VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 20-CV-00823

Howard Center v. AFSCME Local 1674

DECISION ON MOTION

Howard Center issued a written reprimand to one of its employees, Daniel Peyser, for sharing confidential patient information with a union representative. Mr. Peyser's union grieved this action, and the parties proceeded directly to arbitration. The arbitrator sustained the grievance and ordered Howard Center to remove the reprimand from Mr. Peyser's personnel file. Howard Center now seeks to vacate that decision. The court denies the request.

Background

Mr. Peyser is a licensed clinician and social worker, responsible for counseling and support to patients at Howard Center's Chittenden Clinic who struggle with substance abuse and receive medication-assisted treatment. He has worked for Howard Center since 2016. He also serves as Union president. Various laws, policies, and contracts require Mr. Peyser to protect patient confidentiality.

Mr. Peyser's job responsibilities include submitting appropriate paperwork so that Howard Center can bill clients' insurance carriers for services provided. In May 2019, Mr. Peyser's supervisor raised a concern with Mr. Peyser's waiting until May to submit billing paperwork for services that were provided in April. Howard Center administration informed Mr. Peyser that it was considering disciplinary action against him for "dishonesty and unethical action" for backdating client bills, that a meeting on this topic would be held on June 28, 2019, and that he could bring his Union representative or attorney to the meeting.

At the June 28 meeting, Mr. Peyser brought two notes demonstrating that other Howard Center employees used the same billing practice that he did. Those notes contained client names; at the hearing, Mr. Peyser shared them with his union representative. Mr. Peyser did not obtain client permission or Howard Center authorization to share this information with anyone.

On July 8, 2019, Howard Center informed Mr. Peyser that it would not discipline him for his billing practices. Then, in August, it informed Mr. Peyser that he appeared to have shown notes from

client records to the union representative at the June meeting, in violation of the Center's confidentiality policy. After Mr. Peyser and the union representative responded, Howard Center issued Mr. Peyser a written reprimand for this violation.

Mr. Peyser subsequently grieved the discipline, citing the "just cause" and "non-discrimination" provisions of the Union's collective bargaining agreement. Ex. I. After Howard Center denied his grievance, the parties agreed to forego steps 2–4 of the grievance process and proceed immediately to arbitration. The arbitrator agreed with Howard Center that sharing records with client names with the union representative was not acceptable and that the Center appropriately raised this issue with Mr. Peyser. He also rejected Mr. Peyser's argument that the discipline was retaliation for union activities. Arbitration Award at 15, 16 n.3 (Ex. A). The arbitrator ultimately sustained Mr. Peyser's grievance, however, concluding that this was a unique situation (i.e., a closed door meeting with a union representative), that Mr. Peyser made an error in judgment rather than intentional misconduct, and that he had an unblemished record of employment. *Id.* at 15–17. The arbitrator ordered the written reprimand removed "under principles of just cause." *Id.* at 16–17.

Discussion

Judicial review of an arbitration award is limited. *UniFirst Corp. v. Junior's Pizza, Inc.*, 2012 VT 13, ¶ 6, 191 Vt. 603. Under the Vermont Arbitration Act, a court "must confirm an arbitration award unless grounds are established to vacate or modify it." *Id.* ¶ 7; 12 V.S.A. § 5676. Grounds for vacating or modifying arbitration awards are limited by statute. *See* 12 V.S.A. §§ 5676–5678. Review of such awards is thus confined to "(1) whether there exist statutory grounds for vacating or modifying the arbitration award, and (2) whether the parties were afforded due process." *Springfield Tchrs. Ass'n v. Springfield Sch. Directors*, 167 Vt. 180, 184 (1997). Here, Howard Center contends that the arbitrator exceeded his authority under 12 V.S.A. § 5677(a)(3), and that he manifestly disregarded the law.

In rather extensive briefing, Howard Center argues that the arbitrator both exceeded his authority and manifestly disregarded the law by: (1) "deciding several issues that had not been submitted to him to decide and that he was procedurally barred from deciding"; and (2) altering the "well-settled definition of 'just cause' . . . in an effort to dispense his own brand of industrial justice." Howard Center's Mot. to Modify and/or Vacate at 30, 38. Howard Center identifies three arguments that it says were not raised by anyone during the grievance process and that the arbitrator was therefore procedurally barred from deciding: (1) that Mr. Peyser had inadequate advance notice that breaching patient confidentiality could subject him to discipline; (2) that the discipline imposed was too severe;

and (3) that there should be limits on Howard Center's ability to discipline its employees in the future for breaches of confidentiality that might occur. *Id.* at 31–33. Howard Center relies on a provision of the collective bargaining agreement that reads: "Neither the Union nor the grievant may raise any arguments or issues or facts beyond Step 4 [of the grievance process] which have not been raised at Step 4, provided such arguments, issues or facts were known or should have been known at the time of the hearing." CBA at 32 (§ 805.B.5) (Ex. B).

An arbitrator's authority derives from the arbitration contract and, "[a]ccordingly, the authority of the arbitrator is defined by the issues the parties agree to submit." *In re Robinson/Keir P'ship*, 154 Vt. 50, 55 (1990). Arbitration submissions are "generally construed as broadly as possible in order to quickly and economically resolve disputes." *Id.* Thus, "any doubts about the scope of the submissions . . . should be resolved in favor of coverage." *Id.* (quotations and alterations omitted). To determine if the arbitrator exceeded his authority, the court "must compare the arbitrator's award with the submissions of the parties." *Id.* (citing *Piggly Wiggly Warehouse, Inc. v. Piggly Wiggly Truck Drivers Union,* 611 F.2d 580, 583 (5th Cir.1980); *Cook v. Carpenter,* 34 Vt. 121, 126 (1861)). Here, because there were no separate submissions, the grievance constitutes the parties' submission. *See Piggly Wiggly*, 611 F.2d at 583–85.

Mr. Peyser's grievance framed the issues for arbitration as follows:

> 1. Why is this a grievance? (List applicable violation):
> Employee disciplined in violation of CBA Section 807A, concerning just cause, Section 108, concerning non-discrimination and inclusive of NLRA Section 7, protected activity, including but not limited to: exoneration of employee from charges alleged as reason for discipline (written reprimand); employer failed to conduct a fair disciplinary investigation or interview and employee was not notified of said investigation until its conclusion; the alleged bases for the reprimand were deficient and/or demonstrably false.

Ex. I. Admittedly, this paragraph is far from a model of clarity. Nevertheless, it fairly encompasses the issues the arbitrator addressed in his decision. In this regard, the court notes that by agreement, the parties proceeded directly from denial of grievance to arbitration, skipping over intermediate internal grievance procedures that might have afforded both sides the opportunity to clarify and narrow the issues for arbitration. Particularly where the employer agreed to bypass these steps and proceed to arbitration on the grievance as originally stated, the court cannot fault the arbitrator for reading the grievance broadly. *See Robinson/Keir P'ship*, 154 Vt. at 55 ("submissions to arbitrators are generally construed as broadly as possible"). The grievance plainly raised the issue of just cause, and the arbitrator rested his decision on a finding that there was no just cause to impose discipline. In short, a

comparison of the grievance, fairly construed, with the arbitrator's decision compels the conclusion that the arbitrator did not exceed his authority in basing his decision on consideration of "just cause" principles.[1]

Neither can it fairly be said that the arbitrator manifestly disregarded the law in his application of the "just cause" doctrine. The Vermont Supreme Court has defined "just cause" as follows:

> The ultimate criterion of just cause is whether the employer acted reasonably in [disciplining] the employee because of misconduct. We hold that a [discipline] may be upheld as one for "cause" only if it meets two criteria of reasonableness: one that it is reasonable to [discipline] employees because of certain conduct, and the other, that the employee had fair notice, express or fairly implied, that such conduct would be ground for [discipline].

In re Brooks, 135 Vt. 563, 568 (1977) (citations omitted). More recently, the Court has elaborated on the "reasonableness" criteria. *See In re Grievance of Brown*, 2004 VT 109, ¶ 12, 177 Vt. 365, 369–70; *In re Grievance of Hurlburt*, 2003 VT 2, ¶ 22, 175 Vt. 40; *In re Grievance of Merrill*, 151 Vt. 270, 275 (1988). Under these teachings, appropriate considerations include: "the nature and seriousness of the offenses"; "Grievant's past disciplinary record"; "Grievant's past work record"; and "mitigating circumstances surrounding the offenses." Vermont jurisprudence is squarely in the mainstream in this regard; other courts have broadly recognized these factors as part of the just cause analysis. *See, e.g., Burr Rd. Operating Co. II, LLC v. New England Health Care Emps. Union, Dist. 1199*, 162 Conn. App. 525, 543, n.8 (2016); *Off. Of Att'y Gen. v. Council 13, Am. Fed'n of State, Cty. & Mun. Emps., AFL-CIO*, 577 Pa. 257, 269 (2004).

Howard Center claims that the arbitrator put his "own spin" on the just cause standard. Specifically, it complains that the arbitrator incorrectly held that an employer must provide an employee with "express advance notice that certain misconduct may be grounds for discipline," Reply at 8, and "eliminated entirely from the just-cause analysis the *Brooks* standard's concept of implied notice." Mot. at 58. If true, this would be at most a mistake of law. It is hornbook law, however, that this is not grounds for vacating an arbitration award. *See* 21 Williston on Contracts § 57:139 (4th ed.) ("Courts also will not vacate or modify an award even if there is a mistake or misapplication of law by the arbitrators."). Not surprisingly, then, our Court has repeatedly rejected any notion that a court may properly second-guess the substance of an arbitrator's decision. *See Vermont Built, Inc. v. Krolick*,

[1] By way of contrast, the court compares the grievance forms that preceded the arbitration in *Howard Center v. Baird Education Ass'n*, no. 20-CV-733, which the court decides contemporaneously with this case. There, rather than framing the question broadly, the parties throughout the multi-step grievance procedure limited themselves to narrower issues, which the arbitrator then ignored in favor of his own recasting.

2008 VT 131, ¶ 17, 185 Vt. 139 ("The proper inquiry focuses on whether the arbitrator had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrator correctly decided that issue.") (quotation and alterations omitted); *Shahi v. Ascend Fin. Servs., Inc.*, 2006 VT 29, ¶ 10, 179 Vt. 434 ("we do not revisit the arbitrator's decision de novo"); *Springfield Teachers Ass'n v. Springfield Sch. Directors*, 167 Vt. 180, 184 (1997) (courts "will not review the arbitrator's decision for errors of fact or law").

In any event, Howard Center's attack on the substance of the arbitrator's analysis rests on a misreading of his decision. Nowhere did the arbitrator explicitly address the issue of notice. In discussing the employer's burden of proof to show that an employee's discipline is for just cause, he mentioned as factors only the employee's guilt of the alleged wrongdoing and that the penalty imposed "is in keeping with the severity of the offense." Arbitration Award at 13. He also found it "appropriate and reasonable" that Howard Center would promulgate and enforce rules on patient confidentiality, and noted that "Mr. Peyser certainly should have known of such rules." *Id*. at 14. While he observed that an employer's counseling and directives "puts employees on notice of the employer's expectations" and that "this is what should have occurred [here]," the point in this context was only that counseling and directives would have been a more reasonable response than imposing discipline. The better reading of the award is that the arbitrator ultimately held that the discipline imposed was unreasonable given certain mitigating circumstances, not that Mr. Peyser lacked sufficient notice. This conclusion is fully consistent with the *Brooks* standard. *See In re Brooks*, 135 Vt. at 568.

Howard Center goes to great lengths to highlight the various laws, rules, and policies concerning patient confidentiality, and particularly its view that Mr. Peyser's conduct amounts to criminality. The notion that violations of this nature may provide just cause for discipline is not controversial. Neither, however, is it relevant. The question here is not whether the arbitrator could properly have found just cause for the Howard Center's discipline of Mr.Peyser; it is whether he manifestly disregarded the law in concluding that there was not just cause. None of the cases that the Howard Center cites in this regard come close to supporting the argument that an arbitrator, faced with circumstances similar to those found here, is bound to find just cause for discipline.

These observations obviate the necessity of determining whether our Court would adopt the "manifest disregard" doctrine. Recently, the Court observed that "[w]hether 'manifest disregard of the law' is a basis for vacating an arbitration award—either as an additional ground or as a corollary to the statutorily enumerated bases, remains an open question." *Masseau v. Luck*, 2021 VT 9, ¶ 30. Even assuming the Court were to adopt the "manifest disregard" standard, however, it would not provide a

basis for modification or vacatur in this case. Courts that have applied this doctrine to vacate arbitration awards "do so on a very limited basis, viewing the arbitrator's decision with considerable deference." *Id*. ¶ 31. As the Court explained:

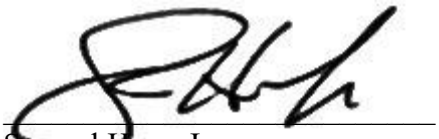
> a court may vacate an arbitration award for manifest disregard of the law only where it finds both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case. Manifest disregard of the law is therefore more than mere error in the law or failure on the part of the arbitrators to understand or apply the law. A court applying this standard should only vacate an arbitration award in those exceedingly rare instances where some egregious impropriety on the part of the arbitrator is apparent, such as when an arbitrator strays from interpretation and application of the agreement and effectively dispenses [their] own brand of industrial justice. The arbitration award should be upheld if "the arbitrator has provided even a barely colorable justification for the arbitrator's interpretation.

Id. (citations and quotations omitted). The court discerns no such "egregious impropriety" here. Admittedly, the arbitrator's decision may be light on legal citations and confusingly written at times, and it may not have explicitly cited *Brooks* even though both parties did in their briefs. As discussed above, however, the arbitrator's ultimate conclusion was consistent with *Brooks* and other Vermont caselaw defining and elucidating the concept of just cause. The "manifest disregard" doctrine provides no basis to vacate or modify the arbitration award.

ORDER

The court denies the request to vacate or modify the arbitration award. Instead, the court affirms and confirms the award. Judgment will enter forthwith.

Electronically signed pursuant to V.R.E.F. 9(d): 9/9/2021 9:08 AM



Samuel Hoar, Jr.
Superior Court Judge