



COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

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Lance M. Geren, Esquire
Freedman & Lorry, P.C.
10 Corporate Circle, Suite 200
New Castle, DE 19720

“J” Jackson Shrum, Esquire
Werb & Sullivan
300 Delaware Avenue, Suite 1300
Wilmington, DE 19801

Aaron R. Goldstein, Esquire
Meredith Stewart Tweedie, Esquire
Department of Justice
820 N. French Street, 6th Floor
Wilmington, DE 19801

Re: *AFSCME, Council 81, Registered Nurses Unit, Local 2305,*
v. State of Delaware, Department of Health and Social Services
C.A. No. 8101-VCN
Date Submitted: January 9, 2014

Dear Counsel:

Petitioner Madhu Jain (“Jain”) worked as a charge nurse in the Kent 3 Unit at the Delaware Psychiatric Center, a facility of Respondent State of Delaware’s Department of Health and Social Services (“DHSS”). On the morning of April 4, 2009, Patient W left her room and collapsed on the hallway floor. Jain walked

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down the hallway and came across Patient W lying face down, not moving, and soaked in urine. Jain, from a few feet away without any physical contact, observed Patient W for perhaps a minute and then moved toward the nurse's station to get help to change Patient W's clothes. A few minutes later, a nursing assistant checked on Patient W and called another nurse who, when Patient W would not respond, began CPR.¹ Patient W would die later that day of a pulmonary embolism, an occurrence that was not preventable.

DHSS investigated the incident and eventually concluded that Jain should be dismissed for patient neglect, failure to perform a thorough assessment of Patient W's condition as required by the applicable standard of care, and unprofessional and unacceptable behavior.

Jain's employment was governed by a collective bargaining agreement (the "CBA") between Petitioner American Federation of State, County and Municipal Employees, Council 81, Registered Nurses Unit, Local 2305 ("AFSCME") and

¹ These events were video recorded.

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DHSS.² Under the CBA, the parties first grieved Jain's termination; that effort was unsuccessful. The CBA prescribes arbitration as the next step. After a two-day arbitration hearing, the arbitrator concluded that there was just cause for Jain's dismissal.³ Jain then brought this action to challenge the arbitrator's decision.⁴

Jain claims that the arbitrator's decision must be vacated (or modified, or remanded) for several reasons:

1. The Award incorrectly assumed that Jain carried the burden to prove that the State did not have just cause for the recommended disciplinary action;
2. The Award applied an incorrect standard of care as to the definition of "neglect"; and
3. The Award completely ignored Jain's due back [sic] and benefits as were her contractual rights under the Collective Bargaining Agreement.⁵

² App'x to Resp't's Opening Br. in Supp. of its Mot. for Summ. J. (the "App'x") at A-001 (CBA).

³ App'x at A-022, Opinion and Award of Arbitrator (the "Award").

⁴ In the interim, Jain had attempted to seek judicial review alone. That effort was dismissed because of the absence of a necessary and indispensable party, AFSCME. See Order Granting Mot. to Dismiss, *Jain v. State of Del., Dep't of Health and Soc. Servs.*, C.A. No. 7262-VCL (Del. Ch. June 5, 2012)

⁵ Pet'r's Answering Br. at 25.

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DHSS has moved for summary judgment.⁶ Summary judgment, which may be granted under Court of Chancery Rule 56 if there are no material facts in dispute and the moving party is entitled to judgment as a matter of law, is a useful procedural device for the judicial review of an arbitrator's decision.⁷

The public policy supporting arbitration as a means of resolving labor disputes not only is well-established, but also explains why judicial review in this context is limited:

Courts rarely set aside an arbitrator's interpretation and application of a collective bargaining agreement because that is what the employer and the union have "bargained for." Moreover, the arbitration of

⁶ This is not the only judicial action spawned by Jain's conduct. First, the Division of Long-Term Care Residents Protection ("DLTCRP"), a division of DHSS, sought to place Jain on the Adult Abuse Registry because she had "neglected" a patient. *See* 11 *Del. C.* § 8564(a)(8); 16 *Del. C.* § 1131(10). The Superior Court, however, reversed that administrative determination, *Jain v. Del. Dep't of Health and Soc. Servs.*, 2010 WL 4513438 (Del. Super. Oct. 29, 2010), and the Supreme Court affirmed. *Del. Dep't of Health and Soc. Servs. v. Jain*, 29 A.3d 207 (Del. 2011). Second, the Delaware Board of Nursing suspended Jain's nursing license for a period of three years because it concluded that she had "failed to conform to legal and accepted standards of the nursing profession." App'x at A-081. The determination by the Board of Nursing was affirmed by both the Superior Court and the Supreme Court. *Jain v. Del. Bd. of Nursing*, 2013 WL 3389287 (Del. Super. Feb. 13, 2013), *aff'd*, 72 A.3d 501 (Del. 2013) (TABLE).

⁷ *City of Wilmington v. Am. Fed'n of State, County, and Mun. Empls., Council 81, Local 1102*, 2005 WL 820704, at *3 (Del. Ch. Apr. 4, 2005), *aff'd*, 884 A.2d 511 (Del. 2005) (TABLE).

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labor disputes has long been held to be an efficient means of resolving these disputes and is strongly supported by public policy.⁸

As set forth in *Meades*:

This Court will not disturb a labor arbitration award unless (a) the integrity of the arbitration has been compromised by, for example, fraud, procedural irregularity, or a specific command of law; (b) the award does not claim its essence from the CBA; or (c) the award violates a clearly defined public policy.⁹

The CBA provides that “[a]ny disciplinary action must be for just cause.”¹⁰

Although the CBA sets the standard for Jain’s discipline, including her termination, it does not define “just cause.” The parties did not incorporate, for example, the standard prescribed for use in the unemployment compensation context. Instead, they left that task to the arbitrator to develop in the specific case. He framed the standard as “what is relevant here is whether, in the relatively brief time interval at issue here, the grievant carried out, or failed to carry out, the duties

⁸ *City of Wilmington v. Am. Fed’n of State, County, and Mun. Empls., Council 81, Local 1102*, 2003 WL 1530503, at *4 (Del. Ch. Mar. 21, 2003) (citation and internal punctuation omitted).

⁹ *Meades v. Wilmington Hous. Auth.*, 2003 WL 939863, at *5 (Del. Ch. Mar. 6, 2003).

¹⁰ App’x at A-014 (CBA § 16.1).

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that are fundamental to her job as a Registered Nurse III, as well as to her added responsibilities as Charge Nurse for the Kent 3 unit.”¹¹

Jain challenges the standard of care used by the arbitrator to measure her conduct. She argues that the Supreme Court fixed the metric in its decision affirming the Superior Court’s decision overturning her being listed on the Adult Abuse Registry. That standard, however, was set by the General Assembly for a specific application, and it was not adopted by the parties in the CBA. As recognized by the Supreme Court, the same conduct can give rise to different types of consequences and may be measured by different standards:

There is a menu of options available to remedy a single act of “neglect,” depending on its nature. First, if the State can prove a reckless, knowing, or intentional act of neglect beyond a reasonable doubt, then a criminal sanction is available. Second, if the State can prove a knowing, reckless, or intentional act of neglect by a preponderance of the evidence, then placement on the Adult Abuse Registry is an available sanction. Third, a civil action may be available to compensate a party for a health care provider’s negligence. Finally, an employer such as DHSS may impose employee discipline.¹²

¹¹ App’x at A-030 (Award at 9).

¹² *Del. Dep’t of Health and Soc. Servs.*, 29 A.3d at 216.

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The evidence before the arbitrator and the evidence before the DLTCRP may have been substantially the same, but that does not answer the question of who prevails in arbitration under the CBA because different sanctions may require different states of culpability.

Jain points out that the charges supporting both listing on the Adult Abuse Registry and termination involved neglect of the same patient. Patient neglect defined by statute is not necessarily the same conduct that must be proven in an employment arbitration under the CBA. The arbitrator was not bound by any statutory, special purpose standard.¹³ His task was to assign meaning to the provisions of the CBA. Perhaps he performed that task well; perhaps he performed that task not so well. But, in any event, Jain has not shown that the arbitrator did not draw his understanding from the essence of the CBA.

¹³ The Supreme Court, in reviewing the DLTCRP proceedings, concluded, as a matter of statutory construction, that the “neglect” of a patient to justify placement on the Adult Abuse Registry requires proof that the party acted “recklessly, knowingly, or intentionally.” *Id.* at 215. Jain does not explain why this statutory standard applies to the CBA and offers no reason for adopting that standard in the context of this arbitration proceeding. It is not unreasonable to conclude that a higher degree of proof or, perhaps more accurately, a greater degree of culpability is needed for listing on the Adult Abuse Registry than for a nurse’s termination.

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Jain testified as to her intent during the incident and told the arbitrator that after assessing Patient W's condition, she had gone to get help to change Patient W's clothes.¹⁴ Her testimony did not persuade the arbitrator, but that is an example of an arbitrator's performing a fact-finding function, which is largely beyond judicial review.

Jain also questions whether the arbitrator may have improvidently shifted the burden of proof to her. The Court accepts that it was not Jain's task to show that good cause did not support her termination. Perhaps the arbitrator's word choice could have been more precise, but a fair reading of the Award confirms that he understood the burden assigned to DHSS and that he held DHSS to its burden to demonstrate good cause for termination in reaching his decision.

Jain raises one possible defect in the Award that requires attention. At issue before the Arbitrator was not only her termination but also whether she was entitled to back pay from the time of her suspension until her termination. The Award does not address this discrete issue as such, but the Award is better read as

¹⁴ She also reported concerns about the risk of physical abuse by the patient.

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confirming (or upholding) DHSS's complete decision, which unavoidably includes resolution of that claim.¹⁵ Thus, the Arbitrator necessarily rejected Jain's effort to obtain back pay.

For the foregoing reasons, summary judgment is granted in favor of DHSS and against AFSCME and Jain, and the Award is confirmed.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap

cc: Register in Chancery-K

¹⁵ Jain was suspended without pay on April 13, 2009. Am. Verified Compl. for Declaratory J. ("Compl.") Ex. B. The parties agree that this issue of back pay and benefits was presented to the arbitrator. Answer of Resp't State of Delaware Department of Health and Social Services ("Answer") ¶ 12; Compl. ¶ 12. It was also raised in Jain's application to the arbitrator to modify the Award. App'x at A-108. It is unclear how the arbitrator may have responded to this application, although Jain alleges, without apparent contradiction, that the arbitrator did not provide a response. Answer ¶ 19; Compl. ¶ 19. Under these facts, because the issue of back pay and benefits was inherently subsumed within the issue of termination, the Award can only be fairly read as addressing both issues. In other words, by resolving the termination issue, the arbitrator necessarily also resolved the back pay and benefits issue.

Moreover, although perhaps beyond the Court's current review, it is unsurprising that the Award—which found that there was just cause to support termination—did not also explicitly address that Jain was not entitled to back pay and benefits.