APPENDIX TABLE OF CONTENTS

ENTRY ORDER

2023 VT 6

SUPREME COURT CASE NO. 21-AP-257

MARCH TERM, 2022

Howard Center	} APPEALED FROM:
v.	} Superior Court,
AFSCME Local 1674 & Daniel Peyser	} Chittenden Unit, Civil Division
	} CASE NO. 20-CV-00823

(Filed Jan. 20, 2023)

In the above-entitled cause, the Clerk will enter:

Affirmed.

FOR THE COURT:

/s/ Paul L. Reiber
Paul L. Reiber,
Chief Justice

Dissenting:

/s/ Harold E. Eaton, Jr.
Harold E. Eaton, Jr.,
Associate Justice

Concurring:

/s/ William D. Cohen
William D. Cohen,
Associate Justice

/s/ Nancy J. Waples
Nancy J. Waples,
Superior Judge,
Specially Assigned

/s/ Denise R. Johnson
Denise R. Johnson,
Associate Justice (Ret.),
Specially Assigned

2023 VT 6

No. 21-AP-257

Howard Center	} Supreme Court
v.	} On Appeal from
AFSCME Local 1674 & Daniel Peyser	} Superior Court, Chittenden Unit, Civil Division
	} March Term, 2022

Samuel Hoar, Jr., J.

Joseph A. Farnham and Kevin J. Coyle of McNeil, Leddy & Sheahan, Burlington, for Plaintiff-Appellant.

John L. Franco, Jr., Burlington, for Defendants-Appellees.

PRESENT: Reiber, C.J., Eaton, Carroll[1] and Cohen, JJ., and Waples, Supr. J., Johnson, J. (Ret.)[2], Specially Assigned

¶ 1. **REIBER, C.J.** Employer Howard Center appeals from a trial court order that confirmed an arbitration award in favor of grievant Daniel Peyser and AFSCME Local 1674. Employer asks this Court to adopt "manifest disregard" of the law as a basis for setting aside an arbitration award and to conclude that the arbitrator violated that standard here. We do not decide whether to adopt the manifest-disregard standard because, assuming arguendo it applies, employer fails to show that its requirements are satisfied. We therefore affirm.

¶ 2. The record indicates the following. Employer is a nonprofit organization that provides mental-health services to individuals in northern Vermont. Grievant is a licensed social worker who has worked for employer since 2016. Grievant provides therapy and support to patients receiving medication-assisted treatment for substance-use disorder. He is required to protect patient confidentiality in compliance with federal and state laws and Howard Center policy. As part of his job, grievant is also responsible for submitting appropriate

---

[1] Justice Carroll was present during oral argument but did not participate in this decision.

[2] Justice Johnson was not present for oral argument, but reviewed the briefs, listened to oral argument, and participated in the decision.

paperwork to allow the Howard Center to bill clients' insurance carriers for services provided.

¶ 3. In May 2019, employer expressed concern over grievant's billing practices, specifically, his submission of billing paperwork in May for services provided in April. Employer told grievant that it was considering disciplining him for "dishonesty and unethical action" concerning the backdated bills. Employer held a meeting about this issue in June 2019 with grievant and his union representative. Grievant brought two billing notes from patient records to show that other employees engaged in the same billing practices. He shared the notes, which contained patients' names, with his union representative.

¶ 4. Employer did not reprimand grievant for the billing practices. In August 2019, however, employer informed grievant that he breached employer's confidentiality policy by sharing the billing notes with his union representative at the June meeting. Employer issued a written reprimand to grievant. The reprimand stated that sharing client records without redacting confidential information violated its protocols and state and federal regulations, and that grievant knew or should have known of these standards. Employer also explained that it was required to report the breach to state and federal authorities and to those individuals whose records were disclosed.

¶ 5. Grievant filed a grievance under the terms of his collective-bargaining agreement, arguing in part that employer lacked just cause to discipline him. The

parties agreed to proceed immediately to arbitration. In an October 2020 decision, the arbitrator sustained the grievance. While the arbitrator agreed that sharing confidential information with the union representative was unacceptable, he found that grievant did not engage in intentional misconduct that justified the placement of a written reprimand in his personnel record. At worst, the arbitrator reasoned, grievant made an error in judgment. Given the unique situation at issue-sharing confidential information with a union representative during an internal closed-door grievance meeting-as well as other mitigating circumstances, the arbitrator determined that employer lacked just cause to issue the reprimand and he ordered the reprimand removed from grievant's personnel file.

¶ 6. Employer then filed an action in the civil division seeking to modify or vacate the arbitrator's award. It argued in relevant part that the arbitrator manifestly disregarded the law in sustaining the grievance. Employer complained that the arbitrator did not cite or apply the "just[-] cause" standard as articulated in In re Brooks, 135 Vt. 563, 568, 382 A.2d 204, 207-08 (1977), but instead offered his "own spin" on just cause and incorrectly held that an employer must provide an employee with "express advance notice that certain misconduct may be grounds for discipline." Employer argued that the factual circumstances here satisfied the just-cause standard and it faulted the arbitrator for failing to cite or examine the federal and state laws and regulations that it cited.

¶ 7. The court rejected these arguments. It found that, even if the arbitrator had based his decision on the absence of "express advance notice," as employer posited, it would be at most a mistake of law, which was not grounds for vacating an arbitration award. See 21 R. Lord, Williston on Contracts § 57:139 (4th ed. 2022) ("Courts . . . will not vacate or modify an award even if there is a mistake or misapplication of law by the arbitrators."); see also Springfield Tchrs. Ass'n v. Springfield Sch. Dirs., 167 Vt. 180, 184, 705 A.2d 541, 544 (1997) (explaining that courts "will not review the arbitrator's decision for errors of fact or law"). In any event, the court found that employer misread the arbitrator's decision. It found that the arbitrator ultimately held that the discipline imposed was unreasonable given certain mitigating circumstances – not that grievant lacked sufficient notice – and this conclusion was fully consistent with the applicable just-cause standard. See Brooks, 135 Vt. at 568, 382 A.2d at 207-08 (explaining that touchstone of just-cause analysis is reasonableness).

¶ 8. The court emphasized that the question before it was not whether the arbitrator could have found just cause for the discipline imposed, but instead whether the arbitrator manifestly disregarded the law in concluding that employer lacked just cause under the circumstances. It found that none of the cases cited by employer supported the argument that an arbitrator, faced with similar circumstances, must always find just cause for discipline. The court thus concluded that the arbitrator's decision did not meet the high bar

required to show manifest disregard of the law, assuming arguendo that this standard applied. Employer appealed, reiterating its argument that the arbitrator's award should be vacated because he manifestly disregarded the law.

I. Legal Standards

¶ 9. At the outset, we emphasize our very narrow review. "Vermont has a long history of upholding arbitration awards whenever possible." Shahi v. Ascend Fin. Servs., Inc., 2006 VT 29, ¶ 10, 179 Vt. 434, 898 A.2d 116. Review is limited to "whether there exist statutory grounds for vacating or modifying the arbitration award" and "whether the parties were afforded due process." Id. This limited review is grounded in the principle that arbitration should provide efficient resolution of disputes and not become another step in the litigation process. Springfield Tchrs. Ass'n, 167 Vt. at 183-84, 705 A.2d at 543-44. Courts act "as an appellate tribunal, not a second arbitrator." Shahi, 2006 VT 29, ¶ 10.

¶ 10. The Vermont Arbitration Act (VAA) identifies five circumstances under which a court must vacate an award. See 12 V.S.A. § 5677(a)(1)-(5). We have not yet decided whether to recognize "manifest disregard of the law" as an additional basis for vacating an arbitration award, although other courts have done so. See Masseau v. Luck, 2021 VT 9, ¶ 30, 214 Vt. 196, 252 A.3d 788 (recognizing that this "remains an open question" under VAA and under Federal Arbitration Act

(FAA)), cert. denied sub nom. Masseau v. Henning, 142 S. Ct. 89 (2021) (mem.); see also Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S, 333 F.3d 383, 388-89 (2d Cir. 2003) (discussing origins and application of manifest-disregard standard in Second Circuit).

¶ 11. Under the manifest-disregard doctrine, a court may vacate an arbitration award if 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.' " Masseau, 2021 VT 9, ¶ 31 (quoting Wallace v. Buttar, 378 F.3d 182, 189 (2d Cir. 2004)). Under the first prong, courts look to the arbitrator's subjective knowledge; the second prong describes an objective inquiry. Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200, 209 (2d Cir. 2002). "The party seeking vacatur bears the burden of proving manifest disregard." Id.

¶ 12. "Manifest disregard" requires "something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law." Id. at 208 (quotation omitted). A court may not vacate an award under this doctrine "merely because it is convinced that the arbitration panel made the wrong call on the law." Wallace, 378 F.3d at 190. Instead, "[t]he error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986).

¶ 13. Use of this doctrine is "severely limited" and vacatur on this basis is "exceedingly rare." Wallace, 378 F.3d at 189 (quotations omitted). An arbitrator's award remains entitled to "considerable deference," Burlington Adm'rs' Ass'n v. Burlington Bd. of Sch. Comm'rs, 2016 VT 35, ¶ 17, 201 Vt. 565, 145 A.3d 844, and should be upheld if "the arbitrator has provided even a barely colorable justification" for the award, Westerbeke, 304 F.3d at 222. Compare N.Y. Tel. Co. v Commc'ns Workers of Am. Loc. 1100, 256 F.3d 89, 93 (2nd Cir. 2001) (per curiam) (applying standard and affirming order vacating award where arbitrator explicitly ignored Second Circuit precedent and followed other circuits' precedents) with Duferco, 333 F.3d at 392-93 (upholding arbitration award despite contradictory reasoning in decision because plausible reading of award fit within governing legal principle).

¶ 14. We review de novo the legal question of whether to recognize the manifest-disregard standard. See Garbitelli v. Town of Brookfield, 2011 VT 122, ¶ 5, 191 Vt. 76, 38 A.3d 1133. Assuming arguendo that the standard applies, we also review de novo whether the arbitrator manifestly disregarded the law in this case. See Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC, 497 F.3d 133, 138 (2d Cir. 2007) ("When a party challenges the district court's review of an arbitral award under the manifest disregard standard, we review the district court's application of the standard de novo" (quotation and emphasis omitted)).

¶ 15. For the reasons set forth below, we conclude, as in Masseau, that "even assuming that courts

are empowered to vacate an arbitrator's decision based on manifest disregard of the law-which we do not decide-the asserted legal error in the arbitrator's decision here does not rise to the level of manifest disregard." 2021 VT 9, ¶ 32.

II. Application

¶ 16. Employer's manifest-disregard argument focuses on the arbitrator's failure to analyze the federal Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule and we tailor our analysis accordingly.[3] Employer contends that, under this rule, it was required to discipline grievant by imposing an "appropriate sanction[]" and it therefore had just cause to reprimand him. Employer maintains that the HIPAA Privacy Rule is "well defined, explicit, and clearly applicable," id. ¶ 31, and that the arbitrator manifestly disregarded the law by "completely ignoring it."

¶ 17. HIPAA "prohibits the disclosure of medical records without a patient's consent." Meadows v. United Servs., Inc., 963 F.3d 240, 244 (2d Cir. 2020) (per curiam). The HIPAA Privacy Rule "generally provides that a covered entity may not use or disclose an individual's protected health information to third parties without a valid authorization, except as otherwise

[3] We do not suggest that the other laws and regulations that employer presented to the arbitrator were inapplicable or could not provide grounds to support a finding of just cause, and we make no judgment in this regard.

permitted or mandated under the Rule." Arons v. Jutkowitz, 880 N.E.2d 831, 841 (N.Y. 2007). Under this rule, a covered entity like employer must "[e]nsure the confidentiality, integrity, and availability of all electronic protected health information the covered entity or business associate creates, receives, maintains, or transmits," and "[e]nsure compliance . . . by its workforce." 45 C.F.R. § 164.306(a)(1), (4) (2022). To do so, a covered entity must implement a sanction policy and "[a]pply appropriate sanctions against workforce members who fail to comply with the security policies and procedures of the covered entity or business associate." Id. § 164.308(a)(1)(ii)(C). In compliance with this regulation and other policies, employer maintains a privacy policy that prohibits disclosure of confidential information without consent, and a personnel policy and collective bargaining agreement that establish a discipline policy.

¶ 18. The arbitrator acknowledged the privacy laws cited by employer in his decision and recognized that employer was required to comply with them. He stated:

> The employer has a number of policies with respect to patient confidentiality, and there are also a number of [s]tate and [f]ederal laws addressing the issue of patient privacy. The various laws and regulations impose sanctions on entities that violate the privacy protections. It is therefore easy to understand why the employer takes matters of patient confidentiality and patient privacy very seriously. It is also appropriate and reasonable

> that the employer would promulgate rules on patient confidentiality, and that its employees would be obligated to follow any such policies. [Grievant] should certainly have known of such rules.

The arbitrator found that employer "acted appropriately in raising this issue of patient confidentiality with [grievant], as there was an obvious method that could have been used to protect patient confidentiality."

¶ 19. Mindful of these laws, the arbitrator nonetheless reasoned that "[n]ot all breaches of patient confidentiality are the same and the facts and circumstances of each and every event must be considered when reviewing disciplinary action issued for such infractions." He found that because the disclosure took place during a closed disciplinary meeting, it was understandable that grievant asked his union representative to attend. According to the arbitrator, the circumstances did not show that grievant engaged in "intentional misconduct"; at worst, he "made an error in judgment." He acknowledged that the written reprimand was "a very low level of discipline" but reasoned that this discipline was not warranted "based on [grievant's] record of unblemished employment" with employer. Thus, he concluded that employer should have instead used informal counseling and directives rather than formal discipline, and that employer thus lacked just cause to reprimand grievant.

¶ 20. Employer fails to show that the HIPAA Privacy Rule clearly and obviously required the arbitrator

to reach a contrary conclusion. Neither the HIPAA statute or regulation referenced above define the term "appropriate sanction" and there is no case law interpreting the term. See Westerbeke Corp., 304 F.3d at 209 ("A legal principle clearly governs the resolution of an issue before the arbitrator if its applicability is obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator." (quotation omitted)). Employer concedes that the term "appropriate" necessarily connotates discretion to some extent. The case cited by employer, Jespersen v. Horizon Healthcare Servs, Inc., No. MER-C-12-17, 2017 WL 837478 (N.J. Super. Ct. Ch. Div. Feb. 15, 2017), does not hold that a particular type of sanction must always be imposed for violations of HIPAA's Privacy Rule.

¶ 21. As one treatise explains:

> HIPAA does not specify particular sanctions that covered entities must impose, leaving the details of sanctions policies to organizations' discretion. In general, the type of sanction applied should vary on the basis of such factors as the severity of the violation, whether it was intentional, and whether the violation indicated a pattern or practice of improper use or disclosure of PHI [(protected health information)]. Sanctions might begin with a warning, for example, but increase in severity with repeated violations. Ultimately, the covered entity may require the termination of a staff member for extremely serious or repeated violations.

Guide to Medical Privacy and HIPAA § 733 (J. Flynn ed. 2016). The treatise provides examples of sanction categories, indicating that violations caused by "[l]ack of training[,] [i]nexperience[,] [a]ccident[,] or [that were] unintentional" could be sanctioned by training or counseling. Id. at fig. 733-1.[4]

¶ 22. The arbitrator essentially took this approach in his decision. He considered grievant's misconduct through the lens of the just-cause framework as he was asked to do. In determining whether just cause exists, the "analysis should center upon the nature of the employee's misconduct," In re Morrissey, 149 Vt. 1, 13, 538 A.2d 678, 686 (1987), and "the ultimate criterion of just cause is whether the employer acted reasonably" in disciplining the employee, Brooks, 135 Vt. at 568, 382 A.2d at 207.[5] There are various factors to consider in this analysis. See In re Brown, 2004 VT 109, ¶ 12, 177 Vt. 365, 865 A.2d 402 (identifying

[4] As set forth above, the arbitrator found that grievant did not engage in "intentional misconduct" and, at worst, he "made an error in judgment." Contrary to the assertion in the dissent, post ¶ 40, this type of conduct falls within the type of "[c]ategory 1" violations described in the treatise, i.e., "[u]nintentional breach of privacy or security caused by carelessness, lack of knowledge or lack of judgment." Guide to Medical Privacy and HIPAA § 733 (J. Flynn ed. 2016).

[5] Although Brooks involved just cause for dismissal, we have suggested that the same standard would apply to a lesser form of discipline if the contract supported that conclusion. In re Gorruso, 150 Vt. 139, 144 n.3, 549 A.2d 631, 634 n.3 (1988) (noting that contract language "appears to relate our 'just cause for dismissal' standard to any disciplinary action"). Likewise, the collective bargaining agreement here provides that "[a]n employee shall not be disciplined except for just cause."

factors relevant to just-cause analysis, including "nature and seriousness of the offenses and their relation to the grievant's duties and positions," "grievant's past disciplinary record," any mitigating circumstances, and "adequacy and effectiveness of alternative sanctions to deter such conduct in the future").

¶ 23. The arbitrator concluded that the sanction was not reasonable under the circumstances, which is supported by factors he considered, including the surrounding circumstances and grievant's unblemished record of employment. The arbitrator's analysis was consistent with just-cause principles and his conclusion was "at least slightly colorable, which is all that is required given the strong presumption that the arbitrator has not acted in manifest disregard of the law." Westerbeke, 304 F.3d at 222.

¶ 24. The case cited by employer, Western Union Telegraph Co. v. American Commc'ns. Ass'n, C.I.O., 86 N.E.2d 162 (N.Y. 1949), does not compel a different result. As employer recognizes, the question in that case was whether the arbitrator exceeded his authority in making his award and not whether he acted in manifest disregard of the law. The parties there agreed as part of a collective bargaining agreement (CBA) that there would be no strikes or work stoppages; they further agreed that an arbitrator lacked authority to alter or modify any of the CBA's express provisions. The court found that the arbitrator violated the clear and unambiguous terms of the parties' agreement in concluding that employees who had engaged in work stoppages in support of a strike were acting consistently

with "a practice generally prevalent in the telegraph industry" and were entitled to be reinstated. Id. at 166. "By that conclusion," the court held, "the arbitrator-entering a field of decision from which the parties had expressly excluded him-modified an express provision of the contract." Id. The court also found that the arbitrator's construction of the parties' agreement would give judicial sanction to conduct-the willful refusal to forward a message-that violated criminal laws which were enacted expressly "to avoid disruption of the public service furnished by a telegraph company." Id. at 168 (emphasis omitted). The court reasoned that the employer could not discharge its own legal duties if it was required to retain employees who refused to transmit messages. Id.

¶ 25. Employer contends that, like the case above, the arbitration award ousts it from exercising control over its own business and prevents it from complying with the law. We are unpersuaded. As discussed above, the HIPAA Privacy Rule does not clearly require a certain type of sanction for violations, unlike the language at issue above. See Duferco, 333 F.3d at 389-90 (explaining that "misapplication of an ambiguous law does not constitute manifest disregard" and party seeking vacatur must show that arbitrator was "fully aware of the existence of a clearly defined governing legal principle, but refused to apply it, in effect, ignoring it"); see also Westerbeke, 304 F.3d at 217 ("A party seeking vacatur must . . . demonstrate that the arbitrator knew of the relevant principle, appreciated that this principle controlled the outcome of the disputed

issue, and nonetheless flouted the governing law by refusing to apply it."). Employer fails to show that this case presents an "exceedingly rare instance[ ]" of "egregious impropriety," Masseau, 2021 VT 9, ¶ 31 (quotation omitted), that rises to the level of manifest disregard, assuming arguendo we would adopt that standard. We therefore affirm the trial court's decision.

Affirmed.

FOR THE COURT:

/s/ Paul L. Reiber
Chief Justice

¶ 26. **EATON, J. dissenting.** The majority's decision essentially transforms our limited review of arbitration decisions into no review. The arbitrator here recognized that the law required employer to sanction grievant for disclosing confidential patient information but the arbitrator chose to disregard that law and reverse employer's decision. The majority's refusal to adopt the manifest-disregard standard is harmful generally because it erodes confidence in arbitration awards and provides an incentive for arbitrators to avoid explaining the bases for their decisions. It is also detrimental under the circumstances of this case because it punishes employer for carrying out its obligations under federal law and ignores the harm to patients whose information was improperly disclosed. Because employer's decision to sanction grievant was supported and required by law and the arbitrator

disregarded the law in overturning it, I would reverse and remand for the trial court to vacate the arbitration order. Therefore, I dissent.

¶ 27. It is not necessary to recount the full procedural posture of this case, but a few undisputed facts must be emphasized. Grievant is employed as a social worker by employer, Howard Center, and is responsible for providing counsel and support to patients who receive medication-assisted treatment for substance-use disorder. In this role, grievant has access to private health information of patients and is required to protect patient confidentiality in compliance with employer's policy as well as federal and state laws. It is undisputed that grievant did not maintain this confidentiality and instead unnecessarily shared patients' private health information for his own purposes with a union representative without permission or authorization, breaching employer's confidentiality policy. In response to this clear violation of employer policy and in furtherance of employer's obligations under federal law, employer issued a written reprimand to grievant. Grievant challenged this action before an arbitrator.

¶ 28. In defense of its action, employer argued that there was just cause to reprimand grievant because grievant violated its confidentiality policy, which was enacted in accordance with federal and state laws requiring it to maintain the privacy of its clients and their records. Employer cited federal and state laws on patient privacy and confidentiality, including the federal Public Health Service Act and the federal Health Insurance Portability and Accountability Act (HIPAA)

and their implementing regulations, as well as Vermont patient-privacy law.

¶ 29. To appreciate the legal outcome of this case, it is important to understand these privacy laws, particularly HIPAA, which was passed to "protect[] the privacy of health information in the midst of the rapid evolution of health information systems." S.C. Med. Ass'n v. Thompson, 327 F.3d 346, 348 (4th Cir. 2003). The HIPAA Privacy Rule forbids organizations from using or disclosing private health information without a valid authorization. Arons v. Jutkowitz, 880 N.E.2d 831, 840-41 (N.Y. 2007). Under this Rule, employer must "[e]nsure the confidentiality, integrity, and availability of all electronic protected health information the covered entity or business associate creates, receives, maintains, or transmits," and "[e]nsure compliance . . . by its workforce." 45 C.F.R. § 164.306(a)(1), (4) (2022). Employer is also required to implement a sanction policy and "[a]pply appropriate sanctions against workforce members who fail to comply with the security policies and procedures of the covered entity or business associate." Id. § 164.308(a)(1)(ii)(C). To ensure compliance, employer has a privacy policy that prohibits disclosure of confidential information without consent, and a discipline policy. Employer argued that it was legally mandated to respond to the breach of confidentiality by imposing an "appropriate sanction[]" and therefore had just cause to take action against grievant. See In re Brooks, 135 Vt. 563, 568, 382 A.2d 204, 207 (1977) (explaining that employer must have just cause to impose discipline).

¶ 30. The arbitrator recognized the existence and importance of these privacy laws and employer's obligation to comply with them. The arbitrator noted that employer was subject to state and federal laws that impose sanctions on entities that violate privacy protections and that it was "appropriate and reasonable that the [e]mployer would promulgate rules on patient confidentiality, and that its employees would be obligated to follow any such policies." The arbitrator also found that grievant should have known about these rules. Even though the arbitrator agreed with employer that sharing the confidential information with the union representative was unacceptable, the arbitrator concluded that the breach of employer policy did not warrant formal discipline. The arbitrator characterized grievant's unauthorized and unlawful disclosure as an "error in judgment," and overturned employer's sanction. Following employer's appeal, the civil division recognized that violations of patient confidentiality may provide just cause for discipline, but rejected employer's argument that the arbitrator manifestly disregarded the law in concluding that there was no just cause in this case.

¶ 31. The majority affirms the civil division's decision, concluding that neither HIPAA nor its implementing regulations define what the appropriate sanction is for disclosing private health information and emphasizing that the law provides some discretion in how an employer responds. Ante, ¶ 20. The majority basically holds that HIPAA did not require employer to formally sanction claimant and therefore the arbitrator

did not disregard the law when he reversed employer's sanction of claimant. As explained more fully below, this interpretation is at odds with the language of federal law and the guidance relied on by the majority.

¶ 32. I agree that arbitration decisions should not be lightly overturned and that under our limited review of those decisions even legal errors are not an express basis for overturning arbitration awards under the Federal Arbitration Act (FAA), 9 U.S.C. § 10(a)(1)-(4), or the Vermont Arbitration Act (VAA), 12 V.S.A. § 5677(a)(1)-(5). However, this is not merely a situation where the arbitrator misapplied the law. Here, the arbitrator had full knowledge of employer's obligations under federal law, acknowledged them, and chose to ignore those requirements.

¶ 33. To address exactly this type of situation, the Second Circuit and several other jurisdictions have adopted a two-pronged test for manifest disregard under which the court must "'find[] 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.'" Masseau v. Luck, 2021 VT 9, ¶ 31, 214 Vt. 196, 252 A.3d 788 (quoting Wallace v. Buttar, 378 F.3d 182, 189 (2d Cir. 2004)), cert. denied sub nom. Masseau v. Henning, 142 S. Ct. 89 (2021) (mem.); see also Wachovia Sec., LCC v. Brand, 671 F.3d 472, 482-83 (4th Cir. 2012) (concluding that manifest disregard exists as basis to overturn arbitration decision); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros, 70 F.3d 418, 421 (6th Cir. 1995)

(recognizing manifest disregard as basis for review of arbitration order). Manifest disregard is for "rare instances where some egregious impropriety on the part of the arbitrator is apparent," and not for a mere error in understanding or applying the law.[6] Masseau, 2021 VT 9, ¶ 31 (quotation omitted).

¶ 34. Employer urges application of this standard to the arbitrator's decision in this case, arguing that the arbitrator ignored the governing law regarding patient confidentiality and refused to acknowledge that employer was required to sanction grievant for his violation of the law. I agree that the arbitrator manifestly ignored the law in concluding that employer lacked just cause to discipline grievant for violating patient confidentiality. I would adopt the manifest-disregard standard and allow courts to vacate an arbitration award when they find that (1) the arbitrator knew the governing law but refused to follow it or ignored it, and (2) the applicable law was "well defined, explicit, and clearly applicable to the case." Id. (quoting Wallace, 378 F.3d at 189). Although mere legal error will not suffice to vacate an award, id. ¶ 29, this Court

---

[6] This Court and the U.S. Supreme Court have left open the question as to whether manifest disregard of the law may provide a basis for review. See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 672 n.3 (2010) (recognizing manifest-disregard doctrine for purposes of dispute but declining to decide whether doctrine is "an independent ground for review or . . . judicial gloss on the enumerated grounds for vacatur" under FAA); see also Masseau, 2021 VT 9, ¶ 30 (discussing manifest-disregard standard but declining to reach question of whether it applies under VAA).

should not turn a blind eye to intentional disregard of the law. While the majority pays lip service to the possibility of adopting the manifest-disregard standard at some future time, I can think of no clearer opportunity to do so than is presented here, where the arbitrator purposely ignored applicable law to excuse an unnecessary and unlawful breach of patient confidentiality by grievant. The majority's failure to adopt the manifest-disregard doctrine in this case is essentially a rejection of it.

¶ 35. There would be negative general consequences if manifest disregard were not available as a ground for vacating an award. First, the application of the manifest-disregard standard to a narrow set of cases secures confidence in the arbitration process. By agreeing to arbitration, parties "waive important rights, including trial by jury, procedural protections offered by the courts, and appellate review by an independent judiciary." Knaresborough Enters., Ltd. v. Dizazzo, 2021 VT 1, ¶ 11, 214 Vt. 32, 251 A.3d 950. As courts have recognized, however, "parties do not agree in advance to submit to arbitration that is carried out in manifest disregard of the law." Schiferle v. Cap. Fence Co., 61 N.Y.S.3d 767, 772 (App. Div. 2017) (quotation omitted). Without manifest disregard, "[i]f the courts merely rubber-stamp arbitrators' decisions . . . litigants will hesitate to entrust their affairs to arbitration." R.E. Bean Constr. Co. v. Middlebury Assocs., 139 Vt. 200, 205, 428 A.2d 306, 309 (1980).

¶ 36. Second, without this standard, arbitrators could have an incentive not to provide reasoning for

their decisions. See Travelers Ins. Co. v. Nationwide Mut. Ins. Co., 886 A.2d 46, 49 (Del. Ch. 2005) (explaining that where error is blatant and obvious, court may "infer the required knowledge of the law and intentionality on the part of the arbitrator" because otherwise "arbitrators would have a positive incentive to refuse to explain their decisions, and the last resort review provided by the possibility of vacatur for manifest disregard . . . would be eviscerated"); see also Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 204 (2d Cir. 1998) (explaining that "when a reviewing court is inclined to hold that an arbitration panel manifestly disregarded the law, the failure of the arbitrators to explain the award can be taken into account"). The narrow framework ensures confidence in arbitration as an alternative to litigation and protects the rights of parties while "guarantee[ing] that review for manifest disregard [does] not grow into the kind of probing merits review that would undermine the efficiency of arbitration." Wachovia, 671 F.3d at 483; see also Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S, 333 F.3d 383, 389 (2d Cir. 2003) (explaining that, at time, Second Circuit had vacated only four out of forty-eight cases in which court applied manifest-disregard standard).

¶ 37. Here, both elements of manifest disregard are met because the arbitrator chose to ignore the law that required employer to sanction grievant for his misconduct and the applicable legal principle was clearly defined. As to the first element, the arbitrator acknowledged the governing privacy law but nonetheless

disregarded the HIPAA Privacy Rule's command requiring employer to sanction grievant. See 45 C.F.R. § 164.308(a)(1)(ii)(C); see Duferco, 333 F.3d at 390 (explaining that to determine arbitrator's awareness of the law, court "impute[s] only knowledge of governing law identified by the parties to the arbitration"). The arbitrator acknowledged the "plethora of laws, regulations and policies with respect to ensuring patient privacy," that these various laws and regulations "impose sanctions on entities that violate the privacy protections," and that employer has to "require that its employees follow such policies on patients' privacy." Despite this acknowledgment, the arbitrator concluded that formal discipline was not warranted without mentioning employer's legal obligation to sanction grievant under the HIPAA Privacy Rule. Thus, the arbitrator "knew of [the] governing legal principle yet refused to apply it or ignored it altogether." Masseau, 2021 VT 9, ¶ 31 (quotation omitted).

¶ 38. There was no reasoned basis for the arbitrator to ignore the law. Although the arbitrator stated that employer's duty to comply with privacy laws had to be balanced against the union's right to defend employees from wrongdoing, the arbitrator acknowledged that "there was no need for [grievant] to have shown [the union representative] the records with the names of the clients identifiable on the records. The clients' names could have been redacted" without compromising the union representative's ability to defend grievant. Moreover, the fact that the disclosure happened in a closed-door meeting does not excuse

grievant's actions or alter employer's obligation under HIPPA. The disclosure of private health records in this setting was just as harmful, and undoubtedly just as unwelcome, to the patients involved as a disclosure in some other setting, especially having in mind the disclosure had nothing to do with the patients' treatment but rather with grievant's billing practices. Congress has recognized that privacy in medical records is particularly important for substance-abuse treatment. "Without th[e] assurance [of confidentiality], fear of public disclosure of [substance] abuse or of records that will attach for life will discourage thousands from seeking the treatment they must have if this tragic national problem [of addiction] is to be overcome." Loc. 738, Int'l Bhd. of Teamsters v. Certified Grocers Midwest, Inc., 737 F. Supp. 1030, 1033 (N.D. Ill. 1990) (quotation omitted) (explaining congressional goals behind enactment of Public Health Service Act). It is already difficult for individuals to seek substance-abuse counseling and treatment and ignoring the harm caused by disclosing private health information, as I believe the majority's decision does, could result in a chilling effect in the future on those needing treatment.

¶ 39. The second part of the manifest-disregard test is also met in that the governing law is "well defined, explicit, and clearly applicable to the case." Masseau, 2021 VT 9, ¶ 31 (quotation omitted). The HIPAA Privacy Rule mandates that covered entities "must . . . [e]nsure the confidentiality, integrity, and availability of all electronic protected health information" and "[e]nsure compliance with this subpart by its workforce."

45 C.F.R. § 164.306(a)(1), (4). In accordance with § 164.306, a covered entity "must" implement a sanction policy and "[a]pply appropriate sanctions" against employees who fail to comply with patient-confidentiality policies and procedures. Id. § 164.308(a)(1)(ii)(C). Like "shall," "must" is "imperative or mandatory language" that is "inconsistent with a concept of discretion." State v. Rafuse, 168 Vt. 631, 632, 726 A.2d 18, 19 (1998) (mem.); see also State v. Henderson, 436 S.E.2d 209, 211 (Ga. 1993) ("[T]he plain meaning of 'must' is a command, synonymous with 'shall.' "). The plain language of the Privacy Rule refutes the conclusion that a covered entity may choose not to sanction an employee who violates patient confidentiality.

¶ 40. The majority asserts that employers have flexibility in how to sanction employees for violating HIPAA because the phrase "appropriate sanctions" is not defined by relevant statute or regulation and "necessarily connotates discretion to some extent." Ante, ¶ 20. Relying on a HIPAA treatise, the majority concludes that some HIPAA violations could be sanctioned through training or counseling and therefore the arbitrator did not manifestly disregard the law when it reversed employer's formal discipline. This after-the-fact rationale for the arbitrator's decision is inconsistent with the arbitrator's own factual findings regarding claimant's conduct. Under the rubric of the treatise, "category 1" sanctions such as training and counseling are appropriate for unintentional breaches of privacy or security caused by carelessness. In contrast, "category 2a" is for deliberate unauthorized access, such as

"accessing a coworker's information without a legitimate business reason." Here, grievant deliberately accessed and shared private health information of his patients solely for his own purposes. While the arbitrator did not find any malicious intent, there is no question grievant acted deliberately.

¶ 41. Had the arbitrator applied the HIPAA Privacy Rule, he necessarily would have concluded that employer had just cause to reprimand grievant. See Duferco, 333 F.3d at 390 (explaining that court will "not vacate an arbitral award for an erroneous application of the law if a proper application of law would have yielded the same result"); see also Brooks, 135 Vt. at 569, 382 A.2d at 208 (concluding that just cause existed as matter of law). In fact, the arbitrator essentially concluded that just cause existed for discipline by determining that grievant's conduct breached patient confidentiality, that grievant knew or should have known so, and that employer acted appropriately in raising the issue with him.[7] Moreover, the arbitrator

---

[7] The majority's reliance on and discussion of just cause misses the point. Ante, ¶ 22. Just cause is typically used in cases involving termination and involves evaluating whether there was "some substantial shortcoming detrimental to the employer's interests, which the law and a sound public opinion recognize as a good cause for [the employee's] dismissal." In re Brown, 2004 VT 109, ¶ 12, 177 Vt. 365, 865 A.2d 402 (quotation omitted). In some situations, there may be just cause for discipline for a lesser sanction but not for the sanction chosen. Id. ¶ 18. Here, the arbitrator agreed with employer that grievant acted in a way that was detrimental to employer's interest, essentially concurring that employer had just cause to impose some type of discipline. There was, however, no lesser sanction because employer imposed the

recognized that employer accounted for the mitigating circumstances by issuing grievant a written warning, which the arbitrator characterized as "a very low level of discipline." Nonetheless, the arbitrator deemed a formal reprimand unwarranted because grievant made an "error in judgment" rather than an intentional disclosure and suggested that employer should have initiated informal counseling instead of formal discipline. This conclusion runs contrary to the HIPAA Privacy Rule, which makes no exception based on the intent of the disclosure or the scope of the misconduct. See 45 C.F.R. § 164.308(a)(1)(ii)(C). While the rule provides some discretion to the employer to determine what type of sanction is appropriate under the circumstances, informal counseling is not an available form of discipline under employer's personnel policy or the collective bargaining agreement. And, as explained above, even if less formal discipline was an option for employer, it was not here where grievant's conduct was intentional. Therefore, the arbitrator's conclusion could not satisfy employer's requirement under the HIPAA Privacy Rule and was inconsistent with just-cause principles. Cf. W. Union Tel. Co. v. Am. Commc'ns Ass'n, C.I.O., 86 N.E.2d 162, 188 (N.Y. 1949) (concluding that arbitrator exceeded authority where award

---

lowest level of discipline available under the employment contract. If this was the sole error made by the arbitrator, it may not be grounds for reversal since it would amount to an error of law and not a total disregard for the law. The reason this case rises to the level of egregious conduct warranting reversal is that employer's action of sanctioning claimant was not just proper under its employment contract but required by federal law.

prevented employer "from performing duties to the public required by law").

¶ 42. Because the arbitrator manifestly disregarded the law, I would reverse the superior court and direct the court to vacate the arbitrator's decision. I dissent.

/s/ Harold E. Eaton, Jr
Associate Justice

[SEAL]

VERMONT SUPERIOR COURT
Chittenden Unit
175 Main Street, PO Box 187
Burlington VT 05402
802-863-3467
www.vermontjudiciary.org

CIVIL DIVISION
Case No. 20-CV-00823

Howard Center v. AFSCME Local 1674

DECISION ON MOTION

(Filed Sep. 9, 2021)

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

---

[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.

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*, 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

/s/ Samuel Hoar, Jr.
Samuel Hoar, Jr.
Superior Court Judge

[SEAL]

VERMONT SUPERIOR COURT
Chittenden Unit
175 Main Street, PO Box 187
Burlington VT 05402
802-863-3467
www.vermontjudiciary.org

CIVIL DIVISION
Case No. 20-CV-00823

Howard Center v. AFSCME Local 1674

JUDGMENT

The court, having denied Appellant's motion to vacate the arbitration award in this case, now enters judgment for the Respondent. The award is confirmed, and the case dismissed with prejudice.

Electronically signed pursuant to V.R.E.F. 9(d):
9/9/2021 9:13 AM

/s/ Samuel Hoar, Jr.
Samuel Hoar, Jr.
Superior Court Judge

In the Matter of Arbitration Between:

AFSCME LOCAL 1674

&

HOWARD CENTER

Daniel Peyser – Letter of Discipline

AWARD OF THE ARBITRATOR

(Filed Oct. 26, 2020)

The Undersigned Arbitrator, having been designated in accordance with the arbitration agreement entered by the above named parties and having been duly sworn and having duly heard the proofs and allegations of the parties AWARDS as follows:

For the reasons set forth in the attached Decision, the grievance is sustained. The written reprimand must be removed from Mr. Peyser's personnel files.

October 26, 2020 /s/ Gary D. Altman
Brookline, Massachusetts Gary D. Altman

In the Matter of Arbitration Between:

AFSCME LOCAL 1674

&

HOWARD CENTER

Daniel Peyser – Letter of Discipline

ARBITRATION DECISION AND AWARD

Introduction

AFSCME Local 1674 ("Union") and the Howard Center ("Employer") are parties to a Collective Bargaining Agreement ("Agreement"). Under the Agreement, grievances not resolved during the grievance procedure may be submitted to arbitration. The parties presented their case in a virtual arbitration hearing before Gary D. Altman, Esq., on August 21, 2020. The Union was represented by Corey Williams, Esq., and the Employer was represented by Joseph Farnham, Esq. The parties had the opportunity to examine and cross-examine witnesses and to submit documentary evidence. The parties submitted written briefs after the close of the testimony.

Issue

The issue to be decided is as follows:

> Did the Howard Center have just cause to issue the Letter of Reprimand to the grievant, Daniel Peyser? If not, what shall the remedy be?

Facts

The Howard Center is a non-profit organization that provides various types of mental health services to children, adults and elders for over 16,000 clients in Northern Vermont. The Center employs over 1,500 employees that provide direct counseling services, and also employees that perform administrative services to fund and operate the Center.

Daniel Peyser is a Licensed Social Worker and has worked for the Howard Center since 2016. Mr. Peyser stated that his job duties include providing therapy to the Center's substance abuse clients and his duties also include case management. Mr. Peyser, as a licensed clinician, is also responsible for submitting appropriate paperwork so that the Center can bill the client's insurance carrier for services that he provided to the clients. In addition to his work responsibilities, Mr. Peyser also serves as the President of the Union.

Mr. Peyser testified that in May of 2019 his supervisor, Jessica Wilder, contacted him about his billings for the month of May. Apparently, there was an issue of Mr. Peyser not billing for his clinical services in April when the services were actually provided but instead waited until May to complete the paperwork and submit bills. Mr. Peyser stated that there were emails back and forth between him and Ms. Wilder on this issue and he believed that the matter had been resolved.

On May 23, 2019 Ms. Wilder wrote to Mr. Peyser informing him that a meeting would be held to discuss his billing practices, and that based on what was

learned at the meeting, it was possible that disciplinary action could be taken. Mr. Peyser testified that he was "rattled" by the meeting, and there were accusations of fraud and dishonesty and threats of possible discipline. Mr. Peyser stated that after the meeting he followed up with a written response and asked the Center's Administration whether they needed any further information on his billing practices.

On June 25, 2019, Catherine Simonson, Chief of Client Services, wrote to Mr. Peyser, informing him that the Howard Center was considering taking disciplinary action against him for "dishonesty and unethical action", for his backdating of client bills. Ms. Simonson informed Mr. Peyser that a meeting would be held on June 28, so that he could be heard on the matter, and that he could bring his Union representative or attorney with him for this meeting.

Mr. Peyser stated that this meeting occurred on June 28, with members of Howard Center's Administration and David Van Deusen, the Union Business Agent[1], accompanied him at this meeting. Mr. Peyser testified that he explained his actions with respect to the client billing, discussed the email sent to him by Ms. Wilder and explained that he now understood the correct method to bill, but he believed that the issue had been resolved earlier with Ms. Wilder.

Mr. Peyser testified that he also brought with him two notes regarding the billing practice that had been

[1] Mr. Van Deusen is not an employee of the Howard Center.

used by others, and the names of Center's clients were set forth on these documents. Mr. Peyser testified that he brought this information because he was concerned that the Center was considering terminating his employment and he wanted to show the Center that he was not the only employee that had been involved in this same billing practice. Mr. Peyser admitted that he shared this information with Mr. Van Deusen at the meeting, as he was his Union representative during the meeting. There is no dispute that Mr. Peyser did not obtain permission from the clients, or authorization from the Center to share this information with anyone.

On July 8, 2019 Ms. Simonson wrote to Mr. Peyser informing him that no discipline would be issued on his billing practices. Ms. Simonson also noted, in this letter, that a clarification advisory would be sent to the staff notifying them of the appropriate billing procedures.

On August 2, Laura Pearce, Director of Information Management and Compliance, wrote to Mr. Peyser, informing him that during the June 28, meeting she noticed that notes from client records appeared to have been shown to Mr. Van Deusen. Ms. Pearce wrote that showing this information to Mr. Van Deusen violated the Center's policy on confidentiality, and that the Center now had to notify the clients and appropriate State and Federal agencies of this matter.

Mr. Peyser testified that he believed that the agency was harassing him, and also singling him out

because of his union activities, and because he had Union representation at the disciplinary meeting. Mr. Peyser also mentioned that he had recently filed unfair labor practice charges with the National Labor Relations Board. Mr. Peyser responded that, in the future, Ms. Pearce should be in contact with Mr. Van Deusen. On August 2, Mr. Van Deusen responded in an email to Ms. Pearce:

> As the Union Representative for bargaining unit employees at the Howard Center, it is my absolute right and responsibility to represent my members in matters of potential discipline. And to do this effectively, it is also my right to view information which is central to this task. What appears below gives an appearance of harassment to our union president, and seems to question the union's right to effectively represent our members. Be advised that AFSCME will take any and all steps necessary to defend our rights, members, and union officers. Further I require that any addition communication in regards to the below issue go directly to me.

On August 16, 2019 Ms. Simonson responded:

> This follows up on your email letter of August 2 David. In such letter, you asserted that the Howard Center's concern about client identifying information being made available to you and used during the recent due process meeting concerning Daniel's accounting for his work time represented impermissible interference with protected union activities.

Nothing could be further from the truth. The Agency took no exception to your efforts on behalf of Daniel. Instead, your explanation of these events was most helpful. Rather, our expressed concern is related instead to the fact that in the transmission/sharing, the two of you used certain information/records that did not redact confidential personal identifying information concerning the Agency's clients. Doing this was in violation of both Howard's protocols and the state and federal regulations that we must follow. 42 CFR, Part 2 and as amended is quite clear and knowledge of and adherence to this regulation is a core principle in the provision of substance use disorder treatment and Licensure. Daniel either knew or should have been aware of these regulations and he should have followed them. He had no right to violate them by sharing client identifying information with you or anyone else. He could have just as easily met the regulatory requirements by redacting all the client information and still shared the information necessary to substantiate your positions. Because HIPAA overlays 42 CFR we are required to report the breach to the state and federal authorities. In addition, we have 60 days from when we became aware of the breach to define a mitigation plan and then we are required notify the individuals whose records were impermissibly disclosed of the event and what we have done to mitigate further violation.

Consequently, Daniel, you should please regard this letter as an official reprimand for

> this violation and a notice that any repetition will result in the imposition of more serious discipline up to and including the possibility of dismissal. Additionally, either immediately please return all referenced documents or provide an affirmative statement that they have been shredded in a manner which precludes being put back together. Please acknowledge receipt of this official communication.

Dave Kronoff has worked for the Center for 36 years, and currently serves as the Privacy Officer for the Center. Mr. Kronoff explained that the Center must comply with various Federal and State regulations with respect to client's records. Mr. Kronoff explained that if an issue is raised with respect to a breach of a client's confidentiality he, as the Privacy Officer, must investigate any such incident, and if a violation is found the appropriate agencies and the client must be notified of the breach. Mr. Kronoff stated that in the present case, Mr. Van Deusen, as an outside party, should not have seen the records, as the names of the clients were on the records, and that such action was a breach of the Agency's privacy protocols. Mr. Kronoff explained that before any records could be shown to an outside person, it would be necessary to obtain authorization of the clients, which was not done in the present case.

Ms. Simonson explained that the Center is legally required to maintain the confidentiality of all its client's records. Ms. Simonson testified that if there are violations of client confidentiality the Center is

obligated to notify the client, the State, and at times, the appropriate Federal authorities. Ms. Simonson stated that client confidentiality is extremely important, and the Agency's funding could be impacted by any such breach, and that is why she believed it was appropriate to issue the written reprimand to Mr. Peyser. Ms. Simonson stated that the names of the clients could have been redacted before being shown to Mr. Van Deusen. Ms. Simonson explained that redacting the names would not have impacted Mr. Peyser's position at the grievance meeting. Ms. Simonson further testified that the warning letter had nothing to do with Mr. Peyser's Union activities, as she believed that the Center and Union labor relations have been positive, and that she has worked well with Mr. Peyser, as the Union President, on labor issues that have arisen at the Center.

Relevant Provisions of the Agreement

Section 108 – Non-Discrimination

> Neither the Agency nor the Union shall discriminate against or in favor of any employee in violation of any applicable federal or state statute or regulation.

Section 807 – Discipline

> A. An employee shall not be disciplined except for just cause. Whenever an employee is being investigated for workplace misconduct, the Agency shall provide the employee with

the specific violation of policy, work performance or Standard of Excellence.

B. Where appropriate, the Agency shall follow a policy of progressive discipline. Disciplinary response may be based upon the severity and/or frequency of the offense. Where warranted by severity or frequency, lesser forms of discipline need not be utilized.

C. Available forms of discipline include:

1. Oral reprimand – to constitute a formal oral reprimand as opposed to an evaluative comment, criticism or request for improvement, the giving of the reprimand must be noted in the employee's personnel file.

2. Written reprimand.

3. Suspension.

4. Denial of salary increment for up to three (3) months.

5. Discharge-Termination could result from unsatisfactory job performance, violation of Agency policy or acceptable standards of behavior, including but not limited to the following:

a. Unethical . . . behavior.

b. Falsification of client reports or other documents.

c. A breach of confidentiality. . . .

Positions of the Parties

Summary of the Employer's Arguments

The Employer maintains that there was just cause to issue a written reprimand to the grievant, Daniel Peyser. The Employer states that there can be no dispute that the Center is responsible for following a number of Federal and State laws and regulations relating to the privacy and confidentiality of its clients and their records. Moreover, the Employer states that employees receive the Center's written policy on maintaining the privacy of patient records. The Employer states that the record shows that Mr. Peyser as a licensed clinician received and should have known of the Center's policies on patient confidentiality.

The Employer maintains that there is no dispute that at a disciplinary meeting Mr. Peyser, in an attempt to explain his billing practices, showed Mr. Van Deusen copies of client notes, and the names of the clients could be seen on the notes. The Employer states that Mr. Peyser did not obtain authorization from clients nor did he follow the Center's protocols on sharing these client records with an outside person. The Employer contends that Mr. Peyser's action clearly violated the Center's policy, and that disclosing these records with patients' names was a very serious violation that caused the Center to have to explain such action to the appropriate authorities, notify the clients, and could have resulted in the Center being penalized with financial sanctions.

The Center states that the Union's contention that the Union representative had a legal right to review such records has no merit. First, the Center argues that the State and Federal regulations do not provide an exception that would permit an outside Union representative to have access to any such client records. The Employer further argues that even assuming such information was relevant to Mr. Peyser's position at the disciplinary meeting, the information could have been provided in a manner that did not violate the patients' privacy. Specifically, the Employer asserts that Mr. Peyser could have easily redacted the names from the records, and still have presented his position. The Employer states that based on the fact that there was an easy alternative to maintaining patient privacy and still make his point, Mr. Peyser engaged in serious misconduct, and a written reprimand was an appropriate management response.

The Employer further argues that the Union's contention that the Center discriminated against Mr. Peyser for his union activities is without merit. The Employer maintains that its policies, and the Federal and State laws with respect to patient confidentiality, apply to all Center employees, and these rules were not promulgated to interfere with an employee's Union activities. Moreover, the Employer states that even Mr. Peyser acknowledged that the union-management relations were positive. The Employer states that Mr. Peyser, as the Union President, must still follow the Center's policies, and its action in issuing a written reprimand was a reasonable and appropriate management

response for Mr. Peyser's serious misconduct in the present case. The Employer concludes that the grievance must be dismissed.

Summary of the Union's Arguments

The Union maintains that there was not just cause to issue any discipline upon the grievant, Daniel Peyser. The Union contends that in the present case, Mr. Peyser was not only an employee of the Howard Center, but for the past two years also served as the Union President. The Union maintains that during his tenure as Union President, he has had a number of interactions with Management at the Howard Center, filing grievances, and also unfair labor practice charges with the National Labor Relations Board.

The Union states that initially there was an issue with respect to the manner and timing in which Mr. Peyser was sending out bills to insurance carriers. Mr. Peyser spoke with his supervisor, and the matter was clarified, and Mr. Peyser acknowledged that he understood the billing process and would ensure that in the future, bills would be submitted in an appropriate and timely manner. The Union states that after this matter was resolved, Mr. Peyser, on an unrelated matter, then filed an unfair labor practice charge against the Employer, and on May 23, 2019 he also notified the Employer of the filing of this charge.

The Union contends that on May 23, after filing the charge, Mr. Peyser was then summonsed to a meeting with Management on May 29, to discuss the billing

procedures, and was informed that discipline may be issued based on the results of the meeting. The Union argues that the only conclusion that can be reached is that Management was targeting Mr. Peyser because of his Union activity as the issue of the billing procedures had previously been discussed and resolved between Mr. Peyser and his supervisor.

The Union states that the harassment continued after the May 29, meeting as Ms. Simonson, Chief Client Services Officer, then informed Mr. Peyser that the Center was considering discharging him for dishonesty and was also threatening to take action on his clinical license. The Union states that there was then a meeting on June 28, 2019 after which the Center determined that no disciplinary action would be issued relating to the billing issues. The Union states that, even though no discipline was issued against Mr. Peyser for the original reason of the hearing, after the meeting the Employer then decided, on August 16, 2019 to discipline Mr. Peyser on events that occurred at the disciplinary meeting in which Mr. Van Deusen, the Union Representative, attended.

The Union states that on August 5, 2019 Mr. Peyser re-filed an unfair labor practice with the NLRB. The Union maintains that the timing of Mr. Peyser's discipline, issued two weeks after he refiled the NLRB charges, clearly demonstrates that the Center was retaliating against Mr. Peyser for his protected Union activities.

The Union further contends that the Center disciplined Mr. Peyser for having his Union Representative present during his June 29, 2019 disciplinary hearing. The Union argues that Mr. Peyser had the contractual right to defend himself for the serious allegations made by the Center, and have the assistance of his Union Representative. The Union states that Mr. Peyser had documents, which he downloaded from the Center's database that showed that he was not alone in the manner in which he submitted clients' bills. The Union states that this information was clearly relevant to the charges brought against Mr. Peyser, and he was certainly entitled to see these documents in his role as an employee of the Center and as the Union President. The Union further maintains that the fact that Mr. Van Deusen was present during the meeting and may have seen the names of the clients on the records was not an intentional violation of the Center's confidentiality rules. The Union argues that the internal grievance meetings are closed proceedings, not open to the public, and such proceedings are exempt from HIPPA and State privacy regulations.

The Union concludes that the totality of the evidence demonstrates that there was not just cause to issue any discipline against Mr. Peyser, that the discipline was issued against Mr. Peyser for engaging in Union activities, and that the discipline must be removed from Peyser's personnel files.

Discussion

It is a well-established arbitral precedent that the Employer has the burden to prove that an employee's discipline is for just cause. This includes proof that the employee is guilty of the alleged wrong doing, and that the penalty imposed by the Employer is in keeping with the severity of the offense.

In the present case the Mr. Peyser was initially summoned to a disciplinary meeting for allegedly violating the Employer's billing practices, and was accused of dishonesty and fraud. It is certainly understandable that Mr. Peyser would want to defend himself against such serious allegations, and it was certainly appropriate that he obtained assistance from Mr. Van Deusen, the Union's Representative, during this meeting. In defending himself, he had obtained records involving other employees who had apparently followed the same billing practices for which Mr. Peyser was accused of fraud. On these records were the names of patients. There is no dispute that Mr. Van Deusen, is not an employee of the Center, and that he saw patient's names on certain records.[2]

The Employer has a number of policies with respect to patient confidentiality, and there are also a number of State and Federal laws addressing the issue of patient privacy. The various laws and regulations impose sanctions on entities that violate the privacy protections. It is therefore easy to understand why the

[2] Besides the names of the clients, the record does not reflect what Mr. Van Deusen actually saw on the records.

Employer takes matters of patient confidentiality and patient privacy very seriously. It is also appropriate and reasonable that the Employer would promulgate rules on patient confidentiality, and that its employees would be obligated to follow any such policies. Mr. Peyser should certainly have known of such rules.

The so-called breach of confidentiality occurred during a disciplinary meeting in which Mr. Peyser was accused of serious wrongdoing; allegations of dishonesty and unethical conduct. The testimony shows that Mr. Peyser downloaded certain records from the Center's database to support his position, and that this was not what he was disciplined for, since he is an employee of the Center, but rather it was that Mr. Van Deusen, the Union representative and a non-employee, saw the records and the names of patients were on these records. The issue thus raised is the extent to which a Union representative, a non-employee, can have access to patient records to defend a member of the bargaining unit of alleged wrongdoing.

There is a plethora of laws, regulations and policies with respect to ensuring patient privacy. As stated above, the Center has the right to ensure patient confidentiality, and to require that its employees follow such policies on patients' privacy. On the other hand, a Union has the right to defend employees from wrongdoing, and in certain situations this may involve having access to patient records. In such situations there must be a balance between the two interests.

In the present case it must be concluded that there was no need for Mr. Peyser to have shown Mr. Van Deusen the records with the names of the clients identifiable on the records. The clients' names could have been redacted. There is nothing on the record to suggest that redacting the names of the clients would have in any way compromised Mr. Van Deusen's duty and ability to defend Mr. Peyser of these serious charges. The Employer is correct that otherwise unacceptable conduct cannot be rendered acceptable simply because the matter involves union activities. In other words, the Employer acted appropriately in raising this issue of patient confidentiality with Mr. Peyser, as there was an obvious method that could have been used to protect patient confidentiality.

Not all breaches of patient confidentiality are the same and the facts and circumstances of each and every event must be considered when reviewing disciplinary action issued for such infractions. It must be remembered that what occurred in the present case was a unique situation. Indeed, David Kronoff, the Center's Privacy Officer, testified that he had never been involved in a situation in which purportedly confidential information had been shared with a Union representative during an internal grievance meeting. A Union-Management meeting to discuss discipline is a closed proceeding, and it is understandable that Mr. Peyser chose to exercise his statutory right to have a Union representative at this meeting.

It is not unusual for a supervisor to speak with and provide direction to employees on work rules and

conduct prior to initiating formal discipline. An employer's counseling or directives puts employees on notice of the employer's expectations but does not constitute an adverse action or discipline; this is what should have occurred in the present case. The facts show that "at worst", Mr. Peyser made an error in judgment, but not that he engaged in intentional misconduct that would warrant the conclusion that any future mistake, no matter when it occurred, would result in discipline. Even though expressed in a written warning, which is a very low level of discipline, the fact that this reprimand is placed in Ms. Peyser's personnel record and becomes part of the progressive disciplinary process is not warranted based on Mr. Peyser's record of unblemished employment with the Center.

Accordingly, under the principles of just cause, this written reprimand must be removed.[3]

---

[3] The timing of the discipline, although close in time to Mr. Peyser's union activities, and the fact that showing Mr. Van Deusen the patient records occurred during a disciplinary meeting, it cannot lead to the conclusion that the motivating reason for the Employer's decision to discipline Mr. Peyser was because of his Union activities. As stated above, the Employer has a legitimate reason to ensure patient confidentiality. Should a similar event occur in the future it would be in the parties' best interest to discuss how information can be provided to the Union in a manner that respects a patient's privacy rights.

Conclusion

For the reasons set forth above, the grievance is sustained. The written reprimand must be removed from Mr. Peyser's personnel files.

October 26, 2020
Brookline, Massachusetts

/s/ Gary D. Altman
Gary D. Altman

VERMONT
SUPREME COURT
109 State Street
Montpelier VT
05609-0801
802-828-4774
www.vermontjudiciary.org

Case No. 21-AP-257

[SEAL]

ENTRY ORDER

FEBRUARY TERM, 2023

Howard Center* v. AFSCME Local 1674 & Daniel Peyser	} APPEALED FROM:
	} Superior Court,
	} Chittenden Unit,
	} Civil Division
	} CASE NO. 20-CV-00823

(Filed Feb. 7, 2023)

In the above-entitled cause, the Clerk will enter:

Appellant's motion for reargument fails to identify points of law or fact presented in the briefs upon the original argument that the Court has overlooked or misapprehended, and therefore is denied. V.R.A.P. 40.

BY THE COURT:

/s/ Paul L. Reiber
Paul L. Reiber,
Chief Justice

/s/ Harold E. Eaton, Jr.
Harold E. Eaton, Jr.,
Associate Justice

/s/ Karen R. Carroll
Karen R. Carroll,
Associate Justice

/s/ William D. Cohen
William D. Cohen,
Associate Justice

/s/ Nancy J. Waples
Nancy J. Waples,
Associate Justice