

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

14-P-756

CITY OF WALTHAM

vs.

WALTHAM POLICE PATROL OFFICERS' UNION, LOCAL 161, MASSACHUSETTS
COALITION OF POLICE, AFL-CIO.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The city of Waltham (city) appeals from a Superior Court judgment confirming an arbitrator's award and denying the city's motion for summary judgment, which sought to vacate the arbitration award for the defendant union's member, Officer Paul Tracey.¹

Background. While on patrol on February 17, 2011, Officer Tracey was asked by a friend to help him obtain information from tenants he was attempting to remove from an apartment his family owned in Waltham. After accompanying his friend to the apartment at about 10:00 P.M. and obtaining information from Edgar Gonzalez and his younger brother, Tracey left the apartment. Gonzalez immediately began complaining to the police

¹ We use the spelling of the officer's last name as it appears in the complaint and is used by the parties and the arbitrator.

that he had been threatened with eviction and deportation if he did not leave, and requested an investigation. A police department internal affairs investigation began, and on April 20, 2011, Tracey was placed on paid administrative leave. A police lieutenant issued a report of the investigation on June 9, 2011. Following a civil service hearing, the hearing officer found on January 18, 2012, that the city was justified in issuing a suspension. Pursuant to police department conduct regulations, the police chief on January 30, 2012, ordered Tracey suspended for fifteen days with a further fifteen days to be imposed in the event of future misconduct. That action also brought an end to Tracey's administrative leave. The union filed a grievance and the parties agreed to submit the matter to arbitration.

The arbitrator issued his award on November 25, 2012, concluding the city violated the collective bargaining agreement (CBA) by maintaining Tracey on paid leave from September 1, 2011, until January 30, 2012, and issued a monetary sanction. The arbitrator also determined that the city did not have just cause to issue the disciplinary suspension, and ordered that it be converted to a written reprimand.

The city filed an action in the Superior Court under G. L. c. 150C, § 11, seeking to vacate or modify the award. In a decision on cross motions for summary judgment dated February

26, 2014, the judge allowed the union's motion, and the city filed this appeal.

Discussion and analysis. a. Standard of review. "Absent proof of one of the grounds enumerated in G. L. c. 150C, § 11, to vacate arbitral awards, we are strictly bound by the arbitrator's factual findings and conclusions of law, even if they are in error." School Comm. of Pittsfield v. United Educators of Pittsfield, 438 Mass. 753, 758 (2003).

b. The arbitrator's decision. The arbitrator framed his analysis by stating: "Under the circumstances of this case, [Tracey] only engaged in serious misconduct IF he abused his office on behalf of his friend and neighbor by threatening eviction, deportation and to return in 24 hours, under color of police powers, as alleged by Mr. Gonzalez." The arbitrator also stated: "The Gonzalez complaints triggered much investigation which ultimately unveiled only one technical violation: [Tracey's] failure to call [in to the dispatch center his unauthorized visit to the friend's apartment] or otherwise make a record of it."²

² The arbitrator reached this conclusion after a thorough and detailed analysis of Gonzalez's allegations. He found as follows: the "allegations of threats of eviction and deportation by [Tracey] were made orally on the night of the incident and a second time in writing three weeks later. . . . However, Mr. Gonzalez did not testify at arbitration or at the City's disciplinary hearing Therefore the only evidence of Mr. Gonzalez['s] allegations presented at the arbitration was

The agreed issues before the arbitrator were presented in the following questions:

"1.) Did the City violate the collective bargaining agreement by maintaining Officer Paul Tracey on paid administrative leave from April 20, 2011 until January 30, 2012?

"2.) If so, what shall be the remedy?

"3.) Did the City have just cause to issue a 15-day disciplinary suspension to Officer Paul Tracey?

"4.) If not, what shall be the remedy?"

We examine together the arbitrator's answers to those questions and the city's arguments disputing them, as follows.

Question 1. The arbitrator stated that "[f]or reasons that were not revealed at arbitration, the City's investigation was unusually and unnecessarily long." He noted that "[b]y September 1[, 2011,] all investigations were complete and there was no further apparent reason to maintain [Tracey] on leave until January 30, 2012." The arbitrator concluded that the city violated the CBA "by arbitrarily and capriciously maintaining [Tracey] on administrative leave . . . , an action that was also effectively discipline without just cause."

As remedy for the excessive period of leave, the arbitrator awarded payment to Tracey of \$645 per week from April 20, 2011,

hearsay Neither [the police investigator] nor [the hearing officer] directly confronted the hearsay nature of the evidence by Mr. Gonzalez and his overall credibility which I find determinative in this case. . . . Considering these facts and allegations I do not credit Mr. Gonzalez'[s] hearsay allegations." The arbitrator also found that the city did not prove that Tracey made any threats.

until January 30, 2012, based on overtime and detail earnings in the prior year of \$33,542, divided by fifty-two weeks. Article XIII, § 13.2k(1) of the CBA provides that an officer shall not lose salary or benefits until formally charged.

The city argues at length that the award impinges on the police chief's performance of his public functions, and interferes with his management duties. There is no merit in this argument. The arbitrator did not disturb the decision of the chief to place Tracey on administrative leave or to order him to end the leave, or otherwise interfere with his duties at any time during the internal affairs investigation.

Question 3. The arbitrator found that "[t]he City proved, and [Tracey] acknowledged, that his failure to [call in his location to the dispatch center] or subsequently to write a report violated departmental policies and procedures." He noted that the "Union established that no one was previously disciplined for this technical violation of essentially clerical functions of the position of police officer." The arbitrator found that the "City's policies and procedures concerning reports are reasonable and enforceable with discipline, and therefore the City had just cause to discipline [Tracey]." He concluded, however, "[c]onsidering that this is the City's first known use of discipline to formally enforce this policy, it is appropriate to start at the first step of progressive discipline

with a written reprimand. A lost time discipline such as the suspension that was imposed is excessive and without just cause for the first discipline for such a technical violation."³

As remedy the arbitrator ordered that the discipline be converted to a written reprimand and the city make Tracey whole for lost pay and benefits, plus \$1,290 for two weeks of lost overtime and lost detail opportunity of \$645 per week during his suspension from January 30 through February 13, 2012.

Here, we observe that the city's appeal arguments appear to address issues which might have been raised if Gonzalez's allegations had been substantiated. But because the arbitrator found those "allegations of police misconduct were never corroborated or proven," we reject all the arguments asserting violations of G. L. c. 268A, § 23, and 42 U.S.C. § 1983.

There also is no merit in the city's assertions that the arbitrator exceeded his authority. We conclude from our review that the essence of the arbitrator's award properly was drawn from the CBA, which he interpreted and applied. See School Dist. of Beverly v. Geller, 435 Mass. 223, 228-229 (2001), and cases cited.

³ Article XV, § 15.1a states: "No OFFICER may be disciplined, suspended or discharged except for just cause."

Finally, we discern no error in the Superior Court judge's reasoned decision and conclusions of law in denying the city's motion for summary judgment.

Judgment affirmed.

By the Court (Cypher, Hanlon
& Agnes, JJ.⁴),

Clerk

Entered: June 17, 2015.

⁴ The panelists are listed in order of seniority.