IN THE SUPREME COURT OF IOWA
POLK COUNTY CASE NO. CVCV063608

NO. 23-0439

PRINCIPAL SECURITIES, INC.,

Petitioner-Appellee,

vs.

MARK A. GELBMAN,

Respondent-Appellant.

RESPONDENT-APPELLANT'S FINAL REPLY BRIEF

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE CELENE GOGERTY

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I, Jacob M. Oeth, certify that I did file the attached brief with the Clerk of the Iowa Supreme Court by electronically filing the brief through the EDMS system on August 10, 2023.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES 5-6

REPLY ARGUMENT 7-24

TABLE OF AUTHORITIES

Iowa Supreme Court Cases:

Ales v. Anderson, Gabelmann, Lower & Whitlow, P.C.,
728 N.W.2d 832, 839 (Iowa 2007) 13-14
Humphreys v. Joe Johnston Law Firm, P.C.,
491 N.W.2d 513, 516 (Iowa 1992) 18
Johnson v. Dodgen,
451 N.W.2d 168, 171 (Iowa 1990). 18
LCI, Inc. v. Chipman,
572 N.W.2d 158 (Iowa 1997) 16, 17
United Paperworkers International Union v. Misco, Inc.,
484 U.S. 29, 38, 108 S.Ct. 364, 371,
98 L. Ed. 2d 286, 299 (1987))). 14

Other Authorities:

FINRA Regulatory Notice 09-16 16
FINRA Rule 13904 ..... 13, 14, 15
FINRA Rule 13904(b) 16
FINRA Rule 13904 (e)-(f) 14-15, 16
FINRA Rule 13904 (g)(3) 16
Domke on Commercial Arbitration,
§39:12, at 24 (3d ed. 2005) 14

Iowa Court of Appeals Cases:

Des Moines Area Ass'n of Realtors, Inc. v. U.S. Recognition, Inc.,
No. 04-1701, 2006 Iowa App. LEXIS 29, at *3
(Ct. App. Jan. 19, 2006)..... 13
DLR Grp., Inc. v. Oskaloosa Cmty. Sch. Dist.,
881 N.W.2d 470 (Iowa Ct. App. 2016)..... 13
Kanis v. T. D. Eilers Constr. Co.,
No. 01-2041, 2003 Iowa App. LEXIS 2 (Ct. App. 2003)..... 13-14
MBNA Am. Bank, N.A. v. Boyce,
No. 04-1733, 2006 Iowa App. LEXIS 948,
at *2 (Ct. App. Aug. 9, 2006)..... 13
Sellers v. Gupta,
978 N.W.2d 105 (Iowa Ct. App. 2022)..... 13

California Superior Court Cases:

Shum v. First Midwest Secs.,
2021 Cal. Super. LEXIS 82040
(Superior Court of Calif., Cty. of Orange, April 8, 2021)..... 15-16

Iowa Rules:

Iowa Code Section 679A.12 17
Iowa Code Section 679A.12(f)..... 17, 18
Iowa R. App. P. 6.903(2)(f) 12

STATEMENT OF FACTS

Gelbman joined Principal as a registered representative on October 3, 2011. Gelbman received many positive reviews from his supervisors at Principal over the years, including specific commendations for his documentation. With his Club Production level, Gelbman was subject to two performance reviews every year. One annual review would be completed by Principal Home Office Compliance and the other would be completed by Gelbman's Supervising Registered Representative ("SRR"), Lance Gardner ("Gardner").

The reviews consisted of a form titled the "Principal Securities Registered Representative SRR Annual Visit and Client File Review Form." These review forms include specific yes or no questions about client documentation, where Gardner consistently noted that Gelbman's documentation was sufficient. The review forms also offered space for additional notes, where on at least one occasion Gardner handwrote "Good Documentation." (App. at 390); (App. at 399-404).

In 2020, due to issues with Principal's automatic rebalancing system, there was a program change for financial advisors. The advisors were given minimal training on this new program, "InvestNet Platform," despite there being a significant change in the process for staged trading (App. at 281, 286-287). Under the new program, it became standard practice for financial advisors to stage trading

on behalf of clients who held advisory-based accounts. Staged trading meant that liquidations and purchases would occur on separate days. Even in cases when a client had given written permission for their financial advisor to conduct regular rebalancing of their account, the financial advisor was required to contact the client on the day when the liquidations were executed and again on the day when purchases were made. Gelbman was never provided with a "policy and procedure" handbook or a manual of any kind for this staged trading policy that purportedly required two phone calls to clients on subsequent days. (App. at 283-284, 290, 292, 353, 362).

Gelbman generally had discretionary authority for his clients' accounts. This discretionary authority had been granted by both Principal Securities and the Agency Office. Gelbman did not intend to use his discretionary authority as rebalancing was generally done as the result of review meetings. (App. at 278-279). Gelbman had 35 clients who maintained nondiscretionary accounts.

In or around 2020, Gelbman executed rebalancing of these nondiscretionary accounts. The clients authorized both the liquidations and the purchases but the purchase authorizations were obtained by Gelbman on the day prior to being executed, in conjunction with the authorizations for the liquidations. Gelbman believed that he was acting in accordance with company policy for non-

discretionary trading accounts, having never received a handbook or document describing Principal's staged trading procedure. (App. at 413).

In February 2021, Scott Kruger ("Kruger"), the Senior Regional Managing Director, asked to meet with Gelbman. Gardner was also in attendance. Kruger and Gardner wanted to discuss an unrelated matter involving Gelbman's calls to prospective clients, as well as Gelbman's recent health issues. Kruger and Gardner told Gelbman that he had the support of the agency office as well as Candy Bidler ("Bidler"), the head of Principal Financial Network. (App. at 303).

In early March 2021, Gelbman offered to resign his position with Principal but Kruger encouraged Gelbman not to do so and reiterated that Gelbman had the support of the agency office as well as Bidler. (App. at 306). Gelbman decided to stay with Principal, where he had worked since 2011 and been assured by management that he had the support of the office.

Gelbman reached out to his client base to explain Principal's policy and obtained discretionary trading authorization forms from the majority of his clients. (App. at 644). All new accounts established were set up with discretionary trading authority.

Gelbman was terminated on March 30, 2021 without any official warning and was given no reason for his termination. Principal filed a Form U5 for

Gelbman on April 12, 2021, which states "Mark Gelbman was terminated for failure to adhere to the firm's policies and procedures regarding discretionary trading." (App. at 459).

After the filing of the Form U5, Gelbman has faced tremendous difficulty securing employment and customers in the financial services industry. He lost equity in his practice and has suffered extreme financial hardship due to his loss of income. (App. at 311).

On June 14, 2021, Gelbman initiated a FINRA arbitration proceeding seeking expungement of the termination disclosure from the Form U5. (App. at 641). Gelbman's Statement of Claim explained that the language in the Form U5 tends to mislead the public and is defamatory in nature, "such that the disclosure of the Occurrence causes more harm to Claimant than it might be helpful to regulators or the investing public. Claimant is not alleging defamation *per se* and is not required to do so in order to be granted expungement." (App. at 641). Under FINRA Rule 8312(g)(1), information shall not be released on BrokerCheck that is "potentially defamatory." Claimant requested that the arbitrator (1) amend the Reason for Termination to read "Voluntary"; (2) expunge the Reason for Termination explanation; (3) amend answers on questions 7B and 7F(1) on Form U5 from "yes" to "no"; and (4) delete the Internal Review and Termination

Disclosure Reporting Pages accompanying occurrence numbers 2121897 and 2121898. (App. at 647-648).

Principal filed a Statement of Answer in September 2021 denying Gelbman's claims and requesting dismissal. Throughout the discovery process, Principal never provided a "policy and procedure" document for staged trading, including a description of the requirement to place two separate phone calls to clients on subsequent days. Principal also never indicated that Gelbman's files did not contain the required documentation evidencing customer consent to trades. Gelbman never admitted to having failed to secure such consent either.

After the hearing on February 8, 2022, an Arbitrator issued an award granting Gelbman's expungement request. (App. at 202-205). The Reason for Termination remained the same but the Termination Explanation was replaced with "Mr. Gelbman unknowingly failed to abide by a technical trading requirement for nondiscretionary clients. A program change triggered this technical requirement. Principal Securities, Inc.'s own actions, especially incomplete training, largely caused this failing. Moreover, during its own investigation, Principal Securities, Inc. encouraged Mr. Gelbman not to resign." (App. at 203). The award also expunges references to Occurrences Numbers 2121897 and 2121898 from the record, and any "yes" answers should be changed to "no" as applicable. (App. at 203).

See also "RESPONDENT-APPELLANT'S PROOF BRIEF," the Statement of Facts portion of which is hereby incorporated by reference.

REPLY ARGUMENT

1. THE DISTRICT COURT ERRED IN GRANTING PRINCIPAL SECURITIES, INC.'S MOTION TO VACATE THE ARBITRATION AWARD.

As an initial matter, we note that Gelbman has not waived each argument raised on appeal. In the Brief Opposing Request for Vacatur of Arbitration Award, Gelbman described extensive case law showing that an arbitrator's decision enjoys a presumption of validity and that the District Court has a very limited scope of review. Gelbman pointed to Iowa Code 679A.12(2), stating "[t]he fact that the relief awarded could not or would not be granted by a court of law or equity is not ground for vacating…the award." (App. at 99). While Gelbman does not make the express argument that there is substantial evidence, throughout his brief Gelbman points to the uncontested facts of the case as proof that there is substantial evidence to support the arbitrator's decision.

In his proof brief, Gelbman also references pertinent parts of the record as required by Iowa R. App. P. 6.903(2)(f). Respondent-Appellant's Proof Brief at 7. The argument section of the same brief includes extensive citations to authorities relied on and refers to the record in several instances. Respondent-Appellant's

Proof Brief at 18, 19, 20. Gelbman's argument is in no way devoid of relevant facts, and presents an analysis of the District Court's misapplication of law. Respondent-Appellant's Proof Brief at 17-20.

This Court should overturn the decision of the District Court because the District Court erred as a matter of law. The correct standard for the appellate court's review of the district court's decision in a civil lawsuit is for correction of errors at law. *See MBNA Am. Bank, N.A. v. Boyce*, No. 04-1733, 2006 Iowa App. LEXIS 948, at *2 (Ct. App. Aug. 9, 2006); *Des Moines Area Ass'n of Realtors, Inc. v. U.S. Recognition, Inc.*, No. 04-1701, 2006 Iowa App. LEXIS 29, at *3 (Ct. App. Jan. 19, 2006); *DLR Grp., Inc. v. Oskaloosa Cmty. Sch. Dist.*, 881 N.W.2d 470 (Iowa Ct. App. 2016); and *Ales v. Anderson, Gabelmann, Lower & Whitlow, P.C.*, 728 N.W.2d 832, 839 (Iowa 2007).

In this case, the District Court erred as a matter of law because it misapplied the governing FINRA Rule 13904, whereby the arbitrator did not have to include a description of his findings. In overlooking this rule, the District Court applied the wrong standard to the arbitrator's decision. As stated in *DLR Grp Inc.*, "[the court's] role is not to inquire into the propriety of the arbitrator's application of the law—[the court] merely determine[s] if he acted within the powers granted by the arbitration agreement." *DLR Grp., Inc.*, 881 N.W.2d at 470. *See also Sellers v. Gupta*, 978 N.W.2d 105 (Iowa Ct. App. 2022) and *Kanis v. T. D. Eilers Constr.*

Co., No. 01-2041, 2003 Iowa App. LEXIS 2 (Ct. App. 2003). "[W]hen an arbitrator interprets an agreement, the arbitrator is able to draw from the "essence" of the agreement" and "'as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority' even a court's conviction that the arbitrator committed error does not suffice to overturn the decision." *Ales v. Anderson, Gabelmann, Lower & Whitlow, P.C.*, 728 N.W.2d 832, 841 (Iowa 2007) (quoting *Domke on Commercial Arbitration*, §39:12, at 24 (3d ed. 2005) (quoting *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 38, 108 S.Ct. 364, 371, 98 L. Ed. 2d 286, 299 (1987))). In this case, the arbitration agreement was governed by FINRA regulations. Specifically, FINRA Rule 13904 states:

> "…(e) The award *shall* contain the following: (1) The names of the parties; (2) The name of the parties' representatives, if any; (3) An acknowledgement by the arbitrators that they have each read the pleadings and other materials filed by the parties; (4) A summary of the issues, including the type(s) of any security or product, in controversy; (5) The damages and other relief requested; (6) The damages and other relief awarded; (7) A statement of any other issues resolved; (8) The allocation of forum fees and any other fees allocable by the panel; (9) The names of the arbitrators; (10) The dates the claim was filed and the award rendered; (11) The number and dates of hearing sessions; (12) The location of the hearings; and (13) The signatures of the arbitrators. (f) The award *may* contain a rationale underlying the award."

FINRA Rule 13904 (e)-(f) (emphasis on mandatory "shall" and permissive "may" supplied). The Arbitrator followed this rule exactly when granting the award. The District Court disregarded this fact, writing:

> While the Court acknowledges in most arbitrations, findings for a decision are not required, the Court notes the lack of findings in the Award is problematic in the instant case because Respondent submitted alleged findings in his request…Respondent's claim specifically identified the basis on which he was requesting expungement; it was due to the allegedly defamatory and misleading nature of Petitioner's answers on Form U5…the Award instructs a remedy in favor of Respondent, yet neglects to make any finding that the answers were defamatory in nature or misleading as outlined in Respondent's Statement of Claim.

(App. at 159). Gelbman did note that Form U5 contained defamatory and misleading statements, and the Arbitrator did not address whether those grounds were actually found. However, under Rule 13904, the Arbitrator did not need to include any description or analysis of his findings in the Award. It is simply not part of the requirement under the FINRA rule.

In a California case examining FINRA Rule 13904, the Petitioner claimed the arbitrator "disregarded the law and standards for expungement, disregarded the evidence presented, and rendered a decision entirely unfounded in reason and fact, unconnected with the workings and purpose of the Code." *Shum v. First Midwest Secs.*, 2021 Cal. Super. LEXIS 82040 (Superior Court of Calif., Cty. of Orange, April 8, 2021). The court found that the "Petitioner did not meet his burden to

show that the award should be vacated based on the evidence submitted." *Id*. The court noted, "The arbitrator is not required to provide his/her reasoning for the award. FINRA Rule 13904(f). In addition, Petitioner did not show he properly requested an explained decision. FINRA Rule 13904(g)(3). Lastly, "[u]nless the applicable law directs otherwise, all awards rendered under the Code are final and are not subject to review or appeal." FINRA Rule 13904(b)." *Id*. According to Regulatory Notice 09-16, parties may make a request for an explained decision. The request must be made jointly 20 days before the date of the first scheduled hearing. FINRA Regulatory Notice 09-16. As in *Shum*, Principal did not request an explained decision in this case. As such, the Arbitrator was under no obligation to provide one. He was only obligated to render an Award addressing the relief requested, and he did so.

Another Iowa case found that an arbitrator's award was supported by substantial evidence after the petitioner claimed that the arbitrator's decision was made without evidence on the record. *LCI, Inc. v. Chipman*, 572 N.W.2d 158 (Iowa 1997). The court relied in part on the known expertise of the arbitrators:

> It is a general rule that arbitrators who are selected on the basis of special fitness or knowledge in the field to which a dispute relates, with the evident intention that the process of arriving at a decision should include the exercise of such special skill in a manner supplementary to such facts, if any, as may be established, may, in the absence of other restrictions or controlling evidence, rely wholly or partially on their own knowledge, or on information acquired

> through a proper use of such knowledge and personal observation or investigation.

Id. at 162. The same is true here, where the Arbitrator relied on his own special knowledge and training in rendering his award.

The leading case law in Iowa discusses the very limited circumstances in which judicial involvement is allowed in arbitration decisions. This case law has been discussed at length in both the proof briefs submitted by Gelbman and Principal, and such discussion will not be reiterated here.

Iowa Code Section 679A.12 describes the only grounds upon which an arbitration award can be vacated. Section 679A.12(f) includes "substantial evidence on the record as a whole does not support the award." It further clarifies, "The fact that the relief awarded could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award." Iowa Code § 679A.12(f).

After the District Court ignored the governing FINRA rule, it then relied upon Section 679A.12(f) to examine this case. (The District Court's ruling found that the arbitrator did not exceed his authority; it ruled instead that the award was not supported by substantial evidence.) Even if Section 679A.12(f) is applied here, which it should not be, the award should still be reinstated.

Section 697A.12(f) states that upon application of a party, a District Court shall vacate an award if "substantial evidence on the record as a whole does not support the award." Iowa Code § 679A.12(f). "Generally, evidence is substantial if a reasonable person would accept the evidence as sufficient to reach a conclusion." *Humphreys*, 491 N.W.2d at 516 (citing *Johnson v. Dodgen*, 451 N.W.2d 168, 171 (Iowa 1990)). If the District Court's decision is appealed, the appellant "must show on appeal that the district court erred in its finding of substantial evidence." *Id.* at 516.

There is significant evidence on the record to support the Arbitrator's award in this case. As described in the Statement of Facts, Gelbman received many positive reviews from his supervisors at Principal, including specific commendations for his documentation. (App. at 387-391); (App. at 399-404). Gardner completed a "Principal Securities Registered Representative SRR Annual Visit and Client File Review Form" on December 20, 2019, in which he indicates that Gelbman submitted trade requests for clients, verbally confirmed all trade requests that arrived via email, and had documentation regarding discussions with clients supporting trade activity. (App. at 389). Gardner also included a hand-written note that that Gelbman had "Good Documentation." (App. at 390). Gardner filled out the same form one year later, on December 17, 2020. Gardner completed this form in a similar fashion and confirmed that Gelbman had documentation

reflecting his having obtained client authorization for trading. (App. at 401). Principal fails to address these clearly positive reviews of Gelbman's trading practices, which were completed for the exact time frame that Principal conducted its internal review of Gelbman, and which therefore constitute substantial evidence in support of the Award.

There are numerous misstatements and inaccuracies in Principal's response brief. Principal claims that Gelbman's "files did not contain the required documentation evidencing customer consent to the trades, a fact that Gelbman also admitted." Petitioner-Appellee's Proof Brief at 7. As discussed above, Gelbman's SRR confirmed in both 2019 and 2020 that there were no issues with Gelbman's documentation. In the many years that Gelbman worked at Principal, this was never raised as a concern by Principal's Compliance Team, Gelbman's SRR, Compliance, FINRA, or the SEC, who did audits of the Financial Network and Gelbman's practice.

Principal claims to point to documents that show "Mr. Gelbman was fully apprised of the discretionary trading rules and that those rules were reviewed with him on a regular basis." Petitioner-Appellee's Proof Brief at 7. The truth of the matter is, Principal only provides partial exhibits. Principal has **never** provided a "policy and procedure" document for staged trading that shows the requirement for

two phone calls to clients or any proof that Gelbman was told of this policy. (App. at 283-284, 290, 292, 353, 362).

In fact, evidence submitted by Principal shows that Gelbman was open and honest when questioned about his knowledge of this policy. Gelbman explained to Gardner and Nick Miller, Director of Field Supervision, that it was not his understanding that he needed to place two calls when doing a staged trade since by definition he would be placing both a buy and a sell. (App. at 413). Gelbman's openness when questioned highlights the fact that he had never been told about the requirement for clients to be called twice when their accounts were rebalanced through staged trading.

Principal also fails to note that it cloaked its investigation of Gelbman in attorney-client privilege, denying him access to critical information and additional evidence. In its response brief, Principal insinuates that Gelbman had been accused of violating investment-related rules. Petitioner-Appellee's Proof Brief at 11. Yet the record shows that despite receiving monthly reports about Gelbman's trades, his supervisors did not raise concerns about how Gelbman facilitated trades in his account. (App. at 288-289). In fact, he was performing staged trading for a year before any supervisor raised any concern about Gelbman's trading. (App. at 291-292).

Finally, Principal claims that "Gelbman's evidence regarding the purported inducement not to resign was insubstantial." Petitioner-Appellee's Proof Brief at 13. In fact, Gelbman received multiple commitments of support, including explicit support concerning his trading practices and documentation, from the managing director in February and March of 2021. (App. at 303, 306).

Taken in whole, a reasonable person would clearly be able to accept this as more than sufficient evidence to support the Award.

CONCLUSION

For the reasons articulated herein, the district court's ruling should be reversed and the Arbitrator's Award should be reinstated.

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CERTIFICATE OF COST

The undersigned hereby certifies that the cost of printing the Appellant's Brief was $0, because it was filed electronically.

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