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NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2184CV01517

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CITY OF SOMERVILLE

vs.

SOMERVILLE POLICE EMPLOYEES ASSOCIATION

MEMORANDUM OF DECISION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

The plaintiff, City of Somerville ("City"), brought this action seeking to vacate, pursuant to G.L. c. 150C, § 11(a)(3), the June 4, 2021 decision of a labor arbitrator ("Decision") ordering it to reinstate former Somerville Police Detective Dante DiFronzo ("DiFronzo"), a member of defendant Somerville Police Employees Association ("Union"), to his former position. The Union cross-petitioned to confirm the award, pursuant to G.L. c. 150C, § 10.[1] Both parties moved for summary judgment, and the Court heard oral argument on March 2, 2023. For the below reasons, the Decision is **VACATED** and the matter is **REMANDED** to the arbitrator for further proceedings consistent with this decision.

BACKGROUND

On March 2, 2015, Jonathan Machado ("Machado") critically stabbed Henry Alvarez ("Alvarez") at 9 Alston Street in Somerville. The Somerville Police Department ("the Department") investigated the crime. On September 29, 2016, the Department received information from the Middlesex District Attorney's Office ("DA's office") that the DA's office

[1] The Union's Memorandum of Law in support of its Motion for Summary Judgment is in excess of the 20-page limit set by Superior Court Rule 9A(5)(iv) and was filed without the court's permission. See Paper 16. The Union is cautioned that the Court will reject any further papers filed in excess of the applicable page limit without the court's permission.

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had "discovered possible criminal conduct" by DiFronzo. Specifically, examination of Machado's phone revealed that DiFronzo and Machado had exchanged text messages about trying to locate Alvarez, who had stolen marijuana from Machado. In one of the messages, DiFronzo told Machado that Alvarez was at 9 Alston Street. Days later, Alvarez was stabbed at 9 Alston Street. Upon learning these allegations, the Department placed DiFronzo on paid administrative leave pending the outcome of the investigation.[2]

On May 31, 2017, the Department suspended DiFronzo for five days without pay. On May 8, 2018, the City terminated DiFronzo for violating the Department's Rules and Regulations requiring officers to promptly and accurately complete and submit all reports and forms, be truthful, and not fabricate, withhold, or destroy evidence, and prohibiting conduct unbecoming an officer, filing false information on records, and improper associations.

DiFronzo grieved his dismissal pursuant to the procedures in the collective bargaining agreement ("CBA") between the City and the Union and the matter went to arbitration. On June 4, 2021, the arbitrator issued the Decision, a seventy-seven page ruling, concluding that although

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[2] On March 23, 2017, the DA's office sent the Department a Notice Regarding Potential Commonwealth Witness, also known as a "Brady letter," which stated the following:

> On February 28, 2015, ... DiFronzo spoke with a confidential informant ("CI"). The CI told Det. DiFronzo that an individual ("the Individual") had recently stolen marijuana from him. Detective DiFronzo knew that the CI had a violent criminal past and that the CI was looking for the Individual. The CI told Det. DiFronzo that he intended to harm the Individual.
>
> Detective DiFronzo, with this knowledge, actively assisted the CI in locating the Individual by providing information to the CI regarding the Individual's whereabouts. After receiving this information from Det. DiFronzo, the CI participated in a home invasion on March 2, 2015, in which the Individual was stabbed multiple times with a machete requiring hospitalization and surgeries.
>
> ~~The Commonwealth is also aware that Detective DiFronzo knowingly made material~~ omissions in police reports that were submitted in connection with the investigation of the home invasion.

the City had just cause to discipline DiFronzo, it did not have just cause to terminate him. In relevant part, the arbitrator stated the following:

> ... I conclude that [DiFronzo] did not violate the Department rule regarding Improper Associations. The fact that [DiFronzo] knew that Machado had a criminal record and knowledge of at least some of the offenses Machado committed did not prohibit [DiFronzo] from using Machado as a source. Further, in reaching this conclusion I note: street sources are an accepted method of gathering information; the [Department] Chief was aware of the use of street sources and appears to have had knowledge of [DiFronzo's] use of Machado as a street source in at least one other case; there are no clear rules regarding the use of street sources; and there is no rule requiring the disclosure of street sources to upper command or that the registration process of confidential informants applies to street sources. Further, the evidence does not support the conclusion that [DiFronzo] was concealing information, including the text messages, to avoid implicating himself in helping Machado to locate Alverez [sic].... I note that [DiFronzo] did not delay the issuance of the search warrants and did not limit the dates of the phone dump to conceal the text messages he had with Machado. In addition, ... the evidence is not sufficient to conclude that [DiFronzo's] actions resulted in the stabbing of Alverez [sic].
>
> However, I conclude that [DiFronzo] demonstrated poor judgment in the manner that he used Machado as a source. Although there is no evidence that [DiFronzo] gained personal benefit in the way he used Machado, it appears that his focus on locating Alverez [sic] clouded his judgement [sic] in the manner he used Machado. At the point that Machado informed him that he was looking for Alverez [sic], and also informed [DiFronzo] that he wanted to give Alverez [sic] a beating, [DiFronzo] should have reevaluated the manner that he was using Machado and the detail of information he was providing to Machado. Instead of reevaluating his use of Machado as a source, [DiFronzo] demonstrated poor judgment in concluding that Machado was not serious in making comments about harming Alverez [sic]. [DiFronzo] should have consulted with superiors about his use of Machado as a source in light of the substance of the telephone conversation. Further, I conclude that [DiFronzo] should have submitted a written report about his belief that Machado was a suspect immediately after the stabbing. The fact that [DiFronzo] was off duty for two days after the stabbing should not have prevented him from formally and clearly communicating his belief about Machado and allow the possibility of other officers continuing the investigation on his days off.

The arbitrator ordered that DiFronzo be reinstated without back pay or benefits, but without loss of seniority. The arbitrator further stated:

> The City, as soon as practical, but not later than thirty (30) calendar days from the date of this decision, shall reinstate [DiFronzo] to his prior position. [DiFronzo's] reinstatement to his former position is conditioned upon his successful completion of a training program related to the use of confidential sources and/or street sources. In addition, his reinstatement is conditioned upon [DiFronzo] completing training related to report writing. In each case the training shall be consistent with existing training available to officers/detectives currently employed by the Department.
>
> In the event that such training cannot be completed within the 30-calendar day period stated above, [DiFronzo] shall be initially reinstated to a non-field position and shall be moved into his former position at the point such training is completed. [DiFronzo] shall be paid at the rate of pay of his former position during the period of the training described above and shall be paid at the rate of pay of his former position during the period that he may be required to work in a non-field position.

On July 2, 2021, the City moved to vacate the arbitrator's award reinstating DiFronzo as violating public policy.[3] On July 21, 2021, the Union cross petitioned to confirm the arbitrator's award and also requested that the court order the City to reinstate DiFronzo to his "position in Detectives." On May 12, 2022, the court (Connolly, J.) denied the Union's motion for a preliminary injunction.

DISCUSSION

Massachusetts has a strong public policy favoring arbitration, especially in the context of labor disputes. *Pittsfield* v. *Local 477 Int'l Bhd. of Police Officers*, 480 Mass. 634, 636-637

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[3] On June 30, 2021, the DA's office sent the Department another "Brady letter," which essentially repeated the findings of the first Brady letter, but also stated:

> ... Barring extraordinary circumstances, the Commonwealth does not intend to call Detective DiFronzo as a witness in any future case.

On July 1, 2021, the Department informed DiFronzo that, effective July 4, 2021, he was being placed on paid administrative leave until further notice because the Department must "commence a new investigation into and an assessment" of this "new" notice from the DA's office. On February 22, 2023, the City notified DiFronzo that it intended to hold a hearing to determine if the June 30, 2021 Brady letter requires DiFronzo's discharge because the police chief "does not believe there is a job assignment that you could be assigned that does not include the potential need for you to testify in court."

(2018); *School Comm. of Pittsfield* v. *United Educators of Pittsfield*, 438 Mass. 753, 758 (2003). To further this policy, judicial review of arbitration awards is confined to certain narrow grounds. *Id.* See also *Plymouth-Carver Reg'l Sch. Dist.* v. *J. Farmer & Co.*, 407 Mass. 1006, 1007 (1990). "Courts inquire into an arbitration award only to determine if the arbitrator has exceeded the scope of his authority, or decided the matter based on 'fraud, arbitrary conduct, or procedural irregularity in the hearings.'" *Id.*, quoting *Marino* v. *Tagaris*, 395 Mass. 397, 400 (1985); see G.L. c. 150C, § 11(a)(3) (court shall vacate arbitration 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"). An arbitrator exceeds his authority by granting relief beyond the scope of the arbitration agreement, beyond that to which the parties bound themselves, or prohibited by law. *Plymouth-Carver Reg'l Sch. Dist.*, 407 Mass. at 1007. In addition, an arbitrator cannot order a party to engage in an action that violates a well-defined public policy. *Boston* v. *Boston Police Patrolmen's Ass'n*, 477 Mass. 434, 442 (2017); *Boston* v. *Boston Police Patrolmen's Ass'n*, 443 Mass. 813, 818 (2005); see also *Massachusetts Highway Dep't* v. *American Fed'n of State, County, and Mun. Employees, Council 93*, 420 Mass. 13, 16 (1995) (award that offends public policy is beyond arbitrator's powers). "The question of public policy is ultimately one for resolution by courts and not by arbitrators." *Boston Police Patrolmen's Ass'n*, 443 Mass. at 818 (internal quotation and additional citations omitted).

I. <u>The Arbitrator's Remedy Exceeded His Authority</u>

The City argues that the arbitrator exceeded his authority by reinstating DiFronzo to his "prior" or "former" position within the Department. The Court agrees.

"There are certain nondelegable rights of management, matters that are not mandatory subjects of collective bargaining ..., that a municipality and its agents may not abandon by

agreement, and that an arbitrator may not contravene." *Billerica* v. *International Assn. of Firefighters, Local 1495*, 415 Mass. 692, 694 (1993). Relevant here, the assignment of police officers is within the exclusive managerial authority of the police chief and may not be delegated or contravened through arbitration or collective bargaining. *Framingham* v. *Framingham Police Officers Union*, 93 Mass. App. Ct. 537, 537-538, 542 (2018); see *Boston* v. *Boston Police Superior Officers Fed'n*, 466 Mass. 210, 215 (2013) (police commissioner has nondelegable authority over assignment and organization of officers within police department).

The Union acknowledges the Somerville police chief's nondelegable right to assign officers[4] but contends that the arbitrator did not exceed his authority because the arbitrator did not direct the City to reinstate DiFronzo to his detective assignment. More specifically, the Union argues that the arbitrator distinguished between an officer's *position* (i.e., patrolman, sergeant, lieutenant, chief) and an officer's *assignment* (i.e., detective, professional standards) and that the arbitrator returned DiFronzo to his *position* as patrolman not to his *assignment* as a detective in the Criminal Investigation Division (CID). There is no indication in the decision, however, that the arbitrator meant anything other than detective when he referred to DiFronzo's "prior" or "former" position. Instead, the arbitrator appears to have specifically contemplated DiFronzo's reinstatement as a detective. For example, the arbitrator conditioned DiFronzo's reinstatement to his former position on completing training "consistent with existing training available to officers/detectives currently employed by the Department[,]" including "training related to the use of confidential sources and/or street sources." The arbitrator also stated that if such training could not be completed within thirty days, the City should "initially" reinstate DiFronzo to a non-field position and move him into his former position after training.

[4] The Union admits that the position it took in support of its motion for preliminary injunction, that the arbitrator should order DiFronzo reinstated to the assignment of detective, was mistaken.

To the extent the award required the City to return DiFronzo to his "prior" or "former" position as detective, it must be vacated. See G.L. c. 150C, § 11(a)(3) (court shall vacate arbitration award if "the arbitrators exceeded their powers ...."). Thus, on remand, the arbitrator shall vacate any portion of the order requiring the City to reinstate DiFronzo as a detective.

II. The Arbitrator Made Insufficient Findings to Address the Public Policy Issue

The City further argues that DiFronzo's reinstatement to the Department in any capacity offends public policy. As the Court is remanding this case to the arbitrator, it declines to address the City's public policy argument at this time. Instead, on remand, the arbitrator should make additional findings which are necessary to decide whether ordering the Department to reinstate DiFronzo would be contrary to public policy. See *Boston Police Patrolmen's Ass'n*, 477 Mass. at 442.

The arbitrator recognized that DiFronzo's interactions with Machado in the days before the stabbing, including their texts, did not come to light until police searched Machado's phone a year and a half after the stabbing. Moreover, the arbitrator further recognized that the text messages "clearly became important evidence in creating a link between Machado and the events that surrounded the stabbing." Nonetheless, in his Decision, the arbitrator couched DiFronzo's conduct almost entirely in terms of "poor judgment," and addressed the important question of DiFronzo's intentions only in the most cursory way. See *supra* at 3. The arbitrator failed to squarely address whether DiFronzo intentionally withheld information from the Department about his interactions with Machado and, if he did, whether his motive was to protect himself, impede the investigation, or some other reason.

Additional findings as to DiFronzo's intent are important, and perhaps essential, to a determination of whether reinstating DiFronzo would violate public policy, and their absence

renders the Decision insufficiently clear. See *Sheriff of Suffolk County* v. *Jail Officers & Employees*, 451 Mass. 698, 702 & n.5 (2008) (concluding arbitrator's findings were not sufficiently clear because arbitrator had not decided whether reports were incomplete or false or misleading; court had previously directed matter be remanded to arbitrator for specific findings on two points, but arbitrator had died). Therefore, on remand the arbitrator should make additional findings as to whether DiFronzo intentionally withheld information about his interactions with Machado and, if he did, whether his motive was to protect himself, impede the investigation, or some other reason.

III. June 30, 2021 Brady Letter

As noted above, see *supra* footnote 3, after the Decision, the DA's office sent the Department another "Brady letter," which essentially repeated the findings of the March 23, 2017 Brady letter, but also stated that "[b]arring extraordinary circumstances, the Commonwealth does not intend to call Detective DiFronzo as a witness in any future case." Thereafter, the City notified DiFronzo that it intended to hold a hearing to determine if the June 30, 2021 Brady letter requires DiFronzo's discharge because the police chief "does not believe there is a job assignment that you could be assigned that does not include the potential need for you to testify in court."

The City argues that because the June 30, 2021 Brady letter arose post-arbitration it should not be part of the Court's review of the Decision,[5] and the Court agrees. However, the City should not use this procedural posture to unnecessarily delay the proceedings. The parties should endeavor to agree on a procedure that would avoid the need for the arbitrator to conduct two future hearings, one based on a record without the "new" Brady letter and one based on a

[5] Instead, the City would require DiFronzo to grieve, and potentially arbitrate, any non-favorable decision arising out of the June 30, 2021 Brady letter.

record with the letter. The Court leaves this matter in the first instance to the parties and the arbitrator.

CONCLUSION AND ORDER

For the above reasons, Defendant Somerville Police Employees Association's Motion for Summary Judgment (Paper # 15) is **DENIED**, and the City of Somerville's Cross-Motion for Summary Judgment (Part of Paper # 17) is **ALLOWED** to the extent set forth herein. The June 4, 2021 decision of the arbitrator in this matter is **VACATED**, and the case is **REMANDED** to the arbitrator to (1) vacate any portion of the Decision requiring the City to reinstate DiFronzo as a detective; and (2) make additional findings as to whether DiFronzo intentionally withheld information about his interactions with Machado and, if he did, whether his motive was to protect himself, impede the investigation, or some other reason.

Robert L. Ullmann
Justice of the Superior Court

Dated: May 24, 2023

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