

IN THE SUPREME COURT OF THE STATE OF NEVADA

ERIN M. FONG,
Appellant,
vs.
MGM MIRAGE INTERNATIONAL
MARKETING, INC., A NEVADA
CORPORATION,
Respondent.

No. 57397

FILED

OCT 17 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Angela*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order confirming an arbitration award. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Appellant Erin Fong was terminated by her employer, respondent MGM Mirage International Marketing, Inc., before the conclusion of her contracted term of employment. Fong filed a demand for arbitration, asserting claims for breach of contract and breach of the implied covenant of good faith and fair dealing; MGM asserted counterclaims against Fong. After a hearing, the arbitrator concluded that both parties' claims lacked merit and denied them. Fong moved to vacate the arbitrator's award in district court, but the district court denied the motion and instead confirmed the award. Fong appeals, seeking reversal on the following grounds: the arbitrator manifestly disregarded the law; the arbitrator should have been disqualified; Fong was deprived of a fair hearing; and the arbitration award was arbitrary and capricious. We review a district court's confirmation of an arbitration award de novo. Thomas v. City of North Las Vegas, 122 Nev. 82, 96, 127 P.3d 1057, 1067

(2006). We conclude that Fong's arguments lack merit. Accordingly, we affirm the district court's order.

The arbitrator did not manifestly disregard any applicable law

Fong argues that the arbitrator manifestly disregarded: (1) NRS 613.210, which requires an employer to give a truthful reason for the employee's termination; (2) the sword and shield doctrine, which prohibits a party from both asserting a privilege and benefiting from that privileged material; (3) laws regarding notice; and (4) laws regarding the burden of proof.

"An arbitrator manifestly disregards the law when he or she recognizes that the law absolutely requires a given result and nonetheless refuses to apply the law correctly." Bohlmann v. Printz, 120 Nev. 543, 545, 96 P.3d 1155, 1156 (emphases added) overruled on other grounds by Bass-Davis v. Davis, 122 Nev. 442, 134 P.3d 103 (2006). "Mere error in the application of the law is not grounds to vacate an arbitration award." Id. at 545, 96 P.3d at 1156. In order to vacate an arbitration award due to manifest disregard of the law, "[t]he governing law alleged to have been ignored must be well-defined, explicit, and clearly applicable." Graber v. Comstock Bank, 111 Nev. 1421, 1428, 905 P.2d 1112, 1116 (1995). "[C]ourts are not at liberty to set aside arbitration awards because of an arguable difference regarding the meaning or applicability of laws." Id. at 1428, 905 P.2d at 1116.

Not surprisingly, "the scope of judicial review of an arbitration award is limited and is nothing like the scope of an appellate court's review of a trial court's decision." Health Plan of Nevada v. Rainbow Med, 120 Nev. 689, 695, 100 P.3d 172, 177 (2004). "A 'reviewing court should not concern itself with the 'correctness' of an arbitration award' and thus does not review the merits of the dispute." Bohlmann, 120 Nev. at 547, 96

P.3d at 1158 (quoting Thompson v. Tega-Rand Intern., 740 F.2d 762, 763 (9th Cir. 1984)); see also Clark Cty. Educ. Ass'n v. Clark Cty. Sch. Dist., 122 Nev. 337, 342, 131 P.3d 5, 8 (2006); Graber, 111 Nev. at 1428, 905 P.2d at 1116.

Thus, “[a] party seeking to vacate an arbitration award based on manifest disregard of the law may not merely object to the results of the arbitration.” Clark Cty. Edu. Ass'n, 122 Nev. at 342, 131 P.3d at 8 (quoting Bohlmann, 120 Nev. at 547, 96 P.3d at 1158). Rather, “[t]he party seeking to attack the validity of an arbitration award has the burden of proving, by clear and convincing evidence, the statutory or common-law ground relied upon for challenging the award.” Rainbow Med., 120 Nev. at 695, 100 P.3d at 176.

NRS 613.210

Fong argues that MGM could not terminate her for a different reason than the one it provided in her termination letter pursuant to NRS 613.210, and that the arbitrator willful ignored NRS 613.210 when he found that MGM had not violated this statute. We disagree.

NRS 613.210(4) provides, in relevant part, that an employee may receive “a truthful statement of the reason for . . . discharge of that employee.” MGM sent Fong a letter informing her that, pursuant to NRS 613.210, she was terminated for “[u]nsatisfactory job performance.” Fong asserted that MGM was barred from subsequently relying on section 7 of the employment agreement, which deals with gaming licensing. The arbitrator did not agree. In reaching his decision, the arbitrator expressly considered and interpreted NRS 613.210, applied it to the facts of the case, and determined that MGM did not violate the requirements of the statute. Without determining whether the arbitrator’s interpretation of this statute is correct, we conclude that the arbitrator’s findings and

application of the statute did not rise to the level of manifest disregard of the law.

The “sword and shield” doctrine

Fong also argues that the arbitrator manifestly disregarded the sword and shield doctrine because he permitted MGM to terminate Fong because of licensing concerns, under section 7 of the employment agreement, but then allowed MGM to classify certain documents regarding MGM’s licensing concerns as privileged under the gaming privilege.¹ We reject Fong’s argument.

A party may not use a privilege as both a sword “to assert a claim” and a shield “to protect the content” relating to that claim. Molina v. State, 120 Nev. 185, 194, 87 P.3d 533, 539 (2004). Review of the record reveals that the arbitrator did not permit MGM to assert a gaming privilege. He only allowed the Nevada Gaming Control Board (NGCB) to assert the privilege with respect to three documents relating to compliance reports and correspondence.² Because the NGCB was the only entity

¹The gaming privilege “encompasses any communication made by a licensee or applicant to assist the Gaming Control Board or Gaming Commission in the performance of their respective duties.” Hampe v. Foote, 118 Nev. 405, 408, 47 P.3d 438, 440 (2002) overruled on other grounds by Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 228 n.6, 181 P.3d 670, 672 n.6 (2008).

²Fong’s counsel never challenged the NGCB’s privilege with respect to these documents, and the arbitrator required MGM to produce all other documents it initially withheld under the gaming privilege.

allowed to assert the gaming privilege and not MGM, the sword and shield doctrine is inapplicable in this case.³

Notice

Fong maintains that the two written notices provided by MGM did not provide her sufficient notice or an opportunity to cure in accordance with her employment agreement. She asserts that the arbitrator manifestly disregarded the law by finding MGM's failure to provide notice was a "technical deficiency" and not a material breach of the employment agreement. We disagree.

The employment agreement placed several limitations on MGM's ability to terminate Fong, including a requirement that MGM give Fong notice, and, in some instances, an opportunity to cure. The written notices informed Fong that she was being terminated for good cause and for unsatisfactory job performance, but did not state the specific reason for her termination. After explaining that notice provisions must be

³Fong also argues that the arbitrator misinterpreted NRS 463.3407, which describes the gaming privilege. This court will not address the correctness of the arbitrator's interpretation of NRS 463.3407. See Clark Cty. Educ. Ass'n, 122 Nev. at 345, 131 P.3d at 10. Additionally, Fong argues that she was unable to test the credibility of MGM's witnesses because all relevant information provided to the NGCB was not provided to her. However, an arbitrator is not bound by the formal rules of evidence and enjoys wide discretion to admit or exclude evidence. See NRS 38.231(1) (an arbitrator has the authority to "determine the admissibility, relevance, materiality and weight of any evidence"). Fong has failed to show how this evidence is material and did not merely go to the credibility of a witness. Finally, Fong again argues that MGM never mentioned licensing concerns as a reason for terminating her employment. However, this argument is irrelevant to the issue of whether the arbitrator manifestly disregarded the sword and shield doctrine.

reasonably construed according to their purpose, and citing caselaw from another jurisdiction, the arbitrator determined that the licensing requirement section of the contract was the appropriate section for Fong's termination and did not require notice. Further, he concluded that even if notice was required under a different section, MGM's failure to give Fong detailed reasons for her termination was merely a technical deficiency and not a material breach of the contract. Citing to relevant caselaw from other courts, the arbitrator determined that Fong was aware of the grounds for her termination. He also found that Fong failed to show harm for any inadequate notice given that the pertinent section of the agreement did not give her an opportunity to cure. The arbitrator specifically relied on relevant caselaw, albeit from other jurisdictions, to support his findings. He did not simply disregard the law, and this court will not set aside arbitration awards due to arguable differences in the meaning or application of the law. Graber, 111 Nev. at 1428, 905 P.2d at 1116.

Burden of proof

Fong also argues that MGM bore the burden of proof to demonstrate how its gaming license was threatened and MGM did not meet this burden. Specifically, Fong argues that the arbitrator's decision was premised entirely on MGM's purported fear over its gaming license, which was not supported by any evidence.

Fong's argument is virtually devoid of citations to legal authority. She only cites to one generally applicable treatise provision and does not reference any statutory authority or caselaw. See SIIS v. Buckley, 100 Nev. 376, 382, 682 P.2d 1387, 1390 (1984) (declining to address an issue briefed as "two pages of conclusory arguments, lacking substantive citation to relevant authority"). Certainly, Fong does not

reference any “clearly applicable” law that the arbitrator manifestly disregarded. Graber, 111 Nev. at 1428, 905 P.2d at 1116. Thus, we decline to consider this argument.

We conclude that the arbitrator did not manifestly disregard any applicable law and that the district court did not err in denying Fong’s motion to vacate the arbitration award on this basis.

The arbitrator need not have been disqualified

Fong argues that the arbitrator should have been disqualified because he previously represented one of MGM’s potential witnesses, and his wife formerly worked for this potential witness. Fong further argues that her due process rights were violated as a result of the arbitrator’s continued involvement. Applying a de novo standard of review to the district court’s confirmation of the arbitration award, we conclude that Fong’s argument lacks merit. Thomas v. City of N. Las Vegas, 122 Nev. 82, 98, 127 P.3d 1057, 1068 (2006).

Pursuant to NRS 38.241(1)(b)(1), a court shall vacate an arbitration award if there was “[e]vident partiality by an arbitrator appointed as a neutral arbitrator.” “Claims of evident partiality fall into two categories: (1) actual bias and (2) nondisclosure of information.” Thomas, 122 Nev. at 98, 127 P.3d at 1068. Here, the arbitrator disclosed the relationship between him and the potential witness to the parties. Therefore, the relevant inquiry in this case is whether the arbitrator had an actual bias.

“The appearance of impropriety, standing alone, is insufficient to establish evident partiality in actual bias cases, . . . because a reasonable impression of partiality does not necessarily mean that the arbitration award was the product of impropriety.” Woods v. Saturn Distribution Corp., 78 F.3d 424, 427 (9th Cir. 1996) (internal citation and

quotations omitted). Specific facts that point to an arbitrator's improper motives are needed in order for a party to prove evident partiality in an actual bias case. Id. "[T]he mere fact of a prior relationship is not in and of itself sufficient to disqualify arbitrators. The relationship between the arbitrator and the party's principal must be so intimate—personally, socially, professionally, or financially—as to cast serious doubt on the arbitrator's impartiality." Kay v. Kaiser Foundation Health Plan, Inc., 194 P.3d 1181, 1188 (Haw. Ct. App. 2008) (internal quotations omitted).

Here, in disclosing his working relationship with the potential witness, the arbitrator advised the parties that he did not recall if he ever met or spoke with the potential witness but had dealt only with her in-house attorney. Additionally, in response to Fong's request to disqualify the arbitrator, MGM agreed to remove any evidence relating to the potential witness. Thus, the potential witness did not testify in the arbitration proceedings.

Fong has failed to set forth specific facts which point to the arbitrator's improper motives. The record does not support a finding that the arbitrator exhibited actual bias or that the arbitration award was the product of impropriety. We conclude that the arbitrator need not have been disqualified, and the district court did not err in denying Fong's motion to vacate the arbitration award on this basis.

Fong has not been deprived of a fair hearing

Next, Fong argues that the arbitrator allowed MGM to assert the gaming control privilege, which deprived her of a fair hearing and resulted in a violation of her due process rights. MGM contends that it was the NGCB that asserted the privilege, and that the three documents that the NGCB asserted the gaming privilege over were not determinative of the outcome of the case. We agree.

“[A] party to [an] arbitral proceeding has a right to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.” NRS 38.231(4). A court shall vacate an arbitration award if the arbitrator “refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to [the required process], so as to prejudice substantially the rights of a party to the arbitral proceeding.” NRS 38.241(1)(c). However, while a court may vacate an arbitration award when the arbitrator refuses to hear evidence material to the controversy, an arbitrator has broad discretion to determine the relevance and materiality of the evidence. See NRS 38.231(1).

Here, again, the NGCB asserted a gaming privilege with respect to three documents relating to compliance reports and correspondence. Fong’s counsel has never challenged the NGCB’s privilege for these documents, and MGM was required to produce all other documents it originally withheld under the gaming privilege. Further, the arbitrator did not mention any of the privileged documents as a basis for his decision. He instead based his award on evidence that was presented during the arbitration hearing, such as testimony from MGM’s counsel that Fong’s conduct created licensing concerns for MGM.

Fong failed to sufficiently demonstrate that the NGCB’s assertion of the gaming privilege excluded evidence material to the controversy, or that her substantial rights were prejudiced. See NRS 38.241(1)(c). We conclude that the district court did not err in denying Fong’s motion to vacate the arbitration award based on a violation of her due process rights.

The arbitrator's award was not arbitrary and capricious

Lastly, Fong argues that the arbitrator's award was arbitrary and capricious because it was not based on substantial evidence. We disagree. While this court has recognized that an arbitrary and capricious award can be vacated, "[t]he arbitrary-and-capricious standard does not permit a reviewing court to vacate an arbitrator's award based on a misinterpretation of the law. Rather, [this court's] review is limited to whether the arbitrator's findings are supported by substantial evidence in the record." Clark Cty. Educ. Ass'n v. Clark Cty. Sch. Dist., 122 Nev. 337, 343-44, 131 P.3d 5, 9-10 (2006). Under the arbitrary-and-capricious standard, this court has upheld a district court's confirmation of an arbitration award because the arbitrator's decision was supported by substantial evidence as it "recount[ed] the factual underpinning of the award." Id. at 344, 131 P.3d at 10.


Here, four witnesses testified that Fong admitted to allowing a player in a junket group to cash out chips as a favor to the junket representative.⁴ Additionally, MGM's in-house counsel and outside counsel both testified that they had concerns about MGM's gaming license based on the illegal nature of the junket representative's website. Fong's attorney was also notified soon after Fong's termination that MGM reported Fong's conduct to the NGCB, and that MGM thought that the


⁴A junket is a group of individuals who travel to Nevada to "participate in gambling games if they so choose" at a particular hotel. Casino Operations, Inc. v. Graham, 86 Nev. 764, 767 n.6, 476 P.2d 953, 956 n.6 (1970). The individuals are brought together by a junket representative who receives a fee from the hotel the junket gambles at. In re Morgan, 377 F. Supp. 281, 282-83 (S.D.N.Y. 1974).


NGCB was investigating Fong. As is reflected in the record, the arbitrator expressly relied on this testimony to support his decision that Fong's termination was appropriate pursuant to the licensing requirements section of the employment agreement.

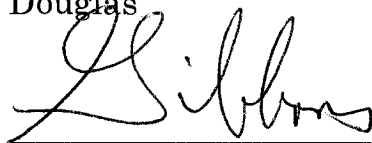
Moreover, the arbitrator noted that even if MGM was mistaken about whether Fong was involved in Pang's website, it was entitled to terminate Fong under the licensing requirements section of the employment contract after determining that Fong might be engaged in activities that could jeopardize MGM's gaming licenses, business or reputation. He indicated that MGM's concern over its gaming license was evidenced by its reporting Fong to the NGCB. The arbitrator specifically recounted the factual underpinning of the award. We conclude that the arbitration award was not arbitrary and capricious.

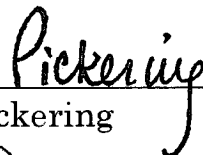
Accordingly, we ORDER the judgment of the district court AFFIRMED.

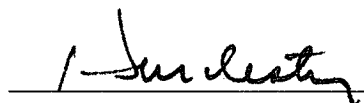

Cherry, C.J.

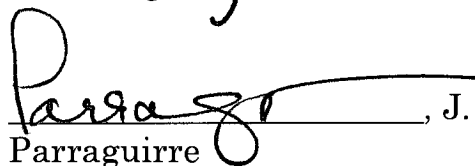

Douglas, J.


Saitta, J.


Gibbons, J.


Pickering, J.


Hardesty, J.


Parraguirre, J.

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Paul H. Schofield, Settlement Judge
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