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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
SUCV2016-00938

TOWN OF WINTHROP

vs.

WINTHROP POLICE BROTHERHOOD LOCAL 421

MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS

INTRODUCTION

The Plaintiff, Town of Winthrop, seeks to vacate an arbitration award in favor of the Defendant, Winthrop Police Brotherhood Local 421, ordering the Plaintiff to reinstate patrolman Ferruccio Romeo ("Officer Romeo"). The Defendant filed a Motion to Confirm the Arbitration Award and a Motion for Attorney's Fees. In response, the Plaintiff filed a Cross-Motion to Vacate the Arbitration Award.¹ For the following reasons, the Defendant's motions are denied, the Plaintiff's motion is allowed, and the arbitrator's award is vacated. Judgment is to enter for the Plaintiff.

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Sent

04.05.17

HLG

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BACKGROUND

The following background is a summary of the arbitrator's factual findings.

¹ In response to the Defendant's Motion to Confirm the Arbitration Award, the Plaintiff submitted a document titled "Memorandum of Law in Support of Plaintiff's Motion for Judgment on the Pleadings." The Plaintiff never submitted a motion for judgment on the pleadings to this Court, but given the substance of the document, this Court will treat the Plaintiff's submission as a Cross-Motion to Vacate the Arbitration Award.

At the time of the incident leading to this action, Officer Romeo had been a patrolman in Winthrop for nineteen years. He had also served as the Defendant's union president for the past eleven years.

In 2014, the Plaintiff undertook the Winthrop Beach Nourishment Project, funded by the Massachusetts Department of Conservation and Recreation ("DCR"), to move sand and rocks to the Winthrop beach. A police detail was assigned to direct traffic around the project ("Pump Station Detail"). The Pump Station Detail required an officer with a police cruiser to work out of the Department of Public Works' pumping station. The detail officer was permitted to drive along the truck route as long as the police radio was on and he was available to quickly respond to an incident along the route. The detail officer was required to sign into the Pump Station Detail at 7:00 a.m. After signing in, he was permitted to use the next two hours as he wished. At 9:00 a.m., the detail officer was required to arrive at the Pump Station Detail where he would spend the day on site until approximately 3:00 p.m. During the shift, the detail officer was allowed bathroom breaks and a one hour lunch break.

Officer Romeo had signed up to perform the Pump Station Detail on November 24, 2014 from approximately 7:00 a.m. until 3:00 p.m. On the same day that he was scheduled to perform this Pump Station Detail, Officer Romeo was also scheduled to, and did, attend a union negotiation session at the Winthrop Town Hall from approximately 10:00 a.m. until 2:30 p.m. At the end of the day, Officer Romeo submitted a request to be paid for performing eight hours of work at the Pump Station Detail on November 24, 2014.

On November 25, 2014, Police Chief Terence Delehanty noticed that Officer Romeo submitted a pay request for the Pump Station Detail during the same time that he was negotiating on behalf of the union at the Town Hall.² On December 1, 2014, Chief Delehanty initiated an internal investigation into Officer Romeo's detail work on November 24, 2014. That same day, he placed Officer Romeo on paid administrative leave for the duration of the internal investigation.

Due Process Hearing

On December 18, 2014, the Plaintiff held a Due Process Hearing. In Chief Delehanty's testimony, he recalled that on November 25, 2014, he confronted Officer Romeo about his work the previous day for the Pump Station Detail. He testified that Officer Romeo explained to the Chief that after speaking with Manager Steve Colometo and Mike Vickery, both from DRC, he understood that the Pump Station Detail was a "floating detail" where the detail officer was not required to remain in any specific location as long as he was available to respond to an incident. Chief Delehanty also testified that Mr. Colometo informed him that the Pump Station Detail was "stationary" and that Mr. Colometo did not recall telling officers that it was a "floating detail." Mr. Vickery also told Chief Delehanty that the Detail was stationary. Chief Delehanty testified that he next asked three police officers about their understanding of the Pump Station Detail, all of whom confirmed that the detail officer had to be on the detail route, i.e. stationary.

Officer Romeo testified at the Due Process Hearing that he never submitted payment for a detail that he did not perform. It was his understanding that the detail was "mobile" and that it did not have a fixed post. Officer Romeo explained that he believed

² This Court reasonably infers that Officer Romeo was also paid for his negotiation work at the Town Hall.

that he was able to fulfill the Pump Station Detail's duties because he was located within a general radius of the actual work site, i.e. anywhere in Winthrop, that allowed him to respond to any emergencies along the Detail's route.

Officer Romeo testified that on November 24, 2014, he arrived at the Winthrop Police Station at 7:00 a.m. to pick up an available cruiser. He then went to the DCR trailer to submit his time slip, on which he indicated that he began working at 7:00 a.m. Officer Romeo testified that he left the DCR trailer and returned to the Winthrop Police Station around 9:45 a.m.

On redirect examination, Chief Delehanty explained that video surveillance and car access controls from November 24, 2014 showed that Officer Romeo entered the police building at 7:29 a.m. and left the building at 8:21 a.m. At 9:28 a.m., Officer Romeo returned to the police parking lot again, entered the police building at 9:32 a.m., and exited the building at 9:54 a.m. He then attended the union negotiations.

After the Due Process Hearing, Winthrop Town Manager James McKenna dismissed Officer Romeo as a police officer. As grounds for the decision, Mr. McKenna made five findings. First, Officer Romeo submitted a detail slip for payment for eight hours at the Pump Station Detail on November 24, 2014. During most, if not all, of the time that Officer Romeo billed for that Detail, he was not present at the Detail location. Mr. McKenna determined that billing for services rendered without being present constituted unacceptable judgment fraud and conduct unbecoming a police officer. Second, billing time for work not performed constitutes a dishonest act that is contrary to the trust that citizens put in public safety officers. Third, Officer Romeo stated that DCR engineers told him that it was unnecessary to be physically present at the Detail, but the

DCR resident engineer and the DCR inspector contradicted this account. All the members of the Winthrop Police Department who were contacted about the Pump Station Detail's duties also contradicted Officer Romeo's assertion that he did not have to be present at the Detail. Fourth, Officer Romeo's statements during the disciplinary investigation and hearing were untruthful, which itself, constituted just cause for dismissal. Fifth, Officer Romeo's above referenced conduct violated the rules and regulations of the Winthrop Police Department, specifically 1.4.8 integrity, 1.11.2 personal behavior and 1.11.113 conduct unbecoming an officer.

Arbitration

On January 16, 2015, Officer Romeo filed a grievance to challenge his dismissal. Because the parties were unable to resolve the grievance, the Defendant filed for arbitration on behalf of Officer Romeo. The parties agreed to submit the following issues to an arbitrator: (1) Was there just cause to terminate Officer Romeo? (2) If not, what shall be the remedy? The Plaintiff and Defendant submitted to arbitration hearings on August 24, 2015, September 24, 2015, October 21, 2015 and November 2, 2015.

At the Arbitration Hearing, Officer Romeo testified for a second time that he believed the Pump Station Detail was mobile and not stationary. When Officer Romeo was asked why he believed that it was a mobile detail instead of a fixed worksite, Officer Romeo stated that Mr. Colometo told him that he wanted the detail officer to be available if something happened. Mr. Colometo told him, "I don't want to get one of your shift officers tied up. So just be available." Officer Romeo testified that Lieutenant Lessard emphasized that he had to be available as a detail officer.

Officer Romeo acknowledged at the Arbitration Hearing that his memory regarding his whereabouts during the morning of the detail was incorrect and that he had difficulty recalling a morning that occurred approximately one month before the Arbitration Hearing. He explained further that he had performed the Pump Station Detail three times before that week.

At the Arbitration Hearing, the Plaintiff charged Officer Romeo with three acts that justified his termination: filing a false detail slip ("Charge 1"); lying to Chief Delehanty during his investigation ("Charge 2"); and lying at the Due Process hearing to determine his discipline ("Charge 3"). On February 26, 2016, the arbitrator rendered the following decision in favor of the Defendant:

Charge 1 – Filing a False Detail Slip

- “[Officer Romeo] correctly believed that he should be on the ready to respond to any incident along the truck route. He also believed that being present in the Town Hall on November 24 would fulfill the requirements of working the detail: he had radio contact with the dispatcher, although he was not called that day;³ he was in very close proximity at all times to the truck route he was assigned to assist in case of difficulty; he had a cruiser at his disposal; and he was free to respond if called.”
- “It was [Officer Romeo’s] belief that his physical location, while waiting for a call, was flexible: he believed that the Town Hall was an acceptable location, and that it was reasonable to position himself there, given the requirements of the detail. He offered the following: ‘I could perform the detail being mobile pretty

³ This seems at least inconsistent with the arbitrator’s other findings. Officer Romeo was perhaps within radio contact distance at the Town Hall, but never called.

much anywhere in town because the town is only 1.8 square miles.’ When asking DCR manager Colometo to characterize the responsibility of the Pump Station Detail, [Officer Romeo] recalled him saying words to the effect, I just want you to be available if something happens. I don’t want to get one of your shift officers tied up. So just be available. Colometo made it very clear that a primary requisite of this detail is that the officer assigned should always be available to respond.”⁴

- “Was [Officer Romeo] working the Pump Station detail when he was working the detail from the Town Hall? I find in the affirmative. He was performing all the tasks of working the detail for some 5 hours that day,⁵ albeit from an unapproved location. There was no protestation from either the Town or DCR that the detail had not been performed satisfactorily.”
- “Romeo did not ask for nor receive approval from the DCR personnel or the shift commander for this change of venue before he opted to make the change. It was a mistake not to do so, disobeying the verbal instructions he had been given by Colometo.⁶ But I do not find him dishonest when he acted on his belief that he could use the Town Hall as his base from which he could execute the detail.⁷ He was, in the words of Colometo, ‘available’ the entire shift.⁸ I find that he fulfilled the tasks of working the Pump Station Detail that day, albeit from a location that

⁴ Mr. Colometo did not testify at the Arbitration Hearing. Therefore, the arbitrator must have relied on Officer Romeo’s representation of Mr. Colometo’s statements to him, some of which were contradicted by Chief Delehanty’s representations of what Mr. Colometo told him.

⁵ That still means he submitted an inaccurate request to be paid.

⁶ This suggests that the arbitrator accepted that Mr. Colometo told Officer Romeo that he needed to be present at the detail.

⁷ The arbitrator does not articulate why he credits Officer Romeo’s erroneous and factually unfounded belief, given that the arbitrator also finds that Officer Romeo knew Mr. Colometo intended him to be present at the Detail.

⁸ Again, Mr. Colometo did not testify at the Arbitration Hearing. Therefore, the arbitrator must have relied on Officer Romeo’s representation of Mr. Colometo’s statements to him, some of which were contradicted by Chief Delehanty’s representations of what Mr. Colometo told him.

had not been approved, and was acting honestly when he submitted the DCR bill for November 24, 2014.”

- “It is worth noting that because he was engaged in working the Pump Station detail while attending the negotiation, the issue of detail time spent by him at the negotiations that was raised is not relevant.⁹ He was carrying out the detail for the hours required, while at the same time, participating in the negotiations.”

Charge 2 – Lying to Chief Delehanty during the Internal Investigation

- “[Officer Romeo] explained that it was his understanding of the detail, gained from speaking with Manager Steve Colometo of DCR, that he characterized the detail as a *floating detail*: a detail where you didn’t have to remain in one place as long as you were available. Because he understood it to be a *floating detail* in this sense, he didn’t believe that he had done anything wrong on November 24 when he worked the detail from the Town Hall.”
- “[Officer Romeo] asked Mr. Colometo what was required of the officer with the cruiser...He stated to [Officer Romeo] ... just be available.”
- “[Officer Romeo] testified at the Due Process hearing ... ‘My belief, based on the information that I had, was that I would be able to fulfill the requirement of the detail because it was a *mobile* detail and because of the distance involved; and in case of any emergency response, I would be available within a general radius of the actual work site.’” (Internal quotations omitted).

⁹ This is clearly an error of law. If Officer Romeo was “double billing,” i.e. billing for this detail when he was also being paid by the Town for the negotiation detail, then this is certainly relevant to determining whether there was just cause for his termination, especially where both sources of pay involve public money.

- “I can find no testimony from [Officer Romeo] where he asserted that Colometo gave him permission to work the detail from other than the Pump Station.”¹⁰
- “It is clear that [Officer Romeo] believed, albeit erroneously, that the detail gave wide latitude as to where the officer might work from, and this is what he conveyed to the Chief. Colometo, on the other hand, expected the officer to sit at the Pump Station or drive on the truck route.”¹¹
- “On December 1, 2014, [Officer Romeo] simply gave his opinion to the Chief about the detail based on conversation with Colometo. He did not state affirmatively that the detail was a ‘floating detail,’ and never asserted that Colometo agreed with him, but only offered that as a way of describing it. I find that he did not lie to the Chief during the investigation on December 1, 2014.”
- “[Officer Romeo] worked the Pump Station detail from start to finish, albeit from an unauthorized location, the Town Hall, with no apparent defect.”
- “[Officer Romeo] was aware that the intention of Colometo was to have an officer at the Pump Station or on the truck route,¹² yet he chose not to seek prior authorization for a change of location to the Town Hall, from either the DCR or his shift commander, but worked the detail from that unauthorized location.”

¹⁰ This finding is contradictory to the arbitrator’s other findings.

¹¹ This finding is contradictory to the arbitrator’s other findings, as it is clear that the arbitrator accepts that Mr. Colometo told Officer Romeo that he needed to be present at the Pump Station detail.

¹² Again, this finding, that Mr. Colometo told Officer Romeo that he needed to be present at the detail, is contrary to the arbitrator’s other findings.

Charge 3 – Lying During the Due Process Hearing

- “Although [Officer Romeo’s] testimony at the Town hearing was inaccurate, I do not find it was intended to deceive.¹³ Rather I find that it was a failure to recollect accurately what had occurred on the morning in question. He had nothing to gain by offering this inaccurate account of his activities between 7-10 am that morning.¹⁴ His time was his own between 7 am and 9 am and returning at about 9:30 am to prepare for the negotiations with his lawyer would be expected.”
- “Moreover, [Officer Romeo] is a lawyer, he has dealt with interrogations and lying in his capacity as the Union President, and he is well aware of what perjury is, and what damage perjury can bring to a police officer. He was aware that lying in these circumstances could potentially jeopardize his career as a police officer.¹⁵ Once he saw the video and keycard records information from that

¹³ The arbitrator’s finding allowing Officer Romeo to offer inaccurate testimony offends our society’s long-standing tradition of holding police officers to the highest moral caliber. It is an undisputed principle that police officers, like every witness, must testify honestly. They are often called upon to testify to facts that occurred months, if not years, before they appear in court. In those cases, the lapse in time does not justify offering inaccurate testimony. A police officer, like every witness, can testify that he does not recall the answer, if that is truthful. No witness’s testimony should be based on guesses or speculation. Unfortunately, the arbitrator’s decision effectively communicates to police officers that they do not have to provide factually accurate testimony.

¹⁴ This is another inaccurate finding. Clearly to save his job, Officer Romeo apparently believed he had to come up with some excuse for his behavior. Creating an erroneous and unfounded “belief” apparently was his excuse.

¹⁵ As a lawyer, Officer Romeo is forbidden from knowingly making a false statement of material fact or law to a tribunal. See Mass. R. Prof. C. 3:07, 3.3(a)(1) (2017) (“A lawyer shall not knowingly: make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer”). This Court, too, has ethical obligations to report lawyers who violate the Rules of Professional Conduct. See S.J.C. Rule 3:09, 2.15 (2017) (“A judge having knowledge of or receiving credible information indicating a substantial likelihood that a lawyer has otherwise violated the Rules of Professional Conduct shall take appropriate action.”). Given my concern that testifying to an unfounded and erroneous “belief” violates Rule 3.3(a)(1) of the Massachusetts Rules of Professional Conduct, and therefore implicates S.J.C. Rule 3:09, this Court will accordingly forward this opinion to the Massachusetts Board of Bar Overseers to satisfy my obligation.

morning, days after the Due Process hearing, he realized that he had misspoken during the Town hearing.”

- “I find the inaccuracy of the testimony reflecting what actually occurred the morning of November 24 was contributed in large part due to the Town preventing him access to the video and keycard records before the Due Process hearing. I find no deliberate misrepresentation on his part.”

Award

- “There was not just cause for the termination of Officer Romeo Romeo. He shall be given a Letter of Warning for failing to receive authorization for an alternative location for performing the Pump Station detail on November 24, 2014, prior to working the detail. He shall be made whole for all lost wages and benefits, less offsetting income.”

On March 21, 2016, the Plaintiff filed the instant action to vacate the arbitrator’s award. On April 11, 2016, the Defendant filed a counterclaim to affirm the arbitrator’s award.

DISCUSSION

This Court has only a limited role in reviewing an arbitrator’s award. See Bureau of Special Investigations v. Coalition of Public Safety, 430 Mass. 601, 603 (2000). “The strong public policy favoring arbitration requires us to uphold an arbitrator’s decision even where it is wrong on the facts or the law, and whether it is wise or foolish, clear or ambiguous.”¹⁶ City of Boston v. Boston Police Patrolmen’s Ass’n, 443 Mass 813, 818

¹⁶ Notwithstanding my serious concern about the propriety of the extreme deference that courts are required to give to an arbitrator’s decision, this Court is still required to apply it.

(2005). An arbitrator's award will only be vacated in the limited circumstances set forth in G.L. c. 150C, § 11(a)(1)-(5). This Court's research has not revealed that the Court is required to defer to an arbitrator who makes errors on both facts *and* law.

The Plaintiff initiated the instant action under G.L. c. 150C, § 11(a)(3), arguing that the arbitrator exceeded his authority by rendering an award that was in direct conflict with well-defined, dominant public policy. "Arbitration, it is clear, may not award relief of a nature which offends public policy." Bureau of Special Investigations, 430 Mass. at 603 (internal quotations omitted). In determining whether an arbitrator's award violates public policy, judicial review of the award is de novo, with no deference accorded to the arbitrators' decision. Essex Cnty. Sheriff's Dep't v. Essex Cnty. Corr. Officers Ass'n, 27 Mass. L. Rptr. 487 (Mass. Super. 2010) (Lowy, J.), citing Adam Ass'n, Inc. v. William, 22 Mass. L. Rptr. 380, 391 (Mass. Super. 2007) (Gants, J.).

This Court applies a three-part analysis to determine whether the narrow public policy exception to vacate an arbitrator's decision is appropriate in this case. Boston Police Patrolmen's Ass'n, 443 Mass. at 818; Town of Middleton v. Middleton Police Benevolent Ass'n, SUCV2014-1863, slip op. at 5-6 (Mass. Super. February 27, 2017) (Lauriat, J.). First, the public policy at issue must be well-defined and dominant. Id. Second, the exception does not apply to disfavored conduct in the abstract; rather, it only applies to disfavored conduct that is integral to performing one's employment duties. Id. at 819. Third, the arbitrator's award reinstating the employee must violate public policy to such an extent that the employee's conduct would have required dismissal. Id.

It is a well-defined, dominant public policy that dishonesty by police officers will not be tolerated. See Boston Police Patrolmen's Ass'n, 443 Mass at 820. Furthermore,

the courts have recognized that honesty is integral to a police officer's performance of his or her employment duties. See *id.* ("A police officer who ... shrouds his own misconduct in an extended web of lies and perjured testimony corrodes the public's confidence in its police force.").

Given the arbitrator's findings that "[Officer Romeo] was aware that the intention of Colometo was to have an officer at the Pump Station or on the truck route," and that Officer Romeo nonetheless testified that his "belief" was that he could perform the Detail from anywhere in Winthrop, the decision to reinstate him would offend public policy. Public policy requires that Officer Romeo's dishonesty throughout the course of Chief Delehanty's investigation and the subsequent hearings, as found by the arbitrator, required dismissal and that any lesser sanction would frustrate public policy. It would be untenable to allow police officers to disobey their assignment's rules, and then assert erroneous, unfounded "beliefs" to avoid responsibility for their misbehavior. Moreover, the Winthrop Police Department's internal policies further support the conclusion that Officer Romeo's conduct warranted dismissal. Under Rule 1.4.3, "Members shall report for duty at the time and place required by assignment or orders..."

In addition to the aforementioned reasons, the arbitrator's award must also be vacated because there is no basis for his findings or explanation of why he credits Officer Romeo's belief. There was no evidence in the record that supported Officer Romeo's "erroneous belief" that he could perform his duties from an unapproved location. Contrary to Officer Romeo's belief that the Pump Station Detail could be performed in a variety of off-site locations, everyone else from the Winthrop Police Station who was asked about the Pump Station Detail, as well as DCR, knew that it required an on-site

detail officer. Given that Officer Romeo's recollection of Mr. Colometo's description of the Detail duties were contrary to Mr. Colometo's testimony, the arbitrator was required to make a credibility determination. The arbitrator should have articulated why he credited Officer Romeo's belief in light of the contradictory facts in the record.

The arbitrator's decision to credit Officer Romeo's unfounded and erroneous belief in the absence of any supporting evidence, while at the same time crediting that he was expected to be at the detail, would allow future police officers to disregard the rules of their assignments and seek shelter from all consequences if they simply assert a "belief" that they were justified in their failure to follow department rules. "Although arbitration decisions are given great deference, they are not sacrosanct." Boston Police Patrolmen's Ass'n, 443 Mass. at 823.

Officer Romeo is not the first police officer to make a billing error. However, in this Court's experience, the police officer usually recognizes and admits that he made a mistake. Officer Romeo did not assume any such responsibility for his behavior. Instead of admitting his billing error, he simply stated his "belief" that the Pump Station Detail was "mobile," even though his belief lacked any factual support and that the arbitrator found it to be erroneous. While the discipline seems extreme, his termination is warranted because of his dishonesty, compounded by his unwillingness to take responsibility for disobeying the Detail's rules. Furthermore, although the arbitrator finds it "not relevant," the award appears to invite, if not encourage, double billing from public funds for doing details at which they are intentionally not even present.¹⁷

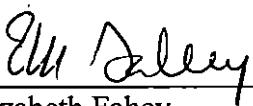
For these reasons, the arbitrator's award is vacated.

¹⁷ Neither party has requested that this Court remand the case to the arbitrator to address whether Officer Romeo double billed on November 24, 2014, and if so, what his consequence should be.

ORDER

It is therefore **ORDERED** that the Defendant's motions to affirm the arbitrator's award and for attorney's fees be **DENIED**. The arbitrator's February 26, 2016 award ordering the reinstatement of Romeo Ferruccio is **VACATED**. Judgment is to enter for the Plaintiff on its decision to terminate Romeo Ferruccio.

DATED: April 3, 2017



Elizabeth Fahey
Justice of the Superior Court