

American Arbitration Association

City of Worcester

Case # 11 390 648 10

And

Gr: D. Rawlston Discharge

New England Police
Benevolent Association

Award: February 21, 2011

Arbitrator: Roberta Golick, Esq.

Hearing: October 15, 2010

Appearances: For the Union
Peter J. Perroni, Esq.
Gary G. Nolan, Esq.
Nolan Perroni Harrington, LLP

For the Employer
Tim D. Norris, Esq.
Collins, Loughran & Peloquin, P.C.

The Issue

The parties submitted the following issue:

Was the discharge of David Rawlston on February 18, 2010, for just cause?

If not, what shall be the remedy?

The Agreement

The collective bargaining agreement between the parties provides, in relevant part:

Article 14 Internal Affairs Investigations

Section 1. No permanent member of the bargaining unit shall be removed, dismissed, discharged, suspended reprimanded or disciplined except for just cause...

Section 4. All complaints or charges which may result in potential disciplinary action against any employee shall be brought by the City or the Police Department within six (6) months from the date of the completion of the investigation of said complaints or charges...

Background

While employed as a Police Officer for the City of Worcester, David Rawlston was authorized to carry a firearm pursuant to M.G.L. c. 41 §98.¹ Separate from this authority conferred on Rawlston (and all Worcester officers) by Police Chief Gary Gemme, Rawlston also had a license to carry firearms pursuant to M.G.L. c. 140 §131. This is the same license under the same statute that permits eligible civilians to carry firearms. Chief Gemme testified that it is the policy of the Department to issue this so-called Chapter 140 "License to Carry" to all police officers employed by the City of Worcester.

In April 2007, Police Officer Rawlston was involved in an off-duty incident (referred to as the Tory Fort Lane incident), which triggered an internal Department investigation. At the time, Rawlston was on injured-on-duty leave from the Department. Per order of the Chief, Rawlston immediately turned in his Department-issued firearm, ammunition and ammunition clips. He continued to be carried on IOD status for the next several months.

On July 10, 2007, while he was still absent on IOD, Officer Rawlston's M.G.L. c. 140 License to Carry expired. He apparently took no steps at that time to renew it.

In September 2007, Officer Rawlston was medically cleared to return to work. Inasmuch as the investigation into the April 2007 incident was still on-going, Chief Gemme converted Rawlston's status from IOD to Administrative Leave with Pay. On September 21, 2007, the Chief wrote to Rawlston, in pertinent part:

¹ The statute provides that police officers may carry within the Commonwealth such weapons as the chief of police or the board or officer having control of the police in a city or town shall determine.

You are hereby notified that effective immediately your status has been changed from Injured on Duty to Administrative Leave with Pay, until further notice from me. Also, the following shall also apply: you shall not exercise any authority as a police officer; you shall not perform any police powers or police-related functions; your License to Carry a Firearm is under indefinite suspension, as is your right to carry a firearm under the statutory authority conferred by M.G.L. c. 41 sec. 98. You are directed to turn over your LTC, all department-issued equipment, including but not limited to: firearm; badges; Capstun; police radio; handcuffs; ammunition, etc. to the person serving you this notice, if you have not already done so.

Officer Rawlston remained on Administrative Leave while the Department completed its investigation into the Tory Fort Lane incident. At the conclusion of the investigation and after a hearing on several charges of misconduct, the Department discharged Officer Rawlston on February 1, 2008.

The Union filed a grievance on Officer Rawlston's behalf. When the matter could not be resolved, the parties presented the matter in binding arbitration before Arbitrator Richard Higgins. The first hearing day was scheduled for August 25, 2008.

Meanwhile, on April 1, 2008, Rawlston filed an application pursuant to M.G.L. c. 140 for a License to Carry (LTC) a firearm.² The LTC application contains a section of yes/no questions. One of the questions on the application is:

13. Has any License to Carry Firearms, Permit to Possess Firearms, or Firearms identification Card issued under the laws of any state or territory ever been suspended, revoked, or denied?

Rawlston answered "no" to that question. As required, he filed the application with the Police Department, where he knew it would be reviewed and ruled on by the Chief or his designee.

On May 9, 2008, Chief Gemme denied Rawlston's application for the License to Carry. Gemme wrote that he deemed Rawlston an "unsuitable person." In a letter from Gemme to Rawlston dated May 14, 2008, the Chief explained the basis for his denial in more detail. The Chief described those aspects of the Tory Fort Lane incident where he believed that Rawlston acted improperly. He concluded:

² As Rawlston subsequently testified in this case, after his termination he tried to find employment in the field of security, and the higher paying jobs required the License to Carry.

Each of [the described] actions by you constituted use of unnecessary force by means of an inappropriate use of your department-issued firearm and/or by other means. As such, the proven circumstances of this incident constitute evidence of both your demonstrated inability to use firearms properly and your lack of suitability or fitness to carry firearms.

The Chief continued:

All of the above notwithstanding, the following also apply, and serve as additional, valid considerations in the review of your application.

- 1) It has been determined that your renewal application is incomplete:
 - A. Required information with respect to type of application [new or renewal] and type of license being sought [FID card, LTC, etc.] on page 1 of the application has not been provided;
 - B. Your most recent LTC expired on July 10, 2007, during the pendency of the investigation of the April 7, 2007, incident on Tory Fort Lane. You were notified that your LTC, which expired on July 10, 2007, was placed under indefinite suspension by me on September 21, 2007. It was my explicit intention at that time to make you ineligible for renewal of this license. But for the technicality that the LTC had already expired, it would have been suspended on that date. In addition, any authority to carry a firearm conferred to you under MGL c 41 § 98 was also suspended on that same date. You were notified of these suspensions in an official, department document titled, "Special Order: Notification of Administrative Leave" that was issued to you on September 21, 2007, and which was served upon you by a member of this department. However, despite your actual knowledge of these suspensions and the consequent actual status of your LTC, you chose not to include this information on your most recent renewal application, opting instead simply to answer "No" to question #13...The information concerning my decision to suspend your LTC and any authority to carry a firearm under MGL c. 41 §98 has direct relevance to the consideration of any future application by you for a LTC or a Firearms Identification Card in this or in any other jurisdiction, and therefore it should have been included in your renewal application.

The Chief ended his correspondence to Rawlston by reminding him that he had the right to appeal the Chief's decision within 90 days to the District Court with appropriate jurisdiction.

Rawlston did not file an appeal with the District Court.

Over the course of five days in 2008 and 2009, Arbitrator Richard Higgins conducted hearings in the case of Rawlston's dismissal. On July 17, 2009, he issued his lengthy (90 pages) decision. Higgins made a number of findings. He concluded that the three juveniles involved in the Tory Fort Lane incident (all of

whom testified at arbitration) lied to the investigating officers and lied under oath during the arbitration hearing. He concluded that the City failed to meet its burden of proving that Officer Rawlston's handling of his weapon violated any Department rules and regulations. He accepted the version of events advanced by Officer Rawlston and supported by other witnesses. He found that Rawlston did not precipitate the confrontation on Tory Fort Lane but rather responded to the provocative movements of the three juveniles. He concluded that the City failed to meet its burden to show that Officer Rawlston's handling of his weapon and/or any other conduct related to the Tory Fort Lane incident, including Rawlston's truthfulness in his version of the events, violated any departmental rules or regulations.³ Arbitrator Higgins wrote, after thorough analysis of all the evidence, that "there was not just cause for the termination of Police Officer David Rawlston." Higgins declared the termination revoked, and he ordered that Officer Rawlston be reinstated to his position with full back pay and benefits, less any and all outside earnings and/or unemployment compensation.

The City did not reinstate Officer Rawlston to his position. Instead, the City filed an appeal in Superior Court to vacate Arbitrator Higgins's award. The City contended that the arbitrator's decision contravened public policy. An August 2009 news story in the Worcester Telegram and Gazette about the Higgins decision quoted Police Chief Gemme as stating: "We will do everything we can to prevent this individual from returning to the Worcester Police Department."

On August 24, 2009, a month after the Higgins award, the City took steps to discharge Rawlston for the second time. City Manager Michael O'Brien served Rawlston with a notice of hearing scheduled for September 23, 2009, "for the purpose of determining whether you should be discharged based on the grounds set forth below:"

On July 10, 2007 your most recent license to carry a firearm expired. On September 21, 2007, by letter from the Chief of Police, you were notified that your right to carry a firearm was suspended indefinitely. Subsequently, you applied for a license to carry firearms and, by letter of May 14, 2008, the Chief of Police denied your application in writing. The denial was on the grounds of unsuitability based upon your admitted use of a firearm in an incident involving three teenagers, and because of untruthful statements on the license application, which you

³ Higgins noted that the Worcester Police Detective Bureau, investigating independently of the Department's Bureau of Professional Standards (which found Rawlston guilty of the several counts of misconduct), found no probable cause that Rawlston had committed a crime. Higgins also noted that the district attorney's office declined to prosecute any crime.

signed under the penalties of perjury. The letter indicated that you had 90 days in which to appeal to the District Court. That 90 day appeal period ran on August 12, 2008. You did not appeal the denial of your application for a license to carry firearms in a timely fashion. Having the right to carry a firearm is an essential qualification of a police officer. In the City of Worcester, all police officers are required to have a license to carry a firearm.

In a report dated February 12, 2010, the Hearing Officer for the City of Worcester found that:

Mr. Rawlston does not possess a LTC or have any other legal right to carry a firearm within the Commonwealth. Having the legal right to carry a firearm is a necessary qualification of the job of a city of Worcester police officer. Without that qualification, Mr. Rawlston cannot be a city of Worcester police officer. This, in and of itself constitutes just cause for discharge. Additionally, Mr. Rawlston gave incomplete and evasive responses on his LTC application, which also constitutes just cause for discharge.

On February 18, 2010, the City made it official: City Manager Michael O'Brien wrote to Rawlston, in pertinent part:

...It is apparent that the charges against you are sustained. You do not possess, and are not able to obtain a License to Carry a Firearm, which is a necessary qualification for your position as police officer in the City of Worcester. This makes it impossible to continue your employment...

Moreover...I view your response to the question [on whether a LTC had ever been suspended] as perjury, and wholly inconsistent with your service as a Worcester Police Officer. Even if I were to accept your defense that you relied on a technicality to answer the question, the response was still not the truth, and such a disregard for the truth is not tolerable in one entrusted with the responsibilities of a police officer.

Based upon the foregoing, I have no choice but to discharge you from employment.

The Union grieved this second termination of Rawlston, and the matter proceeded, unresolved to arbitration before me on October 15, 2010.

On November 30, 2010, Superior Court Associate Justice Kimberly Budd denied the City's appeal of the Higgins award, noting: "The City puts its eggs in several baskets, and identifies a number of public policies it claims are violated by the arbitrator's decision. However, the deference owed to the arbitrator's decision forecloses all the city's arguments." Justice Budd granted the Union's motion to confirm the arbitrator's award.

Positions of the Parties

The Union contends that there was no just cause for any discipline of Officer Rawlston. Procedurally, the Union argues, the City's case is flawed. First, the collective bargaining agreement prohibits the department from initiating discipline more than six months from the end of its investigation. Second, principles of res judicata and laches preclude a finding of just cause. And third, there can be no just cause to terminate an employee whom the City does not recognize as an employee.

On the merits, the Union asserts that even if no procedural defects are found, the City still lacked just cause for the discipline. The City has not established that a License to Carry under c. 140 is a job requirement in the City of Worcester; it is a "practice" that has been waived by the Chief in other situations. In any event, and very significantly, the charges against Officer Rawlston are not legitimate, were leveled against him in bad faith, and are a blatant attempt by the City to evade Arbitrator Higgins's award. In addition to its request for a ruling reinstating Rawlston with full back pay and benefits, the Union seeks an award of attorney's fees to be paid to Rawlston and the Union for the City's bad faith conduct.

The City asserts that all police officers in the Worcester Police Department are required to carry firearms. Consistent with practice, and with just two specific exceptions, all sworn police officers in Worcester are conferred Licenses to Carry firearms pursuant to M.G.L. c.140 §131. The two exceptions are officers serving under non-precedential "last chance" agreements reached between the Union and the City; with certain restrictions, the two officers are permitted by the Chief to carry weapons. Rawlston had an opportunity to appeal the Chief's denial of his LTC application and he failed to take action. Accordingly, he is disqualified from serving as a police officer, and the discharge must be upheld. Moreover, Rawlston was untruthful and misleading in his response to Question #13 on the LTC application. His dishonesty renders him unemployable in the City's Police Department.

Discussion

The Union's procedural challenges to the City's right to take steps to discharge Officer Rawlston are not dispositive of this case and I will not dwell on them. Although the Higgins award and the facts and circumstances that were involved in that case remain front and center stage in this case, the issues

before me are, for the most part, different from the issues that Higgins addressed.⁴ As for the timing of the City's discharge proceedings and the City's right to discharge an officer whom the City refuses to acknowledge as an employee, I find in this unusual situation that neither challenge ends this case. The application of the "six month rule" to issues such as this, where the City terminated Rawlston with no investigation, is not perfectly clear, and the suggestion that the City had no right to take action against someone whose employment status was in litigation cannot be credited. When there is post-discharge conduct or circumstances that provide grounds for new charges, there is nothing procedurally wrong with the City's taking steps to minimize its economic liability even as it awaited the Court's ruling on the integrity of the Higgins award.⁵

Turning, then, to the two bases upon which the City relies to justify Rawlston's second termination, I will begin with the Question #13 matter. The City posits that Rawlston's "no" answer to the application question of whether any License to Carry Firearms, etc., had ever been suspended, revoked or denied was dishonest and rendered Rawlston unfit to serve as a Worcester police officer. It is notable that Rawlston's April 2008 application for the LTC blossomed in the City's vocabulary from being "incomplete"⁶ to being "incomplete and evasive" to being "perjury."

The parties may debate ad infinitum whether the correct answer to Question #13 in Officer Rawlston's case was "yes" or "no." As everyone acknowledges, the answer "no" is technically accurate, for at the time the Chief expressed his "intention" to suspend Rawlston's LTC in September 2007, the officer's

⁴ The City would say the issues in this case are *entirely* different. I do, however, detect a *degree* of overlap on the LTC issue. The City did provide testimony and make an argument to Higgins based on the employability of Rawlston in the absence of his License to Carry a firearm, and Higgins did order reinstatement of Officer Rawlston, which is an indication that Higgins was not troubled by the employability question. But that aspect of the Higgins case was subordinate to the key issues before him, and Higgins did not comment on it. Therefore, I cannot find with sufficient certainty that the matter was fully decided in the earlier case.

⁵ If the Higgins award is ultimately reversed by a higher court, the issues before me arguably become moot. If, however, his award ordering the reinstatement of Officer Rawlston and the confirmatory ruling of the Superior Court are upheld on further appeal, the questions raised in this phase of the controversy retain their relevance. In any event, the current state of the Higgins case is that the arbitrator issued a final and binding decision within the scope of his powers under the collective bargaining agreement and that the decision passes legal scrutiny. Unless and until that changes, Arbitrator Higgins's award has the mantle of authority.

⁶ It is true that Rawlston's application was incomplete in that he did not check off whether this was a "new" application or a "renewal," and he did not check off which LTC he was applying for (Class A, Class B, etc.), but the only "incomplete" at issue in Rawlston's discharge relates to his answer on Question #13.

license had been long expired. Rawlston therefore did not possess a License to Carry that the Chief could suspend. The Chief's intention did not make it so, and there is a defensible argument that the clear answer to #13 was, in fact, no.⁷ Question #13 does not use the word "License" in its informal sense of permission. As it is used on the application form (the same form used by private civilians who seek to legally carry a firearm and as it would apply to Rawlston whose only "License to Carry" was the one issued under c. 140 of the Massachusetts General Laws) the question plainly referred solely to the License issued to Rawlston in accordance with Ch. 140, §131, the License that expired on July 10, 2007.

Of course, the City is entitled to its view of how Officer Rawlston *should have answered* Question #13. An argument can certainly be made that on some level, "no" was not the correct answer. The City may reasonably hold to the opinion that Rawlston should have at least provided the information that if he *did* have a Chapter 140 License to Carry, it would have been suspended back in September 2007.

The task here is not to determine who is right on this question. Rawlston was not fired for giving the wrong answer. He was fired for lying, and that charge requires a showing that Rawlston knowingly and deliberately answered the question falsely. By that standard, the charge of perjury fails. While it is true that Rawlston "knew" that the Chief had intended to suspend his LTC, he believed, not unreasonably, that the Chief's September letter had no impact whatsoever on the actual status of his LTC because he did not have an LTC at the time. Rawlston also "knew" that the Chief would be reviewing his application and he knew that the Chief knew of his own September 2007 effort to suspend the officer's LTC. The application that Rawlston submitted in April 2008 was a simple one with straightforward questions. It did not seek further explanations or additional information beyond "yes" and "no" answers. Inasmuch as Rawlston, applying for an LTC as an ordinary citizen, had no duty to go beyond the express question asked on the application, his failure to answer the question "yes" or to compose a special note to explain why he believed the answer to Question #13 was "no" cannot be regarded as dishonest or deceitful.

Accordingly, the "perjury" or "reckless disregard of the truth" component of the City's case against Rawlston is dismissed.

⁷ By way of analogy, can an employer fire an employee who previously resigned from his job? Would such an employee be required to answer "yes" on a subsequent job application asking if he'd ever been discharged from a job? One would think not; an employer cannot "discharge" someone who previously voluntarily resigned. By the same token, the Chief arguably could not "suspend" a license that had already expired.

The second basis for Rawlston's termination, according to the City, is that Rawlston's inability to secure a License to Carry a firearm pursuant to M.G.L. c. 140 renders him disqualified to serve as a police officer in the Department. The City points out that Rawlston had recourse in April 2008 if he was aggrieved by the Chief's LTC denial of his application; he had 90 days to file an appeal to the District Court. Since Rawlston did not appeal the Chief's determination, the City asserts, that determination stands and the discharge must be upheld.

Ignoring, for a moment, the peculiar facts that underlie Rawlston's lack of an LTC, a threshold question is whether the possession of a Chapter 140 LTC is, *in fact*, a job requirement. The arbitration record indicates that it is the Department's "practice" to bring each new police class up to the license division and to issue each newly sworn police officer an LTC. Consistent with the practice, Department policy governing the issuance of LTC's to the general public confirms that "It shall...be the policy of the department to issue a LTC to all police officers employed by the City of Worcester" (irrespective of whether the officer resides in the City). Though the City argues that the practice and policy stand for the proposition that a person *without* an LTC cannot be employed as a police officer, the practice/policy can just as easily be construed to stand for the proposition that the department *will* issue LTC's to its police officers; in other words, employment as a police officer comes first and the issuance of an LTC comes with the territory, like a uniform and a badge. The policy can be read as a statement of intent, not a disqualification for employment.

Be that as it may, the arbitration record further indicates that even if possession of a Chapter 140 LTC is generally viewed as a requirement, it is a requirement that the Chief can waive at his discretion. In circumstances the Chief has deemed worthy, he has done so in the past.

Assuming, though, for purposes of discussion, that possession of a Chapter 140 LTC (separate from Chapter 41 §98 permission⁸) is a requirement of the job, and accepting the City's assertion that the prerogative of the Chief to assess suitability for such License cannot be encroached upon by an arbitrator, the contractual question remains whether the City has demonstrated just cause for terminating Rawlston's employment.

⁸ Chapter 41 §98 does not confer a License to Carry as that phrase is used in Chapter 140. What it confers is the *authority*, controlled at all times by the Chief, to carry such weapons as the Chief deems appropriate.

In the context of just cause, it is permissible to consider the circumstances behind the Chief's determination that Rawlston is unsuitable to carry a firearm. The circumstances are quite straightforward and are not in dispute: the Chief is not swayed by and disagrees with the facts found by Arbitrator Higgins relative to Rawlston's conduct in the Tory Fort Lane incident; the Chief stated publicly after the Higgins award that the Department would do everything it could do to prevent Rawlston from returning. How did it do that? First, it challenged the Higgins award in Court. Second, it launched a collateral attack on the officer's qualifications to serve as a police officer by cutting off any legal route for him to be able to carry a gun. Ensuring that Rawlston could not secure a License to Carry was not merely an attempted end-run around Higgins's directive to reinstate Rawlston to his position; it was and is an attempted end-run around the contract's just cause provision. If all it takes for a department to permanently rid itself of an unwanted officer is to revoke the officer's Chapter 140 §131 License to Carry a firearm and withdraw permission to carry a weapon under Chapter 41 § 98, then an officer's contractual right not to be discharged except for just cause is meaningless. Just cause for dismissal is not established by the unadorned fact that a chief exercises his discretion to refuse to issue an employee a firearm.⁹ What is essentially the Department's dissatisfaction with Arbitrator Higgins's findings and ruling does not provide just cause under the collective bargaining agreement to discharge Rawlston.

The case at hand is an example of the Worcester Police Department hoping to achieve by fiat that which it failed to achieve in the Higgins case, namely, the permanent removal of Officer Rawlston from the force. The Chief is free to disagree with the outcome of the Higgins arbitration, and he may be free to exercise his claimed authority to refuse to permit Rawlston to carry a weapon. But in the realm of just cause, which is the contractual standard for dismissal, the City's reliance on an alleged "disqualification" that the Chief himself decided to impose so as to prevent Rawlston from reinstatement was capricious and does not meet the test of contractual fairness.

Accordingly, I find as follows:

⁹ Although the City points out that an individual can appeal an LTC denial to District Court, it acknowledges that the standard to overturn the Chief's determination in this context is extremely high (arbitrary and capricious) and that the burden is on the individual, not the Chief. Under the collective bargaining agreement, the burden is on the Department to prove just cause for dismissal, not on the individual to show otherwise.

Award

The discharge of David Rawlston on February 18, 2010, was not for just cause.

Rawlston is entitled to immediate reinstatement to the active payroll, with full back pay and benefits, including demonstrable lost overtime, less applicable outside earnings and/or unemployment compensation received, if any.

Due to the unresolved final status of the Higgins award among other complicating factors, the design and implementation of the remedial portion of this award may require additional arbitral involvement.

I will retain jurisdiction for 90-day periods, such jurisdiction to be extended upon the request of either party, to assist in the implementation of this remedy and to make appropriate modifications when and if circumstances warrant.

A handwritten signature in cursive script that reads "Roberta Golick". The signature is written in black ink and is positioned above a horizontal line.

Roberta Golick, Esq.
Arbitrator

Date: February 21, 2011