

September 27, 2017

Terence M. Delehanty, Interim Town Manager
Winthrop Town Hall
Metcalf Square
Winthrop, MA 02152

Re: Town of Winthrop v. Winthrop Police Brotherhood Local 421
Appeals Court No.: 2017-P-0785

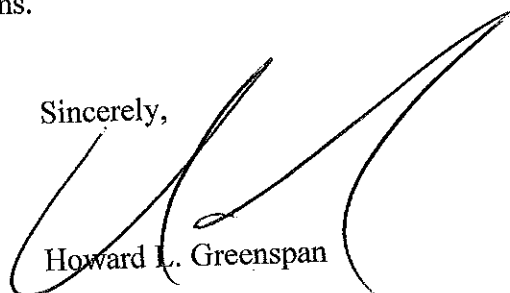
Dear Mr. Delehanty:

Enclosed please find the following:

1. Copy of the Town of Winthrop's Brief; and
2. Copy of Defendant Appellee's Brief in connection with the above referenced matter.

Please contact me if you have any questions.

Sincerely,


Howard L. Greenspan

HLG/dc
Encl.

**COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT**

Appeals Court No. 2017-P-0785
Lower Court No. 1684CV00398

TOWN OF WINTHROP,

Plaintiff - Appellee,

v.

WINTHROP POLICE BROTHERHOOD LOCAL 421,

Defendant - Appellant,

On Appeal from the Judgment of the
Suffolk Superior Court

DEFENDANT - APPELLANT'S BRIEF

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Dated: July 24, 2017

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I. STATEMENT OF THE ISSUES

1. Whether the Superior Court erred in denying Defendant's motion to confirm the Arbitrator's Award, pursuant to G.L. c. 150C, Section 10, and granting Plaintiff's request to vacate the award, pursuant to G.L. c. 150C, Section 11?
2. Whether the Superior Court improperly made independent findings of fact regarding the dispute that were beyond, and in conflict with, those facts found by the Arbitrator?
3. Whether the Superior Court applied the appropriate standard of review to the Arbitrator's Award?
4. Whether the Superior Court erred in failing to grant the Union's request for attorney's fees and costs?

II. STATEMENT OF THE CASE

In January 2015, the Town of Winthrop ("the Town"), terminated the employment of Ferruccio Romeo, who had been a patrol officer in the Winthrop Police Department for 19 years. [App. 9]. The Winthrop Police Union, Local 421, MCOP ("the Union") filed a grievance contesting the termination pursuant to its collective bargaining agreement with the Town. *Id.* The parties were unable to resolve the grievance and the Union filed for arbitration. *Id.* at p. 14. The matter was heard by Arbitrator Bruce Fraser. *Id.* The parties agreed to the following issue: "Was there just cause for the termination of Officer Ferruccio Romeo? If not, what shall be the remedy?" *Id.* at 15. The

Arbitrator determined that the Town did not have just cause to terminate Romeo and ordered that he be reinstated, with back pay. *Id.* at 37.

The Town filed a complaint in Superior Court, requesting that the Award be vacated. [App. 7]. The Union filed a motion to confirm the Award, which sought interest and attorneys' fees. *Id.* at 45. The Town filed a Memorandum of Law in Support of Plaintiff's Motion for Judgment on the Pleadings, though it never filed a Motion for Judgment on the Pleadings. The Superior Court treated the Town's Memorandum as a Cross Motion to Vacate the Arbitration Award. *Id.* at 205. The Superior Court denied the Union's motion and granted the Town's motion. *Id.* at 218. The Union filed a timely notice of appeal. *Id.* at 221.

III. STATEMENT OF FACTS

A. The Arbitrator Finds that Romeo Was Not Dishonest

As of January 2015, the Grievant, Romeo, had been a patrol officer in the Winthrop Police Department for 19 years. [App. 16]. Prior to the termination at issue in this matter, Romeo had an unblemished and discipline-free record. *Id.* He had also served as President of the Union for some 11 years and, while a

Winthrop police officer, earned a law degree and passed the Massachusetts Bar. *Id.* On November 24, 2014, Romeo was not scheduled to work his regular day shift. *Id.* at 14-16. In other words, there is no evidence offered or found by the arbitrator that November 24 was a paid work day for Romeo. Romeo signed up to work a police detail that day, referred to as the "Pump Station Detail." *Id.*

The Town is approximately 1.8 square miles in length. [App. 32]. In 2014, the Town undertook the Winthrop Beach Nourishment Project, which was funded by the Massachusetts Department of Conservation and Recreation (DCR). *Id.* This project involved moving sand and rock to the Winthrop beach. *Id.* In mid-Fall 2014, it became necessary to add a detail (i.e., the Pump Station Detail) to the daily Winthrop Police Department details that assisted, when necessary, with traffic associated with the project. *Id.* It was this Pump Station Detail that Romeo signed up for on November 24, 2014. *Id.*

Generally, the Pump Station Detail was scheduled from 7 a.m. to 3 p.m., with the officer required to be on duty at 9 a.m. (officers, after signing in at 7 a.m., were free to spend time until 9 a.m. as they

wished). *Id.* The Winthrop Department of Public Works (DPW) Pump Station was located near the beach and along the traffic route, where the project took place. *Id.* Officers working the Pump Station Detail were assigned a police cruiser: they could base themselves at the Pump Station or drive about the area as needed, including along the truck route associated with the project. Officers assigned to the Pump Station Detail were expected to be available to respond to emergencies that happened along the truck route. [App. 16, 18-19]. The detail officer was not required to remain at the Pump Station; the officer could use the assigned cruiser to move about as long as the police radio was on and the officer could respond quickly to an incident. *Id.* No evidence was produced at the arbitration hearing that Romeo, or other officers, were ever informed that the detail was a "stationary" detail, meaning that an officer was required to be parked at the Pump Station at all times. *Id.* Officers assigned to the Pump Station Detail are seldom called upon to do anything. *Id.* at 19.

On November 24, 2014, in addition to working the detail, Romeo, as President of the Union, was also scheduled to attend labor negotiations with the Town.

[App. 16]. Officers had been permitted by the Chief to attend negotiations while assigned to a detail. *Id.* at 30-31. Romeo did, in fact, attend negotiations on that date from approximately 10 a.m. to 2:30 p.m. *Id.* The supervisors of the shift that day knew Romeo was assigned to a detail and attending negotiations. *Id.* at 31. Negotiations lasted much longer than everyone expected. *Id.* at 22. He attended negotiations wearing his uniform, carrying a radio, and with access to an assigned cruiser. *Id.* at 22. The Town never called him to service. *Id.* at 32. He subsequently submitted a detail slip indicating that he had worked the Pump Station Detail that day. *Id.* at 16.¹ On November 25, 2014, Police Chief Terence Delehanty (hereinafter "Chief Delehanty") reviewed Romeo's detail slip and knew that Romeo had been at negotiations on the 24th. *Id.* Yet, Chief Delehanty decided to investigate Romeo's detail slip. *Id.* at 17. On December 1, 2014, Chief Delehanty called Romeo to his office and asked why he submitted a detail slip for a period when he attended negotiations. *Id.*

¹ An officer working the detail would be on duty between 9 a.m. and 3 p.m., and was authorized to indicate that he/she had worked 8 hours on the detail. *Id.* at 15-16.

Romeo informed Chief Delehanty that it was his belief, based on the information that he had been given by DCR Manager Steve Colometo (hereinafter "Colometo") and another DCR employee, Mike Vickery (hereinafter "Vickery"), that he could fulfill the requirements of the detail while at negotiations because the Pump Station assignment was a mobile, or floating, detail (i.e., a detail where an officer was not required to remain in one place, as long as available to respond to a call). [App. 34]. He stated that he believed he could perform a mobile detail from negotiations because he was within the general radius of the work site and was available to respond to any calls within a minute or two. *Id.* Romeo did not claim to have been given permission by Colometo, or anyone else, to work the detail from a location other than the Pump Station. *Id.* Romeo told Chief Delehanty that he would never put in a slip for a detail he had not worked. *Id.* at 20.

Chief Delehanty, who did not have any documents describing the detail and its requirements, subsequently spoke with Colometo and asked him about the detail. *Id.* at 18-19. Colometo explained that the purpose of the detail was to monitor truck traffic

from the Pump Station location. *Id.* When asked whether it was a mobile, or floating, detail, Colometo replied that it was a stationary detail. *Id.* He further stated that he did not recall telling officers that it was a floating detail. *Id.* Chief Delehanty later asked Vickery if he had told officers that they could perform their duties on a floating basis, Vickery did not directly answer the question, but indicated that it was a stationary detail. [App. 18].

In a letter provided to Romeo on December 1, 2014, Chief Delehanty informed Romeo that he was being placed on administrative leave pending an investigation of the detail. *Id.* at 17. The letter further stated: "I am ordering you not to discuss this matter with anyone except for your legal representatives while the investigation is ongoing." *Id.* In addition to ordering Romeo not to discuss the matter with his co-workers, the Town also froze Romeo's access to documents related to the work he performed on November 24, 2014, including video and door access monitor records. *Id.* at 36. There is no evidence Romeo was ever paid for the detail. On December 9, 2014, Romeo received a letter from Town Manager James McKenna stating that the Town would hold

a Due Process Hearing to consider Romeo's actions on November 24, 2014 and that the hearing "might result in discipline including dismissal for just cause." *Id.* at 17. This pre-termination Due Process Hearing was held December 18, 2014. *Id.*

During the Due Process Hearing, Romeo was asked to describe the work he performed on November 24, 2014. *Id.* at 21. Romeo testified the he followed his usual practice and arrived at the police station at 7 a.m., picked up a cruiser, got his detail slip signed at the DCR offices, picked up a coffee and a bagel, went to the Pump Station, and remained there until about 10 a.m., when he went to the Town Hall for negotiations. [App. 35]. He indicated that his recollection might be somewhat faulty. *Id.* at 21.

Subsequently, Chief Delehanty, during re-direct testimony, testified that video and card access control records showed that Romeo arrived at the police station parking lot at about 7:24 a.m., entered the station at 7:29 a.m., and left the building at 8:21 a.m. *Id.* He further testified that the same records showed Romeo return to the station parking lot at 9:28 a.m., enter the station at 9:32 a.m., and exit the station (to attend negotiations at Town Hall) at

9:54 a.m. *Id.* Following the Due Process Hearing, Romeo was, for the first time, allowed to check the documentation cited by Chief Delehanty. *Id.* Romeo recognized the flaws in his initial description of the events of November 24th. *Id.*

Following the Due Process Hearing, McKenna terminated Romeo. *Id.* at 23. The termination letter dated January 9, 2015, stated, *inter alia*:

1. On November 24, 2014, you submitted a voucher for a detail slip for pay for 8 hours pay in the total amount of \$344 for a detail at the Short Beach Pump Station. During the time that you billed for this detail, you were not present at the detail. Billing for services rendered without being present constitutes unacceptable judgment fraud, and conduct unbecoming an officer.
2. The above referenced conduct constitutes a dishonest act which is contrary to the trust that citizens put in public safety officers.
3. You specifically stated that the engineers from the Commonwealth of Massachusetts stated to you that it was unnecessary for you to be physically present at the detail. Your statement was specifically contradicted by the DCR resident engineer as well as the DCR inspector. Your assertion that you didn't have to be present at the detail was also specifically contradicted by other members of the Police Department.
4. Your statements during the disciplinary investigation and the hearing were

untruthful which in and of itself
constitutes just cause for your dismissal.

[App. 24].

Romeo and the Union grieved the termination. *Id.*
As the parties did not resolve the grievance, the
Union filed for arbitration. *Id.* at 25. The parties
agreed that the arbitrator would decide this issue:
"Was there just cause for the termination of Officer
Ferruccio Romeo? If not, what shall be the remedy?"
Id. at 15. The Town cited three specific acts by Romeo
that it argued justified his termination: (1) filing a
false detail slip; (2) lying to the Chief during the
course of the investigation; and (3) lying during the
Due Process Hearing. [App. 26].

At the arbitration hearing, Romeo testified that
the chronology of events described by Chief Delehanty
regarding his actions between 7 and 10 a.m. on
November 24, 2014 was correct. *Id.* at 21, 36. He
further explained that his statements on this subject
at the Due Process Hearing were based upon his
recollection of having performed three other Pump
Station Details during the same week. *Id.* He had not
been able to refresh his recollection prior to his Due
Process Hearing testimony because he had not been

allowed to view the video or card access control records until after the Hearing. *Id.*

Following a multi-day hearing at which both parties put on multiple witnesses and submitted documentary evidence, and after receiving written briefs filed by both parties, the Arbitrator determined that the Town did not have just cause to terminate Romeo. *Id.* at 15, 37. **Regarding Charge 1, the Arbitrator found that Romeo did not file a false detail slip.** *Id.* at 33. The Arbitrator held that the substance of the Town's charge was that Romeo knowingly and deliberately submitted documents stating that he had worked the Pump Station Detail from 9 a.m. to 2 p.m. on November 24, 2014, when in fact he had not worked it. [App. 32]. The Arbitrator held that Grievant "correctly" believed that the primary duties of the detail were to be ready to respond to any incident on the truck route. *Id.* Furthermore, the Arbitrator found that the Grievant did have radio contact with the dispatcher, was in close proximity to the truck route, had a cruiser at his disposal, and was free to respond to any police calls. *Id.* Accordingly, the Arbitrator found that Romeo's culpability for Charge 1 had not been proven because

"he was performing all the tasks of working the detail for some five hours that day ..." even if he was located at the Town Hall. *Id.* at 33. The Arbitrator held that: "The critical question here is the following: Was Romeo working the Pump Station detail when he was working the detail from the Town Hall? I find in the affirmative." *Id.*

Regarding Charge 2, the Arbitrator found that Romeo did not lie to Chief Delehanty during the investigation about the detail. *Id.* at 35. The basis of this charge was the Town's allegation that Romeo lied by claiming that "the engineers from the Commonwealth of Massachusetts stated to you that it was unnecessary for you to be physically present at the detail." *Id.* at 24. Contrary to this allegation, however, the Arbitrator found that while Colometo did expect the officer assigned to the detail to be based at the Pump Station, Romeo never "asserted that Colometo gave him permission to work the detail from the Town Hall." *Id.* at 34. Rather, Romeo merely told Chief Delehanty that he believed that the detail was a mobile detail and that he had wide latitude to move around while on the detail, so long as he was nearby the truck route and available to respond to any calls

regarding the detail. *Id.* at 35. Thus, the Arbitrator wrote that:

On December 1, 2014, Romeo simply gave his opinion to the Chief about the detail based on [his] 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.

Id. at 24.

Regarding Charge 3, the Arbitrator found that Romeo did not lie during the Town Due Process Hearing. [App. 35-36]. The Town contended that Romeo's recitation of his whereabouts between 7 a.m. and 10 a.m. on November 24 was a lie. *Id.* However, the Arbitrator found that: "Although Romeo's testimony at the Town hearing was inaccurate, I do not find that it was intended to deceive." *Id.* (emphasis added) To the contrary, the Arbitrator held that Romeo merely failed to accurately recollect what had occurred that morning and that the inaccuracy of his description of events was "contributed" to in "large part" by the Town "preventing him access to the video and keycard records before the Due Process hearing." *Id.* The Arbitrator determined that Romeo had nothing to gain by offering an incorrect description of his

whereabouts since "[h]is 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 could be expected."

Id. "Once he saw the video and keycard records information ... days after the Due Process Hearing, he realized he had misspoken at the Town Hearing." *Id.* Consequently, the Arbitrator wrote: "I find no deliberate misrepresentation on his part." *Id.*

While the Arbitrator did not find that the Town had proven any of its charges, he did find that Romeo should have asked for permission to base himself at the Town Hall during the detail. *Id.* at 37. Because he did not seek permission to base himself at Town Hall, the Arbitrator ordered that he should be issued a Written Letter of Warning. *Id.* He concluded that the Town's termination violated the just cause language of the collective bargaining agreement. *Id.* To remedy this breach, the Arbitrator ordered the Town to reinstate Romeo and make him whole for all lost wages and benefits (minus offsetting income). *Id.*

**B. The Superior Court Voiced "Serious Concern"
With Longstanding Precedent Regarding The
Narrow Scope of Judicial Review of Arbitration
Awards**

During oral argument before the Superior Court in this matter, Justice Fahey voiced her distaste for longstanding precedent regarding the limited role of the courts when reviewing an arbitration award on a motion to vacate. [App. 179]. When counsel for the Union noted the "narrow" scope of judicial review, Justice Fahey responded:

I have, frankly, never understood why we give such deference. I have to put a bag on my head. Unless there is fraud, which is never proven, I have to put a bag on my head and affirm what some arbitrator decides. He could be wrong on the facts, wrong on the law, and unless there's fraud or a violation of public policy, I'm supposed to affirm it.

Id. This distaste was restated in her Order. After citing a case describing the appropriate standard for judicial review, Justice Fahey wrote in a footnote that: "Notwithstanding my serious concerns about the propriety of the extreme deference that courts are required to give an arbitrator's decision, this Court is still required to apply it." *Id.* at 215.

**C. The Superior Court Made Findings of Fact In
Addition to, and Contrary to, Those Found by
the Arbitrator**

Despite the Arbitrator's clear and unambiguous findings that Romeo was not dishonest and did not lie, and despite her tacit acknowledgment that judges are bound by an arbitrator's findings, Justice Fahey made her own findings of fact regarding Romeo's conduct and credibility. Justice Fahey first articulated independent findings of fact during oral argument:

What I understand occurred in this case is that it was denied and then some fiction about you don't have to show up at this detail. I get to collect all this money and I don't have to show up. I need to be available even when I'm at a hearing for four and a half hours. I mean, what's the taxpayer going to think of this?

Id. at 177.² The Order affirmed and expanded upon her findings, contrary to the Arbitrator, that Romeo lied.

Justice Fahey ordered that the Award be vacated because Romeo's "dishonesty throughout the course of

² See also App. 186, where Justice Fahey stated:

So [Romeo] wasn't just oh, I made a mistake. He wasn't just -- so that's why it seemed more -- there was a flagrancy to it that the arbitrator, in my skimming his decision, seemed to be saying well, he said what he believed. I've seen too much of that recently. You know, it's just not necessarily correct.

Chief Delehanty's investigation and the subsequent hearings, as found by the arbitrator, required dismissal and that any lesser sanction would frustrate public policy." [App. 217]. Additionally, contradicting her statements that the vacating of the Award was based on the Arbitrator's findings, she held that there was "no basis" for the Arbitrator's "findings or explanation of why he credits Officer's Romeo's belief" that he could perform the detail from a location other than the Pump Station. *Id.* at 218. She referred to the Arbitrator's findings as "inaccurate" and "contradictory." *Id.* at 213. She made her own finding regarding Romeo's credibility, writing that his statements regarding his "belief" were "unfounded and erroneous." *Id.* Finally, even though Romeo was not paid separately for attending bargaining and that the Town never accused him of "double billing," Justice Fahey determined that she could "reasonably infer[] that Officer Romeo was also paid for his negotiations work at the Town Hall," that the Arbitrator committed an "error of law" by failing to find that Romeo had been "double billing," and stated that "the award appears to invite, if not encourage, doubling billing" *Id.* at 218. Justice Fahey also

referred Romeo, a Massachusetts lawyer in good standing, to the Board of Bar Overseers for investigation.³

Justice Fahey acknowledged that judicial disregard for the appropriate standard could result in considerable financial cost to taxpayers:

I mean, I think defense counsel is correct that very often -- all too often in my mind -- but that if I find a public policy violation and I'm wrong, you're going to be paying him for two more years while he's practicing law, apparently. His own lawyer said that; that's what he's been doing. I didn't know that. And that's what you -- that's what the Town of Winthrop wants me to do.

... But notwithstanding that the town could then be on the hook for whatever thousands of dollars, tens of thousands of dollars, that's what the town wants.

[App. 186].

IV. SUMMARY OF ARGUMENT

The Superior Court erred by vacating an arbitration award that specifically concluded that a

³ Justice Fahey wrote:

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.

Id. at 214, n.15.

terminated police officer did not file a false detail slip or lie. [Brief at 28-37]. Given these findings, the Superior Court erroneously concluded that it violated public policy to reinstate an officer who filed a false detail slip and/or lied. *Id.* It is black letter law that a court is bound by the facts found by an arbitrator, even if the court believes the arbitrator's findings are incorrect, poorly reasoned, contradictory, or ambiguous. *Id.* at 26-28. As recently as July 2017, the Supreme Judicial Court confirmed that a court cannot apply the public policy exception to vacate an award when the arbitrator already rejected the factual basis for the public policy argument. *Id.* at 33-34. In other words, the public policy exception cannot be applied where the arbitrator has found that the employee did not engage in the conduct alleged to violate public policy. *Id.* Thus, where the Arbitrator chosen by the Town and the Union in this matter expressly rejected the factual allegations that form the basis of the Town's Complaint, the Superior Court was required to confirm the Award without even addressing the Town's public policy argument. *Id.* at 35-38.

The Superior Court further erred by making its own independent findings of fact and reaching its own conclusions, contrary to those found by the Arbitrator. [Brief at 42-48]. It compounded these errors by basing its Order to vacate the Award upon those independent findings. *Id.* Despite citing to the strict standard of review applied to the judicial review of arbitration awards, the Superior Court dismissed the Arbitrator's findings, describing them as erroneous, incorrect, and contradictory. *Id.* The Superior Court based its decision to vacate the Award on its own finding that Romeo was dishonest, despite the Arbitrator's clear and unambiguous finding that Romeo was not dishonest. *Id.* Indeed, the Superior Court went so far as to assert that Romeo was double billing (i.e., that he was paid both for the detail and attending negotiations, which would constitute fraud) even though Romeo was indisputably not paid for attending negotiations and the Town never alleged that he was paid in this manner. *Id.* at 45-48. The Superior Court further abused her authority by recommending Romeo, a lawyer in good standing, for bar investigation based upon conduct that the Arbitrator found to be truthful and not fraudulent. *Id.*

For these reasons, the Court should vacate the Order of the Superior Court and remand the case to the Superior Court with instructions to confirm the Award and determine the attorneys' fees. *Id.* at 49-50.

V. ARGUMENT

A. The Court Is Bound By The Arbitrator's Findings Of Fact And Conclusions

Massachusetts appellate courts have repeatedly emphasized the limited role of the courts in reviewing arbitration awards. The scope of judicial review of an arbitration decision is very narrow and deferential. *City Of Boston v. Boston Police Patrolmen's Ass'n*, No. SJC-12077, 2017 WL 2960815, at *7 (July 12, 2017) (hereinafter *Boston Police Patrolmen's Ass'n 2017*) (Add.); *School Dist. of Beverly v. Geller*, 435 Mass. 223, 225 (2001); *Bureau of Special Investigations v. Coalition of Public Safety*, 430 Mass. 601, 603 (2000); *Plymouth-Carver Reg'l Sch. Dist. v. J. Farmer & Co., Inc.*, 407 Mass. 1006, 1007 (1990). A court may not review alleged errors of law or fact or overrule an arbitrator based on a different interpretation of a contract. See *Concerned Minority Educators of Worcester v. School Comm. of Worcester*, 392 Mass. 184, 187-88 (1984). Indeed, a court is "strictly bound by

an arbitrator's findings and legal conclusions, even if they appear erroneous, inconsistent, or unsupported by the record at the arbitration hearing." *City of Lynn v. Thompson*, 435 Mass. 54, 61 (2001), cert. den. 534 U.S. 1131 (2002); see also *Boston Police Patrolmen's Assn v. City of Boston*, 60 Mass. App. Ct. 672, 674 (2004), rev. den. 442 Mass. 1103 (2004) ("Unlike our review of factual findings and legal rulings made by a trial judge, we are strictly bound by an arbitrator's findings and legal conclusions, even if they appear erroneous, inconsistent, or unsupported by the record at the arbitration hearing.").

A party disappointed by an arbitrator's ruling cannot obtain judicial relief because it disagrees with a decision rendered by the very individual it has directed to resolve the controversy. *Id.* Absent fraud, corruption, or misconduct, an arbitration award may be vacated only if it was in excess of authority or requires the public employer to commit an act prohibited by law. G.L. c. 150C, § 11(a); *School Comm. of Waltham v. Waltham Educators Ass'n*, 398 Mass. 703, 705-06 (1986); *Plymouth-Carver Reg'l Sch. Dist.*, 407 Mass. at 1007. "An arbitrator's result may be wrong;

it may appear unsupported; it may appear poorly reasoned; it may appear foolish. Yet, it may not be subject to court interference." *City of Lynn*, 435 Mass. at 62. Therefore, regardless of the findings by the Superior Court, this Court is bound by the Arbitrator's findings of fact and conclusions, including his findings that Romeo did not file a false detail slip and did not lie during the investigation or the Due Process Hearing.

B. The Court Need Not Address The Application Of Public Policy Related To A Police Officer Lying Because The Arbitrator Unambiguously Found That Romeo Did Not Lie

While a court may, on rare occasions, vacate an arbitration award that violates a well-defined and dominant public policy, there are no grounds to apply the public policy exception in this matter.⁴ Though the

⁴ "To meet the criteria for application of the public policy exception, the public policy in question must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. The public policy exception does not address disfavored conduct, in the abstract, but only disfavored conduct which is integral to the performance of employment duties. Finally, we require a showing that the arbitrator's award reinstating the employee violates public policy to such an extent that the

Town and the Superior Court rely on a public policy against police officers lying, which is not nearly as broad as either appears to believe, the Court cannot even reach the public policy arguments because the basic facts necessary to support its application are lacking. See *City of Lynn*, 435 Mass. at 63-65. The Court need not analyze any public policy regarding police officers lying because the Arbitrator clearly and unambiguously found that Romeo did not lie.

In its Complaint, the Town alleged: "On November 24, 2015 ... Romeo submitted a false detail slip ..." [App. 9]. However, the Arbitrator specifically found that Romeo did not file a false detail slip. *Id.* at 33. The Town further alleged in its Complaint that: "During the course of the investigation conducted by the Chief of Police, Romeo lied to the Chief as to the obligations of the detail." *Id.* at 9. However, the Arbitrator found that Romeo did not lie during the investigation. *Id.* at 35. Finally, the Town alleged that: "During the pre-termination hearing before the

employee's conduct would have required dismissal."

City of Lynn, 435 Mass. at 62-63 (internal quotations and citations omitted).

Town Manager of the Town of Winthrop, Romeo lied as to the times that he was at the detail ..." *Id.* at 9.

However, the Arbitrator found that Romeo did not lie during the hearing before the Town Manager. *Id.* at 36. Given these findings, there are no grounds to address the public policy relied upon by the Town and the Superior Court.

The Town is not the first public employer to seek to vacate an arbitrator's award on public policy grounds despite the arbitrator's refutation of the basic findings necessary to support such an action. In the *City of Lynn* case, a public employer argued that an arbitrator's award reinstating a police officer whom the employer alleged had used unnecessary and excessive force violated public policy. 435 Mass. at 63-65. However, the Supreme Judicial Court found that it did not need to consider whether it violated public policy to reinstate an officer who used unnecessary and excessive force *because the arbitrator had found that the officer did not actually engage in such conduct.* *Id.* The Court specifically rejected the employer's argument that the award violates public policy by requiring the reinstatement of an officer who used unnecessary and excessive force: "We need not

parse the application of the public policy exception to such a scenario, because it is a factual scenario that the arbitrator expressly determined had not been proved." *Id.* at 65.

Notably, even while confirming the award, the Court gave every indication that it did not agree with conclusions reached by the arbitrator, writing:

One may well take issue with the arbitrator's analysis. The conclusion that an officer, whose record includes a civil rights judgment against himself and the city for excessive force (including an award of \$30,000 in punitive damages), nevertheless has an unblemished record because another arbitrator determined that [the officer] should not be disciplined for that incident, appears notably unsound. Similarly, the conclusion that force sufficient to break a person's arm, even the arm of a person with fragile bones, is not "excessive" when the person does not even pose a current danger to the officers is a conclusion that seems indefensible. Finally, common sense would dictate that the city would not voluntarily pay [the alleged victim] to settle her civil rights claim unless there were significant evidence supporting that claim.

Id. at 64. The Court acknowledged that, despite its strong reservations about the merits of the decision, it nonetheless was bound by the arbitrator's findings. *Id.* ("Yet, we are not free to ignore the arbitrator's conclusions merely because they appear unsound, poorly reasoned, or otherwise flawed.").

Similarly, the Supreme Judicial Court did not need to "parse the application of the public policy exception" in a case where an employer alleged that a teacher was not fluent in English because the arbitrator had concluded that the employer failed to establish this basic fact. *Sch. Comm. of Lowell v. Robishaw*, 456 Mass. 653, 664-65 (2010). This Court refused to determine whether it violated public policy to reinstate a police officer who was alleged to have violated three teenagers' constitutional rights and engaged in felonious conduct by assaulting the teenagers because the arbitrator had found that the officer had not engaged in the alleged conduct. *O'Brien v. New England Police Benev. Ass'n, Local 911*, 83 Mass. App. Ct. 376, 381-82 (2013) (court could not find that it would violate public policy to reinstate officer "by the expedient of ignoring the arbitrator's finding that [the officer] had acted reasonably under the circumstances and had not violated the rights of the teenagers, nor used excessive or improper force, nor had improperly used his firearm").⁵

⁵ See also *International Brotherhood of Teamsters, Local 122 v. Boston Housing Authority*, No. 2016-1130A (Mass. Super. July 18, 2016) (no need to address public policy argument related to employees making

Recently, in July 2017, the Supreme Judicial Court again reiterated the core holding of these cases, writing, "We are aware of no prior application of the public policy exception to vacate an award ordering reinstatement where the arbitrator found no underlying misconduct." *Boston Police Patrolmen's Ass'n* 2017, 2017 WL 2960815, at *7. In that case, an officer was terminated based on an allegation that he had used unreasonable force during an arrest and had been dishonest during a subsequent investigation when he denied having used excessive force. *Id.* at *3. An arbitrator found that, though he had used a choke hold during the arrest, he had not used unreasonable force and had not been dishonest during the investigation of the incident. *Id.* at *3-4.

The Supreme Judicial Court noted that "a de novo analysis of whether [the officer's] actions constituted excessive force in the totality of the

threats of violence where arbitrator specifically found that employee did not make threats of violence) [App. 89]; *City of Boston v. Boston Police Superior Officers' Federation*, No. 2012-9985 (Mass. Super. Sept. 13, 2013) (no need to address public policy argument regarding police officers telling the truth where arbitrator found that officer did not lie) [App. 103].

circumstances could support a conclusion very different from the one reached by the arbitrator." *Id.* at *7. However, the Court concluded that the question to be answered when a public employer relies on the public policy exception is not whether an employee's actions "justified termination," but "whether it required termination, such that any lesser sanction would violate public policy." *Id.* Because the arbitrator found that the officer used reasonable force and was not untruthful in subsequent investigations, the award was upheld, even though the Court was clearly troubled by the officer's use of a choke hold. *Id.*

These cases establish that a court cannot apply the public policy exception when an arbitrator has already rejected the factual basis for the employer's public policy argument. That is true even where a court finds an arbitrator's conclusions to be inconsistent, unsound, poorly reasoned, or foolish. Pursuant to these cases, this Court cannot uphold the Superior Court's vacating of the Arbitrator's Award on the grounds that it violates public policy to reinstate an employee who has filled out a false detail slip or lied because the Arbitrator expressly

found that Romeo did not fill out a false detail slip or lie.

Regarding Charge 1, the Arbitrator found that Romeo correctly believed that the primary duties of the detail were to be ready to respond to any incident on the truck route and that Romeo's culpability for Charge 1 was "not proven" by the Town because "he was performing all the tasks of working the detail for some five hours that day ..." App. 33, 37. **The Arbitrator wrote, "The critical question here is the following: Was Romeo working the Pump Station Detail when he was working the detail from the Town Hall? I find in the affirmative." Id. at 33.⁶**

Regarding Charge 2, the Arbitrator found that Romeo did not lie to Chief Delehanty during the investigation regarding the detail on November 24, 2014, Id. at 35. The basis of this charge was the Town's allegation that Romeo lied by claiming that

⁶ Courts have found that officers are on duty when they are, for example, in uniform and on-call. See, e.g., *Wormstead v. Town Manager of Saugus*, 366 Mass. 659, 665 (1975) ("A venerable line of workmen's compensation cases established the principle that one who is injured while on call, even though not actually working, is entitled to compensation, at least where he is injured on the employer's premises.").

"the engineers from the Commonwealth of Massachusetts stated to you that it was unnecessary for you to be physically present at the detail." *Id.* at p. 24. The Arbitrator wrote that:

On December 1, 2014, Romeo simply gave his opinion to the Chief about the detail based on [his] 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.**

Id. at 35 (emphasis added).

Regarding Charge 3, the Arbitrator found that Romeo did not lie during the Town's Due Process hearing. *Id.* The Town contended that Romeo's recitation of his whereabouts between 7 a.m. and 10 p.m. was a lie. *Id.* However, the Arbitrator, who personally witnessed all testimonial and documentary evidence, found that: "Although Romeo's testimony at the Town hearing was inaccurate, I do not find that it was intended to deceive." *Id.* at 36. He held that Romeo merely failed to accurately recollect what had occurred that morning and that the inaccuracy of his description of events was "contributed" to in "large part" by the Town "preventing him access to the video and keycard records before the Due Process hearing."

Id. Consequently, the Arbitrator wrote: "**I find no deliberate misrepresentation on his part.**" *Id.* (emphasis added).

Thus, this is not a case where the Arbitrator found that the employee actually engaged in felonious perjury but determined that termination was excessive. *Cf. City of Boston v. Boston Police Patrolmen's Ass'n*, 443 Mass. 813, 819 (2005) (hereinafter "*Boston Police Patrolmen's Ass'n* 2005") (applying public policy exemption where arbitrator ordered that police officer be reinstated even though arbitrator had found officer falsely arrested two individuals on misdemeanor and felony charges and lied in sworn testimony over a period of two years about official conduct). Rather, this is a case where the Arbitrator clearly and unambiguously found that the employee did not engage in the terminable acts alleged by the employer. Given that the Court is bound by those findings, even if it feels the Award is "wrong on the facts or the law ... wise or foolish, clear or ambiguous," there is no need to parse the application of the public policy exception in this matter, because the factual scenario alleged by the Town in its Complaint is the exact scenario that the Arbitrator determined had not been

proved. *Boston Police Patrolmen's Ass'n 2005*, 443 Mass. at 818; see *City of Lynn*, 435 Mass. at 65.⁷

C. The Public Policy Exception Does Not Apply To The Only Improper Act The Arbitrator Found That Romeo Committed.

While, as explained below, the Superior Court's findings differ from the Arbitrator's findings, the only improper conduct found by the Arbitrator (i.e., that Romeo should have sought authorization to work the detail while based at Town Hall), does not implicate the public policy relied upon by the Town or the Superior Court. This public policy exception has been applied only in situations where the arbitrator actually found that the officer engaged in egregious felonious conduct. In the Supreme Judicial Court case in which this public policy was discussed, *Boston Police Patrolmen's Ass'n 2005*, the public policy exception was applied only because the arbitrator actually found that the officer falsely arrested two individuals on misdemeanor and felony charges, lied in

⁷ See also *City of Boston*, 60 Mass. App. Ct. at 674 ("Unlike our review of factual findings and legal rulings made by a trial judge, we are strictly bound by an arbitrator's findings and legal conclusions, even if they appear erroneous, inconsistent, or unsupported by the record at the arbitration hearing.").

sworn testimony, and continued to lie about his official conduct for over two years. 443 Mass. at 819. The Court held: "A police officer who uses his position of authority to make false arrests and to file false charges, and then shrouds his own misconduct in an extended web of lies and perjured testimony, corrodes the public's confidence in its police force." *Id.* at 820. Therefore, the Court concluded the officer's "continued employment as a police officer would frustrate strong public policy against the kind of egregious dishonesty and abuse of official position in which he was proved to have engaged, we vacate the arbitrator's award." *Id.* at 814.

This public policy exception has not been applied where the arbitrator did not find facts establishing that an officer engaged in egregious felonious conduct and abuse of power. See *Sheriff of Suffolk County v. Jail Officers & Employees of Suffolk County*, 451 Mass. 698, 702-703 (2008) (confirming award reducing discipline for officer from a termination to six-month suspension where arbitrator's findings of fact did not firmly establish that the officer supplied false information, rather than merely incomplete

information, in order to cover up assault of inmate); *University of Massachusetts Boston v. Massachusetts Com'n Against Discrimination*, 2008 WL 5382249, *4 (Mass. App. Ct. 2008) (public policy discussed in *Boston Police Patrolmen's Ass'n 2005* inapplicable where officer drafted an accident report that "contained some misstatements" because such conduct was "far less egregious than making false accusations of misconduct against members of the public") (App. 107); *Massachusetts Bay Transp. Authority v. MBTA Superior Officers Ass'n*, 2005 WL 3605390, *6 (Mass. Super. 2005) (confirming award where arbitrator concluded that officer's actions in making insensitive and arguably racist comments did not establish conduct unbecoming of an officer, and further noting that even if conduct unbecoming an officer had been established, public policy would still not require dismissal) [App. 114].⁸

⁸ See also *City of Peabody v. Peabody Firefighters, Local 925*, 2008 WL 731979, *2 (Mass. App. Ct. 2008) (confirming award reducing termination to 30-day suspension where "conduct of the employee in the present case represented mere dereliction of duty, rather than false arrests of citizens followed by obstruction and prevarication in the ensuing investigation.").

Here, the Arbitrator found only that Romeo should have sought authorization to work the detail while based at Town Hall. He did not find that Romeo filed a false detail slip or lied. He found that Romeo, even from Town Hall, performed the work expected of the detail - available to respond to emergencies. The public policy related to untruthfulness or egregious felonious conduct certainly does not apply to a failure to properly request authorization related to the manner in which a detail is performed. Romeo was not found by the Arbitrator to have abused his power as an officer or to have engaged in egregious conduct of any type.⁹ Again, the Court is bound, as the Superior Court should have been bound, by these conclusions even if it finds the Award to be "wrong on the facts or the law ... wise or foolish, clear or ambiguous." *Boston Police Patrolmen's Ass'n 2005*, 443 Mass. at 818. It does not offend public policy for an arbitrator to direct the reinstatement of an officer who failed to seek permission to work from a different

⁹ The Arbitrator noted that the Town itself argued that "if the only misconduct of Romeo was filing a false detail slip (Charge 1), there would be some grounds for reversing the dismissal based on the principles of progressive discipline." [App. 28].

location, especially where this different location was known to his supervisors and the Chief. Accordingly, the public policy exception discussed in the *Boston Police Patrolmen's Ass'n 2005* case cannot be applied to this matter.¹⁰ Thus, the Court should vacate the decision of the Superior Court and remand the case to the Superior Court with instructions to confirm the Arbitrator's Award.

D. The Superior Court Did Not Apply The Proper Standard Of Review And Improperly Made Findings Of Fact In Addition To, And Contrary To, Those Found By The Arbitrator

While the Court can order that the Award be confirmed without addressing the Superior Court's findings and analysis, it is clear that the Superior Court did not apply the correct standard of review. The extent of the Superior Court's disregard for the well-established standard warrants independent correction. As explained above, a court is "strictly

¹⁰ Even if the Arbitrator had found that Romeo had lied in this matter, the public policy exception discussed in the *Boston Police Patrolmen's Ass'n 2005* does not apply here, because Romeo's conduct did not involve an abuse of power or an egregious act, such as a series of lies intended to cover up a false arrest. Given the Arbitrator's findings that Romeo did not lie, it is not necessary for the Court to address this issue.

bound by an arbitrator's findings and legal conclusions, even if they appear erroneous, inconsistent, or unsupported by the record at the arbitration hearing." *City of Lynn*, 435 Mass. at 61; *Boston Police Patrolmen's Ass'n* 2017, 2017 WL 2960815, at *4. This standard is cited in the Superior Court's Order as applicable in theory, but ignored in fact. The Order not only contains independent findings of fact and credibility determinations that directly contradict those made by the Arbitrator and are without independent factual basis, the decision to vacate the Award is based upon those independent findings and determinations.¹¹

The Order states that the Award must be vacated because 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." [App. 217]. However, the Arbitrator clearly and unambiguously found that Romeo did not lie

¹¹ It appears that the disregard shown for the appropriate standard of review was based upon Justice Fahey's personal distaste. She voiced "serious concern" with the level of deference given to an arbitrator's findings both during the oral argument and in the text of her Order. See *supra* at 21-23.

and was not dishonest. Indeed, the Order quotes the Arbitrator's findings that he did "not find [Romeo] dishonest when he acted on his belief that he could use the Town hall as his base from which he could execute the detail," that he "did not lie to the Chief during the investigation on December 1, 2014," that he "did not intend to deceive" during the Due Process Hearing, and that he did not commit "deliberate misrepresentation." [App. 211, 213-15]. Given that the Superior Court based its Order on a conclusion that was the opposite of that reached by the Arbitrator, it is unclear what is meant by its statement that its Order is based upon facts "as found by the arbitrator."

The Order's grounding in independent findings of fact made by the Superior Court is made abundantly clear in a series of footnotes describing the Arbitrator's findings as "contradictory" and "inaccurate." *Id.* The Order states that "there is no basis" for the Arbitrator's "findings." *Id.* at 217. Romeo's "belief" that "he could perform the Detail from anywhere in Winthrop," which was relied upon by the Arbitrator, is described as "erroneous." *Id.* at 217.

A significant portion of the Order is devoted to the Superior Court's independent analysis of Romeo's credibility. The Superior Court acknowledges that its determination regarding Romeo's credibility differs from the Arbitrator's own determination, as the Order states that the Arbitrator erred by "allowing Officer Romeo to offer inaccurate testimony" and by failing to articulate why he "credited Romeo's belief" regarding where and how the detail could be performed. *Id.* at 214, fn. 13, 218. Of the Arbitrator's finding that Romeo had no reason to offer an inaccurate account of his activities on the day in question, the Superior Court writes, "This is another inaccurate finding." *Id.*

Additionally, the Order contains an independent finding of fact about alleged double billing, stating, "This Court reasonably infers that Officer Romeo was also paid for his negotiation work at the Town Hall." *Id.* at 207, 218. The Arbitrator's alleged failure to make a finding that Romeo engaged in double billing, despite not being asked to do so by any party, is described as "an error of law." *Id.* at 212. None of this is based upon any facts contained in the Award, the record before the Arbitrator, the pleadings of the

parties, or representations during oral argument. Simply stated, Romeo was not paid on November 24, 2014 - either for his time as a negotiator, for police shift, or for the detail. He did not submit a bill to be paid for anything other than details. And the Town never alleged that Romeo was paid for any reason that day, or engaged in "double billing" or "double dipping." In this context, the Superior Court's baseless publication of a criminal, career-ending allegation, where the standard of review expressly forbade the Superior Court from engaging in such action, is deeply troubling.

The Superior Court's decisions to second guess the Arbitrator, make its own findings of fact, and address an alleged "error of law" arising from an issue never placed before the Arbitrator are all clearly outside of the appropriate standard of review. A court is bound by an arbitrator's findings even if they "appear erroneous, inconsistent, or unsupported by the record at the arbitration hearing" and "errors of law or fact" do not provide grounds to set aside an award." *City of Lynn v. Thompson*, 435 at 61. The Superior Court never should have determined that the Arbitrator's findings were "contradictory" or

"inaccurate." [App. 211, 213-15].¹² Similarly, it never should have determined that Romeo's testimony was not credible.¹³ Nor should it have inferred that Romeo was double billing.¹⁴ It also should not have faulted the arbitrator for failing to *sua sponte* consider Romeo's "double billing", where the Town never claimed Romeo had done so, and, moreover, even if the arbitrator had investigated the issue at the Town's instigation, he would have found no evidence in support of the claim. The Superior Court certainly should not have based its Order to vacate the Award on its independent findings

¹² The Superior Court was particularly concerned with what it saw as contradictory findings by the Arbitrator. However, the appropriate standard of review, articulated as recently as July 12, 2017, establishes that "inconsistent" findings are not grounds for vacating an award. *Boston Police Patrolmen's Ass'n* 2017, 2017 WL 2960815 at *4. Otherwise, as appellate courts know, this will render the deferential review a nullity, by miring judges in microscopic analysis of factual findings in arbitration decisions to determine if they are 100 percent consistent.

¹³ In addition to being outside of the well-recognized standard of review, it is notable that the Superior Court's credibility determination regarding Romeo's testimony was not even based upon a review of a transcript of the hearing, as there was no transcript to review.

¹⁴ The Superior Court should not have made an inference regarding double billing even if the record supported such an inference, which it did not.

of fact, credibility determinations, and conclusions regarding errors of law. These errors did not merely infect reversible error of an order that can be corrected on appellate review. Justice Fahey used the independent and unfounded findings to refer Romeo, a Massachusetts lawyer in good standing, to the Board of Bar Overseers for discipline. *Id.* at 214.

The public policy exception can be applied only where the arbitrator finds that an employee engaged in the conduct that violates public policy. That did not happen here. Thus, the Superior Court acted improperly when it based its application of the public policy exception upon its own independent findings and conclusions, rather than those of the Arbitrator.¹⁵

¹⁵ The Superior Court also improperly engaged in its own analysis regarding whether Romeo's termination was justified, stating, "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." [App. 218]. The question to be answered when a public employer relies on the public policy exception is not whether an employee's actions "justified termination," but whether the employee's actions, as found by the arbitrator, "required termination, such that any lesser sanction would violate public policy." *Boston Police Patrolmen's Ass'n* 2017, 2017 WL 2960815 at *7 (emphasis added).

**E. The Superior Court Should Be Ordered To Revisit
The Union's Request For Attorney's Fees**

Given the Superior Court's disregard for the appropriate standard of review and the additional costs incurred by the Union as a result of the Town's filing of a complaint that alleged facts directly contrary to those found by the Arbitrator, this matter should be remanded to the Superior Court with instructions to revisit the Union's request for Attorney's fees. The Union argued below that it is entitled to fees and costs under G.L. c. 231, § 6F because the Town knowingly drafted a complaint that ignored the Arbitrator's conclusions, as well as black letter law establishing that any reviewing court would be bound by those conclusions. [App. 61-64].¹⁶

¹⁶ G.L. c. 231, § 6F provides, in relevant part:

Upon motion of any party in a civil action in which a finding, verdict, decision, award, order or judgment has been made by a judge . . . the court may determine, after a hearing . . . that all or substantially all of the claims defenses, setoffs or counterclaims . . . made by any party who was represented by counsel during most or all of the proceeding, were wholly insubstantial, frivolous and not advanced in good faith . . . If such a finding is made with respect to a party's claims, the court shall award to each party against whom such claims were asserted

VI. CONCLUSION

For the reasons stated herein, the Court should vacate the Order of the Superior Court and remand the case to the Superior Court with instructions to confirm the Arbitrator's Award, and revisit the Union's motion for Attorney's Fees.

Respectfully submitted,

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Dated: July 24, 2017

an amount representing the reasonable counsel fees and other costs and expenses incurred in defending against such claims.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Rules of Appellate Procedure, the undersigned hereby certifies that the foregoing brief complies with the rules of the Court that pertain to the filing of briefs.

/s/Patrick Bryant

Patrick N. Bryant

CERTIFICATE OF SERVICE

I, Patrick N. Bryant, hereby certify that I have this day served a copy of the foregoing Brief of Defendant-Appellant upon the Plaintiff-Appellee, by forwarding a copy to counsel for Plaintiff-Appellee, Howard L. Greenspan, via first class mail.

Signed under the pains and penalties of perjury
this 24th day of July, 2017.

/s/Patrick Bryant

Patrick N. Bryant

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NOTIFY

7

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.

Noted
Sent
04.06.17
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PNB
PREPC
(mo)

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

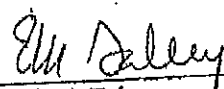
For these reasons, the arbitrator's award is vacated.

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

Winthrop Police Local 421	Arbitration Decision & Award
	AAA No. 01-15-0002-6830
	Grievance: F. Romeo
Town of Winthrop, Massachusetts	February 26, 2016

Hearings were held in the Town of Winthrop, MA on August 24, September 24, October 21, and November 2, 2015. 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 January 28, 2016.

THE ISSUE

The parties agreed upon the following issue:

Was there just cause for the termination of Officer Ferruccio Romeo?

If not, what shall be the remedy?

THE FACTS

In 2014, the Town of Winthrop, Massachusetts undertook the Winthrop Beach Nourishment Project funded by the Massachusetts Department of Conservation and Recreation (DCR). This project involved moving considerable sand and rock to the Winthrop beach area. In mid-Fall, 2014, it became necessary to add a detail to the daily Winthrop Police Department details in order to assist the traffic in connection with the work being carried out. This detail, known as the Pump Station detail, required an officer with a cruiser to work out of the D.P.W. pumping station at the end of Crest Avenue, with license to move about the area as needed.

The Pump Station detail required the officer who had signed up for it on any given day to be on duty from 9 am until 3 pm-a total of 6 hours-although he was authorized to indicate 8 hours at

his signing in at 7 am when he was to report to the DCR office. After signing in, the Pump Station detail officers were free to spend the first two hours of the detail as they wished, as long as they arrived at the pump station by 9 am. The detail required that the officer was to be available if there was an incident along the truck route that required attention. The detail officer was not required to remain at the Pump Station, but could cruise along the route as long as the police radio was on and was able to respond quickly to an incident. A one hour lunch break was authorized as were bathroom breaks, as needed. Generally, work for this detail ceased about 2:30 pm and the detail officer present was not required thereafter, and was free to leave.

At the time of the incident leading to this grievance, Ferruccio Romeo, the Grievant, had been a Patrolman for 19 years with the Wintthrop Police with an unblemished record, had been the Union President for some 11 years, and had acquired a law degree and passed the Massachusetts Bar during this time. He was not scheduled for a day shift on November 24, 2014, and signed up for the Pump Station detail for that day. However, as the Union President, he was scheduled to attend a negotiation session on that date, beginning at 10 am. [Note: The term *negotiation* will be used throughout to refer to both negotiation and mediation sessions.] He attended the negotiation session from approximately 10 am to 2:30 pm on November 24, 2014, and did not go to the Pump Station between 10 and 2:30 that day. He submitted a Pump Station detail slip for 8 hours of work on November 24, 2014.

On November 25, in checking over the detail slips from the day before, Police Chief Terence Delehaanty noticed that Romeo had submitted a slip for 8 hours worked on the Pump Station detail, while for 5 hours of that time, he was engaged in Union-Town negotiations along with the Chief.

On December 1, 2014, the Chief had questioned a number of individuals, including Romeo, to whom he later wrote the following:

I am writing to inform you that I am placing you on Administrative Leave with Pay pending the outcome of an internal investigation of a detail you worked on 8/24/14 (sic)

Please turn in your firearm, badge, radio, and I.D. to Sergeant Rogers the Administrative Sergeant while you are on leave.

I am also ordering you not to discuss this matter with anyone except for your legal representatives while the investigation is ongoing.

You will be notified when and where your employee interview will take place by my office.

On December 9, 2014, Town Manager James McKenna wrote to Romeo informing him that he would hold a Town Due Process hearing to consider Romeo's actions on November 24, 2014, "which might result in discipline including dismissal for just cause." The hearing was held on December 18, 2014.

[Note: The following testimony was taken either at the Due Process hearing or at the Arbitration hearing and is interpolated unless indicated otherwise.]

At the Town hearing, the Chief testified that on November 25, 2014, he realized that he saw Romeo at the negotiation session while the detail slip indicated he was on detail duty. On December 1, 2014, he called Romeo to his office, offered him Union representation, which he refused, but stated that he wanted to explain the matter. The Chief stated that Romeo explained that it was his understanding from speaking with Manager Steve Colometo and Mike Vickery of DRC that the Pump Station detail was a floating detail, one where you didn't have to remain in one place, but as long as you were available to respond, you need not remain in a specific loca-

tion. The Chief stated that Romeo felt that because he understood it was a floating detail, that he hadn't done anything wrong.

Pursuant to his investigation, the Chief telephoned a number of individuals with Lt. Perrin in the room. [Perrin presumably heard only one side and was not asked to be a witness at either hearing.] The Chief testified that he called the DCR Resident Manager Steven Colometo who is in charge of the Winthrop Beach Project. According to the Chief, Colometo explained that the purpose of the detail was to monitor truck traffic specifically from the Pump Station location, and when asked if it was a floating detail, replied that no, it was a stationary detail. Colometo said he did not recall talking to other officers about it being a floating detail. His memo, dated October 6, 2014, states, in part, that "Winthrop shall have 1 detail at Short Beach near D.P.W. building with a cruiser."

The Chief also spoke with DCR Inspector Mike Vickery who works for Colometo who stated it was a stationary detail to monitor truck traffic on Crest Ave. When asked specifically whether or not he informed the detail officers if they could perform their duties on a floating basis, he did not directly answer the question, but said that it was a stationary post.

When questioning Officer Feeley about his understanding of the detail, Feeley stated that it was a stationary post and that the officer was expected to remain on the post except for bathroom and lunch breaks. When Officer Defreitas, he replied that the detail was called the "Pump Station" and that's where he thought he should be. Inquiring of Lt. Frank Scarpa what he believed that pump station detail entailed, he replied that you were assigned there to respond to emergencies, "that you were like a one-man strike force, that if anything happened along the truck route that, you would respond and take care of it. When asked by the Chief if it was his understanding

that it was a stationary post, Scarpa said "You had to be there." From these responses, the Chief stated that he drew the conclusion that Romeo's version was not viable.

When questioned at the arbitration hearing whether or not the Pump Station detail was different from the other details, Sergeant Arthur Hickey stated, "The job is to go to the pump house, take a cruiser, go to the pump house and just sit there. And should an emergency arise, they send you for anything along the truck route involving the DRC." When asked if Romeo, while at the negotiation at the Town Hall, would be able to respond if there were a call to Pump Station detail, Hickey's response was "Oh absolutely... We're talking a short distance here had there even been an issue along the truck route or anywhere else in town for that matter." When asked if it's a "roaming detail," he did not answer directly, but pointed out that it's kind of crazy sitting in one spot for eight hours." On cross examination, he acknowledged that he never advised an officer assigned to the Pump Station detail that they didn't have to go there.

When questioned under cross-examination, the Chief admitted he did not have any documents describing what the Pump Station detail consisted of and stated that he was not aware that the officer on this detail is seldom called upon to do anything. He did acknowledge that after the Romeo incident, he ordered a supervisor to be hired for these details.

When cross-examined about the discipline imposed on various officers, the Chief acknowledged he followed a policy of progressive discipline, although he stressed that where you began would depend on the severity of the event, and the person's willingness to accept responsibility, and their willingness to be retrained.

The Chief stated that discipline is commensurate with the infraction, and "when a person recognizes they have done something wrong and is willing to accept responsibility for that is dif-

ferent, much different in my view, than a person who as not accepted responsibility. He continued, that "when you've recognized you did something wrong and you recognize that you shouldn't have done that, you won't repeat it. A person who doesn't recognize that will repeat it (the behavior), and I think the goal is to make sure the behavior's not repeated." He did not agree that the fact that he had assigned a supervisor for these details after the Romeo incident meant that the failure of supervision bore some responsibility for Romeo's event.

At the Town hearing on December 18, 2014, the Grievant, Ferruccio Romeo, testified that he had never put a slip in for a detail he didn't work, that he had worked that detail on November 24, 2014, and stated that he had worked the Pump Station detail three times before that week.

Romeo testified that his understanding of the detail is that it was a mobile detail, it did not have a fixed post." He continued that

My belief, based on the information that I had, was that I would be able to fulfill the requirements of that detail because it was a mobile detail and because of the distances involve... in case any emergency responded (sic), I would be available within a general radius of the actual work site.

Romeo testified that when he met with the Chief in his office along with Lt. Perrin, he was informed that he was being placed on Administrative Leave pending an investigation involving the detail slip he had submitted. After receiving the Chief's permission to explain his position, he explained what he had been informed of the detail and stated to the Chief that he "should know that I would never put in for a slip without actually working a detail." Romeo continued that he then explained to the Chief his understanding of what the detail consisted of, in particular, that he had been informed by Colometo, Vickery, and Lessard that the only responsibility for that detail was to be available for emergencies.

At this point Romeo stated that the Chief left the room saying "Let me see if I can at least rescind the Administrative Leave portion." He returned a short time later, explained that he was counseled against doing it, and thereupon implemented the Administrative Leave.

Romeo testified on direct examination that on November 24, he followed his usual practice: he arrived at the station at 7 am, picked up an available cruiser (in this case Winthrop 9-4), then went to the DCR trailer at Mermaid and Shore where he submitted his slip for the day, putting the start time of 7 am on the slip but leaving the end time for the DCR official to enter. He then left, keeping his radio on, and returned to the Police Station about 9:45. When asked on indirect examination to repeat the events of the morning, he repeated the same chronology, although admitting that his recollection was perhaps at times faulty.

On redirect examination at the Due Process hearing, the Chief testified that the video and card access controls for November 24, show that Romeo had arrived at the Police Station parking lot at about 7:24 am in his personal vehicle, entered the police building at 7:29, and left the building at 8:21. Then, at 9:28 he entered the police parking lot again, entered the police building at 9:32, and at 9:54 he exited the building to attend the negotiation.

At the arbitration, hearing Romeo agreed with the chronology given by the Chief, explaining that he had been asked to recall a morning of nearly a month earlier after he had already performed the Pump Station detail three times before that week, and was upset and concerned with the actual details of the day that followed. He explained further that because the Chief had forbade him access to the relevant documents, he just repeated his usual routine. Once he checked the documentation which was made available to him only in mid-January 2015, he recognized his error, which he acknowledged at the arbitration.

Romeo testified at the arbitration hearing about the morning prior to the negotiation. He stated that he entered the Winthrop Police Station wearing his uniform and carrying a radio, he spoke with Lt. Perrin, informing him that he was going over to the negotiation, but did not mention specifically that he was on a detail. He also did not notify either Colometo or Vickery that he would be attending a negotiation for part of the day. He noted that, looking back on the day, he should have informed them.

Romeo testified that the negotiation lasted until about 2:30, much longer than everyone had expected. He left the Town Hall, turned in his keys to the cruiser, and left the area. He drove by the pump station on his way out of town, about 2:30, but he saw no activity. He stated that he received no detail calls on that day and submitted the DCR slip for the detail, for 8 hours.

Romeo once again testified at the arbitration hearing that it was his understanding that it was a mobile detail and not fixed. When asked what various people told him to lead him to believe it was a mobile and not a fixed worksite, he stated that when he inquired of Colometo the responsibility of the officer with the cruiser, Colometo replied that he just wanted the officer to be available if something should happen, stating, "I don't want to get one of your shift officers tied up. So just be available." Romeo reported that when he checked with Lt Lessard, the officer stressed that you have to be available. He added that he had not received any information from the Chief or Lieutenants as to what responsibilities were attached to this detail.

Romeo again stated that it was his belief that he "could perform the detail being mobile pretty much anywhere in town because it's only 1.8 square miles." He added that when he previously had worked this detail, he spent roughly several hours at the Pump Station, and the rest of the time was mobile throughout Winthrop.

When asked on cross examination if, according to his understanding, it would be permissible to stay in a house in Winthrop all day as long as he were available, Romeo responded that it could satisfy his detail obligation but he would not do it — it would be inappropriate.

Lt. Scarpa was asked what he would do if he had been in charge of Romeo when he came in to the negotiation in uniform, with a cruiser and a radio: how would he deal with it? He stated that he would determine where Romeo was supposed to be working, and if he had permission to leave the post. When asked how he would handle Romeo's case specifically, he would have counseled Romeo that he should leave or get back to where you were or whatever. He stated, "but I assumed everybody at the meeting knew that he was on that detail." He stated further that if he were not notified but became aware that Romeo was on detail, he would talk to him, would tell him that he had been at the negotiations for an awful long time and that he should notify the appropriate people so they could make arrangements. I guess I'd give him a warning, I would counsel him. "I would say that you would start off with a verbal, written, and then go from there.

On cross-examination, Scarpa stated that he had done several Pump Station details and that the Chief had asked him what his understanding was concerning the responsibilities of the detail. He replied that it would be a fixed post, but you could from time-to-time leave it to check the route. He stated that he would leave it occasionally during the course of an eight hour shift but he felt that his obligation was to be in the general area of the pump station. "It said pump station; otherwise it would have just said patrol." And, when asked if he would sanction an officer billing for a private detail that he wasn't present for, Scarpa said no.

As a result of the Due Process hearing, on January 9, 2015, McKenna dismissed Romeo as a Police Officer for the following reasons:

1. On November 24, 2014, you submitted a voucher for a detail slip for pay for 8 hours pay in the total amount of \$344 for a detail at the Short Beach Pump Station. During the time that you billed for this detail, you were not present at the detail. Billing for services rendered without being present constitutes unacceptable judgment fraud, and conduct unbecoming a police officer.

2. The above referenced conduct constitutes a dishonest act which is contrary to the trust that citizens put in public safety officers.

3. You specifically stated that the engineers from the Commonwealth of Massachusetts stated to you that it was unnecessary for you to be physically present at the detail. Your statement was specifically contradicted by the DCR resident engineer as well as the DCR inspector. Your assertion that you didn't have to be present at the detail was also specifically contradicted by other members of the Police Department.

4. Your statements during the disciplinary investigation and the hearing were untruthful which in and of itself constitutes just cause for your dismissal.

5. The above referenced conduct violates the rules and regulations of the Department, specifically 1.4.8 integrity, 1.11.2 personal behavior, and 1.11.13 conduct unbecoming an officer.

The above referenced conduct constitutes just cause for your dismissal as a police officer. Specifically, there is a strong public policy against employing police officers who are untruthful.

The Town had never previously notified Romeo that he was contemplating discipline for untruthfulness.

On January 16, 2015, Officer Romeo grieved his dismissal. It reads, in part, as follows:

On January 12, 2015, I received, via U.S. Mail, written Notice from Town Manager James McKenna, dated January 9, 2015, that he had decided to dismiss me after he allegedly reviewed all the evidence presented at a disciplinary hearing he presided over as the Appointing Authority on December 18, 2014. The Notice did not include an effective date of dismissal. I was never interviewed during the investigation that was initiated and conducted by Chief Terence M. Delehanty and Chief Terence M. Delehanty was the only witness to testify on behalf of the Town. I was ordered not to talk about the alleged investigation or the alleged incident on December 1, 2014, except for my legal counsel, by Chief Terence M. Delehanty, which is a violation of my due process rights to prepare a defense and confront

witnesses. I was never allowed or able to cross examine any alleged parties interviewed for the alleged investigation. The disciplinary hearing conducted on December 18, 2014 was biased and not factual. The facts are in dispute and Chief Terence M. Delehanty testified untruthfully and has been biased against me for several years that further create suspicion of his evil motives and intent. This decision is also after I was threatened by Town Manager James McKenna on January 7, 2015 during a phone call discussion that he placed to me at my home at 9:15 p.m. that if I did not accept a 30 day suspension he would be forced to terminate me as long as I released the Town of all my pending legal matters against them. (sic) He also attempted to coerce me by mentioning my loss of healthcare and pension... The decision to dismiss me is without just cause, procedurally flawed, and contrary to Law

When the parties were unable to resolve the grievance, the Union appealed to arbitration.

The following provision of the parties Agreement is relevant:

Article XXXV - Disciplinary Action

No permanent employee shall be removed, dismissed, discharged, suspended or charged in any manner *except for just cause* and at any hearings or interviews attendant thereto the police officer will have an opportunity to have an attorney present on his behalf.

The following provisions of the Winthrop Police department -- Rules and Regulations are relevant:

Section 1.4.8 Integrity -- no Department member shall under any circumstances make any false official statements or intentional misrepresentation of facts;

...
Section 1.11.2 Personal Behavior -- Each member shall while on duty conduct him/ herself in a manner that will reflect credit on themselves and the Winthrop Police Department. No employee shall engage in conduct which tends to bring the Department into disrepute or reflects discredit upon the members of the Department or which tends to impair the operation or efficiency of the Department or the employees;

...
Section 1.11.13 Conduct Unbecoming an Officer -- Members shall not commit any specific act or acts of immoral, improper, unlawful, disorderly, or intemperate conduct, whether on or off duty, which reflect(s), discredit or reflect(s) unfavorably upon the member, upon other members, or upon the police department. Members shall

conduct themselves at all times, both on and off duty, in such a manner as to reflect most favorably on the department and its members.

Conduct unbecoming a member shall include that which tends to indicate that the member is unable or unfit to continue as a member of the department, or tends to impair the operation, moral integrity, reputation or effectiveness of the department or its members.

The following article of the Winthrop Police Department - Detail Policy, is relevant.

ARTICLE IX. VIOLATION GUIDELINES

Progressive discipline shall apply for all violations of these rules and regulations, policy and procedures or orders of the Chief of Police.

CONTENTIONS OF THE TOWN

The Town contends that the removal of the Grievant was for just cause. Specially, it charges him with (1) filing a false detail slip; 2) lying to the Chief during the course of his investigation; and (3) lying at the Due Process hearing held by the Town of Winthrop to determine his discipline. I will consider them in turn.

Charge 1.

The charge of filing a false detail slip was based on Romeo's submission of a detail payment slip for the amount of \$344 for a day's work on November 24, 2014, in which he indicated that he had worked 8 hours of detail duty, whereas for at least 4 of these 8 hours he was attending a negotiation session in Town Hall.

Romeo claimed that the detail was a "floating detail," which permitted him license to roam in the vicinity of the truck route in his cruiser while waiting for a call from the dispatcher that he was needed, and argued that the Town Hall was positioned in an acceptable location to wait for a

radio summons. His contention that the detail was to be labeled a "floating detail" was not supported by other police officers or DCR employees and must be considered a false claim.

The Chief testified that officers on a shift for the Town on detail duty could participate in negotiations, usually over their lunch break, but he was aware of no policy that would allow an officer on detail for the third party to participate in negotiations. Based on this testimony and facts, Romeo was charged with filing a false detail slip.

The Town contends that the submission of the detail bill by Romeo for service not rendered constituted unacceptable judgment, and conduct unbecoming a police officer, and that his conduct also violated Department Rules of Conduct. The Town maintains that the Grievant violated these rules and regulations when he submitted a false detail slip for 8 hours of work on November 24, 2014. It maintains that Police officers are required to refrain from indictable conduct... they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.

Charge 2.

The Town contends that Romeo lied to the Chief during the course of the investigation, specifically with respect to the duties and responsibilities of the detail. According to the Chief at the investigation on December 1, 2014, Romeo told him that the detail was a "floating detail" and he was not required to be at a specific location. He also informed the Chief that he had spoken with Manager Colometo as to his responsibilities on the detail. The Chief stated he also interviewed Colometo (by phone) who told him that the purpose was to monitor truck traffic specifically from that location. The Chief also reported that when he asked if it was a "floating detail," Colometo said no and that he had not advised officers that it was a floating detail.

The Town further claims that Romeo's testimony to the Chief of what Colometo had told him was completely contradicted by Colometo at the arbitration who, among other things, testified that he never told Romeo that he wasn't supposed to be either at the Pump Station or on the truck route.

Charge 3.

The Town contends that Romeo lied during the Town hearing when he testified as to his activities on the day before the negotiation began. According to Romeo's testimony at the Due Process hearing, he got his slip signed at the DCR offices, picked up a coffee and bagel, went to the pump station, and remained there until about 10 am when he went to Town Hall for the negotiation.

The Town revealed at the end of the Due Process hearing that the video and door access controls on the Police Station show that Romeo entered the police parking lot at 7:24 am in his personal vehicle, entered the police building at 7:29, and left the building at 8:21. Then, at 9:28 he entered the police parking lot again, entered the police building at 9:32 and at 9:54 he exited the building to attend the negotiation next door. The Town contends that this recitation of his whereabouts for the 3 hours (7-10 am) before the negotiations began, is a complete fabrication and lie.

More generally, the Town continues that if the only misconduct of Romeo was filing a false detail slip (Charge 1), there would be some grounds for reversing the dismissal based on the principles of progressive discipline. However, it argues that due to this untruthfulness, it would violate public policy to reduce the discipline and to reinstate Romeo.

The Town offers several cases where there has been a ruling against a police officer who has lied. The Town states that police officers who lie on a police report filing criminal charges and lying under oath are all felonies and Courts have ruled that it would be a violation of public policy permitting someone who committed such an act to work as a police officer. Put simply, the Town asserts that Romeo's proven record of dishonesty prevents him from useful service as a law enforcement officer.

In sum, the Town concludes that Romeo submitted a fraudulent request for detail reimbursement, lied about the lack of need for an officer to be present during this detail, and further lied about his whereabouts on the day in question.

Finally, the Town rejects the assertion by the Union that the Town's actions were in retaliation for carrying out his duties as Union President. Although there was evidence presented that the Grievant and the Chief had locked horns a number of times, there was no evidence of retaliation against Romeo for his diligence doing his Union President's job.

CONTENTIONS OF THE UNION

The Union contends that Officer Ferruccio Romeo, a veteran police officer and Union President with a spotless personnel record, was not terminated for just cause when he attended a negotiation while assigned to a detail. It maintains that he violated no actual or known policy, his conduct was consistent with conduct allowed by other officers, the investigation of the matter ignored contrary evidence, and the punishment far exceeded progressive discipline, in particular the punishment meted out to officers for similar or more severe conduct, such as for insubordination, lying, or unexcused absences. The Union also maintains that the animosity between the

Chief and Romeo which has existed for years, surely contributes to the severity of the punishment.

The Union contends that the Town failed to establish that Romeo violated a policy of the Department, or that it was completely unreasonable for him to believe that officers could attend a negotiation while assigned to a detail (especially a non-stationary detail). The only dispute about the mobile nature of the detail is, with radio contact in case Romeo was needed and a cruiser at his disposal, whether he could go to a negotiation meeting in Town Hall and remain for an extended period of time. There is no question that officers on detail have spent their lunch hour at negotiation sessions, some for longer stretches.

The Union further contends that the Town's contention that Romeo was untruthful during the investigation, the Town's termination hearing, or the Arbitration hearing, do not rise to the level of deliberate lies, intended to deceive the Town about the facts at issue here. In particular, Romeo's statements about the Pump Station were consonant with the DCR representative and fellow police officers. In addition, his original statements concerning his whereabouts during the period of 7-10 am on November 24, while inaccurate, were not intended to mislead, and were a byproduct of the Town preventing him from adequately preparing for the hearing. Moreover, the Town Manager did not point to this discrepancy as contributing to his decision to terminate.

In addition to failing to provide requisite notice of the untruthfulness charges, the Union argues the Town's case suffers from the following defects: 1) The Chief never formally interviewed Romeo, despite a written promise to do so; 2) The Chief never interviewed the supervisors on the shift in question, which would have confirmed that they knew Romeo was at the negotiations; 3) The Chief did not interview all the people who worked the Pump Station detail, or

examine the past practice of officers attending negotiations while on a detail; 4) The Chief never disciplined supervisors for allowing Romeo to attend negotiations while assigned to a detail.

Finally, the Union contends that the termination of Romeo was inconsistent with the commitment to progressive discipline. The offense of attending a negotiation while on a non-stationary detail cannot be regarded as an inherently serious act, as illustrated by the Chief's permission for other officers to do so in past negotiations. Moreover it is inconsistent with the discipline imposed on other officers found to be AWOL, or untruthful, and the penalty is not supported by Romeo's blemish-free performance history. In fact, Romeo's forthright admissions about his conduct argue against termination.

Here, the Town claimed it terminated Romeo for attending contract negotiations while assigned to a detail, and for making false statements about the nature of the detail and his whereabouts that morning. While the Town phrased its charges in various ways, the case boils down to two charges: 1) attending negotiations while assigned to a detail is conduct unbecoming and/or dishonest; and 2) Romeo's December 1 statement about his conversation with Colometo and his December 18 statement about his November 24 whereabouts from 7:30-8:20 am, were untruthful. Both charges fail on procedural and substantive grounds.

DISCUSSION

The Town contends that the removal of the grievant was for just cause. Specially, it charges the Grievant with (1) filing a false detail slip; 2) lying during the course of the investigation; and (3) lying at the hearing held by the Town of Winthrop to determine his discipline. I consider them in turn.

The first charge is that Officer Romeo submitted a false detail slip. Referring to Black's Law Dictionary, we find the following:

FALSE - In law, this word usually means something more than untrue; it means something designedly untrue and deceitful and implies an intention to perpetrate some treachery or fraud... The word "false" has two distinct and well recognized meanings: (1) intentionally or knowingly or negligently untrue; (2) untrue by mistake or accident or, honestly after the exercise of reasonable care...

...
False Token - a false document or sign of the existence of a fact

The statements above capture the essence of what I take is meant by the Town's accusation that the Grievant submitted a "false slip." The claim is that the Grievant knowingly and deliberately submitted a document stating that he had worked the Pump Station detail from 9-2+ on November 24, 2014, when in fact he had not.

What is meant by "working the Pump Station detail"? The Grievant 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; 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 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 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, 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.

The critical question here is the following: Was 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, albeit from an unapproved location. There was no protestation from either the Town or DCR that the detail had not been performed satisfactorily.

However, 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. 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. He was, in the words of Colometo, "available" the entire shift. I find that he fulfilled the tasks of working the Pump Station detail that day, albeit from a location that 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. He was carrying out the detail for the hours required, while at the same time, participating in the negotiations.

The second charge brought by the Town is that Romeo lied to the Chief during the course of the investigation conducted by the Chief on December 1, 2014. According to the Chief's testi-

mony, 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.

Romeo also informed the Chief that he had spoken with Manager Colometo as to his responsibilities on the detail. When asked what he said to Colometo, he responded,

I asked Mr. Colometo what was required of the officer with the cruiser. I did not say anything about a location. I asked him what's the responsibility of the officer with the cruiser. And he stated to me as I just want it to be available if something happens. I don't want to, you know, I don't want to get one of your shift officers tied up. So just be available.

In addition, Romeo testified at the Due Process hearing in response to a question about how he could work the detail on November 24 and yet attend the negotiation, replied,

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 with[in] a general radius of the actual work site.

I can find no testimony from Romeo where he asserted that Colometo gave him permission to work the detail from other than the Pump Station.

According to the Chief, Colometo, who was interviewed on the telephone on the same day, December 1, explained that the purpose of the detail was to monitor truck traffic and emergencies along the truck route primarily from the Pump Station location. When he inquired if it was a *floating detail*, the Chief stated that Colometo replied no, it was a *stationary detail*.

No one, neither Romeo, Colometo, nor the Chief, provided a definition (or definitions) of a *floating detail* as it applies to police work. (Black Law Dictionary and Google also fail to do so.) But in my view, a definition is irrelevant. It is clear that 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. This was Colometo's testimony at the arbitration hearing a year later.

On December 1, 2014, 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.

The third charge brought by the Town is the contention that Romeo lied during the Town Hearing on December 18, when he testified to his pre-negotiation activities on November 24. According to Romeo's testimony at the Due Process hearing, he picked up his cruiser, got his slip signed at the DCR offices, picked up a coffee and bagel, went to the pump station, and remained there until about 10 am when he went to Town Hall for the negotiation. The Town revealed at the end of the Due Process hearing that the video and door access controls on the Police Station show that Romeo entered the police parking lot at 7:24 a.m. in his personal vehicle, entered the police building at 7:29, and left the building at 8:21. Then, at 9:28 he entered the police parking lot again, entered the police building at 9:32 and at 9:54 he exited the building to attend the negotiation next door. The Town contends that his recitation of his whereabouts for the 3 hours (7-10), the time before the negotiations began, is a complete fabrication and lie.

Romeo testified at the arbitration hearing that the Town's statement of his whereabouts on November 24th were indeed correct, and he had erred on his recollection on December 18. He pointed out that the testimony he gave at the time recalled from events of almost a month before, that this was the fourth Pump Station detail he had worked that week, and because the Chief froze his access to all documents until January 22, 2015, he was not able to refresh his memory using the video and door access monitor records before the Town hearing on December 18, 2014. Instead, he simply repeated what he had done the previous times he had worked the detail.

Although Romeo's testimony at the Town hearing was inaccurate, I do not find it was intended to deceive. 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 incorrect account of his activities between 7-10 am that morning. 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, the Grievant is a lawyer, he has dealt with interrogations and lying for years 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. Once he saw the video and keycard records information from that 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.

In summary, I find that Charge 1, that the Grievant filed a false detail slip on November 24, 2014, was not proven. Romeo worked the Pump Station detail from start to finish, albeit from an unauthorized location, the Town Hall, with no apparent defect.

He was aware that the intention of Colometo was to have an officer at the Pump Station or on the truck route, 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. For this action, he shall be given a Written Letter of Warning for not following the Pump Station guidelines.

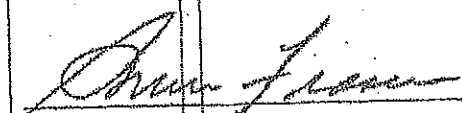
I find that Charges 2 and 3 were not proven by the Town.

AWARD

There was not just cause for the termination of Officer Ferruccio 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. I shall retain jurisdiction for 30 days to resolve any disputes arising from the award.

Scituate, MA
February 26, 2016


Bruce Fraser
Arbitrator

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXI. Labor and Industries (Ch. 149-154)
Chapter 150C. Collective Bargaining Agreements to Arbitrate (Refs & Annos)

M.G.L.A. 150C § 10

§ 10. Confirmation of award

Currentness

Upon application of a party, the superior court shall confirm an award, unless within the time limits, hereinafter imposed grounds are urged for vacating, modifying or correcting the award, in which case the court shall proceed as provided in sections eleven and twelve.

Credits

Added by St.1959, c. 546, § 1.

Notes of Decisions (16)

M.G.L.A. 150C § 10, MA ST 150C § 10
Current through Chapter 31 of the 2017 1st Annual Session

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Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title XXI. Labor and Industries (Ch. 149-154)

Chapter 150C. Collective Bargaining Agreements to Arbitrate (Refs & Annos)

M.G.L.A. 150C § 11

§ 11. Vacation of award; grounds; application; rehearing

Currentness

(a) Upon application of a party, the superior court shall vacate an award if:--

- (1) the award was procured by corruption, fraud or other undue means;
- (2) there was evident partiality by an arbitrator appointed as a neutral, or corruption in any of the arbitrators, or misconduct prejudicing the rights of any party;
- (3) the arbitrators exceeded their powers or rendered an award requiring a person to commit an act or engage in conduct prohibited by state or federal law;
- (4) the arbitrators refused to postpone the hearing upon a sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section five as to prejudice substantially the rights of a party;
- (5) there was no arbitration agreement and the issue was not adversely determined in proceedings under section two and the party did not participate in the arbitration hearing without raising the objection; but the fact that the award orders reinstatement of an employee with or without back pay or grants relief such that it could not grant or would not be granted by a court of law or equity shall not be ground for vacating or refusing to confirm the award.

(b) An application under this section shall be made within thirty days after delivery of a copy of the award to the applicant; provided that, if such application is based upon a claim of corruption, fraud or other undue means it shall be made within thirty days after such grounds are known or should have been known.

(c) In vacating the award on grounds other than stated in clause (5) of paragraph (a) the court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the court in accordance with section three, or if the award is vacated on grounds set forth in clause (3) or (4) of paragraph (a), the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with section three. The time within which the agreement requires the award to be made shall be applicable to the rehearing and shall commence from the date of the order.

§ 11. Vacation of award; grounds; application; rehearing, MA ST 150C § 11

(d) If the application to vacate an award is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

Credits

Added by St.1959, c. 546, § 1.

Notes of Decisions (283)

M.G.L.A. 150C § 11, MA ST 150C § 11

Current through Chapter 31 of the 2017 1st Annual Session

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)
Title II. Actions and Proceedings Therein (Ch. 223-236)
Chapter 231. Pleading and Practice (Refs & Annos)

M.G.L.A. 231 § 6F

§ 6F. Costs, expenses and interest for insubstantial, frivolous or bad faith claims or defenses

Currentness

Upon motion of any party in any civil action in which a finding, verdict, decision, award, order or judgment has been made by a judge or justice or by a jury, auditor, master or other finder of fact, the court may determine, after a hearing, as a separate and distinct finding, that all or substantially all of the claims, defenses, setoffs or counterclaims, whether of a factual, legal or mixed nature, made by any party who was represented by counsel during most or all of the proceeding, were wholly insubstantial, frivolous and not advanced in good faith. The court shall include in such finding the specific facts and reasons on which the finding is based.

If such a finding is made with respect to a party's claims, the court shall award to each party against whom such claims were asserted an amount representing the reasonable counsel fees and other costs and expenses incurred in defending against such claims. If the party against whom such claims were asserted was not represented by counsel, the court shall award to such party an amount representing his reasonable costs, expenses and effort in defending against such claims. If such a finding is made with respect to a party's defenses, setoffs or counterclaims, the court shall award to each party against whom such defenses, setoffs or counterclaims were asserted (1) interest on the unpaid portion of the monetary claim at issue in such defense, setoff or counterclaim at one hundred and fifty per cent of the rate set in section six C from the date when the claim was due to the claimant pursuant to the substantive rules of law pertaining thereto, which date shall be stated in the award, until the claim is paid in full; and (2) an amount representing the reasonable counsel fees, costs and expenses of the claimant in prosecuting his claims or in defending against those setoffs or counterclaims found to have been wholly insubstantial, frivolous and not advanced in good faith.

Apart from any award made pursuant to the preceding paragraph, if the court finds that all or substantially all of the defenses, setoffs or counterclaims to any portion of a monetary claim made by any party who was represented by counsel during most or all of the proceeding were wholly insubstantial, frivolous and not advanced in good faith, the court shall award interest to the claimant on that portion of the claim according to the provisions of the preceding paragraph.

In any award made pursuant to either of the preceding paragraphs, the court shall specify in reasonable detail the method by which the amount of the award was computed and the calculation thereof.

No finding shall be made that any claim, defense, setoff or counterclaim was wholly insubstantial, frivolous and not advanced in good faith solely because a novel or unusual argument or principle of law was advanced in support thereof. No such finding shall be made in any action in which judgment was entered by default without an appearance having been entered by the defendant. The authority granted to a court by this section shall be in addition to, and not in limitation of, that already established by law.

If any parties to a civil action shall settle the dispute which was the subject thereof and shall file in the appropriate court documents setting forth such settlement, the court shall not make any finding or award pursuant to this section with

respect to such parties. If an award had previously been made pursuant to this section, such award shall be vacated unless the parties shall agree otherwise.

In proceedings under this section in any action which has been heard by the medical malpractice tribunal established pursuant to section sixty B, the decision of the tribunal may be introduced as evidence relevant to whether a claim was wholly insubstantial, frivolous and not advanced in good faith.

Upon receiving an inmate's complaint and affidavit of indigency, the court may, at any time, upon motion or sua sponte: (1) dismiss a claim or any action without a hearing if satisfied that the claim or action is frivolous or in bad faith; or (2) conduct a hearing presided over by the court or an appointed master, which shall be held telephonically unless the court finds that a hearing in court is necessary, to determine whether the inmate's action is frivolous and in bad faith.

If the court finds that the claim or action is frivolous or in bad faith, the court shall dismiss the claim or action but if, after hearing, the court finds that the claim is both frivolous and in bad faith in order to abuse the judicial process, the court shall, in addition to dismissing such claim or action, order that the inmate lose up to 60 days of good conduct credit earned or to be earned pursuant to section 129C or 129D of chapter 127.

If the court finds at any time that the inmate has repeatedly abused the integrity of the judicial system through frivolous filings, the court may order that the inmate be barred from filing future actions without leave of court. In determining whether a claim or action is frivolous or in bad faith, the court may consider several factors including, but not limited to, the following:- (a) whether the claim or action has no arguable basis in law or in fact; (b) the claim or action is substantially similar to a previous claim in that it is brought by and against the same parties and in that the claim arises from the same operative facts of the previous claim.

No finding shall be made that a claim or action is frivolous or in bad faith solely because a novel or unusual argument or principle of law was advanced in support thereof.

Credits

Added by St.1976, c. 233, § 1. Amended by St.1986, c. 351, § 20; St.1999, c. 127, § 179.

Notes of Decisions (90)

M.G.L.A. 231 § 6F, MA ST 231 § 6F

Current through Chapter 31 of the 2017 1st Annual Session

477 Mass. 434
Supreme Judicial Court of Massachusetts.

CITY OF BOSTON
v.
BOSTON POLICE PATROLMEN'S ASSOCIATION.

SJC-12077
|
December 5, 2016
|
July 12, 2017.

Arbitration. Confirmation of award, Authority of arbitrator. Municipal Corporations, Police. Police. Discharge. Public Employment, Police, Termination. Public Policy.

Civil action commenced in the Superior Court Department on July 22, 2013.

The case was heard by Dennis J. Curran, J.

The Supreme Judicial Court granted an application for direct appellate review.

Attorneys and Law Firms

Kay H. Hodge (Geoffrey R. Bok also present) for the plaintiff.

Alan H. Shapiro (John M. Becker also present) for the defendant.

Present: Gants, C.J., Lenk, Hines, Gaziano, Lowy, & Budd, JJ.

Opinion

HINES, J.

*1 This is an appeal from a judgment of the Superior Court confirming an arbitrator's award reinstating a Boston police officer terminated for using a choke hold in arresting an unarmed suspect for disorderly conduct and making false statements in the ensuing departmental investigation. The arbitrator found that the officer, David Williams, had applied a choke hold, but that the choke hold had not actually choked the citizen, that the force was reasonable in the circumstances, and that the officer's subsequent characterization of events was thus truthful. Accordingly, the arbitrator ruled that the city of Boston

(city) lacked just cause to terminate Williams, and ordered his reinstatement with back pay.

In July, 2013, the city filed a complaint in the Superior Court to vacate the arbitrator's award. The court dismissed the complaint in June, 2015, and the city appealed. We granted the city's application for direct appellate review. Because the award neither exceeds the arbitrator's authority nor violates public policy, and because we are not free to vacate it where no underlying misconduct was found, we affirm.

1. Background. a. Facts. On January 18, 2012, the city discharged Williams based on specifications arising from a disorderly conduct arrest on March 16, 2009. The specifications were use of excessive force, in violation of Boston police department rule 304 on use of nonlethal force, and untruthfulness in the subsequent investigation, in violation of rule 102, § 23, on truthfulness. Chosen by mutual agreement of the city and the Boston Police Patrolmen's Association (union) pursuant to a collective bargaining agreement (CBA), an arbitrator held three days of hearings, concluded that the city had proved neither charge, and ordered Williams's reinstatement with back pay. He based his conclusion on the following factual findings.

In 2009, Boston's Saint Patrick's Day Parade fell on Sunday, March 15. Among the revelers that day were Michael O'Brien and his friends Thomas Cincotti and Eric Leverone. Having consumed some alcohol during the daytime celebrations, the three proceeded to a Faneuil Hall bar where O'Brien received free drinks by virtue of knowing the staff and owners. Because Leverone had recently returned from active military duty, patrons purchased him many drinks, and he became extremely intoxicated.

From that bar, the three walked to Cincotti's apartment in the North End neighborhood of Boston. While his friends waited on the sidewalk, Cincotti moved his motor vehicle to avoid getting a parking citation the next day. In doing so, he backed across a double yellow line and into a double-parked vehicle occupied by Guy Fils-Aime. Cincotti got out of his vehicle, asked O'Brien to move it out of the street, and approached Fils-Aime. O'Brien testified that, before moving the vehicle to a legal parking space, he heard Fils-Aime say, "I am a federal agent and you are fucked." ¹

*2 Fils-Aime called 911 just after midnight to report the accident. On that recorded call, he can be heard to say, "No, no, no. Don't worry. I work for Homeland Security. I'm a Federal agent. You're not going to get in trouble. Relax." After describing the accident to the dispatcher, Fils-Aime added, "They're drunk."

Officers Williams and Diep Nguyen arrived on scene at 12:08 A.M. O'Brien described their interaction as immediately hostile and aggressive, while the officers characterized O'Brien and his friends as drunk and uncooperative. O'Brien, who with Cincotti and Leverone is Caucasian, appeared further provoked by the officers' friendliness with Fils-Aime, who like Williams is African-American. As the officers spoke with Fils-Aime, O'Brien approached and demanded that they issue a citation to Fils-Aime for double-parking, and find out whether he was in fact a Federal agent. Receiving no answer, O'Brien began to film the officers with his cellular telephone as he repeated his demands from the middle of Hanover Street, where he was blocking traffic.²

After O'Brien failed to heed multiple warnings to get out of the street, Nguyen decided to arrest him for disorderly conduct. O'Brien pushed Nguyen away, and the two struggled as Nguyen attempted to handcuff him; he managed to cuff one wrist. Seeing this struggle from the cruiser where he had been writing a citation for Cincotti, Williams came to Nguyen's aid and tackled O'Brien to the ground; Nguyen was "fighting off" Cincotti and Leverone. In an effort to extricate O'Brien's uncuffed hand from underneath O'Brien's body, Williams pressed his upper left arm and shoulder against the right side of O'Brien's neck. He characterized this maneuver as a "semi-bear-hug hold." Nguyen testified that Williams had his arm "around [O'Brien's] neck" in a "chokehold." O'Brien testified that he could not breathe and began to lose consciousness.

Williams called for assistance using a police radio attached to his uniform, and the eight officers who soon arrived arrested O'Brien. As he was being taken to a police wagon, O'Brien announced his employment with the sheriff's office and shouted the names of officers he knew. Once in the wagon, he realized that he had urinated in his pants.

O'Brien was charged with resisting arrest, assault and battery on a police officer (Nguyen), and disturbing the

peace. He was booked at 12:40 A.M., with a bruise visible on his left temple and an abrasion on the right side of his forehead. Lieutenant James Leary, who was duty supervisor at that time, examined O'Brien and noted nothing unusual. Twenty minutes later, O'Brien complained of chest pain and head pressure, and emergency medical technicians thereafter transported him to Massachusetts General Hospital. The triage nurse, in notes recorded at 2:30 A.M., observed O'Brien to be under the influence of alcohol. At 3:43 A.M., O'Brien reported to the attending physician, Dr. Andrew Liteplo, that he had been beaten and choked by police. Liteplo noted petechiae, which are sometimes associated with choking, on O'Brien's face. O'Brien was otherwise asymptomatic.

On March 19, 2009, O'Brien filed a complaint with the internal affairs division (IAD) of the Boston police department (department). Although IAD assigned the complaint to an officer, little investigation was done, and O'Brien's counsel withdrew it in May, 2009. Williams did not learn of the allegations against him until September 24, 2009, when O'Brien filed a Federal lawsuit alleging unreasonable use of force, unconstitutional arrest, and assault and battery. The next day, counsel filed another IAD complaint; when IAD still had taken no action in January, 2010, counsel sent a letter-demanding that the matter be investigated. Sergeant Philip Owens conducted initial interviews of the officers in April, 2010, but not until February, 2011, was Williams placed on administrative leave.

*3 A second round of IAD interviews occurred in March, 2011. In June, 2011, the department exonerated Nguyen, but issued two specifications against Williams: the use of unreasonable force, in violation of rule 304, § 2,³ and untruthfulness during the IAD interview, in violation of rule 102, § 23.⁴ The departmental trial board held hearings in November and December, 2011, and sustained the charges. The city terminated Williams on January 18, 2012, and settled O'Brien's civil lawsuit for \$1.4 million shortly thereafter.

The union filed a grievance, contending that the city lacked just cause to terminate Williams.⁵ The case went before an arbitrator to determine whether the city had just cause to terminate Williams, and whether the city violated the CBA by placing Williams on administrative

leave in February, 2011. A hearing was held in September, October, and December, 2012.

b. The arbitrator's award. In June, 2013, the arbitrator issued his decision based on the premise that Williams had been terminated for use of excessive force, not for application of a choke hold ("The Department evidently credited O'Brien's charge that [Williams] attacked him for no reason, knocked him to the ground, grabbed him around the neck, and strangled him almost to the point of unconsciousness").

Characterizing the case as contingent on a credibility determination, the arbitrator rejected O'Brien's account of the incident as "not truthful," and concluded that Williams used only the amount of force reasonably necessary to overcome O'Brien's resistance to arrest. In support of his finding that "O'Brien was not a credible witness about any of the events of March 16," the arbitrator cited several factors. First, the arbitrator found that O'Brien had been drunk; as a result, the accuracy of O'Brien's memory was diminished, and the likelihood that he had displayed the conduct Williams and Nguyen described increased. Second, the arbitrator found that the professional repercussions potentially facing O'Brien for his drunk and disorderly conduct provided a motive to fabricate these allegations against the officers. Third, he found the objective physical evidence of choking scant. Finally, he noted as further reasons to discredit O'Brien that the cellular telephone video recording was unavailable, and that neither Cincotti nor Leverone came forward to corroborate O'Brien's account.

*4 As to Williams, the arbitrator found that he had "knock[ed] O'Brien to the ground and tightly gripp[ed] him in a manner that placed [Williams's] upper right arm and shoulder against the right side of O'Brien's neck. It would be accurate to call this a chokehold." Nguyen, who the arbitrator credited as a "conscientious and credible witness," agreed that Williams had used a choke hold and explained that police were not trained in this maneuver. Nonetheless, Nguyen opined that Williams had not choked O'Brien and had used reasonable force in the circumstances, and the arbitrator agreed. Accordingly, the arbitrator concluded that Williams's IAD interviews had been truthful, and that there was no just cause for termination. He ordered Williams reinstated with back pay.

2. Discussion. a. Standard of review. "A matter submitted to arbitration is subject to a very narrow scope of review." Plymouth-Carver Regional Sch. Dist. v. J. Farmer & Co., 407 Mass. 1006, 1007 (1990). Especially where parties have elected to arbitrate disputes as part of a CBA, School Dist. of Beverly v. Geller, 435 Mass. 223, 229 (2001) (Cordy, J., concurring), we defer to that election and are "strictly bound by an arbitrator's findings and legal conclusions, even if they appear erroneous, inconsistent, or unsupported by the record." Lynn v. Thompson, 435 Mass. 54, 61 (2001), cert. denied, 534 U.S. 1131 (2002) (Thompson).

In arbitrations pursuant to collective bargaining agreements, awards may be vacated only on statutorily enumerated grounds. G. L. c. 150C, § 11 (a) (3) ("superior court shall vacate an award if ... the arbitrators exceeded their powers or rendered an award requiring a person to commit an act or engage in conduct prohibited by state or federal law"). The city argues both grounds exist here, and we address each in turn.

b. Nondelegability of police commissioner's powers and scope of arbitrator's authority. The city argues that the award must be vacated because the arbitrator exceeded his authority by intruding on the nondelegable powers of the Boston police commissioner (commissioner) to discipline officers. The union counters that discharge and discipline are at the heart of collective bargaining, and the arbitrator merely interpreted the relevant terms of the parties' agreement.

Some powers may not be delegated, even with the consent of the parties. Boston v. Boston Police Superior Officers Fed'n, 466 Mass. 210, 216 (2013). "An arbitrator exceeds his authority when he intrudes upon decisions ... left by statute to the exclusive managerial control of designated public officials." Massachusetts Bd. of Higher Educ./Holyoke Community College v. Massachusetts Teachers Ass'n/Mass. Community College Council/Nat'l Educ. Ass'n, 79 Mass. App. Ct. 27, 32 (2011). The city asserts that the so-called "police commissioner's statute" leaves discipline and discharge of officers for excessive force or untruthfulness to the commissioner's exclusive managerial control. St. 1906, c. 291, as appearing in St. 1962, c. 322, § 11 ("police commissioner shall have cognizance and control of the government, administration, disposition and discipline of the department, and of the police force of the department and shall make all needful rules

and regulations for the efficiency of said police"). This argument fails for three related reasons.

First, the terms of a CBA trump any authority enumerated under the State's collective bargaining law. G. L. c. 150E, § 7 (d) ("If a collective bargaining agreement ... contains a conflict between matters which are within the scope of negotiations pursuant to [§ 6] of this chapter¹⁶ and ... the regulations of ... a police commissioner ... the terms of the collective bargaining agreement shall prevail"). Accordingly, the CBA's just cause provision permits the arbitrator to interpret regulations promulgated pursuant to the commissioner's statute, and usurps no authority in so doing.

*5 Second, this conclusion is consistent with courts' reluctance to allow broad discretionary powers to subsume bargained-for provisions. See Lynn v. Labor Relations Comm'n, 43 Mass. App. Ct. 172, 182 (1997), citing School Comm. of Newton v. Labor Relations Comm'n, 388 Mass. 557, 564–566 (1983) ("where the governmental employer acts pursuant to broad, general management powers, the danger is presented ... that to recognize the statutory authority as exclusive would substantially undermine the purpose of G. L. c. 150E, § 6, to provide for meaningful collective bargaining").

Finally, although we have recognized the breadth of the commissioner's authority in a long line of cases, those cases have largely confined nondelegable matters to the administrative realm and have never reached the core matters of discipline and discharge. See, e.g., Boston Police Superior Officers Fed'n, 466 Mass. at 215 (commissioner has exclusive, nondelegable authority to assign and transfer police officers).⁷ Indeed, where the parties bargained to arbitrate "any dispute concerning the interpretation or application" of the CBA, G. L. 150E, § 8, such a broad arbitration clause, see AT&T Techs., Inc. v. Communications Workers of Am., 475 U.S. 643, 650 (1986), leaves discipline well within the arbitrator's ambit. Boston Police Patrolmen's Ass'n v. Boston, 60 Mass. App. Ct. 672, 676–677 (2004) (severity with which municipal employer treats its police officers in disciplinary proceedings can be subject of grievance).

c. Public policy exception. The city argues that the award must be vacated because Williams's reinstatement violates public policy. The union contends that this exception is

unavailable because the court is bound by the arbitrator's finding that Williams committed no misconduct.

Our deference to arbitration notwithstanding, we recognize the primacy of certain policy matters over expediency, and will not allow an arbitrator to order a party to engage in an action that violates well-defined public policy. G. L. c. 150C, § 11 (a) (3). Boston v. Boston Police Patrolmen's Ass'n, 443 Mass. 813, 818, 823 (2005) (Patrolmen's Association). If an arbitration award violates public policy, "we are obliged to refrain from enforcing it." Massachusetts Highway Dep't v. American Fed'n of State, County & Mun. Employees, Council 93, 420 Mass. 13, 16 & n.5 (1995), quoting W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am., 461 U.S. 757, 766 (1983).

*6 In determining whether this narrow public policy exception requires the vacation of an arbitrator's award, we apply a "stringent, three-part analysis." Patrolmen's Association, 443 Mass. at 818. First, the policy at issue "must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." Massachusetts Highway Dep't, 420 Mass. at 16, quoting W.R. Grace & Co., 461 U.S. at 766. Second, the exception does not address "disfavored conduct, in the abstract, but [only] disfavored conduct which is integral to the performance of employment duties" (emphasis in original). Massachusetts Highway Dep't, *supra* at 17, quoting Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l, 861 F.2d 665, 671 (11th Cir. 1988), cert. denied, 493 U.S. 871 (1989). "Finally, we require[] a showing that the arbitrator's award reinstating the employee violates public policy to such an extent that the employee's conduct would have required dismissal." Patrolmen's Association, *supra* at 819, quoting Thompson, 435 Mass. at 63. The question in the third prong is not whether the employee's behavior violates public policy, but whether an award reinstating him or her does so. Eastern Associated Coal Corp. v. United Mine Workers of Am., Dist. 17, 531 U.S. 57, 62–63 (2000).

The first two prongs of this test are easily satisfied in cases of alleged police misconduct toward civilians, as the Superior Court recognized below. See, e.g., O'Brien v. New England Police Benevolent Ass'n, Local 911, 83 Mass. App. Ct. 376, 381 (2013) (in police excessive force

case, it is "clear" that first two prongs of public policy test were met). It is inarguable that well-defined public policy condemns excessive force by police officers. See Commonwealth v. Adams, 416 Mass. 558, 563 (1993); Human Rights Comm'n of Worcester v. Assad, 370 Mass. 482, 487 (1976).

Similarly, there is no question that refraining from excessive force is integral to a police officer's duties to protect the public and keep the peace. Patrolmen's Association, 443 Mass. at 819. See Attorney Gen. v. McHatton, 428 Mass. 790, 793-794 (1999), quoting Police Comm'r of Boston v. Civil Serv. Comm'n, 22 Mass. App. Ct. 364, 371 (1986) ("Police officers must comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. They are required to do more than refrain from indictable conduct. ... In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities").

Thus, only the exception's third prong remains contested here. "To prevail, the city must therefore demonstrate that public-policy requires that [Williams's] conduct, as found by the arbitrator, is grounds for dismissal, and that a lesser sanction would frustrate public policy" (emphasis added). Patrolmen's Association, 443 Mass. at 819. Because the arbitrator found that Williams acted reasonably and truthfully, the public policy exception cannot bar his reinstatement.

The arbitrator found that Williams "placed [his] right arm and shoulder against the right side of O'Brien's neck." Nguyen, who the arbitrator found to be "a conscientious and credible witness," testified that Williams had his arm "around [O'Brien's] neck" in a "chokehold." But he also found that Williams was terminated not for use of a choke hold, which is nowhere prohibited by department rules, but for excessive force in choking O'Brien. Because the arbitrator concluded that Williams's use of force was reasonable and had not actually restricted O'Brien's breathing, he also found that Williams's characterization of events had been truthful and that there was no just cause for termination.

*7 Without doubt, a de novo analysis of whether Williams's actions constituted excessive force in the

totality of the circumstances could support a conclusion very different from the one reached by the arbitrator. This was an arrest for disorderly conduct. Williams gave no verbal commands, and used neither of the methods of nonlethal force in which he was trained before applying a choke hold,⁸ despite his training to avoid a suspect's neck area.⁹ Williams is significantly larger than O'Brien, who was unarmed. It is unreasonable to justify a choke hold -- as the arbitrator did -- on the grounds that a suspect could always "grab" an officer's service weapon, because this is true of any civilian interaction with police and would obviate any continuum of force.¹⁰

This is especially true given the unpredictably lethal nature of choke holds. See, e.g., Los Angeles v. Lyons, 461 U.S. 95, 116-117 (1983) (Marshall, J., dissenting) ("It is undisputed that chokeholds pose a high and unpredictable risk of serious injury or death"); Thompson v. Chicago, 472 F.3d 444, 446 (7th Cir. 2006) (officer's application of choke hold contributed to suspect's death by asphyxia); Maddox v. Los Angeles, 792 F.2d 1408, 1411 (9th Cir. 1986) (officer's application of choke hold for twenty to thirty seconds caused suspect's death). Cf. Commonwealth v. Stockwell, 426 Mass. 17, 19 n.2 (1997) (posited among methods of strangulation supporting conviction of murder in first degree, choke hold occurs when "the aggressor's forearm is placed on the neck of the victim").

Where the city failed to recognize those dangers in any rule, however, we are not free to redefine terms the parties bargained over. Had the city prohibited choke holds as excessive force, an arbitrator who found a choke hold reasonable would have exceeded his authority. See G. L. c. 150C, § 11 (a) (3) ("the superior court shall vacate an award if ... the arbitrators exceeded their powers"); School Dist. of Beverly, 435 Mass. at 229 (Cordy, J., concurring), quoting United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960) ("[A]n arbitrator's 'award is legitimate only so long as it draws its essence from the collective bargaining agreement' that he is confined to interpret and apply"). In other words, that a de novo factual analysis would permit a finding of felonious conduct does not permit us to proceed as if the arbitrator actually made that finding.

We are aware of no prior application of the public policy exception to vacate an award ordering reinstatement

where the arbitrator found no underlying misconduct. See Patrolmen's Association, 443 Mass. at 820-821, 823 (vacating reinstatement of police officer found by arbitrator to have committed felonious misconduct of perjury and filing of false police reports); Boston v. Boston Police Patrolmen's Ass'n, 74 Mass App. Ct. 379, 382 (2009) (vacating reinstatement of police officer found by arbitrator to have committed off-duty felonious misconduct of assault by means of dangerous weapon). The question, in other words, is not whether Williams's conduct justified termination, but whether it required termination, such that any lesser sanction would violate public policy. See Thompson, 435 Mass. at 63. Because the arbitrator found that Williams used reasonable force and was not untruthful in subsequent investigations, the award reinstating him must be upheld.

*8 d. Prospective guidance. Today's decision should not be read to view the city -- and more importantly, the citizens of Boston -- as without remedy moving forward. First, it is incumbent on the city to clarify its own policies with respect to excessive force and specifically choke holds if it does not wish in the future to relinquish interpretive control of that term.

As a threshold matter, it cannot be that when a choke hold is applied, the excessive force determination nonetheless depends on the extent of resulting harm. See Stamps v. Framingham, 813 F.3d 27, 35 (1st Cir. 2016) (rejecting argument that inadvertent excessive force is shielded from scrutiny under Fourth Amendment to United States Constitution, reasoning that "[t]he defendants' proposed rule has the perverse effect of immunizing risky behavior only when the foreseeable harm of that behavior comes to pass"). If anything, it is the unpredictable dangerousness of choke holds that warns against their use at all. Indeed, it is untenable to assert both that choke holds are so potentially dangerous that reinstating officers who use them violates public policy and that the commissioner retains the discretion to determine whether a choke hold is excessive force in any given case. As discussed supra, it is because choke holds are unpredictably lethal that both officers and the public deserve a bright-line rule.

Second, the city must investigate allegations of excessive force with substantially more alacrity than was evidenced

here. Pursuant to its own existing rules,¹¹ the department owes a duty, both to the public and to its own officers, to investigate allegations of excessive force thoroughly and promptly. As with the tension between a choke hold's dangerousness and the commissioner's desire to retain discretionary review of their use, it is difficult to reconcile the department's position that an officer's use of a choke hold requires termination with its protracted inaction in this case. See Massachusetts Highway Dep't, 420 Mass. at 21 n.8 ("In determining that the safety of the work environment was not sufficiently threatened by [the employee's] behavior to require permanent discharge, the arbitrator could consider the fact that the department waited nearly one year after the [misconduct] was discovered" before bringing disciplinary action). There was a two-year delay on meaningful internal investigation; the department concedes, as it must, that it mishandled an inquiry that took entirely too long. Officers deserve notice of allegations against them, and citizens deserve investigations not contingent on the filing of Federal lawsuits.

Last, we are troubled by the prospect that any use of force not explicitly prohibited by a rule of conduct is essentially unreviewable. It is difficult to fathom why we elevate the values of "expediency" and "judicial economy" so high as to eclipse the substantive rights of citizens who have no seat at the bargaining table. We recognize, of course, that public employers may or may not choose to adopt rules for the protection of the public from the excessive use of force. Without the benefit of such rules, however, arbitrators remain free to find reasonable any level of force that does not explicitly require termination. Absent legislative authority for a broader review of arbitration decisions, we are constrained in our ability to review the use of excessive force by public safety officials.

*9 3. Conclusion. For the reasons stated above, we affirm the Superior Court's decision confirming the arbitrator's award.

So ordered.

All Citations

--- N.E.3d ----, 477 Mass. 434, 2017 WL 2960815

Footnotes

- 1 Michael O'Brien was at the time employed as a deputy sheriff and correction officer, and said that Guy Fils-Aime's comments made him concerned both for his employment and for his pending military candidacy.
- 2 The video recording was not in evidence, as O'Brien testified that he no longer was in possession of that cellular telephone.
- 3 Boston police department rule 304, "Use of Non-Lethal Force," provides in relevant part:

"Because there are an unlimited number of possibilities, allowing for a wide variety of circumstances, no rule can offer definitive answers to every situation in which the use of non-lethal force might be appropriate. Rather, this rule will set certain specific guidelines and provide officers with a concrete basis on which to utilize sound judgment in making reasonable and prudent decisions, attending to the spirit over the letter of the rule.

"Section 1. Definitions. ... 1. Reasonable Amount of Force is the least amount of force that will permit officers to subdue or arrest a subject while still maintaining a high level of safety for themselves and the public.

"Section 2. General Considerations. The policy of the Boston Police Department is to use only that amount of force that is reasonably necessary to overcome resistance in making an arrest or subduing an attacker.

"The right to use non-lethal force is extended to police officers as an alternative in those situations where the potential for serious injury to an officer or civilian exists, but where the application of lethal force would be extreme."
- 4 Boston police department rule 102, "Conduct and General Rights and Responsibilities of Department Personnel," provides in relevant part:

"Section 23. Truthfulness. ... Reports submitted by employees shall be truthful and complete. No employee shall knowingly enter, or cause to be entered, any inaccurate, false or improper information."
- 5 Article V(A), § 1, of the collective bargaining agreement provides as follows: "No bargaining unit member who has completed his one-year probationary period shall be disciplined or discharged without just cause."
- 6 General Laws c. 150E, § 6, provides that parties "shall negotiate in good faith with respect to wages, hours, standards or productivity and performance, and any other terms and conditions of employment."
- 7 See also, e.g., Boston v. Boston Police Patrolmen's Ass'n, 403 Mass. 680, 684 (1989) (nondelegable management prerogative to assign one officer, as opposed to two, to marked patrol vehicle); Nolan v. Police Comm'r of Boston, 383 Mass. 625, 629-630 & n.4 (1981) (authority to determine by way of psychiatric examination officer's fitness to perform duties); Broderick v. Police Comm'r of Boston, 368 Mass. 33, 41 (1975), cert. denied, 423 U.S. 1048 (1976) (authority to question officers regarding private conduct); Boston Police Patrolmen's Ass'n v. Boston, 367 Mass. 368, 371-372 (1975) (authority to require officers seeking elective office to take leave of absence without pay during campaign); Boston v. Boston Police Superior Officers Fed'n, 52 Mass. App. Ct. 296, 301 (2001) (sole discretion to make and end temporary assignments); Boston v. Boston Police Patrolmen's Ass'n, 41 Mass. App. Ct. 269, 271-273 (1996) (authority to determine and assign overtime); Boston v. Boston Police Superior Officers Fed'n, 29 Mass. App. Ct. 907, 908 (1990) (nondelegable matters include staffing levels, assignments, uniforms, weapons, and definition of duties); Boston v. Boston Police Patrolmen's Ass'n, 8 Mass. App. Ct. 220, 226-227 (1979) (sole authority to determine whether officer should be reissued service weapon).
- 8 The department authorizes the use of the following nonlethal force methods: verbal commands, pepper spray, wrist locks, and batons. It is uncontested that Williams attempted none of these methods before tackling O'Brien.
- 9 Beyond requiring that officers use "the least amount of force" and "only that amount of force that is reasonably necessary to overcome resistance in making an arrest," rule 304 on the use of nonlethal force confines officers to the use of procedures on which they have been trained and found "proficient." Nguyen and Williams each admitted that this training did not include choke holds as an appropriate means of force, and the IAD investigator explained that Boston police officers are trained to avoid contact with a person's head or neck due to the high risk of injury.
- 10 Indeed, the notion that an unarmed suspect must nonetheless be treated as dangerous because he or she interacts with an armed police officer ("[e]ven if O'Brien was unarmed, there was always the possibility that he would grab Nguyen's gun") controverts clear United States Supreme Court precedent, see Graham v. Connor, 490 U.S. 386, 396 (1989); Tennessee v. Garner, 471 U.S. 1, 11 (1985), and we reject the troubling presumption of a citizen's dangerousness that this proposition would create.
- 11 See Boston police department rule 304, "Use of Non-Lethal Force," § 7, "Investigation of Use of Force."