

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

SLATER HEALTH CENTER, INC.,

Plaintiff

v.

CIVIL ACTION # 93-0077-T

DISTRICT 1199, NEW ENGLAND
HEALTH CARE EMPLOYEES UNION,

Defendant

MEMORANDUM AND ORDER

ERNEST C. TORRES, United States District Judge.

This case is before the Court on cross-motions for summary judgment. Slater Health Center, Inc., ("Slater") seeks to vacate an arbitration award requiring that it reinstate a previously terminated employee. District 1199, New England Health Care Employees Union, (the "Union") seeks to enforce the award. For reasons that follow, the Union's motion is granted, and Slater's motion is denied.

FACTS

In December 1990, the Union entered into a collective bargaining agreement (the "CBA") with Pawtucket Institute for Health Services (the "Institute"), a health care facility for the elderly located in Pawtucket, Rhode Island. The CBA provided, inter alia, that "cause" was required to discharge employees.

In December, 1991, the Rhode Island Department of Health ("RIDOH") conducted a performance audit of the Institute and cited

it for an incident of patient mistreatment based on an allegation of verbal abuse by Dennis Hazard, a nursing assistant. Specifically, RIDOH alleged that, after state auditors had left, Hazard said to a patient "I heard you were talking to the State. You better have not said anything about me. Keep your big mouth shut." However, despite the fact that nursing assistants are licensed by the state, RIDOH never took any action against Hazard.

At the time of the audit, Hazard's personnel file indicated that, earlier in 1991, Hazard had been warned for allegedly telling a patient that he hated her, an allegation that Hazard denied. In addition, Hazard's file contained a 1989 letter from a community group complaining about Hazard's gruff manner. It appears that neither Hazard nor his supervisor was informed of the letter but, during his performance evaluation, Hazard was told not to use "storm-trooping" tactics with the patients. Prior to that time, Hazard had a long history of excellent evaluations. On December 17, 1991, Hazard was discharged for the alleged misconduct cited by RIDOH. Slater, which was then in the process of purchasing the Institute, concurred in the decision to terminate Hazard.

The Union then filed a grievance on Hazard's behalf, and when that grievance was denied, the Union proceeded to arbitration. By stipulation of the parties, the question submitted to the arbitrator was "Did the Employer have cause to terminate Dennis

Hazard on or about December 17, 1991? If not, what shall the remedy be?"

While the arbitration proceeding was pending, Hazard applied for state unemployment benefits. Slater opposed the application contending that Hazard had been discharged for misconduct. That contention was rejected by a referee, the Board of Review of the state Department of Employment and Training, and the Rhode Island District Court, all of which determined that Hazard had been discharged but was not guilty of misconduct.

On November 11, 1992, the arbitrator issued his opinion finding that Slater had cause to suspend Hazard for one week without pay but not to terminate him. Accordingly, the arbitrator's award directed that Hazard be reinstated and that he receive back pay and lost benefits.

Slater contends that the award should be vacated because the arbitrator, in effect, rewrote the CBA between the parties by requiring Slater to prove that Hazard was terminated for "just cause" rather than for "cause" and by applying a system of progressive discipline not contained in the contract. Slater also contends that the award violates Rhode Island's public policy of preventing and punishing abuse of patients by health care workers. The Union, on the other hand, contends that the arbitrator acted within the scope of both the collective bargaining agreement and the arbitral submission, and urges that the award be enforced.

STANDARD OF REVIEW

Under Federal Rule of Procedure 56(c), summary judgment must be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wynne v. Tufts University School of Medicine, 976 F.2d 791, 793 (1st Cir. 1992).

In reviewing an arbitration award, "courts do not sit to hear claims of factual or legal error by an arbitrator as an Appellate Court does in reviewing decisions of lower courts." United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987). A court may overturn an arbitrator's decision only if the decision is "(1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling, or (3) mistakenly based on a crucial assumption that is concededly a non-fact." Advest, Inc. v. Patrick McCarthy, 914 F.2d 6, 8 (1st Cir. 1990) (quoting Local 1145 UFCW v. Stop & Shop Companies, 765 F.2d 19, 21 (1st Cir. 1985)). As the Court of Appeals for the First Circuit has stated, "judicial review of arbitration awards is among the narrowest known in the law." Maine Central Railroad Co. v. Brotherhood of Maintenance of Way Employees, 873 F.2d 425, 428 (1st Cir. 1989).

However, the degree of deference accorded to an arbitrator's decision does not give the arbitrator carte blanche to do as he or she pleases. The award "must draw its essence from the collective bargaining agreement," and the arbitrator is not allowed to "dispense his own brand of industrial justice." United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960). On the other hand, if the arbitrator is "even arguably construing or applying the contract and acting within the scope of his authority," the court may not overturn the award. Misco, 484 U.S. at 38.

DISCUSSION

I. "Cause"

The CBA provides that "[t]he Employer shall have the right to discharge, suspend or discipline any employee for cause." Collective Bargaining Agreement, Art. XX (1). It further provides that the arbitrator "shall have no power to add to, subtract from, or modify in any way any of the terms of this Agreement." Id., Art. XXIII (4).

Slater argues that the arbitrator did modify the terms of the CBA by requiring Slater to show "just cause" for Hazard's discharge rather than merely "cause" as provided in the CBA. In effect, that argument seeks to draw a distinction without a difference.

Unless a collective bargaining agreement provides otherwise, the terms "cause" and "just cause" generally are construed to be synonymous. See RCA Communications, Inc., 29 Lab. Arb. (BNA) 566, 571 (1957) (Harris, Arb.); Link-Belt Co., 44 Lab. Arb. (BNA) 1209 (1965) (Buckwalter, Arb.). See e.g. Townhouse Apartments, 83 Lab. Arb. (BNA) 538 (1984) (Roumell, Arb.) ("It is well established that the 'just cause' standard for discharge will apply to agreements conditioning discharge on 'cause', 'proper cause' or which are silent as to the standard to be used by the employer in discharging an employee."); Warren Assemblies, Inc., 92 Lab. Arb. (BNA) 521 (1989) (Roumell, Arb.) ("When the parties use 'for cause' in their agreement, they are referring to the concept of 'just cause.'"); Keller Industries, Inc., 79 Lab. Arb. (BNA) 807 (1982) (Milentz, Arb.) (rejecting company's argument that "cause is a far broader standard than "just cause" and finding little if any difference in the two phrases); see also, S.D. Warren Co. v. United Paperworkers' International Union, 846 F.2d 827 (1st Cir. 1988) (quoting arbitrator who concurred "that arbitrators generally consider synonymous the language 'proper cause,' 'just cause' or 'cause.'"). In this case, there is nothing in the CBA indicating a contrary intention. The CBA does not define "cause." Nor does it contain any indication that the parties intended that term to connote something different from its commonly accepted meaning.

Slater's reliance on M. M. Sundt Construction Co., 81 Lab. Arb. (BNA) 432 (1983) (Zechar, Arb.), for the proposition that there is a distinction between "cause" and "just cause" is misplaced. In Sundt, the collective bargaining agreement stated that "[t]he Contractor may discharge any employees for any cause which he may deem sufficient." In this case, the CBA does not vest such unfettered discretion in the employer.

Moreover, the fact that there might be contrary precedents that the arbitrator could have followed is beside the point. As the Supreme Court stated in Misco,

the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract. . . . [A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

484 U.S. at 38 (citing Enterprise Wheel, 363 U.S. at 599).

In this case, it is clear that the interpretation of "cause" adopted by the arbitrator was, at least, an arguable construction of the CBA. The fact that there was another plausible construction does not warrant vacating the award.

The case of Randell Manufacturing, Inc. v. Local Union No. 814, Allied Industrial Workers, 838 F. Supp. 325 (E.D. Mich. 1993), relied upon by Slater, is inapposite. There, it was held that the arbitrator had violated the collective bargaining

agreement by implying a "just cause" standard for discharge because the agreement did not provide any standard for discharge. Here, the arbitrator did not create a standard for discharge but, merely, construed the standard set forth by the parties' in the CBA. Therefore, the Court cannot find that the arbitrator has acted outside the scope of his authority in construing the term "cause" in the agreement to mean "just cause."

II. Progressive Discipline

In his decision, the arbitrator noted that similar conduct by Hazard on previous occasions resulted in nothing more than a verbal warning. Although he acknowledged that Slater, as the new owner, was entitled to set a higher standard, the arbitrator stated: "[N]ew, higher standards for patient care cannot be suddenly imposed without warning and an employee fired for failure to meet those higher standards. Fair warning and progressive discipline are prerequisites for creating a higher standard of care."

Slater contends that, in adopting that view, the arbitrator dispensed his own brand of industrial justice by imposing an unbargained for system of discipline on the parties. However, Slater's contention overstates the case.

In determining whether an arbitrator acted within the scope of his authority, a reviewing court must consider both the collective bargaining agreement and the arbitral submission.

Larocque v. R.W.F., Inc., 8 F.3d 95, 96 (1st Cir. 1993). Here, the issues submitted to the arbitrator were: "Did the Employer have cause to terminate Dennis Hazard on or about December 17, 1991? If not, what shall the remedy be?" The arbitrator interpreted the submission as requiring him to determine whether termination was warranted and, if not, what action was appropriate.

It is settled law that "'an arbitrator's view of the scope of the issue . . . is entitled to the same . . . deference . . . normally accorded to the arbitrator's interpretation of the collective bargaining agreement itself.'" Id. at 97 (quoting El Dorado Technical Servs., Inc. v. Union General de Trabajadores, 961 F.2d 317, 319 (1st Cir. 1992)). Furthermore, the Supreme Court has recognized the broad discretion conferred on an arbitrator in determining remedies, saying: "[n]ormally, an arbitrator is authorized to disagree with the sanction imposed for employee misconduct. . . . [H]e 'is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies.'" Misco, 484 U.S. at 41 (quoting Enterprise Wheel, 363 U.S. at 597) (emphasis in Misco).

Slater relies on Mistletoe Express v. Expressmen, 443 F. Supp. 1, 4 (W.D. Okla. 1976), aff'd 566 F.2d 692 (10th Cir. 1977), for the proposition that an arbitrator exceeds the scope of his authority when he imposes a system of progressive discipline not

agreed to by the parties. However, Mistletoe is readily distinguishable from this case because, there, the question submitted to the arbitrator was only "whether or not the Company violated the collective bargaining agreement in discharging [the employee]." Id. Here, by contrast, the arbitrator was called upon to determine what disciplinary action, if any, was appropriate. In addition, although the CBA did not expressly create a system of progressive discipline, it did provide for a wide range of sanctions that included suspension and lesser forms of discipline. Finally, as the court in Mistletoe observed, "in a proper case an arbitrator, in reliance on custom or usage in an industry, may construe a 'just cause' provision of a labor contract to include a progressive discipline requirement and may determine that certain conduct is 'just cause' for discipline but not for discharge." Mistletoe, 566 F.2d at 695.

In short, like the award in Larocque, the award in this case "viewed against the backdrop of the CBAs and the joint arbitral submission, as well as the surrounding circumstances, . . . was well within the consensual delegation of arbitral authority, the no-modification clause [of the collective bargaining agreement] notwithstanding." Larocque, 8 F.3d at 98. Thus, in making the award, the arbitrator did not re-write the contract.

III. Public Policy

Slater's final argument is that the award is contrary to public policy because it orders reinstatement of a patient abuser. Slater cites both state and federal statutes and regulations designed to protect nursing home residents from physical or mental abuse and, from them, infers a policy to "prevent and punish patient abusers." See, 42 U.S.C. § 1395i-3(1)(A)(i); 42 C.F.R. § 483.13(b); R.I. Gen. Laws § 23-17.5-9(A)(1993); Maggio v. Local 1199, 702 F. Supp. 989, 996 (E.D.N.Y. 1989); see also Brigham & Women's Hospital v. Mass. Nurses Ass'n, 684 F. Supp. 1120 (D. Mass. 1988).

The test for determining whether an arbitration award should be vacated on public policy grounds was set forth in Misco, 484 U.S. 29 (1987). In that case, the Supreme Court held that there is "[no] broad judicial power to set aside arbitration awards as against public policy" but, rather, limited the cases in which awards may be vacated on public policy grounds to those in which the alleged public policy is "well-defined and dominant" and "ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" Misco, 484 U.S. at 43 (quoting W.R. Grace & Co. v. Rubber Works, 461 U.S. 757, 766 (1983)). In addition, the Court required that "the violation of such a policy must be clearly shown if an award is not to be enforced." Id.

In this case, the Court has no difficulty in finding a strong, well-articulated public policy that nursing home residents should be free from all forms of abuse. Such a policy is clearly manifested by the statutes and regulations cited by Slater. Thus, the issues are whether Hazard engaged in abusive conduct and, if so, whether suspension was such an inadequate form of discipline that it violated public policy.

The award does not contain any express finding that Hazard, in fact, made the comments attributed to him. It is true that the arbitrator "credited" the evidence relied upon by Slater in dismissing Hazard. However, the arbitrator also noted that Slater failed to question Hazard or to conduct a thorough investigation in order to determine exactly what happened. As the arbitrator stated, "by simply taking the patient's statement and by refusing to identify the patient, the Employer completely foreclosed any possibility for an explanation inconsistent with an allegation of patient abuse."

The absence of an express finding as to whether Hazard did what he is alleged to have done becomes even more significant when viewed against the backdrop of the unemployment compensation proceedings. As already noted, a referee, a Board of Review and the Rhode Island District Court all found insufficient evidence to establish any misconduct by Hazard.

Even if it is assumed, arguendo, that the allegations against Hazard are accurate, the disciplinary action recommended by the arbitrator is not so patently inadequate as to justify vacating the award. Certainly, the Court does not condone such conduct. However, the test for determining whether an arbitrator's award should be enforced is not whether the Court might have decided differently. As already noted, an arbitrator acting within the scope of a collective bargaining agreement is vested with broad discretion to determine what remedies are appropriate, particularly when the nature of the remedy is a matter expressly submitted for arbitration. See, Misco, 484 U.S. at 41. In such cases, the award must be enforced unless the remedy selected clearly violates public policy.

Here, no such violation has been shown. The arbitrator observed that, prior to 1989, Hazard had an unblemished record and that the incidents occurring after that time were not considered serious enough to warrant anything more than a warning. Furthermore, the state agency charged with enforcing the public policy against patient abuse chose to take no action against Hazard for the December, 1991, incident.

Although the one week suspension recommended by the arbitrator was arguably lenient, it was not so inadequate as to constitute a violation of public policy. In the absence of a clear

showing that enforcement of the award violates public policy, the award must be enforced. Misco, 484 U.S. at 44.

CONCLUSION

The arbitration award at issue draws its essence from the CBA and does not impose an unbargained for system of progressive discipline. Nor does it fit within the narrow exception carved out by Misco for denying enforcement of arbitration awards on public policy grounds.

Accordingly, Slater's motion for summary judgment is hereby DENIED. The Union's cross motion for summary judgment is hereby GRANTED, and it is FURTHER ORDERED that the arbitration award shall be enforced.

IT IS SO ORDERED.

ERNEST C. TORRES
UNITED STATES DISTRICT JUDGE

Date: _____