

NOTICE

APR 26 2011

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPT
SUCV 2001-01841

Notice sent
4/15/2011
R. A. F.
F. H.
J. L. M.
D. S. M.

SHERIFF, COUNTY OF SUFFOLK,
Plaintiff,

v.

JAIL OFFICERS AND EMPLOYEES OF SUFFOLK COUNTY,
Defendant.

(sc)

MEMORANDUM OF DECISION AND ORDER ON PROPOSED FINDINGS OF FACT
AND RULINGS OF LAW

NOTICE TO HAND
04.25.11
S.C.S.D.

INTRODUCTION

Having considered all the evidence, the credibility of the witnesses, and the legal arguments presented by counsel, this Court now makes the following findings of fact and rulings of law:

(LAT)

FINDINGS OF FACT

Notice re-sent
4/25/2011
W. S.
A. M. D.
A. M. W.
J. M. B.
S. G., P.C.
J. G. S.

Case History

Joseph Upton ("Upton") was terminated from his employment as a jail officer at the Nashua Street jail on December 29, 1999, after a hearing officer determined that he failed to report the assault of a detainee in his care by fellow jail officers. Upton is a member of the Jail Officers and Employees of Suffolk County ("JOEASC/Union") (Upton Testimony). Upton's union¹ grieved his termination under the collective bargaining agreement and, when the grievance was denied, sought an arbitrator's review.

(sc)

On March 20, 2001, the arbitrator issued an arbitration decision and award reducing Upton's termination to a six-month suspension and ordered his reinstatement with back pay less outside earnings and unemployment compensation. The Suffolk County Sheriff argued that the

¹ At the time, Upton was represented by AFSCME Council 93, Local 1134.

arbitrator's decision to reinstate Upton violated public policy and sought appellate review in the Superior Court, Appeals Court and the Supreme Judicial Court ("SJC").

On April 23, 2001, the Sheriff, County of Suffolk filed a Complaint and Application to Vacate the Arbitrator's Award, and on August 9, 2002, the Superior Court issued a Memorandum and Order confirming the arbitration award.²

On September 26, 2002, the Sheriff filed an appeal of the Superior Court decision, and on November 5, 2004, the Appeals Court affirmed the judgment of the Superior Court confirming the arbitration award. The case made it all the way up to the Supreme Judicial Court, and was remanded when the SJC denied Further Appellate Review.

On February 1, 2007, the Appeals Court again affirmed the Superior Court decision confirming the arbitration award, and on April 17, 2007, the Supreme Judicial Court allowed a second Further Appellate Review application filed by the plaintiff.

On June 23, 2008, the SJC issued a decision affirming the lower courts and confirming the arbitration decision (See Sheriff, County of Suffolk v. Jail Officers and Employees of Suffolk County, 451 Mass. 698 (2008)). In August 2008, Upton returned to work at the Suffolk County Sheriff's Department.

Upton's gross back pay award is \$431, 447.67, which includes \$426,797.67 in back wages and \$4,650 in longevity bonuses. (Sweeney Depo.). As of this date, Upton has received no back pay from the Sheriff of Suffolk County pursuant to the arbitrator's award because his outside earnings and unemployment compensation have not been determined. This trial addressed this issue.

² Sheriff, County of Suffolk v. AFSCME, Council 93, Local 1134, SUCV2001-01841 (Billings, J.).

Defendant's Financial History

Defendant Joseph Upton did not work regularly after his termination. He did not look for regular work due to his belief that he would be reinstated after he won each appeal. (Trial Exhibit 13, Dep. Testimony of Joseph Upton). The defendant was not required to seek alternate employment during the time between his termination and reinstatement. During the years following his termination, the defendant received significant amounts of money from his parents in order to pay bills and take care of his children. (Juanita Upton Trial Testimony, Day 2).

In 2000, the defendant received \$12,930.00 in unemployment compensation.

In January 2004, the defendant applied for a car loan. On the form he stated that he was employed at Jenny's Pizza in Charlestown, MA. He represented that he was earning \$2,000 a month and had worked there for 18 years. However, Upton had not worked there since before 1991. The defendant lied on the application in order to receive his car loan. (Joseph Upton Trial Testimony, Day 1). The defendant was not employed by Jenny's Pizza when he applied for the car loan.

The defendant had trained to be a carpenter, and in 2006 and 2007 the defendant worked as a self-employed carpenter at Liam Fittz & Co. where he earned \$5,000 per year in 2006 and 2007. In January 2007, the defendant applied for another car loan, stating that he worked continuously for Liam Fittz & Co. as a carpenter since 2000 and that he earned \$2,400 a month. Much like the defendant's 2004 application, the defendant admitted that he lied in order to make sure he received the car loan. (Upton Trial Testimony, Day 1). The only money the defendant made during 2006 and 2007 was \$10,000.(Upton Trial Testimony, Day 1).

In January 2008, the defendant worked for two weeks as a bouncer for King Arthur's Lounge in Chelsea, MA. The defendant earned \$1,280, but later received \$10,500 in worker's compensation because he was injured on the job. (Upton Trial Testimony, Day 1).

RULINGS OF LAW

The Defendant Properly Mitigated His Damages.

A. The Defendant Reported All of His Actual Interim Earnings.

The arbitrator's award states that the defendant's back pay award should be reduced only by actual interim earnings and/or employment compensation. The defendant correctly states that there is nothing in the arbitration award that imposed a duty to mitigate by seeking employment. (See Defendant's Proposed Findings of Fact and Rulings of Law, pg.10). While the plaintiff argues that the defendant made no effort to find work during the period of his unemployment, there is no judicial penalty for failure to make an effort to find employment. McKenna v. Comm. of Mental Health, 347 Mass. 674, 676-677 (1964).

The plaintiff argues that the defendant was a trained carpenter, security guard, corrections officer, and food industry staff member and that the law requires wrongfully discharged public employees to mitigate their damages (Sheriff of Suffolk County's Memorandum of Law in Support of Request for Findings and Rulings, pg. 4 (citing McKenna, 347 Mass. 674 at 675-677)). However, the law does not penalize the defendant's inaction, nor is an employee required to mitigate his damages by accepting a job that was not of the same general character. Saunders v. Smith Granite Co., 232 Mass. 1, 4, 121 N.E. 431, 432 (1919). The employer must show what the plaintiff could have earned in similar work. McKenna, 347 Mass. at 676-677, 1999 N.E.2d at 688 (plaintiff prevails where former employer failed to show what plaintiff could have earned in similar work); see also Kaltsas, 4 Mass.App.Ct. at 639, 357 N.E.2d at 26 (former employer bears

burden of proving discharged employee had opportunity to increase earnings from family business which would mitigate damages). In this case, the plaintiff employer failed to show at trial what the defendant could have earned in a substantially similar full-time position elsewhere.

The plaintiff has not provided this Court with any other actual earnings and unemployment compensation of the defendant, and the defendant reasonably believed that he would be returning to work after the award was issued. (Trial Exhibit 13, Dep. Testimony of Joseph Upton). Therefore, the defendant has no duty to mitigate his damages, and must subtract only his actual interim earnings from his gross back pay award. In my opinion, Upton is entitled to his full back pay (\$431,447.67) minus the following items:

Unemployment compensation:	\$12,930.00
City of Boston:	\$ 1,034.00
City of Boston credit union:	\$ 979.00
Liam Fittz earnings:	\$10,000.00
King Arthur's earnings:	\$ 1,280.00
Workers' compensation:	\$10,500.00
Total:	\$36,723.00

The total amount of back pay owed is \$394,724.67³.

B. The Defendant's Car Loan Applications Inaccurately Reflect the Actual Income the Defendant Collected but Need Not be Used to Increase the Offset Earnings the Defendant Received While He was Not a Prison Employee.

The plaintiff argues that the defendant's car loan application in January 2004 indicates the actual employment and earnings of the defendant from 1986 until 2004 at \$2,000 a month from his position at Jenny's Pizza in Charlestown, MA. The defendant indicated that he lied on the loan application in order to secure the loan⁴. According to the defendant's false

³ \$431,447.67 (arbitration award) - \$36,723.00 (interim earnings and unemployment compensation) = \$394,724.67

⁴ In his 2004 application to secure financing for his loan, the defendant certified that he was earning \$2,000 per month as an employee of Jenny's Pizza. If this were true, Upton would have earned \$96,000 for working at Jenny's Pizza between January 2000 and January 16, 2004.

representation, it appears that the defendant was able to maintain two separate jobs and collect two separate incomes at the same time from 1991 until 1999. However, even if the defendant's car loan application were true, it does not matter whether or not the defendant was working at Jenny's Pizza because he was able to receive a separate income while working at the prison.

The defendant also states that he lied on his January 2007 car loan application, where he claimed to have worked for Liam Fittz & Co. as a carpenter from 2000 until at least 2007, making \$2,400 a month⁵. While it is uncontested that the defendant did indeed work for Fittz & Company, the defendant only did so for a few months in 2006 and 2007 (Sheriff's Memorandum in Support of Request for Findings and Rulings, pg.11). The defendant argues that had he been working for Liam Fittz full-time in January 2004, he would have listed them as his employer on his prior car loan application. (Def's Proposed Findings and Rulings, B.9, pg. 9). Therefore, the statement of earnings on the loan application of 2007 should be given no credence.

The relevant inquiry is whether the defendant's car loan applications accurately reflect the actual income the defendant collected so as to increase his offset earnings from December 1999 until August 2008. However, beside the car loan applications themselves, nothing has been provided by the plaintiff to rebut the defendant's testimony that he was lying about the car loans and his employment history. Because the plaintiff has not been able to rebut the defendant's statements, the statement of earnings on both the 2004 and 2007 car loan applications are given no weight. The plaintiff must pay the defendant the full amount of his back pay minus \$36,723.00 in interim earnings and unemployment compensation.

⁵ According to these representations made by the defendant on his car loan, he would have earned \$204,000 working for Fittz and Company between January 2000 and January 2007.

Post-Judgment Interest

A The Defendant Is Not Entitled to Post-Judgment Interest on His Back Pay Award

The defendant argues that his back pay award is subject to post-judgment interest from the date the arbitration award becomes final and that Massachusetts courts have ruled that interest is due on arbitration awards that have been appealed to court⁶. (Def's Proposed Findings and Rulings, D. 1, pg. 13). The defendant further asserts that the Supreme Judicial Court implied that the date the arbitration award becomes final was the appropriate date for determining when interest began to run and, therefore, the date the defendant's interest began to run was March 20, 2001⁷. (*Id.* at D. 2, pg. 13). However, because the plaintiff sought additional judicial action subsequent to a final determination on the enforceability of the arbitration award, no interest should be awarded. UBoard of County Comm'rs v. United States, U.S. 343, 352 (1939).⁸

The plaintiff indicates that they are entitled to sovereign immunity under Chapter 61 of the Acts of 2009 (St. 2009, c. 61 §3), and argues that post-judgment interest is not available against the Commonwealth in contract claims. C&M Constr. Co. v Commonwealth, 396 Mass. 390, 486 (1985); Onofrio v. Dep't of Mental Health, 411 Mass. 657, 659, 584 N.E.2d 619 (1992) (discussing generally the doctrine of sovereign immunity and holding that post judgment interest is not recoverable against a public employer absent express statutory authority); see also, M.G.L. c.235 §8 (the general post-judgment interest statute does not apply to the Commonwealth). Because of the Sheriff's sovereign immunity, it is my opinion that the defendant is not entitled to an award of post-award interest.

⁶ Reilly v. Local 589, Amalgamated Transit Union, 22 Mass. App. Ct. 558, 577 (1986).

⁷ The two cases the defendant cites are Marlborough Firefighters, Local 1714 v. Marlborough, 372 Mass. 593, 600-601 n. 7 (1978) and Watertown Firefighters, Local 1347 v. Watertown, 376 Mass. 706, 717-719 (1978).

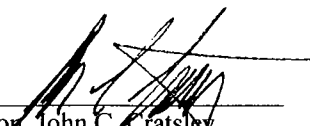
⁸ UBoard of County Comm'rs v. United States, U.S. 343, 352 (1939) ("Interest is not recovered according to a rigid theory of compensation for money withheld, but is given in considerations of fairness. It is denied when its exaction would be inequitable.")

While the plaintiff claims sovereign immunity, the defendant argues that the plaintiff's effort to vacate the arbitration award on public policy grounds unreasonably deprived him of his back pay because of additional delays. (Def's Proposed Findings and Rulings, D. 3, pg. 13). However, due to the complicated procedures involved in this case, the delay that occurred was not unreasonable. In addition, I feel post-judgment interest is inappropriate because the plaintiff reasonably calculated the amount of back pay for the period from 1999 until the defendant's reinstatement in 2008, less about \$36,000 in interim earnings and unemployment as determined in this opinion. The defendant will be in as good a position as he would be had his back pay been paid in 2008. The plaintiff's calculation of the defendant's back pay includes increases in his payment to account for increases in salary and longevity bonuses which would have been awarded had the defendant stayed employed from 1999 until 2008.

CONCLUSION

Based on the above Findings of Fact and Rulings of Law, this Court finds that the defendant properly mitigated his damages and reported all of his actual interim earnings. The defendant is not entitled to post-judgment interest on his back pay award. The Defendant is entitled to his full back pay minus interim earnings and unemployment compensation which equals \$394,724.67.

SO ORDERED,



Hon. John C. Cratsley
Justice of the Superior Court

April 12, 2011