not handled by either BSB or BPPA. The statute refers to the Montana Public Safety Officer Standards and Training Council, colloquially known as "POST". § 7-32-303(2), MCA. If BSB has a concern about Staton's qualifications, it has the option of reinstating her to comply with the Arbitrator's decision and then ordering her to submit to a fit for duty evaluation for the purpose of complying with the law.

ARGUMENT

I. THE COURT MUST GIVE GREAT DEFERENCE TO THE ARBITRATOR

Arbitration holds special significance in the field of labor law where it is an extension of the collective-bargaining process and the primary vehicle for maintenance of a constructive relationship between employers and employees. The U.S. Supreme Court has said that while commercial arbitration is "resorted to because there has been a breakdown in the working relationship of the parties," arbitration under a collective-bargaining agreement "is the means of solving the unforeseeable . . . and to provide for their solution in a way which will generally accord the variant needs and desires of the parties." *United Steelworkers v. Warrior and Gulf Navigation Company*, 363 U.S. 574, 581, 80 S.Ct. 1347, 4 L.Ed.

2d 1409 (1960).[3] The grievance and arbitration process of a labor agreement is "at the very heart" of the system designed to accomplish the well-settled policy of encouraging the friendly adjustment of labor disputes. *Id.*

The arbitrator plays a vital role in labor arbitration because the labor arbitrator is "the person the parties designate to fill in the gaps; for the vast array of circumstances they have not considered or reduced to writing, the arbitrator will state the parties' bargain." *Stead Motors,* 886 F.2d at 1205. When a union and its employer agree to final and binding arbitration, "(i)t is the arbitrator's construction that was bargaining for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him, because their interpretation of the contract is different than his." *San Francisco - Oakland Newspaper Guild v. Tribune Publishing Co.*, 407 F.2d 1327, 1327 (9th Cir. 1979) (per curiam).

Accordingly, "courts reviewing labor arbitration awards afford a 'nearly unparalleled degree of deference' to the arbitrator's decision." *SW Reg'l Council of*

[3] Montana's collective-bargaining act is modeled after the National Labor Relations Act. Thus, the Montana Supreme Court relies on federal labor law decisions regarding Montana's labor law. *Bonner School Dist. No. 14 v. Bonner Educ.,* 2008 MT 9, ¶18, 341 Mont. 97, 176 P.3d 262; *Audit Services, Inc. v. Anderson,* 211 Mont. 323, 684 P.2d 491 (1984); *Great Falls v. Young,* 211 Mont. 13, 686 P.2d 185 (1984); *Small v. McRae,* 200 Mont. 497, 651 P.2d 982 (1982); *Brinkman v. State,* 224 Mont. 238, 729 P.2d 1301 (1986); *Kalispell Educ. Ass'n v. Bd. of Trustees,* 2011 MT 154, ¶ 18, 361 Mont. 115, 255 P.3d 199 (relying on federal labor law regarding arbitration of state labor disputes); *Livingston* at ¶¶ 14, 21, 22, 24, 25, 26, 28, & 36 (relying on federal decisions concerning scope of court review of labor arbitration decisions).

Carpenters v. Drywall Dynamics, Inc., 823 F.3d 524, 530 (9th Cir. 2016) *(quoting Stead Motors*, 886 F.2d at, 1204-05*)*. "[T]he appropriate question for a court to ask when determining whether to enforce a labor arbitration award interpreting a collective bargaining agreement is a simple binary one: Did the arbitrator look at and construe the contract, or did he not?" *Id*. at 532.

"Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." *Paperworkers v. Misco, Inc*., 484 U.S. 29, 37-38, 108 S.Ct. 364, 98 L.Ed. 2d 286 (1987).

To frame it another way:

> If, on its face, the award represents a plausible interpretation of the contract, judicial inquiry ceases and the award must be enforced. This remains so even if the basis for the arbitrator's decision is ambiguous and notwithstanding the erroneousness of any factual findings or legal conclusions.

Stead Motors, 886 F.2d at 1209, (*quoting Sheet Metal Workers v. Arizona Mechanical & Stainless, Inc.,* 863 F.2d 647, 653 (9th Cir. 1988)); *Livingston* at ¶ 15 *("As long as an arbitrator 's factual determination and legal conclusions derive their essence from the collective bargaining agreement itself and the award represents a plausible interpretation of the contract, judicial inquiry ceases and the award must be enforced. This remains so even if the basis for the arbitrator's*

decision is ambiguous and notwithstanding the erroneousness of any factual findings or legal conclusions.").

"Courts are strictly barred from engaging in fact-finding when they review labor arbitration awards." *Id.,* at ¶ 28. "The parties did not bargain for the facts to be found by a court, but by an arbitrator chosen by them." *Misco,* 484 U.S. at 45. "[I]mprovident, even silly, factfinding ... is hardly a sufficient basis for disregarding what the agent appointed by the parties determined to be the historical facts." *Id.* at 39.

II. THE ARBITRATOR DID NOT CONSCIOUSLY DISREGARD MONTANA LAW

BSB cites to Section 7-32-303, MCA and the rule that "when an arbitrator is aware of a clearly governing principle of Montana law, and blatantly refuses to follow it, the statutory conditions of § 27-5-312(1)(b), MCA, have in fact been met." *Tera West Townhomes v. Stu Henkel Realty*, 2000 MT 43, ¶ 35, 298 Mont. 344, 996 P.2d 866.

"'Manifest disregard of the law' means something more than just an error in the law or a failure on the part of the arbitrators to understand or apply the law." *Lagstein v. Certain Underwriters at Lloyd's*, 607 F.3d 634, 641 (9th Cir. 2010), *quoting Mich. Mut. Ins. Co. v. Unigard Sec. Ins. Co.,* 44 F.3d 826, 832 (9th Cir.1995). "The test for manifest disregard of the law requires that the arbitrator

appreciates the existence of a clearly governing principle but decides to ignore or pay no attention to it." *Tera West* at ¶ 35 *(emphasis added)*.

BSB argues that Section 7-32-303, MCA, requires that once Staton was determined by Watson to be unfit for duty, she automatically lost her job. Clearly, that is not what BSB believed at the time because that did not occur. BSB admits that for three months after it received Watson's report, it kept Staton on paid administrative leave. *Doc.*1 at 1, 19.

A central tenet of BSB's argument is that the Arbitrator ignored or paid no attention to the statute. This argument is incorrect. The Arbitrator specifically addressed the statute and held that it made clear that an officer who does not maintain psychological well-being will face removal. *Decision* at 23. The difference is that Arbitrator McCoy held that Watson's examination and opinion was "unfair, insufficient and lacked objectivity" and "must be rejected as completely unreliable support for the Employer's discharge decision." *Id.* at 25, 30. In other words, the only evaluation that BSB used as the basis for termination was itself rejected.

This Court's decisions make clear that the Arbitrator's decision concerning Watson's work in this case must be upheld. Coincidentally, this is not the first case involving Watson. *Livingston* involved a police officer, a fitness for duty examination conducted by Watson, Watson's opinion that the officer was not fit for

duty, and, based on that opinion, the officer's termination. *Livingston* at ¶ 8. The arbitrator in *Livingston* faulted Watson's examination and found that his opinion was "not credible." *Id.* at ¶ 32. The District Court disagreed with the arbitrator's negative assessment of Watson's evaluation and conclusions and overturned the arbitrator's decision. *Id.* at ¶ 31. This Court held that Montana courts "may not re-weigh the evidence in the case or reinterpret the reliability of evidence presented for the Arbitrator's consideration." *Id.* at ¶ 32. Thus, the Court let stand the arbitrator's determination – like the Arbitrator's determination here – that neither Watson nor his conclusion was credible.

Additionally, here the Arbitrator found that prior to terminating Staton, BSB failed to abide by its own policies and failed live up to its contractual promise that "(a)ssistance and rehabilitation will be given the upmost priority and every effort shall be made by the Employer to assist the employee through such difficult times," *CBA* at 6. In other words, the Arbitrator determined the facts and then interpreted the requirements of the CBA. He found as factual matters that Staton was, and management was aware that, she was suffering from emotional issues that interfered with her work, *Decision* at 18, she requested help, *Id.* at 25, and yet BSB failed to make assistance and rehabilitation a priority and did not take its responsibilities to do so "seriously." *Id.* at 25. The Arbitrator's factual determinations must be upheld. *Livingston* at ¶ 28, 32. Arbitrator McCoy's

interpretation of the requirements of the contract must be upheld because when the arbitral decision "draws its essence" from the CBA, "courts are to enforce the award." *Teamsters Union v. C.N.H. Acquisitions,* 2009 MT 92, ¶22, 350 Mont. 18, 204 P.3d 733, *citing, United Food & Commercial Workers v. Foster Poultry,* 74 F.3d 169, 173 (9th Cir.1995); *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 764, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983).

III. THE ARBITRATOR'S REMEDY IS APPROPRIATE

The Arbitrator ordered a "do-over" – reinstatement with back pay to be followed by a fair mental health evaluation to determine if there are rehabilitation strategies that meet the requirements of the CBA. *Decision* at 31. BSB asserts it cannot reinstate Staton because she does not comply with the statute. The basis for this assertion is Watson's opinion, an opinion the Arbitrator rejected. BSB may claim that Patenaude's evaluation is the basis for Staton's non-compliance, but by its own terms, that examination was not a fit for duty evaluation. *Evaluation* at 4.

Again, this Court must defer to the Arbitrator. "If the remedy fashioned by the arbitrator has been rationally derived from the agreement it will be upheld on review." *Savage Educ. Ass'n v. Trustees of Richland County Elementary Dist. No. 7,* 214 Mont. 289, 297, 692 P.2d 1237, 1241, (1984). That is true whether the remedy is "legally correct or incorrect." *Nelson v. Livingston Rebuild Center, Inc*., 1999 MT 116, ¶ 19, 981 P.2d 1185, 294 Mont. 408. The fact that the remedy

"might not have been awarded by a court of law is not grounds for vacating the award." *Id.* at ¶ 18. Judicial review of an arbitrator's remedy "is limited to whether the arbitrator's solution can be rationally derived from some plausible theory of the general framework or intent of the agreement." *Phoenix Newspapers, Inc. v. Phoenix Mailers Union Local 752,* 989 F.2d 1077, 1082 (9th Cir. 1993). "The reviewing court must observe the principle that arbitrators are free to fashion forms of relief which could not be ordered by a court in law or equity. Absent a clause specifically limiting the authority to grant a particular type of relief, it is implied by submitting to arbitration that the arbitrator has the power to order an appropriate remedy." *Livingston,* at ¶ 36 (internal cites omitted).

Here, because BSB utterly failed to comply with both its own policy and the CBA prior to terminating Staton, it was appropriate to order that she suffer no economic consequence and be put back on the payroll, while BSB goes back to the beginning and does what it was supposed to do in the first place.

IV. THIS DISPUTE SHOULD BE SENT BACK TO THE ARBITRATOR

As stated, while BSB neither reinstated Staton nor paid any backpay or benefits, it did arrange for a second evaluation and the results of that evaluation are now available. The question now is what those results mean and what, if any, is an appropriate remedy given those results. The answers to those questions must come

from the Arbitrator who, *at the request of the parties*, retained jurisdiction over implementation of the award. *Decision* at 31 *(emph. added)*.

Courts have long recognized that the proper course of action is to refer a matter back to an arbitrator when "the award fails to address a contingency that later arises or when the award is susceptible to more than one interpretation." *Sterling China v. Glass Workers Local No. 24,* 357 F.3d 546, 554 (6th Cir. 2004); *see also, Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union, Local 182B v. Excelsior Foundry, Co.,* 56 F.3d 844, 847 (7th Cir.1995); *Green v. Ameritech Corp*., 200 F.3d 967, 977 (6th Cir. 1999); *Sunshine Min. Co. v. United Steelworkers of America, AFL-CIO, CLC*, 823 F.2d 1289, 1295 (9th Cir. 1987)(" "It is firmly established that the courts may resubmit an existing arbitration award to the original arbitrator for interpretation or amplification."); *International Brotherhood of Electrical Workers v. New England Telephone & Telegraph Co.,* 628 F.2d 644, 647 & n. 4 (1st Cir.1980).

Referral back to the Arbitrator in this case comports with the agreement of the parties that the Arbitrator has jurisdiction over questions about the remedy and comports, too, with Montana's "well-established policy" of resolving labor disputes under the terms of the collective-bargaining agreement and through arbitration. *Klein v. State*, 2008 MT 189, ¶ 11, 343 Mont. 520, 185 P.3d 986.

The parties agreed that Arbitrator McCoy would retain jurisdiction. *Decision* at 31. While BSB is correct that the common law doctrine of *functus officio* can apply in certain circumstances, this is not one of them. "The doctrine of functus officio provides that unless both parties consent, the arbitrator's jurisdiction ceases when a 'final' award is issued." Norman Brand & Melissa H. Biren, *Discipline and Discharge in Arbitration,* 15.II.A., 15-3 (3rd ed., 2015). The issue here is that both parties consented to the arbitrator's ongoing jurisdiction. Thus, the arbitrator retains jurisdiction "to assist with the implementation of the award." *Decision* at 31.

V. THE ARBITRATOR'S DECISION DOES NOT VIOLATE PUBLIC POLICY

"A court may not enforce a collective-bargaining agreement that is contrary to public policy." *W.R. Grace & Co.*, 461 U.S. at 766. Similarly, courts may refuse to enforce an arbitrator's decision "where the contract as interpreted would violate 'some explicit public policy' that is 'well-defined and dominant.'" *Livingston* at ¶ 24 *(citing Misco,* 484 U.S. at 43).

Arbitrator McCoy considered both the statute and BSB's internal policy that mirrors the law, Policy 302. *See, Decision* at 23-24, e.g. McCoy did not disregard the public policy. In fact, the policy weighed heavily on McCoy's decision, and his determination was that "Montana Statute § 7-32-303 simply makes clear that a detective who does not maintain psychological well-being will face removal. How

the Employer discharges or removes an employee who does not pass a fitness for duty evaluation is governed by the Agreement." *Id.* at 23. In other words, Arbitrator McCoy did exactly what the parties contracted him to do. The fact is that no one has deemed Staton unfit for duty. Until that happens, she is compliant with the statute.

"It is the arbitrator's interpretation of the contract that must be determined to violate a public policy." *Livingston* at ¶ 24. However, if the public policy bars reinstatement, an arbitrator's award may be reversed. *Stead Motors*, 886 F.2d at 1212. The statute is silent on reinstatement. Instead, it says that the peace officer must "be free of any mental condition that might adversely affect performance of the duties of a peace officer, as determined after … (i) a mental health evaluation performed by a licensed physician or a mental health professional licensed by the state." § 7-32-303(2)(g), MCA. Had George Watson's evaluation been conducted in a satisfactory manner and still found Detective Staton to be in violation of the law, the statute may well have been relevant. However, Watson's fitness for duty examination was "completely unreliable support for the Employer's discharge decision." *Decision* at 30. To this day, Staton has not been found to be in violation of the statute.

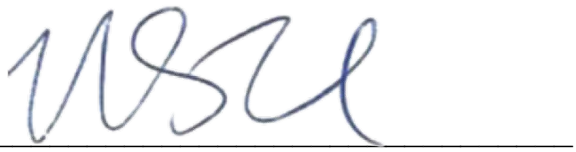
CONCLUSION

It is a bedrock principle of American labor law that labor disputes should be subject to arbitration. Here, the parties agreed to final and binding arbitration and agreed that the Arbitrator was to decide this matter. Based on the legal principle and the parties' own agreement, the scope of review of the Arbitrator's decision is extremely limited. The facts of this case are those determined by the Arbitrator. His legal conclusions represent a plausible interpretation of the collective-bargaining contract. His award must be enforced.

This case involved a termination and there is no doubt that a termination is covered by the contract's grievance and arbitration provisions. Butte-Silver Bow's issues concerning the processing of the grievance were addressed and properly adjudicated by the Arbitrator.

The Arbitrator did not consciously disregard Montana law and his remedy of reinstatement with back pay and benefits simply returned the parties to the status quo that existed immediately prior to the termination. When the parties submitted this case to the Arbitrator, they requested that he retain jurisdiction to resolve any disputes concerning the remedy. The appropriate remedy is one the parties agreed would be determined by the Arbitrator. This matter should be remanded to him.

Dated this 21st day of May, 2022.

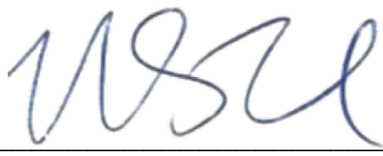


Nate McConnell
Attorney for BPPA

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that the foregoing Appellee's Response Brief is proportionally spaced, printed with the typeface Times New Roman, 14-point font, is double-spaced, and contains approximately 5,172 words, excluding the Caption, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service.

Dated this 21st day of May, 2024.



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I, Nate McConnell, hereby certify that I have served true and accurate copies of the foregoing Brief – Appellee's Response Brief to the following on May 21, 2024:

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