

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

NO. 2017-P-0785

SUFFOLK, SS

TOWN OF WINTHROP,
Plaintiff-Appellee

V.

WINTHROP POLICE BROTHERHOOD LOCAL 421,
Defendant-Appellant

On Appeal from a Judgment and Order
of the Superior Court

Brief for the Plaintiff-Appellee

FOR THE APPELLEE,
TOWN OF WINTHROP:

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TABLE OF CONTENTS

	Page
Table of Authorities	.3
Issues Presented	.5
Statement of the Case	5
Statement of Facts	.7
Argument	22
I. THE TRIAL COURT JUDGE PROPERLY VACATED THE ARBITRATION AWARD	.22
A. The Trial Court Judge Acknowledged And Applied The Proper Standard Of Review.	.24
B. The Arbitrator's Finding That Romeo Worked The Detail And That He Was Not Dishonest Exceeded His Authority.	26
C. Public Policy Mandated Romeo's Discharge	33
II. THE APPEAL OF THE DENIAL OF THE UNION'S REQUEST FOR ATTORNEY'S FEES AND COSTS PURSUANT TO G.L. c. 231, § 6F SHOULD BE DISMISSED	.37
Conclusion	40

TABLE OF AUTHORITIES

	Page
CASES	
<u>Ben v. Schultz</u> , 47 Mass. App. Ct. 808 (1999) . . .	39-40
<u>Bureau of Special Investigations</u> <u>v. Coalition of Public Safety</u> , 430 Mass. 601 (2000).	.23, 33
<u>City of Boston</u> <u>v. Boston Police Patrolmen's Ass'n</u> , 41 Mass. App. Ct. 269 (1996).	.27
<u>City of Boston</u> <u>v. Boston Police Patrolmen's Ass'n</u> , 443 Mass. 813 (2005).	23, 24, 33-34, 37, 38
<u>City of Boston</u> <u>v. Boston Police Patrolmen's Ass'n</u> , 477 Mass. 434 (2017).	23, 25-26, 30, 34
<u>City of Boston v. Boston Police Superior</u> <u>Officers Federation</u> , 466 Mass. 210 (2013).	.22, 26, 27
<u>City of Cambridge v. Civil Service Commission</u> , 43 Mass. App. Ct. 300 (1997).	.35
<u>City of Taunton v. Taunton Branch of the</u> <u>Massachusetts Police Ass'n.</u> , 10 Mass. App. Ct. 237 (1980)	29
<u>Commonwealth v. Paquette</u> , 475 Mass. 793 (2016).	.31
<u>Concerned Minority Educators of Worcester</u> <u>v. School Committee of Worcester</u> , 392 Mass. 184 (1984).	22-23, 32
<u>Giuffrida v. High Country Investor, Inc.</u> , 73 Mass. App. Ct. 225 (2008).	.31

<u>Kannavos v. Annino</u> , 356 Mass. 42 (1969)	31
<u>Miaskiewicz v. LeTourneau</u> , 12 Mass. App. Ct. 880 (1981)	40
<u>Pearson v. Town of Whitman</u> , 16 MCSR 46 (2003)	35
<u>Plymouth-Carver Regional School District</u> <u>v. J. Farmer & Co., Inc.</u> , 407 Mass. 1006 (1990)	22
<u>Robichau v. Town of Middleboro</u> , 24 MCSR 352 (2011)	35
<u>School Committee of West Springfield</u> <u>v. Korbut</u> , 373 Mass. 788 (1977)	22
<u>School District of Beverly v. Geller</u> , 435 Mass. 223 (2001)	30
<u>School District of Beverly v. Geller</u> , 50 Mass. App. Ct. 290 (2000)	23, 37
<u>Town of Andover</u> <u>v. Andover Police Patrolmen's Union</u> , 45 Mass. App. Ct. 167 (1998)	26
<u>Town of Dartmouth</u> <u>v. Dartmouth Police Brotherhood</u> , 85 Mass. App. Ct. 1114 (2014)	27
<u>Town of Falmouth</u> <u>v. Civil Service Commission</u> , 61 Mass. App. Ct. 796 (2004)	35
STATUTES, RULES, and OTHER	
Mass. Gen. Laws, C. 41, § 97A	26
Mass. Gen. Laws, C. 150C, § 11	6, 19, 24
Mass. Gen. Laws, C. 231, § 6F	37, 39, 40
Mass. Gen. Laws, C. 231, § 6G	39

ISSUES PRESENTED

- I. Whether the trial court judge properly vacated the Arbitration Award that reinstated a discharged police officer where the arbitrator's findings and decision exceeded his authority.
- II. Whether the trial court properly vacated the Arbitration Award that reinstated a discharged police officer on the ground that the award violated a well-defined and dominant public policy.
- III. Whether the appeal of the trial court judge's denial of the Union's request for attorney's fees and costs pursuant to G.L. c. 231, § 6F should be dismissed.

STATEMENT OF THE CASE

On January 6, 2015, the Defendant-Appellant, Winthrop Police Brotherhood Local 421 (hereinafter "Union") filed a grievance against the Plaintiff-Appellee, Town of Winthrop (hereinafter "Town") challenging the discharge of Patrolman Ferruccio Romeo (hereinafter "Romeo"). (RA 2)¹ The grievance proceeded to arbitration. The arbitration hearing was held on

¹ References to the Record Appendix are designated RA followed by the page number (RA ____).

August 24, September 24, October 21, and November 2, 2015. (RA 15) Following the hearing, the Arbitrator issued a written Decision and Award on February 28, 2016, in favor of the Union, finding that there was no just cause for Romeo's termination, and ordered that he be reinstated with back pay. (RA 14)

On March 21, 2016, the Town timely appealed the Arbitration Award pursuant to G.L. c. 150C, § 11(a) by filing a Complaint in Suffolk Superior Court, Civil Action No. 1684CV00938 against the Union. (RA 3-4, 6-37) The Complaint sought to vacate the arbitration award alleging that the arbitrator exceeded his authority by improperly intruding upon an area reserved for the judgment of the Plaintiff and by issuing an award contrary to overriding public policy. (RA 12) On April 11, 2016, the Union filed and served an Answer to the Complaint with a Counterclaim to confirm the award. (RA 4, 38-41) The Town filed its Answer to the Counterclaim on April 11, 2016. (RA 4, 42-44)

On October 4, 2016, the Union filed a Motion to Confirm Arbitrator's Award, and for interest and attorney's fees. (RA 4, 45-118). The Town filed a

Memorandum of Law in Support of Plaintiff's Motion for Judgment on the Pleadings which the trial court judge treated as a Cross-Motion to Vacate the Arbitration Award. (RA 5, 119-130)

A hearing on the motions was held on February 21, 2017 before the trial court judge, Elizabeth M. Fahey, J. (RA 5, 169-189) Thereafter, on April 5, 2017, the trial court judge, Fahey, J., issued and filed a Memorandum of Decision and Order for Judgment on the Cross-Motions, denying the Union's motion and allowing the Town's motion, and vacated the Arbitrator's Award. (RA 5, 205-219) The trial court judge also denied the Union's motion for attorney's fees. (RA 5) Judgment entered in favor of the Town on April 11, 2017. (RA 5, 220)

On April 21, 2017, the Union filed a Notice of Appeal (RA 5, 221-222) and the appeal was entered in the Appeals Court on June 14, 2017.

STATEMENT OF FACTS

The arbitrator found the following facts: In 2014, the Town of Winthrop undertook the Winthrop Beach Nourishment Project funded by the Massachusetts Department of Conservation and Recreation (DCR). (RA

15) The project involved moving considerable sand and rock to the Winthrop Beach area. (RA 15) 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 Department of Public Works pumping station at the end of Crest Avenue. (RA 15)

The Duties of the Detail:

The arbitrator further found that the Pump Station detail required the officer who had signed up for it on any given day to report to the DCR office at 7 a.m. and sign in. (RA 15-16) "After signing in, the Pump Station detail officer was free to spend the first two hours of the detail as he wished, as long as he arrived at the pump station by 9:00 a.m." (RA 16) The detail required the officer to be on duty from 9 a.m. until 3 p.m. for a total of six hours, although he was authorized to indicate eight hours on his detail slip. (RA 15-16) During those six hours, the detail officer was required to remain at the pumping station or cruise along the truck route to monitor

traffic, and was required to be available if there was an incident along the truck route that required attention. (RA 16) A one hour lunch break was authorized as were bathroom breaks, as needed. (RA 16)²

Charge 1: Filing a false detail slip

At the time of the incident that led to Romeo's discharge, he had been a Patrolman for nineteen years with the Winthrop Police and had been President of the Union for eleven years. (RA 16) During that time he had also acquired a law degree and was a member of the

² To the extent that the Union's description of the detail requirements as found by the arbitrator, set forth in its Brief, differs from these facts, the Union's description is inaccurate. For example, the arbitrator did not make a finding that "[t]he 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." Union brief, p. 9. Rather the arbitrator found, "[t]he 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 [he] was able to respond quickly to an incident." (RA 16) Neither did the arbitrator find that "[o]fficers had been permitted by the Chief to attend negotiations while assigned to a detail." Union brief p. 10. Although the arbitrator noted that the Union contended, among other arguments, that the Chief "did not examine the past practice of officers attending negotiations while on a detail", he made no finding on the issue and did not further mention the allegation in his decision. (RA 30-31)

Massachusetts Bar. (RA 16) Romeo was not scheduled for a day shift on November 24, 2014 and signed up for the Pump Station detail that day. However, as President of the Union, he was also scheduled to attend a negotiation session at Town Hall on that date beginning at 10 a.m. (RA 16, 22) He attended the negotiation session at Town Hall from approximately 10 a.m. to 2:30 p.m. on November 24, 2014 and did not go to the Pump Station between 10:00 a.m. and 2:00 p.m.+ that day. (RA 16) Nevertheless, Romeo submitted a Pump Station detail slip to be paid for eight hours of work on November 24, 2014. (RA 16)

The following day, on November 25, 2014, Police Chief Terence Delahanty checked over the detail slips from the day before and noticed that Romeo had submitted a slip for eight hours worked on the pump station detail, while for five hours of that time he was engaged in Union-Town negotiations along with the Police Chief. (RA 16)

Charge 2: Misrepresentation/Lying to the Chief during the internal investigation

The arbitrator further found that when questioned by the Chief on December 1, 2014, Romeo explained that

it was his understanding from speaking with Steven Colometo, the DCR Resident Manager who is in charge of the Winthrop Beach Project and Mike Vikery of the DCR, who works for Colometo, 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 location." (RA 17-18) Romeo felt that because he understood it was a floating detail, that he hadn't done anything wrong. (RA 17)

When questioned by the Chief, Colometo explained that the purpose of the detail was to monitor truck traffic specifically from the Pump Station location. (RA 18) When asked if the detail was a "floating" detail, Colometo replied that no, it was a stationary detail. (RA 18) Colometo also said he did not recall talking to other officers about it being a floating detail. (RA 18) The Chief also spoke with Vickery who confirmed that the Pump Station detail was a stationary detail to monitor truck traffic on Crest Ave. (RA 18) Officers Feely, Defreitas, Lt. Frank Scarpa, and Sergeant Arthur Hickey of the Winthrop Police Department each confirmed that the Pump Station

detail was a stationary post and that the officer was expected to remain at the post - at the Pump Station or along the truck route - except for bathroom and lunch breaks. (RA 18-19, 23)

The arbitrator further found that on November 24, Romeo "was aware that the intention of Colometo was to have an officer at the Pump Station or on the truck route" and that Romeo had "disobey[ed] the verbal instructions he had been given by Colometo." (RA 33, 37)

On December 1, 2014, the Chief placed Romeo on paid Administrative Leave pending the outcome of an internal investigation of the November 24, 2014 Pump Station detail. (RA 17)

Charge 3: Misrepresentation/Lying at the Due Process Hearing

The Town Manager notified Romeo 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." (RA 17) The Town Due Process Hearing was held on December 18, 2014. (RA 17) The arbitrator found that Romeo testified at the hearing that he "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." (RA 20) "Romeo testified that his understanding of the detail is that it was a mobile detail, it did not have a fixed post." (RA 20) Romeo continued that it was his belief, based on the information that he had, that he would be able to fulfill the requirements of that detail because it was a mobile detail and because of the distances involved, in case of any emergency, he would be available within a general radius of the actual work site. (RA 20)

On direct examination, Romeo testified at the due process hearing that on November 24, he followed his usual practice for the detail which he had worked three times before that week. (RA 20-21) He arrived at the police station at 7:00 a.m., picked up an available cruiser then went to the DCR trailer where he submitted his slip for the day, putting the start time of 7 a.m. on the slip. (RA 21) He then left, keeping his radio on, and returned to the police station about 9:45 a.m. (RA 21)

At the due process hearing, the Chief testified that the video and card access controls for November 24 showed that Romeo had arrived at the police station parking lot at 7:24 a.m. in his personal vehicle, entered the police building at 7:29 a.m., and left the building at 8:21 a.m. Then, at 9:28 a.m. 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. (RA 21) At the arbitration hearing Romeo agreed with the chronology given by the Chief and explained that his earlier recollection had been faulty. (RA 21) Following the hearing, the Town Manager 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 the 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.
5. The above referenced conduct violates the rules and regulations of the Department, specifically 1.4.8 integrity, 1.11.2 personal behavior, and 1.11.113 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. (RA 24)

Section 1.4.8 Integrity of the Winthrop Police Department Rules and Regulations states "no Department member shall under any circumstances make any false official statements or intentional misrepresentation of facts. (RA 25, 157)

The Arbitration Hearing

At the arbitration hearing Romeo testified that on November 24, he entered the police station wearing his uniform and carrying a radio. He spoke with Lt. Perrin, informing him he was going over to the negotiation, but did not mention 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. (RA 22)

Romeo further testified that negotiations lasted until about 2:30 p.m. He left Town Hall, turned in the keys to the cruiser and left the area, driving by the pump station on his way out of town, about 2:30 p.m. (RA 22) He stated he received no detail calls on that day and submitted the DCR slip for 8 hours. (RA 22)

At the arbitration hearing Romeo reiterated "that it was his understanding that it was a mobile detail and not fixed" and that "he could perform the detail being mobile pretty much anywhere in town because it's only 1.8 square miles." (RA 22) When asked what led him to believe it was a mobile detail and not fixed, Romeo 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." (RA 22) When Romeo checked with Lt. Lessard, the officer stressed that you have to be available. (RA 22) "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 that it would be inappropriate to do so. (RA 23)

Arbitration Decision:

First Charge - Filing false detail slip

In the Discussion section of his decision, the arbitrator determined that "[i]t was Romeo's belief that his physical location, while waiting for a call, was flexible, he believed Town Hall was an acceptable location, and that it was reasonable to position himself there, given the requirements of the detail." (RA 32) The arbitrator concluded that Romeo "was performing all the tasks of working the detail for some 5 hours that day, albeit from an unapproved location." (RA 33) Based on his finding that Romeo "fulfilled the tasks of working the Pump Station detail that day, albeit from a location that had not been approved," he concluded that Romeo "was acting honestly when he submitted the DCR bill for November 24, 2014." (RA 33)

Second Charge: Misrepresentations During The Internal Investigation

The arbitrator found that "[o]n December 1, 2014, Romeo simply gave his opinion to the Chief about the detail based on conversation with Colometo." (RA 35) "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." (RA 35) Although the arbitrator also found that on November 24, Romeo "was aware that the intention of Colometo was to have an officer at the Pump Station or on the truck route (RA 37) and further that Romeo had "disobey[ed] the verbal instructions he had been given by Colometo (RA 33), the arbitrator concluded, "I find that he did not lie to the Chief during the investigation on December 1, 2014." (RA 35)

Third Charge: Misrepresentations During Due Process Hearing

The arbitrator found that "[a]lthough 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." (RA 36) The arbitrator concluded that there was no deliberate misrepresentation on Romeo's part. (RA 36)

Discipline and Award:

The Arbitrator concluded that the Town had not proven any of the three charges and that there was no just cause for the termination of Romeo. (RA 37) The arbitrator further concluded that Romeo

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. (RA 37)

The arbitrator ordered that Romeo be made whole for all lost wages and benefits, less offsetting income. (RA 14, 37)

The Town's Complaint:

The Town filed an action to vacate the Arbitration Award in Superior Court pursuant to G.L. c. 150C, §11(a). (RA 7-13) The Town alleged, inter alia, that the arbitrator exceeded his authority in intruding upon an area reserved for the judgment of

the Town and Police Chief, and by making an award contrary to well-defined and dominant public policy which mandated discharge in the circumstances. (RA 10-12) In its Memorandum of Law in Support of Plaintiff's Motion for Judgment on the Pleadings, the Town argued that the arbitrator exceeded his authority and was in violation of public policy such as to require that the award be vacated. (RA 119-130)

Superior Court Decision:

In vacating the Arbitration Award, the trial court judge concluded that the Arbitrator had exceeded his authority and that the decision to reinstate Romeo violated a well-defined, dominant public policy. (RA 217-218) Specifically, the trial court judge found, as did the Arbitrator, that Romeo was aware of the Detail's rules, including the intention of Colometo to have an officer present at the Pump Station or on the truck route, and that he nevertheless represented to the Chief a belief that he could perform the detail from anywhere in Winthrop. (RA 217) The trial court judge determined that based on the Arbitrator's conclusion that Romeo "was aware that the intention of Colometo was to have an officer at the Pump Station or

the truck route" on which he based his sanction of a written warning, there was no evidence to support the arbitrator's conclusion that Romeo reasonably believed he could perform his duties from an unapproved location. (RA 217-218) "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 [location], 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." (RA 218).

The trial court judge further found that Romeo's failure to perform the detail at the time and place assigned, and his dishonesty throughout the course of the internal investigation and subsequent hearings, compounded by his unwillingness to take responsibility for disobeying the Detail's rules, required dismissal and that any lesser sanction would violate the well-defined, dominant public policy that dishonesty by police officers will not be tolerated. (RA 216-217)

ARGUMENT

I. THE TRIAL COURT JUDGE PROPERLY VACATED THE ARBITRATION AWARD

"When an arbitrator makes a binding award pursuant to a collective bargaining agreement, a Superior Court judge may vacate or alter the award if, *inter alia*, it was procured by "corruption, fraud or other undue means," the arbitrator was evidently corrupt or partial, or "the arbitrator exceeded his or her powers." City of Boston v. Boston Police Superior Officers Federation, 466 Mass. 210, 213 (2013) quoting G.L. c. 150C, § 11; see School Comm. of West Springfield v. Korb, 373 Mass. 788, 792 (1977) (question of whether arbitrator acted in excess of authority is always open for judicial review). "An arbitrator exceeds his authority by granting relief beyond the scope of the arbitration agreement, by awarding relief beyond that to which the parties bound themselves, or by awarding relief prohibited by law." Plymouth-Carver Reg'l Sch. Dist. v. J. Farmer & Co., Inc., 407 Mass. 1006, 1007 (1990) (internal citations omitted). A judge may also vacate an arbitration award if the record before the arbitrator shows no support whatever for the arbitrator's determination. Concerned

Minority Educators of Worcester v. School Committee of Worcester, 392 Mass. 184, 190 (1984) and cases cited.

"Arbitration, it is clear, may not 'award relief of a nature which offends public policy.'" Bureau of Special Investigations v. Coalition of Public Safety, 430 Mass. 601, 603 (2000); City of Boston v. Boston Police Patrolmen's Ass'n, 477 Mass. 434, 442 (2017) (if an arbitration award violates public policy, courts are obliged to refrain from enforcing it). The question of whether an arbitration award offends strong public policy is ultimately one for resolution by the courts and not by arbitrators. City of Boston v. Boston Police Patrolmen's Ass'n, 443 Mass. 813, 818 (2005). "Where an employee performs his employment duties and, in doing so, violates standards, restraints, and restrictions on conduct which have been clearly and explicitly established by the people in their laws, a labor arbitration award which requires that the employer suffer that malperformance and not discharge the employee violates the same well-established public policy, and is subject to vacatur." School District of Beverly v. Geller, 50 Mass. App. Ct. 290, 294 (2000), *aff'd* 435 Mass. 223 (2001).

Accordingly, in this case, the trial court judge's determination that the Arbitration Award exceeded the authority of the Arbitrator and that it violated public policy was a proper basis on which to vacate the award.

A. The Trial Court Judge Acknowledged And Applied The Proper Standard Of Review

In this case, the trial court judge acknowledged the limited role involved in the judicial review of an arbitrator's decision and award. In her Memorandum of Decision the trial court judge wrote, quoting City of Boston, 443 Mass. at 818, "[t]he 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." (RA 215) The trial court judge also recognized that an "arbitrator's award will only be vacated in the limited circumstances set forth in G.L. c. 150C, §11(a)(1)-(5)." (RA 216) The trial court further noted that "[n]otwithstanding my serious concern 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."

(RA 215)

The Union argues in its brief at p. 43 that based on this stated distaste, the trial court judge disregarded the appropriate standard of review, made independent findings and credibility determinations to vacate the arbitrator's award.

The trial court judge here is not the first judge, and will likely not be the last, to criticize the limited extent of judicial review of arbitration awards. In City of Boston v. Boston Patrolmen's Association, 477 Mass. 434 (2017) decided in July and involving the review of an arbitration award that reinstated a police officer who had been terminated for use of excessive force, the Supreme Judicial Court stated that "[w]ithout doubt, a de novo analysis of whether [the officer's] actions constituted excessive force in the totality of the circumstances could support a conclusion very different from the one reached by the arbitrator," and commented that it was "troubled by the prospect that any use of force not explicitly prohibited by a rule of conduct is essentially unreviewable." Id. at 444, 446. The Court

continued its admonition stating, "[i]t 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." Id. at 446-447. Despite the Court's comments and evident dismay, the SJC, nevertheless, applied the governing limited standard of review, as did the trial court judge in this case.

B. The Arbitrator's Finding That Romeo Worked The Detail And That He Was Not Dishonest Exceeded His Authority

General Laws c. 41, §97A states in relevant part as follows:

The chief of police in any such town shall be in immediate control of all town property used by the department, and of the police officers, whom he shall assign to their respective duties and who shall obey his orders.

This statutory provision, "by its plain language, confers non-delegable authority over the assignment and organization of the officers within the department." City of Boston v Boston Police Superior Officers Federation, 466 Mass. 210, 215 (2013)³ Relying

³ In Town of Andover v. Andover Police Patrolman's Union, 45 Mass. App. Ct. 167, 169-170 (1998), a case under G.L. c. 41, §97A, the Appeals Court rejected the

on City of Boston v. Boston Police Patrolmen's Ass'n,
41 Mass. App. Ct. 269, 272 (1996), the court
continued:

considerations of public safety and a
disciplined police force require managerial
control over matters such as staffing
levels, assignments, uniforms, weapons,
**definition of duties, and deployment of
personnel. . . .**" City of Boston, 466 Mass.
at 215 (emphasis added).

A nondelegable authority may not be delegated to
an arbitrator, even with the parties' consent." Id. at
216. "[T]he assignment of police officers based on the
needs of public safety and the definition of duties is
within the exclusive managerial prerogative of the
chief, and accordingly cannot be bargained away." Town
of Dartmouth v. Dartmouth Police Brotherhood, 85 Mass.
App. Ct. 1114 (2014) (Rule 1:28)

In this case, the arbitrator found that the Pump
Station detail required the officer who had signed up
for it to be on duty from 9 a.m. until 3 p.m. for a
total of six hours, although he was authorized to
indicate eight hours on his detail slip. (RA 15-16)

argument that City of Boston v. Boston Police
Patrolmen's Ass'n, 41 Mass. App. Ct. 269 (1996) was
distinguishable because that case rested on a Special
Act defining a commissioner's authority rather than
that of a police chief.

During those six hours, the detail officer was required to remain at the pumping station or cruise along the truck route to monitor traffic, and was required to be available if there was an incident along the truck route that required attention. (RA 16) A one hour lunch break was authorized as were bathroom breaks, as needed. (RA 16)

The Arbitrator further found that Colometo, the DCR Resident Manager in charge of the Winthrop Beach Project, "expected the officer to sit at the Pump Station or drive the truck route" (RA 35), that Romeo was aware that the intention of Colometo was to have an officer at the Pump Station or on the truck route (RA 37), that Romeo had disobeyed the verbal instructions he had been given by Colometo, and that he had not followed the Pump Station guidelines. (RA 33, 37)

It was within the managerial authority of the Chief and DCR, not the arbitrator to designate the duties of the pump station detail which had been created for the public safety to assist the traffic in connection with the work being carried out on the Winthrop Beach Nourishment Project. (RA 15) As such,

it was beyond the arbitrator's authority to rewrite the duties of the pump station detail and conclude that Romeo "fulfilled the tasks of working the Pump Station detail that day, albeit from a location that had not been approved" (RA 33) or that he "performed all the tasks of working the detail for some 5 hours that day, albeit from an unapproved location" where remaining at the Pump Station or along the truck route was a duty and task of the detail, a condition of working the detail of which Romeo was well aware. "A police chief's authority to assign his officers particular duties has long been held to be a matter which concerns public safety." Taunton v. Taunton Branch of the Massachusetts Police Ass'n, 10 Mass. App. Ct. 237, 243 (1980) and cases cited. The issue of public safety and police duties is not subject to an arbitrator's decision and is, in fact and law, beyond an arbitrator's authority. Here, the arbitrator substituted his own judgment regarding the duties and tasks of the Pump Station detail to find that Romeo had worked the detail on November 24 or that he reasonably believed he could perform the detail from anywhere in town which was beyond his authority to do.

Likewise, the arbitrator's finding that despite Romeo's awareness of the detail's rules, including the intention of Colometo to have an officer present at the Pump Station or on the truck route, "[i]t was Romeo's belief that his physical location, while waiting for a call, was flexible, he believed Town Hall was an acceptable location, and that it was reasonable to position himself there, given the requirements of the detail" (RA 32) and the arbitrator's finding that Romeo's representation to the Chief of a belief that he could perform the duties of the detail from Town Hall was reasonable, and not dishonest, was beyond the arbitrator's authority. See City of Boston, 477 Mass. at 445 ("Had the city prohibited choke holds as excessive force, an arbitrator who found a choke hold reasonable would have exceeded his authority.").

An arbitrator's characterization of conduct is not determinative where he found facts and described facts in manner that clearly established prohibited conduct. See School District of Beverly v. Geller, 435 Mass. 223, 231 (2001) (Cordy, J., concurring) (arbitrator's characterization of conduct

not determinative where he found facts and described facts in manner that clearly established conduct to be "conduct unbecoming a teacher.") In this case, Section 1.4.8 of the Winthrop Police Department Rules and Regulations states "no Department member shall under any circumstances make any false official statements or intentional misrepresentation of facts." (RA 25) The law is replete with examples of what constitutes intentional misrepresentation which clearly encompassed Romeo's conduct as found and described by the arbitrator. See Commonwealth v. Paquette, 475 Mass. 793, 799 (2016) (under G.L. c. 268, § 13B making it illegal to willfully mislead a police officer, "mislead means to knowingly make a false statement, to intentionally omit information from a statement causing a portion of that statement to be misleading, or to intentionally conceal a material fact and thereby create a false impression."); Giuffrida v. High Country Investor, Inc., 73 Mass. App. Ct. 225, 239 (2008) (in some circumstances, even half-truths may constitute serious deception); Kannavos v. Annino, 356 Mass. 42, 48 (1969) (fragmentary information may be as

misleading as active misrepresentation, and half-truths may be as actionable as whole lies).

In this case, the arbitrator substituted his own judgment regarding the duties and tasks of the Pump Station detail to find that Romeo had worked the detail on November 24, and that Romeo reasonably believed he could perform the detail from anywhere in town, which was beyond his authority to do.

Additionally, a judge may vacate an arbitration award if the record before the arbitrator shows no support whatever for the arbitrator's determination. Concerned Minority Educators of Worcester, 392 Mass. at 190 and cases cited.

In this case, there was no evidence to support the arbitrator's finding 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" (RA 35) or that "on December 1, 2014, Romeo simply gave his opinion to the Chief about the detail based on conversation with Colometo" (RA 35) where the arbitrator found that the detail required the officer's presence at the pump station or on the truck route (RA 16) and further that Romeo "was

aware that the intention of Colometo was to have an officer at the Pump Station or on the truck route," and that Romeo had disobeyed the verbal instructions he had been given by Colometo. (RA 33, 37)

Here, the trial court judge properly determined, relying on the findings of the arbitrator, statutory provisions and applicable case law, that the arbitrator's decision and award exceeded his authority such that the award must be vacated. The arbitrator's findings clearly established both that Romeo had not performed the duties of the detail on November 24 although he submitted the slip to be paid for working the detail that day, and further that Romeo made intentional misrepresentations to the Chief regarding the duties of the detail, and his belief regarding the requirements of the detail, when questioned on December 1, 2014 and at later hearings.

C. Public Policy Mandated Romeo's Discharge

"Arbitration, it is clear, may not award relief of a nature which offends public policy." Bureau of Special Investigations, 430 Mass. at 603. Whether an award violates public policy is "ultimately one for resolution by the courts and not by arbitrators." City

of Boston, 443 Mass. at 818. In determining whether the public policy exception requires the vacation of an arbitrator's award, courts apply a three-part analysis. City of Boston, 477 Mass. at 442.

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.'" Second, the exception does not address "disfavored conduct in the abstract, but disfavored conduct which is integral to the performance of employment duties." Finally, [the courts] 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." 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. Id. at 442-443 (internal citations omitted)

As the trial court judge found in this case, it is a well-defined, dominant public policy that dishonesty by police officers will not be tolerated. See City of Boston, 443 Mass. at 823. Furthermore, the courts have recognized that honesty is integral to a police officer's performance of his or her employment duties. Id. at 823 ("strong public policy, "explicit, well-defined, and dominant," that police officers be truthful and obey the law in the performance of their

official duties."); Robichau v. Town of Middleboro, 24 MCSR 352 (2011) ("The duty imposed on a police officer to be truthful is one of the most serious obligations he or she assumes, because, among other things, it may compromise the officer's ability to serve as a credible witness in the prosecution of a criminal case.")

An appointing authority has the right to take disciplinary action against an officer, even as far as to terminate him or her, when the officer has shown a "demonstrated willingness to fudge the truth in exigent circumstances" because "police work frequently calls upon officers to speak the truth when doing so might put into question a search or might embarrass a fellow officer. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 801 (2004) citing City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 303 (1997) see also Pearson v. Town of Whitman, 16 MCSR 46, 47 (2003) (termination of police sergeant affirmed because "an officer that has lost his credibility can no longer effectively perform the duties of the position.")

The Winthrop Police Department Rules and Regulations further support that honesty and integrity are essential duties of a police officer. Section 1.4.8 of the Winthrop Police Department Rules and Regulations, entitled "Integrity", states "no Department member shall under any circumstances make any false official statements or intentional misrepresentation of facts." (RA 25)

In this case, the trial court judge properly accepted the arbitrator's findings, and properly disregarded those findings that exceeded the arbitrator's authority, to determine that Romeo's failure to perform the detail at the time and place assigned, and his dishonesty throughout the course of the internal investigation and subsequent hearings, compounded by his unwillingness to take responsibility for disobeying the Detail's rules, required dismissal and that any lesser sanction would violate the well-defined, dominant public policy that dishonesty by police officers will not be tolerated. (RA 216-217) An officer who is found to be untruthful and who shrouds his own misconduct in an extended web of lies and perjured testimony corrodes the public's confidence in

its police force and can no longer perform an essential function of the job such that termination is required. City of Boston, 443 Mass. at 823. See Geller, 50 Mass. App. Ct. at 294 (awards in arbitration proceedings held pursuant to collective bargaining agreements which reinstate discharged employees will not be upheld if the public policy violated by reinstatement relates to the employment and the offense in question goes to the heart of the employee's responsibilities). Accordingly, in this case, the trial court judge properly determined that the arbitration award, reinstating Romeo to his position as a police officer, violated a clearly defined and dominant public policy and exceeded the arbitrator's authority, and properly vacated the award.

II. THE APPEAL OF THE DENIAL OF THE UNION'S REQUEST FOR ATTORNEY'S FEES AND COSTS PURSUANT TO G.L. c. 231, § 6F SHOULD BE DISMISSED.

The Union argued in the Superior Court that it is entitled to attorney's 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 case law establishing that any reviewing court would be bound by those conclusions, and requests that the case be remanded to the Superior Court for reconsideration of the Union's request. (Appellant Brief p. 49)

First, the Union's argument ignores the substantial volume of case law where arbitration decisions and awards have been vacated because the findings or award was in excess of the arbitrator's authority, was not based on any evidence before the arbitrator, or violated public policy. "Although arbitration decisions are given great deference, they are not sacrosanct." City of Boston, 443 Mass. at 823.

Second, the Town contended in its Complaint and in the Superior Court, as it does here, in good faith and with a basis in fact and law, that the arbitrator's decision and award exceeded his authority and violated public policy such that it must be vacated. The trial court judge, Fahey, J., in an independent analysis and review of the law and arguments, determined that the arbitrator had indeed exceeded his authority, that the award violated public policy and, properly vacated the award.

Third, the award of any relief under G.L. c. 231, § 6F, requires that the judge determine that "all or substantially all of the claims, defenses, setoffs or counterclaims . . . made by any party represented by counsel during most or all of the proceeding, were wholly insubstantial, frivolous and not advanced in good faith" In this case, the trial court judge vacated the arbitration award on the grounds alleged in the Town's Complaint and which it argued in its Memorandum and at the trial court hearing. (RA 119-130; 169-190) The trial court judge issued a judgment in the Town's favor, precluding a determination that the action was wholly insubstantial and frivolous.

Finally, an appeal from a decision concerning a motion for attorney's fees and costs pursuant to G.L. c. 231, § 6F must be brought pursuant to G.L. c. 231, § 6G, which prescribes an expedited process requiring notice of appeal to be filed within ten days after receiving notice of that decision and, if as here, the matter arises in the superior court, "the appeal shall be to the single justice of the appeals court." G.L. c. 231, § 6G; Ben v. Schultz, 47 Mass. App. Ct. 808,

810 n. 2 (1999) "The function of the single justice hearing the appeal is to conduct a 'review on the basis of the subsidiary facts as found by the trial court judge.'" Id. at 814 quoting Miaskiewicz v. LeTourneau, 12 Mass. App. Ct. 880, 882 (1981). In addition, a finding under §6F may be made and affirmed under §6G, but any award granted has no freestanding effect until all appeals of the underlying judgment are completed. Ben v. Schultz, 47 Mass. App. Ct. at 814.

Therefore, the appeal of the trial court judge's denial of the Union's request for attorney's fees and costs under G.L. c. 231, § 6F is not properly included in this Appeal and the Appeals Court has no authority to remand the issue to the Superior Court as the Union requests or to order other relief. As such, the Union's appeal on this issue should be dismissed.

CONCLUSION

For the foregoing reasons, the order of the trial court vacating the Arbitration Award should be affirmed, and the appeal of the denial of the Union's request for attorney's fees and costs pursuant to G.L. c. 231, § 6F should be dismissed.

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RULE 16(k) CERTIFICATION

I, Howard L. Greenspan, Esq., counsel for the Plaintiff-Appellee, Town of Winthrop, hereby certify that this brief complies with the rules of Court that pertain to the filing of briefs.

/s/Howard L. Greenspan
Howard L. Greenspan

CERTIFICATE OF SERVICE

I, Howard L. Greenspan, Esq. hereby certify that on this date I served the Brief of the Plaintiff-Appellee, Town of Dartmouth, by electronic filing/eFileMA to: **Patrick N. Bryant, Esq. and Ian O. Russell, Esq., Pyle Rome Ehrenberg PC, 2 Liberty Square, 10th Floor, Boston, MA 02109.**

Signed under the pains and penalties of perjury this 26th day of September, 2017.

/s/Howard L. Greenspan
Howard L. Greenspan