

In the Matter of the Arbitration between:

WINTHROP POLICE UNION, LOCAL 421
-and-
TOWN OF WINTHROP, MA

Re: AAA Case No. 01-15-0002-6830
Remedy: F. Romeo Reinstatement

AWARD

The details of the Remedy are sufficiently long and complex that they are best read in the body of the Award.

January 21, 2018
Pembroke, MA

Bruce Fraser

Bruce Fraser
Arbitrator

Winthrop Police Union, Local 421	Remedy Discussion
-and-	Case No. AAA 01-15-0002-6830 Officer F. Romeo Grievance
Town of Winthrop, MA	January 21, 2019

A remedy hearing was held in Winthrop, MA on September, 17, 2018, in Winthrop, MA. The Union was represented by Patrick Bryant, Esq, and the Town was represented by Howard Greenspan, Esq. Post-hearing briefs were received by the Arbitrator on November 18, 2018.

THE ISSUE

What should be the remedy due Ferruccio Romeo for the Town of Winthrop's termination of Officer Ferruccio Romeo without just cause?

INTRODUCTION

The grievant, Ferruccio Romeo, was placed on administrative leave on November 30, 2014, thereby precluding him from working overtime and details, and terminated from the Winthrop Police Department on January 9, 2015. The Union grieved the termination on January 16, 2015, and hearings were held on August 24, September 24, October 21, and November 2, 2015. Post-hearing briefs were received by the Arbitrator by January, 28, 2016, and an Award from the Arbitrator sustaining the grievance was issued on February 26, 2016.

The decision was appealed to the Superior Court, which vacated the Award on April 3, 2017, based on certain findings-of-fact which were not in the record. The Appeals Court reversed and confirmed the Award in a 1:28 decision on May 21, 2018, writing, "here,...the arbitrator's award

does not violate the well-defined public policy requiring honesty in police officers, because the arbitrator found that Romeo was not dishonest.” The Town thereupon petitioned for further judicial review which the Supreme Judicial Court denied on June 29, 2018. The Town restored Officer Romeo to a paid status on August 3, 2018.

A second arbitration hearing was held on October 18, 2018, to determine the remedy. Briefs were received by the Arbitrator on November 19, 2018. This award is the Arbitrator’s assessment of the facts and proposals presented by the parties. The position of the Union is to insure that Officer Romeo is made whole for the economic loss he suffered by virtue of his being terminated from the Winthrop Police Department from January 9, 2015 until August 3, 2018 – as if he had not been terminated. The Town takes the view that Officer Romeo should be compensated only for lost wages (including longevity, Quinn Bill, and holiday pay), overtime and detail pay, less a deduction for W-2 income, unemployment compensation, and business income.

The parties specified that the Arbitrator should decide the concepts to govern back-pay liability in each instance, but should not determine the specific amount, only the basic approach to the matters. I have done so, attempting to provide a rationale for my recommendation, considering “salary” and “benefits” to be broad and encompassing terms.

In what follows, a statement comparing the positions of the Union and the Town on the different compensation issues is presented first, followed by my recommendation on each of them.

POSITIONS OF THE PARTIES ON THE ISSUES AND THE RECOMMENATIONS

General

The position of the Union is to insure that Officer Romeo is made whole for the economic loss he suffered by virtue of his being terminated from the Winthrop Police Department from

January 9, 2015 until August 3, 2018. Officer Romeo is to be compensated for what he would have earned. The Town takes the view that he should be compensated only for lost wages (including longevity, Quinn Bill, and holiday pay), overtime and detail pay, less a deduction for W-2 income, unemployment compensation, and business income. Its proposal is that the Award should consist of only:

1. \$251,722 for regular wages including longevity, Quinn, and holiday pay
2. \$101,131 for overtime and detail pay
3. A deduction of \$86,825 for W-2 income, unemployment compensation and business income
4. A total of \$266,028 (\$251,722 plus \$101,131 less \$86,825) minus whatever the arbitrator determines is fair for the Grievant's failure to mitigate damages.

The Issues

Straight Wages

Union Position – The Union requested that the Town pay the amount of \$252,000 for lost base pay, including lost salary, holiday pay, educational differentia, and longevity for the termination period.

Town Position – The Town proposes to pay the amount of \$251,722 in regular wages. [Note: All amounts are reduced to the closest dollar amount.]

Arbitrator Recommendation – The Parties should find a compromise position for the \$378 difference. The amount due is \$251.xxx, plus the interest on this amount (the Parties must decide the rate) from the time Romeo was reinstated on August 3, 2018 to when he is paid the total amount, presumably in late January, 2019.

Details & Overtime

Union Position – The Union maintains that there is no dispute that Officer Romeo is entitled to the details and overtime he would have earned had he been working during the entire period. He was consistently among the highest earners and to place him in the middle is a disservice. Moreover, the use of a formula based on his previous earnings may not accurately address the fluctuating nature of the overtime and detail opportunities for the entire period. A fair way to calculate his potential -earnings during this period would be to consider the particulars of actual details and overtime earnings from December 2014 to September 8, 2018 and use an average of the top third earners in each category.

Town Position – The Town proposed \$101,131 based on an average for details

and overtime. It objects to the Union's proposal, stating that it was speculative in nature. The Town rejects the suggestion that the detail and overtime pay for lieutenants be included, since they are a separate bargaining unit. If they are included, then so should the retired police officers and reserves who are paid overtime and perform details.

Arbitrator Recommendation – Given Officer Romeo's participation and his earnings in Detail and Overtime was above average, I suggest that he be compared with the top third of like officers in this matter and receive the average amount of these individuals for the time he was omitted from participation.

Outside Compensation as an Offset

Union Position – What interim earnings Officer Romeo realized during his termination period were gained from his knowledge and skill as an attorney (see Tax Returns) and not because he was a Police Officer. In 2015, while still working as a Police Officer, he earned \$83,000 working as an attorney. This income is not relevant to mitigation.

Town Position – The Town maintains that the amount of damages should be offset by the amount of outside compensation earned by Officer Romeo, including the amount of unemployment compensation paid to him during the period of his absence. Specifically, since the Form 1040 from the year 2015 shows Wages of \$6,256, a Business income of \$59,629, and Social Security Benefits of \$20,940, the award should be reduced by \$86,824.97.

Arbitrator Recommendation – I do not view outside earnings that were carried on prior to his termination to be relevant here. His legal practice is unrelated to his police work, it may have been carried out to supplement his Town earnings, or it may have been for investment purposes. Whatever the case, it was not relevant to his police activities and should not be viewed as an offset.

In addition, I view Social Security income totally irrelevant to this matter and should also not be seen as an offset. I am not aware of the amount of Romeo's Unemployment Benefits, but they should be identified and not reimbursed.

The Mitigation of Damages

Union Position – The charges against Officer Romeo were toxic accusations against a police officer which effectively disqualified him from law enforcement and nearly derailed his secondary job as an attorney, due to the Superior Court's decision spurred on by the Town's claims of Officer Romeo's reported untruthfulness to the Board of Overseers. He simply could not obtain a reasonable job despite many tries. Moreover, there is no contractual basis which supports mitigation of owed salary.

Town Position – The Town maintains that the amount of salary owed Officer

Romeo should be offset by any income he received from working during this period. This includes the issues of separate income from legal work, Social Security, and Unemployment Compensation.

Arbitrator Recommendation – I know of no duty to mitigate, absent the CBA expressing this specific requirement. Moreover, there was no notice by the Town that it was necessary for Officer Romeo to attempt to mitigate the back salary he would receive. The notion of mitigation of damages in arbitration involves obtaining a position that is roughly the same as the one from which the grievant was removed. However, I have serious doubts that Officer Romeo could obtain employment at any of the dozens of organization he listed, given that he had been fired for, among other things, lying to his employer, and this was known. The Town made no credible effort to either cast serious doubt on the numerous places where Officer Romeo attempted to find similar employment, nor did it suggest a number of places where he might find employment. The examination of his attempt was rather cursory. I find no basis for migration of salary owed.

Tax Increase in 2019

Union Position –The Town’s “make-whole” payment will be considered by the IRS as taxable income and may place Officer Romeo in a higher tax bracket than before. Through no fault of his own, he will be forced to pay more in taxes and retain less income, than if his termination had never occurred. The Town should be required to pay any additional money due to the tax bracket, a process known as “Gross Up.”

Town Position – The Town does not believe that it owes interest on the back pay.

Arbitrator Recommendation – If, when the FY 2019 taxes are computed, Officer Romeo must pay over-and-above those which he would have paid had he been compensated in a timely way, the Town should make sure that Officer Romeo does not suffer extra payment simply because of the delayed payment of his salary and benefits because of the Town’s termination actions. If he does have to pay additional taxes in 2019, I believe that the Town should be responsible for the difference.

Pre-Judgement Interest

Union Position – If wages were delayed by no fault of Officer Romeo, he deserves interest.

Town Position – The Town maintains that the Arbitrator’s award is that Officer Romeo be made whole for all lost wages and benefits, less offsetting income. There is no mention in the Award of pre- or post-award interest. It is not customary for an arbitrator to grant interest on claims which he finds owing. However, interest has been granted where there are special circumstances such as

an employer's dilatory conduct, or a necessary delay in the grievance process, or bad faith. None of these facts are present here.

Arbitrator Recommendation – I find no basis for awarding any interest to the monies owed to Officer Romeo prior to the Award of February 16, 2017. Thereafter, I find interest appropriate.

Post-Judgement Interest

Union Position – The Union argues that Officer Romeo is not adequately made whole unless the Town pays appropriate interest on payments wrongfully withheld for the past 2.5 plus years. This addition is increasingly justified by arbitrators, especially where there are post-judgement delays. In the present case, the Town does not dispute that Officer Romeo is owed at least \$252,000, but to date, it has refused to pay any money and has enriched itself with the interest accrued. The Town should be required to pay statutory interest, under L.G. c.231, Section 61, from the date of the arbitration award, February 26, 2016, for all monies owed as of that time, compounded quarterly. In addition, the Town should be required to pay interest, compounded quarterly, on all monies owed, calculated on a monthly basis, from February 27, 2018 to September 8, 2018.

Town Position – The Town maintains that neither the parties' Agreement nor this submission expressly authorizes the arbitrator to award payment of interest. It maintains that it is not customary for the arbitrator to grant interest on claims. As above, it states that this is not a case where an employer delayed conducting the grievance process, or arbitration hearing, or acted in bad faith.

Arbitrator Recommendation – I find it to be fair that the Town pay interest from February 16, 2017, forward, when it rejected the arbitrator's decision to reinstate Officer Romeo following the Award, and entered into the Appeals process. At this point, the Town was gambling that the decision would be reversed and that it would have to pay nothing, and did not seek a stay of enforcement of the Award, pending appeal. The cost of this gamble was the interest charge on any monies owed Officer Romeo on items such as salary, benefits, etc. for the period between February 16, 2017 and August 3, 2018, when he was placed back on the payroll. The rate of interest should be determined by the parties.

Claims of Vacation Hours, Sick Leave, Personal Time, or Compensatory Time

Stipends/Differentials

Union Position – The Union also notes that Officer Romeo earned a night differential and officer-in-charge stipends in 2014. He should be compensated for the years he was out, for these lost earnings based upon his 2014 earnings.

Town Position – The Town rejects any payment of Stipend & Differentials.

Arbitrator Recommendation – If the opportunity for working the extra-duty activities was the same as in 2014, and unless the weight of arbitral evidence is opposed to this additional benefit, I think that some accommodation should be made for the period after the February 16, 2017.

Uniform Allowance.

Union Position - Officers are entitled to \$850 each year for uniforms, whether or not they use these funds to purchase uniforms, and whether or not these funds are sufficient for them to maintain their uniforms. Officer Romeo did not receive this benefit for the time he was out and should be paid the sum of \$1,700.

Town Position – The Town rejects any payment for uniforms.

Arbitrator Recommendation – Officer Romeo presumably received payment for 2015, missed 2016 and I understand that he did receive uniform payments in 2017 and 2018. This should cover his uniform needs.

Health Insurance

Union Position – The Town paid \$17,000 a year during Romeo's absence towards family health insurance premiums. Officer Romeo's actual cost for health insurance for the entire period, including premiums, deductibles, and co-pays, amounted to approximately \$10,500. Because the Town would have had to pay more than three times that amount in premiums alone, it should be ordered to pay for Officer Romeo's health care costs that were not covered by the Town.

Town Position – The Town rejects any payment for health insurance.

Arbitrator Recommendation – When Officer Romeo was absent from duty, he paid \$10,500 for health insurance. The Town should reimburse him for this amount.

Paid Leave

Union Position – The Town should credit or compensate Officer Romeo for all paid leave, including Vacation Leave (600 hours), Sick Leave (169 hours), Personal Leave (90 hours) and Compensatory/Time Due (360 hours) he would have accrued during his absence.

Town Position – The Town rejects any payment of benefits earned in past years. Since neither vacation days nor personal leave are accrued from year to year under the parties' Agreement, they should be denied. In addition, compensatory time must be earned and should not be included in the award.

Arbitrator Recommendations

1. Vacation Leave - According to Article XXXVI, Section 3, provides that “vacation leave shall not be accumulated from one vacation year to another, and salary shall not be paid in lieu of vacation....” It follows that Officer Romeo would have to have taken paid vacation for the years he was off-duty or lost the days. His back pay award will have paid him for this time. For the calendar year 2018, he would have been eligible to take vacation upon his return August 3, 2018 and the Union states that the Town credited him for the hours he should have received on July 1, 2018.

The Union also argued that vacation leave would be allowed to carry over with the Chief’s permission, and he has stated that he has allowed up to 40 hours to be carried over. Thus, Officer Romeo should be compensated or credited with 40 hours of additional vacation leave, which he would have earned.

2. Sick Leave in the amount of 1,600 hours was credited by the Town to Officer Romeo. The Union maintains that he should be credited with 169 hours more. Upon proof of the validity of the claim, the Town should credit him with this amount.

3. Personal Leave is not carried over to the following year. Thus no credit is due here.

4. Compensatory Leave/Time Due for not using Sick Leave time for 3 months. Officer Romeo consistently used very little Sick Leave. His absence caused him not to earn these extra hours of leave. However, these hours translated into time off from his duties, which meant vacation time, for which he is being paid by the Town retroactively.

Officer Romeo also performed additional job duties such as CJIS liaison and Details Maintenance for the Department, and averaged about 90 hours per year of “due time.” It is my understanding that this time was treated as compensatory time when he was excused from work. This, also, is covered by the back-pay order to the Town which it must pay.

This completes my assessment of the issue brought to me concerning making Officer Romeo whole as a result of an erroneous termination.

January 21, 2019
Pembroke, MA

Bruce Fraser

Bruce Fraser
Arbitrator

