UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

----------X

1199SEIU UNITED HEALTHCARE WORKERS EAST,

Petitioner,

-versus-

COMPLETE CARE AT MARCELLA,

Respondent.

----------X

ECF CASE

No. 1:22-cv-01174 (KMW)(MJS)

UNION'S MEMORANDUM OF LAW IN SUPPORT OF PETITION TO ENFORCE ARBITRATION AWARD

Katherine H. Hansen
William S. Massey
GLADSTEIN, REIF & MEGINNISS, LLP
39 Broadway, Suite 2430
New York, NY 10006
(212) 228-7727

Attorneys for 1199SEIU United Healthcare Workers East

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

PRELIMINARY STATEMENT

Petitioner 1199SEIU United Healthcare Workers East ("the Union" or "1199SEIU") seeks to enforce a final and binding arbitration award which requires Respondent Complete Care at Marcella ("the Employer" or "Complete Care") to immediately reinstate Mr. Damian Rivera, a 22-year employee of a skilled nursing facility with an impeccable record. The arbitration award was issued pursuant to an agreement between the Union and the Employer to resolve their dispute concerning Mr. Rivera's termination through "final, binding, and conclusive arbitration." Arbitrator Gary T. Kendellen, the arbitrator selected by the parties to hear the dispute, issued his award after an all-day hearing and after consideration of extensive post-hearing briefs. Based on his assessment of the evidence and arguments presented, Arbitrator Kendellen concluded that Mr. Rivera did not engage in the alleged misconduct, found that the Employer terminated him without just cause, and ordered his immediate reinstatement with full back pay and benefits.

Despite the final and binding effect of the Arbitrator's award, and without explanation or justification, the Employer has failed and refused to comply with the Award in any respect. Despite the Union's multiple requests, the Employer has failed and refused to reinstate Mr. Rivera and has paid him none of the backpay or benefits he is owed. This has caused, and continues to cause, substantial hardship for Mr. Rivera, a committed front-line healthcare worker who dedicated over two decades of his life to caring for the facility's residents, including throughout the grueling years of the pandemic.

For all of the reasons set forth herein, the Union seeks enforcement of the arbitration award along with attorneys' fees and costs, prejudgment interest, and all other appropriate remedies.

STATEMENT OF FACTS

Complete Care at Marcella is a skilled nursing facility located in Burlington, New Jersey. 1199SEIU is the sole and exclusive collective bargaining representative of certain employees of the Employer including, but not limited to, Licensed Practical Nurses, Certified Nursing Assistants ("CNA"), Housekeeping and Dietary employees. The grievant in the underlying arbitration, Damian Rivera, had worked as a CNA at the facility for twenty-two years and had no prior discipline. Petition to Enforce Arbitration Award, dated March 3, 2022[1] ("Pet."), ¶¶ 5, 6, 13.

The Union has represented employees at the skilled nursing facility for many years and, until April of 2021, Genesis Healthcare ("Genesis") was the facility's owner and operator. The Union and Genesis were parties to a number of successive collective bargaining agreements that governed the terms and conditions of employment for bargaining unit employees. *Id.* at ¶¶ 7-8. In April of 2021, Genesis sold the facility and Complete Care became the owner and operator. While Complete Care recognized the Union as the exclusive bargaining representative of the bargaining unit employees, Complete Care did not assume the existing collective bargaining agreement. Instead, it set initial terms and conditions of employment that dramatically diminished bargaining unit employees' health benefits, pension benefits, paid time off and other terms and conditions of employment. *Id.* at ¶¶ 9-10.

Throughout 2021, the Union and Complete Care tried unsuccessfully to reach agreement on a new collective bargaining agreement. In connection with these efforts, and to protest unfair labor practices and address other workplace concerns, the bargaining unit employees engaged in

[1] All dates herein are in 2022 unless otherwise indicated.

numerous activities that were protected by the National Labor Relations Act. Mr. Rivera, an elected Union delegate, was a leader in these efforts. *Id.* at ¶¶ 11-13.

By January of 2022, the Employer had had enough of Mr. Rivera advocating on behalf of himself and his coworkers. On January 14, the day after Mr. Rivera and his coworkers gathered in the facility's lobby to request a meeting with Administrator Joseph Kaufman to discuss concerns related to the pandemic, the Employer summarily fired Mr. Rivera without any investigation, without progressive discipline, and without just cause. *Id.* at ¶ 14. Mr. Rivera's termination was wholly unrelated to his work performance. Rather, to justify his termination, the Employer accused Mr. Rivera of creating a hostile work environment and being insubordinate while acting as a Union delegate. Specifically, the Employer accused Mr. Rivera of being loud and disrespectful during a January 11 meeting with Mr. Kaufman and Ms. Lisa Elcheck, the newly hired Director of Nursing, about workplace health and safety issues. The Employer further accused Mr. Rivera of "riling" up his coworkers when they gathered in the lobby on January 13 and refusing to leave the facility on the same day when asked to do so. *Id.* at ¶ 15; Certification of Katherine H. Hansen In Support of Petition to Enforce Arbitration Award ("Hansen Cert."), Exhibit A (February 10, 2022 Arbitration Award), pg. 2.

On January 19, the Union filed an Unfair Labor Practice Charge ("ULP") with the National Labor Relations Board alleging that Mr. Rivera's termination violated the National Labor Relations Act, which prohibits discipline based on employees' participation in protected concerted activities. The Union further asked that the National Labor Relations Board seek injunctive relief to secure Mr. Rivera's quick return to work. Pet. at ¶ 16.

Shortly after this ULP charge was filed, the Union and Complete Care agreed to resolve their dispute over Mr. Rivera's termination through final and binding arbitration. *Id.* at ¶ 7.

Pursuant to an agreement signed on January 21, the parties agreed that Arbitrator Gary T. Kendellen would hear and resolve the dispute, that the arbitration hearing would take place no later than February 11, that the Arbitrator would render his decision no later than seven days after the hearing, and that the decision of the Arbitrator would be "final, conclusive and binding." Hansen Cert., Ex. B. The parties further agreed that neither side would appeal the Arbitrator's decision. Pet. at ¶ 17. Based on this agreement to conclusively resolve their dispute through the arbitral process, the Union withdrew its ULP charge concerning Mr. Rivera's termination. *Id.* at ¶ 17; Hansen Cert., Ex. B.

An in-person arbitration hearing was held on February 3 and the parties agreed that the sole issue before the Arbitrator was: "Did the Employer have just cause to discharge Damian Rivera? If not, what shall the remedy be?" Pet., at ¶ 1; Hansen Cert., Ex. A at pg. 2. The parties were represented by counsel throughout the proceedings and had full and complete opportunity to present evidence and examine and cross-examine witnesses. The hearing lasted approximately ten hours and the testimony of nine witnesses was received into evidence, two witnesses for the Employer and seven for the Union.[2] Pet. at ¶¶ 19-21; Hansen Cert., Ex. A at pg. 3-10. On February 7, the Union and the Employer submitted extensive post-hearing briefs to the Arbitrator and the matter was fully submitted. *Id.* at ¶22; Hansen Cert., Exs. C-D.

On February 10, Arbitrator Kendellen issued his Opinion and Award ("Award"). *Id.* at ¶ 22; Hansen Cert., Ex. A. In a detailed decision that addressed, analyzed, and weighed the evidence and arguments presented, the Arbitrator found that Mr. Rivera did not engage in any of the alleged misconduct. *Id.* at pgs. 10-16. As to the January 11 meeting, the Arbitrator found that

[2] With the Employer's and the Arbitrator's consent, proffered testimony was received for three of the Union's witnesses.

the testimony of the Employer's witnesses was inconsistent and "unreliable," was contradicted by the Union's witnesses, and that the Employer had "provided *no support* for finding that Mr. Rivera created a hostile working environment" on January 11. *Id.* at pg. 12 (emphasis added). As to January 13, the Arbitrator similarly found that there was "nothing in the record" that supports a conclusion that Mr. Rivera created a hostile working environment that day either. *Id.* at pg. 13. Rather, as explained by the Arbitrator:

> the record evidence demonstrates that the employees and Mr. Rivera gathered at the Fish Tank and asked to talk to first, Mr. Kaufman, and then to Ms. Elcheck, about their concerns – ***no more, no less***…
>
> Furthermore, there is no record evidence that Mr. Rivera "riled up" the employees or that the employees acted in a riled up manner in that there was ***not a hint of an inappropriate action by an employee present*** …

Id. (emphasis added). As to the Employer's claim that Mr. Rivera was insubordinate by failing to leave the facility on January 13 when asked to do so, the Arbitrator found that the evidence established that, in fact, Mr. Rivera left the facility on January 13 as soon as he was asked to do so. *Id.* at pg. 14. The Arbitrator also rejected the Employer's attempt to justify Mr. Rivera's termination with after-the-fact allegations of misconduct that, by the Employer's own admission, played no role in its decision to terminate Mr. Rivera's employment. *Id.* at pgs. 10-11.

Finally, the Arbitrator found that, not only had the Employer failed to establish that Mr. Rivera engaged in any of the alleged misconduct occurred, but the Employer had also failed to satisfy other "critical elements" of just cause, including failing to conduct a fair investigation. Here, the Arbitrator noted that the Employer had failed to review Mr. Rivera's personnel file and was unaware of his two decades of impeccable service when it decided to terminate his employment. *Id.* at pg. 15. For these reasons, and the others set forth in his Award, the Arbitrator

concluded that the Employer fired Mr. Rivera without just cause and ordered his immediate reinstate with full back pay and benefits. *Id.* at pg. 16.

Notwithstanding the Employer's agreement to be bound by the Arbitrator's decision, and notwithstanding the absence of any legitimate basis upon which an appeal could be lodged, the Employer has failed and refused to comply with the Award in any respect. Despite the Union's repeated requests, the Employer has failed and refused to offer Mr. Rivera reinstatement and has failed and refused to pay him any of the damages to which he is entitled. As a result, Mr. Rivera continues to suffer substantial losses of wages and benefits, including the loss of his health insurance, and the facility has one less dedicated CNA to provide resident care that is needed now more than ever. Pet. at ¶ 24-25; Hansen Cert., Ex. E.

ARGUMENT

The Court should grant the Union's motion to enforce the Arbitrator's Award because the Arbitrator acted well-within his authority in finding that the Employer terminated Mr. Rivera without just cause and ordering appropriate make whole relief. Further, because the Employer's failure to comply with the Award is wholly unjustified, the Court should grant the Union attorneys' fees and costs. Finally, the Court should award prejudgment interest, as the damages are ascertainable with mathematical precision and because Mr. Rivera has been, and continues to be, prejudiced by the Employer's failure to abide by the Award.

I. JUDICIAL REVIEW OF AN ARBITRATION AWARD IS EXCEEDINGLY NARROW

Courts accord arbitration decisions "exceptional deference" and will vacate an award only in "exceedingly narrow circumstances." *Handley v. Chase Bank USA NA*, 387 Fed. Appx. 166, 168 (3d Cir. 2010); *Dluhos v. Strasberg*, 321 F.3d 365, 370 (3d Cir. 2003). An award will not be disturbed if "the interpretation can in any rational way be derived from the agreement,

viewed in light of its language, its context, and any other indicia of the parties' intention. . . ." *Akers Nat'l Roll Co. v. United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus*., 712 F.3d 155, 160 (3d Cir. 2013); *Ludwig Honold Mfg. Co., v. Fletcher*, 405 F.2d 1123, 1128 (3d Cir. 1969).

Moreover, courts may not review the merits of an award even where a party contends that the award includes serious errors of fact or was premised upon a misinterpretation of the contract. *United Paperworkers Int'l Union v. Misco, Inc*., 484 U.S. 29, 36 (1987). As long as the "arbitrator has arguably construed or applied the contract, the award must be enforced, regardless of the fact that a court is convinced that the arbitrator has committed serious error. . . ." *News Am. Publ'ns, Inc., Daily Racing Form Div. v. Newark Typographical Union, Local 103*, 918 F.2d 21, 24 (3d Cir. 1990). Only where there has been "manifest disregard of the agreement, totally unsupported by principles of contract construction" may the court disturb the award. *Id.* Finally, an arbitrator has not exceeded her authority as long as the form of the award is rationally derived either from the agreement between the parties or from the parties' submission to the arbitrator, and the terms of the award are not "completely irrational." *Hruban v. Steinman*, 40 Fed. Appx. 723, 723 (3d Cir. 2002).

As the Third Circuit explained in *Kane Gas Light & Heating Co. v. Int'l Bhd. of Firemen & Oilers*, 687 F.2d 673 (1982) "[t]his narrow scope of review is mandated by the strong Congressional policy of encouraging the peaceful resolution of labor disputes by means of binding arbitration." *Id*. at 678. "Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." *Misco*, 484 U.S. at 37. To ignore the constraints on judicial review imposed by the Third Circuit's precedent would annul the

parties' agreement not to use a judicial forum to resolve their disputes and, at the same time, delay and drive up the costs of a final resolution of such disputes thereby undermining the very purpose of the federal policy favoring resolution of labor disputes in arbitration. *See, e.g., id.* at 36; *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960).

II. THE ARBITRATOR'S AWARD IS RATIONALLY DERIVED FROM THE PARTIES' SUBMISSION AND IT MUST BE ENFORCED.

The parties agreed that the sole matter before the Arbitrator was: "Did the Employer have just cause to discharge Damian Rivera? If not, what shall the remedy be?" Hansen Cert., Ex. A at pg. 2. The Arbitrator concluded, based on his careful consideration of the evidence and argument presented, that Mr. Rivera did not engage in any alleged misconduct and, as such, concluded that the Employer did not have just cause to terminate Mr. Rivera. As a remedy, the Arbitrator ordered Mr. Rivera's immediate reinstatement with full back pay and benefits. As the Arbitrator performed precisely the function the parties engaged him to perform, the parties are bound by his Award. *Id.* at pg. 16.

Moreover, given that the Award rests exclusively on the Arbitrator's own evaluation of the evidence presented, that the Award must be enforced is beyond dispute. It is well-settled that an arbitrator's assessment of the evidence presented is not subject to judicial review. As explained by the Third Circuit, the "[f]indings of fact and inferences to be drawn therefrom are the exclusive province of the arbitrator." *Citgo Asphalt Refining Co. v. Paper, Allied-Indus., Chem., & Energy Workers Int'l Union*, 285 F.3d 809, 816 (3d Cir. 2004) (internal quotation marks and citations omitted); *News Am. Publ'ns, Inc.*, 918 F.2d at 24 ("An arbitral award may not be overturned . . . because the court disagrees with the arbitrator's assessment of the credibility of witnesses, or the weight the arbitrator has given to testimony." (internal citations omitted)); *NF&M Corp. v. United Steelworkers of Am.*, 524 F.2d 756, 759 (3d Cir. 1975) ("[A]

court is precluded from overturning an award for errors in assessing the credibility of witnesses, in the weight accorded their testimony, or in the determination of factual issues.").

There are good reasons for this limitation on a court's authority to review arbitral decisions like the one at issue here. Were courts to engage in a review of the underlying merits of such a dispute, it would undermine all of the "benefits of labor arbitration" for which the parties bargained—"speed, flexibility, informality, and finality." *Kinder Morgan Bulk Terminals, Inc. v. United Steel, Paper & Forestry, Rubber Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union*, 9 F. Supp. 3d 507, 514 (E.D. Pa. 2014) (quoting *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357, 360 (3d Cir. 1993)).

Here, the parties agreed to resolve their dispute over whether the Employer had just cause to terminate Mr. Rivera through final and binding arbitration. Based on the evidence presented, the Arbitrator decided the issue submitted and rendered his ruling. That the Employer now regrets having submitted the dispute to arbitration or disagrees with the Arbitrator's findings is of no import. The parties are bound - win or lose.

III. THE UNION SHOULD BE AWARDED ATTORNEYS' FEES AND COSTS

The Court should award the Union attorneys' fees and costs incurred in this action because the Employer has, without justification, refused to comply with the Arbitrator's duly issued Award. "'In suits to compel one party to submit to arbitration or abide by an award, fees are generally awarded if the defaulting party acted without justification or if the party resisting arbitration did not have a reasonable chance to prevail.'" *Wilkes Barre Hosp. Co., LLC v. Wyoming Valley Nurses Ass'n*, 453 Fed. Appx. 258, 261 (3d Cir. 2011) (quoting *Chauffeurs, Teamsters & Helpers, Local Union No. 765 v. Stroehmann Bros. Co.*, 625 F.2d 1092, 1094 (3d Cir. 1980)).

Here, the Employer's failure to comply with the Award is without justification nor does the Employer have any chance of prevailing in an action to vacate the Award. Because "the case law upholding the deferential treatment courts accord arbitration awards is clear, extensive, and readily available," the Court should award the Union attorneys' fees and costs needlessly incurred in having to enforce the Award. *CUNA Mutual Ins. Society v. Office & Prof. Employees Int'l Union Local 39*, 443 F.3d 556, 562 (7th Cir. 2006); *Catalyst Employees' Ass'n v. Air Products & Chemicals, Inc.*, No. CA00-2161 (JEI), 2000 WL 1093614, at *4 (D. N.J. Aug. 4, 2000) (awarding union attorneys' fees where decision of arbitrator was "amply supported by the record"); *Anchor Motor Freight v. Gen. Teamsters Local 326*, 838 F. Supp. 868, 873 (D. Del. 1993) (granting union attorneys' fees where decision of arbitrators "was amply supported by the record and by prior legal decisions").

IV. THE COURT SHOULD AWARD PRE-JUDGMENT INTEREST

Courts "have discretion to award prejudgment interest in claims arising under federal labor law." *Kinder Morgan*, 9 F. Supp. 3d at 522; *see Ambrovage v. United Mine Workers of Am.*, 726 F.2d 972, 982 (3d Cir. 1984). "Prejudgment interest is usually available when the damages 'are ascertainable with mathematical precision.'" *Local Union No. 825, 825A, 825B, 825C, 825D, 825R, 825RH v. Int'l Union of Operating Engineers*, No. Civ. 05-3269 (RBK), 2006 WL 1540997, at *6 (D. N.J. May 30, 2006) (quoting *Eazor Express, Inc. v. Int'l Bhd. of Teamsters*, 520 F.2d 951, 973 (3d Cir. 1975)); *see Glass, Molders. Pottery, Plastics & Allied Workers Int'l Union v. Owens-Ill., Inc.*, 758 F. Supp. 962, 974 (D. N.J. 1991). That is the case where, as here, the damages amount to lost wages and benefits owed as a result of an unjust termination and unlawful delay in reinstatement. *Kinder Morgan*, 9 F. Supp. 3d at 522.

CONCLUSION

For the foregoing reasons, the Court should grant the Union's motion to confirm the February 10, 2022 Arbitration Award. Further, because the Employer's failure to comply with the Award is unjustified, and because of the prejudice caused to Mr. Rivera as a result of the Employer's unwarranted delay in complying with the Award, the Court should grant the Union attorneys' fees and costs incurred in defending this action, along with prejudgment interest.

Respectfully submitted,

/s/ Katherine H. Hansen
Katherine H. Hansen
William S. Massey
Gladstein, Reif & Meginniss, LLP
39 Broadway, Suite 2430
New York, NY 10006
(212) 228-7727

Attorneys for Petitioner 1199SEIU United Healthcare Workers East