IN THE COURT OF APPEALS OF IOWA

No. 23-0439
Filed March 27, 2024

PRINCIPAL SECURITIES, INC.,
Petitioner-Appellee,

vs.

MARK A. GELBMAN,
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Celene Gogerty, Judge.

A party to arbitration appeals a ruling vacating the award. **AFFIRMED.**

Jacob M. Oeth of Dickey, Campbell, & Sahag Law Firm, PLC, Des Moines, and Kevin D. Galbraith of The Galbraith Law Firm, LLC, New York, New York, for appellant.

Angel A. West of Maynard Nexsen, PC, Des Moines, and Kathryn Roe Eldridge of Maynard Nexsen, PC, Birmingham, Alabama, for appellee.

Considered by Bower, C.J., and Buller and Langholz, JJ.

BULLER, Judge.

Mark Gelbman appeals a district court ruling vacating an arbitration award concerning a form filed with the Financial Industry Regulatory Authority ("FINRA") by his former employer, Principal Securities, Inc. ("Principal"). Gelbman claimed in arbitration that the form was defamatory or misleading, though he also admitted it was "not technically unfactual." The arbitrator granted Gelbman relief, but the district court vacated the award after finding it was not supported by substantial evidence. We affirm the district court.

I. Background Facts and Proceedings

Gelbman worked as a financial advisor at Principal beginning in 2011. Some of Gelbman's clients maintained nondiscretionary accounts—meaning Gelbman needed client authorization for liquidations or purchases.

Part of Gelbman's job involved rebalancing his clients' portfolios, often on an annual or more frequent basis. When rebalancing a nondiscretionary account in February 2020, Gelbman's trades overdrew the account. Gelbman made those rebalancing trades using new software, which required separate authorizations to buy and to sell securities. But Gelbman only obtained authorization for one action. Gelbman blamed the software change for overdrawing the client's account.

In early March 2021, Principal's compliance department questioned Gelbman about hundreds of rebalancing trades and whether he obtained adequate authorization from his nondiscretionary-account clients. Gelbman admitted he executed the buy and sell trades for those clients with a single authorization, rather than the two authorizations required.

After Principal questioned these trades over email, Gelbman offered to resign. He knew he was under investigation, though he maintained he subjectively believed the investigation was regarding a complaint about an annuity sale rather than the unauthorized trades. At the end of March, Principal terminated Gelbman's employment.

After Gelbman's termination, Principal was required to file Form U5 with FINRA. This form is used to disclose the circumstances under which an individual leaves employment with an entity subject to FINRA regulation, such as Principal. Other financial firms and investors then have access to the form when making hiring decisions. FINRA's guidance directs that "a firm may not parse through the questions in a manner that would allow the firm to avoid responding affirmatively to a question."

The Form U5 for Gelbman reported the following pertinent information:

- Principal "discharged" Gelbman on March 30, 2021;
- Gelbman "currently is, or at termination was . . . under internal review for fraud or wrongful taking of property, or violating *investment-related* statutes, regulations, rules or industry standards of conduct"; Gelbman was accused of the same before termination;
- Gelbman was discharged "after allegations were made that accused the individual of: violating *investment-related* statutes, regulations, rules, or industry standards of conduct"; he was not accused of fraud or the wrongful taking of property;
- Principal's explanation for termination was that, "[a]fter receiving a customer complaint regarding fee disclosure and suitability of a variable annuity, the Firm reviewed Mr. Gelbman's book of business. Through its review, the Firm found Mr. Gelbman had failed to adhere to its policies regarding discretionary trading."

Gelbman sought arbitration to expunge information from the Form U5, alleging the form was defamatory or misleading. A contested arbitration hearing

was held, and both sides offered documentary evidence. Gelbman also gave sworn testimony consistent with the facts laid out in this opinion and in his statement of claim that initiated arbitration.

Under questioning by Principal, Gelbman admitted he traded in violation of Principal's policies and FINRA rules but he maintained he did not do so knowingly. He also admitted that, during a period when he made 638 trades over four days, he did not contact all his customers to obtain adequate authorization for trading. And he agreed with Principal's attorney that he did not adequately document the authorization for trades where he had obtained it, which independently violated Principal's policies. In response to questions about the Form U5, Gelbman testified Principal's answers were "not technically unfactual."

The arbitrator's award recommended partial expungement and modification of the Form U5. As pertinent to this appeal, the arbitrator recommended:

- The reason for termination—"discharged"—remain the same.
- The answer indicating Gelbman was under internal investigation be changed from "yes" to "no";
- The answer indicating Gelbman was informed of the internal investigation before he was discharged be changed from "yes" to "no"; and
- The explanation be replaced with the following language: "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 investigation, Principial Securities, Inc. encouraged Mr. Gelbman not to resign."

Principal moved to vacate the award in the district court, alleging grounds under both the Iowa arbitration statute (Iowa Code ch. 697A (2022)) and the

Federal Arbitration Act (9 U.S.C. §§ 10–11). Gelbman resisted. After hearing oral argument, the district court found the award was not supported by substantial evidence and vacated it. Gelbman appeals.

II. Error Preservation

Principal contends Gelbman failed to argue in the district court that the award was supported by substantial evidence. Gelbman, in reply, admits he "d[id] not make the express argument that there is substantial evidence" but insists the uncontested facts of the case support the arbitrator's decision. In reviewing the record, we agree Gelbman never argued below the award was supported by substantial evidence and instead claimed that federal law preempted the Iowa arbitration statute (a claim he has abandoned on appeal). But, because the district court ruled on the substantial-evidence claim, we assume without deciding error was preserved for purposes of this appeal**.**

III. Standard of Review

"[J]udicial review of arbitration awards is very limited in Iowa." *Humphreys v. Joe Johnston L. Firm, P.C.*, 491 N.W.2d 513, 514 (Iowa 1992). We do not "second guess" an arbitrator. *Id.* at 515. At the same time, "arbitration awards are not immune from judicial oversight." *SBC Advanced Sols., Inc. v. Commc'ns Workers of Am.*, 794 F.3d 1020, 1027 (8th Cir. 2015); *see Humphreys*, 491 N.W.2d at 514–15 (examining the scope of review by the district court over arbitration awards).

When we consider statutory grounds for vacating an arbitration award, we review a district court ruling for correction of errors at law. *Humphreys*, 491 N.W.2d at 514; *see* Iowa Code § 679A.17(2) ("The appeal shall be taken in the manner

and to the same extent as from orders or judgments in a civil action."). "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(2).

IV. Discussion

Iowa Code section 679A.12(1)(f), with exceptions inapplicable here, provides that Iowa courts "shall vacate" an arbitration award if "[s]ubstantial evidence on the record as a whole does not support the award." *See also* Iowa Code § 4.1(30)(a) ("The word 'shall' imposes a duty."). Substantial-evidence review under section 679A.12 follows established principles:

> Generally, evidence is substantial if a reasonable person would accept the evidence as sufficient to reach a conclusion. This court does not consider evidence to be insubstantial merely because different conclusions can be drawn from the evidence. The ultimate question is whether the evidence supports the finding actually made, not whether the evidence would support a different finding.

Ales v. Anderson, Gabelmann, Lower & Whitlow, P.C., 728 N.W.2d 832, 839 (Iowa 2007) (cleaned up). In Iowa, unlike under federal law, an "award *must* be vacated if not supported by substantial evidence." *Humphreys*, 491 N.W.2d at 516 (emphasis added).

Because the only bases Gelbman alleged for expunging the Form U5 were that it was defamatory or misleading, the threshold question is whether substantial evidence supported such a finding. As the district court recognized, arbitrators are not generally required to include findings of fact supporting their award. *See Reicks v. Farmers Commodities Corp.*, 474 N.W.2d 809, 811 (Iowa 1991). While the complete absence of fact-findings here hamstrings our review, it does not

preclude it. As a result, we look for any possible basis to uphold the award and consider whether either necessary element—that the Form U5 was defamatory *or* misleading—was supported by substantial evidence.

Starting with defamation, it's axiomatic that truthful statements are not defamatory. *See, e.g.*, Restatement (Second) of Torts § 581A (1977) ("There can be no recovery in defamation for a statement of fact that is true . . . ."). And there is no real dispute that the pertinent portions of the Form U5 were true—Gelbman admitted as much in his pleadings and testimony: he was discharged, there was an internal review, he did not follow policies or regulations, and he was informed of the accusation before discharge. While perhaps not artfully stated, Gelbman essentially conceded he had not proven the form was defamatory when he described it as "not technically unfactual." We cannot conclude substantial evidence supports a finding the Form U5 was defamatory.

Moving to whether the form was misleading, we acknowledge Gelbman's testimony that he was upset and believed himself harmed because he thought the form should include more details favorable to him. But our inquiry is whether a reasonable factfinder could have found the form misleading—not whether the subject of the form wishes it included more details. "Misleading" means "delusive" or "calculated to be misunderstood." *Misleading*, *Black's Law Dictionary* (11th ed. 2019); *see also Mislead*, *Webster's Third New International Dictionary* (unabr. ed. 2002) (defining the word to mean "to lead in a wrong direction or into a mistaken action or belief"). There is no substantial evidence in this record that would permit a reasonable factfinder to conclude the Form U5 was misleading. The form succinctly but accurately captured the core details of Gelbman's

termination and there is no evidence—let alone substantial evidence—that the form was calculated to be misunderstood or give a wrong impression.

In his briefing, Gelbman does not meaningfully argue there was substantial evidence proving the Form U5 was defamatory or misleading. He instead points to his past positive performance reviews, asserts he had violated policies in the past without discipline, and emphasizes he "was open and honest" when he admitted to the policy violations during Principal's investigation. None of this evidence would lead a reasonable factfinder to conclude the Form U5 was defamatory or misleading.

Because we conclude neither of the essential facts necessary to expunge the Form U5 were supported by substantial evidence, we affirm vacating the award. We recognize the district court also separately evaluated whether the language added by the award was supported by substantial evidence. We do not engage in such an analysis because our conclusion vacates the award in its entirety.

AFFIRMED.

Bower, C.J., concurs; Langholz, J., dissents.

LANGHOLZ, Judge (dissenting).

When engaging in appellate review, I typically get to read the factfinder's findings, to see its legal reasoning, and to test both against Iowa law to decide whether a statutory or common-law cause of action provides a party their requested relief. But this case is not typical. It's arbitration. So we have no fact findings. No reasoning for the arbitrator's award is given. And the relief granted does not look like anything one could request in an Iowa court. Every usual instinct thus tells me that something is wrong with the award—and the district court properly vacated it. But Iowa law tells me otherwise. Because the district court exceeded the bounds of its limited review of arbitration awards under Iowa Code section 679A.12 (2022), I must respectfully dissent.

From the start of this proceeding to vacate the FINRA arbitration award in his favor, Mark Gelbman has argued that his former employer—Principal Securities, Inc.—asked the court "to re-try this matter, reach different conclusions regarding the facts and law, and substitute its judgment for that of the arbitrator" and thus exceed its statutory authority. And on appeal, Gelbman reiterates that the district court erred by accepting that invitation and holding substantial evidence doesn't support the award "merely because [the court] reached a different conclusion from" the evidence. Gelbman is right.

Iowa law places "extreme limitations" on judicial review of arbitration awards. *Reicks v. Farmers Commodities Corp.*, 474 N.W.2d 809, 812 (Iowa 1991). They receive even more limited review than administrative agency decisions, which themselves receive less scrutiny than a typical trial court ruling. *See id.* This is because "[a] refined quality of justice is not the goal in arbitration"—rather that

goal "is deliberately sacrificed in favor of a sure and speedy resolution . . . without court participation." *Id.* at 811. Put another way, "limited judicial review gives the parties what they bargained for—binding arbitration, not merely arbitration binding if a court agrees with the arbitrator's conclusion." *Humphreys v. Joe Johnston Law Firm, P.C.*, 491 N.W.2d 513, 515 (Iowa 1992) (cleaned up).

And so, an arbitrator "becomes the final judge of the facts and law" and "mistakes of either fact or law are among the contingencies the parties assume when they submit a dispute to arbitration." *Id.* at 516 (cleaned up). Indeed, most of the statutory grounds for vacating an arbitration award are unrelated to the merits. *See* Iowa Code § 679A.12(1)(a)–(e). And the district court did not rely on those grounds here. Rather, the court vacated the award based on the one ground that does touch the merits, concluding that "[s]ubstantial evidence on the record as a whole does not support the award." Iowa Code § 679A.12(1)(f).

But even this substantial evidence review is limited.[1] "[E]vidence is substantial if a reasonable person would accept it as sufficient to reach a conclusion." *LCI, Inc. v. Chipman*, 572 N.W.2d 158, 161 (Iowa 1997). Evidence is not "insubstantial merely because different conclusions can be drawn from" it. *Ales v. Anderson, Gabelmann, Lower & Whitlow, P.C.*, 728 N.W.2d 832, 839 (Iowa 2007). Thus, a court must consider only whether the evidence supports the award actually made—not whether it could have supported a contrary award. *See id.*

[1] Substantial-evidence review is also only available if (1) the arbitration proceedings were "reported"; (2) the parties have not "agreed that a vacation shall not be made on this ground"; and (3) the arbitration was not "conducted under the auspices of the American arbitration association." Iowa Code § 679A.12(f). Gelbman does not challenge the satisfaction of the reporting requirement by the later transcription of audio recordings here. So I assume the review is available.

To decide whether substantial evidence supports the award, a court first needs to ask what facts are required to justify the relief granted in the award. In many arbitrations, this question is not difficult. There, the arbitration is essentially a lawsuit—seeking damages for medical malpractice, for example—merely conducted in a different forum—before the arbitrator instead of a judge. And for conduct in Iowa (or where Iowa law is chosen in the arbitration agreement), we would look to Iowa tort law—the same as we do when reviewing any appeal—to determine what evidence is necessary to support the award. *See, e.g.*, *Ales*, 728 N.W.2d at 842 (looking to Iowa statute and caselaw for the legal standard governing attorney-fee award on breach-of-contract claim submitted to arbitration before conducting substantial-evidence review).

But here, Gelbman has consistently disclaimed bringing any traditional cause of action—including the tort of defamation—against Principal. Instead, he asked merely to expunge or modify the information recorded in the publicly accessible database about the reason for his termination. And he relied on—not a statutory or common-law cause of action—but rules and guidance from FINRA. This makes sense given that FINRA is the organization governing the database in which the challenged statements are recorded and the provider of the arbitration process the parties were mandated to use for any disputes.[2] And our statute expressly reinforces that arbitrators are not limited to theories of relief available in

[2] Both the parties' contract and FINRA rules required any dispute between them to be arbitrated under FINRA's arbitration process. *See* FINRA Rule 13200(a), http://www.finra.org/rules-guidance/rulebooks/finra-rules/13200 (requiring that disputes between "Members and Associated Persons" arising out of their "business activities" "must be arbitrated under" FINRA's Code of Arbitration Procedure for Industry Disputes).

an Iowa court. *See* Iowa Code § 679A.12(2) ("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.").

Gelbman pointed to one rule prohibiting a FINRA member, such as Principal from "fil[ing] with FINRA information with respect to membership or registration which is incomplete or inaccurate so as to be misleading, or which could in any way tend to mislead." FINRA Rule 1122, http://www.finra.org/rules-guidance/rulebooks/finra-rules/1122. And to another rule that prohibits FINRA from releasing reported information that is "potentially defamatory." FINRA Rule 8312(g)(1), https://www.finra.org/rules-guidance/rulebooks/finra-rules/8312. And he highlighted guidance making plain that FINRA views one of its arbitrators as the right decisionmaker to resolve the parties' dispute about what information should be recorded in FINRA's database about Gelbman's termination. *See* Notice to Members 99-54 (July 1, 1999), https://www.finra.org/rules-guidance/notices/99-54. Indeed, that guidance states FINRA's position "that ordering expungement of information from the CRD system that is found to be defamatory, misleading, inaccurate, or erroneous, is equitable in nature and within an arbitrator's authority" despite that power not being expressly addressed in its Code of Arbitration procedure or arbitrator training materials. *Id*. So Gelbman urged the arbitrator that he could expunge or modify the original statements if they were misleading or even tended to mislead third parties about the actual circumstances of his termination.

To be sure, Principal advanced a narrower theory of the correct legal standard. Based mainly on Iowa defamation law, Principal theorized that Gelbman had to prove the original statements were false and that Principal acted with actual

malice because the statements were privileged. *See Huegerich v. IBP, Inc.*, 547 N.W.2d 216, 221 (Iowa 1996) (general defamation standard); *Barreca v. Nickolas*, 683 N.W.2d 111, 118–23 (Iowa 2004) (qualified-privilege standard). But the arbitrator was not required to accept Principal's legal theory. Indeed, we must indulge "every reasonable presumption" favoring the award—including that the arbitrator applied the legal standard most consistent with its award. *Ales*, 728 N.W.2d at 841. It matters not if the arbitrator got the legal standard wrong—the statute does not grant courts the power to correct an arbitrator's mistake of law. *See Humphreys*, 491 N.W.2d at 515; Iowa Code § 679A.12. What's more, even if I were to consider how best to interpret the standard FINRA expects its arbitrators to apply for these expungement disputes, I do not see any sign that FINRA has constrained its arbitrators by engrafting Iowa's defamation law into its rules.[3]

The district court and the majority go astray at this first step of the substantial-evidence review. They follow Principal's beckoning to familiar defamation law and our normal modes of de novo interpretation of legal standards. But we don't get to decide whether FINRA requires a statement in its database to be false before an arbitrator could order it changed. Nor do we get to say that a statement is misleading only if made with the heightened intent of being "calculated

[3] FINRA knows how to require a more constrained standard when it chooses to do so. As Gelbman pointed out in the district court, FINRA adopted stricter rules for requests to expunge customer dispute information—unlike this request to expunge the termination explanation submitted by Principal. *See* FINRA Rule 2080, http://www.finra.org/rules-guidance/rulebooks/finra-rules/2080. And as of October 2023, FINRA adopted even stricter substantive and procedural rules for those customer-dispute-information expungement proceedings. *See* FINRA, *Expungement of Customer Dispute Information*, http://www.finra.org/rules-guidance/key-topics/expungement-of-dispute-information (last visited Mar. 21, 2024). But again, it left the process for disputes like this one untouched.

to be misunderstood or give a wrong impression," as the majority does. The arbitrator could well have accepted Gelbman's interpretation that FINRA permits arbitrators to modify the statements in its database if they are misleading or tend to mislead—by leading the public to an inaccurate impression. And given our limited review, that is the standard we must measure the evidence against.

So is there substantial evidence that the information originally reported would be misleading to the public? Gelbman summarizes his argument that substantial evidence supports the award by pointing out what he terms the district court's "acknowledg[ment] that Respondent's own testimony supports the expungement and language change prescribed in the Award." (Cleaned up.) And I agree that should have been enough to satisfy the substantial-evidence review here.

The gist of Gelbman's testimony tracks the revised termination explanation awarded by the arbitrator. According to the testimony, when performing the annual rebalancing of the securities accounts of about thirty clients, Gelbman unknowingly violated Principal policies that required him to get consent for the rebalancing trades no earlier than the same day the trades were made. He got each client's authorization once—for both the buying and selling—on the day that he started the rebalancing process by selling their securities. But because of a technological limitation in Principal's program for conducting the trades, the corresponding buy trades had to be made on a later day after the sell trades had settled. And Gelbman did not obtain a second authorization on the second day from each client as technically required under Principal's same-day policy.

Gelbman said he did not realize he needed two authorizations. Principal's prior trading program had been able to perform both the sell and buy trades in a different manner not staged over multiple days. So he had always obtained only a single authorization for annual rebalancing. And Gelbman testified that he was never trained that rebalancing with the new program required a second client authorization under Principal's policies. Gelbman also testified—and submitted a supporting text message exchange—that he offered to resign while Principal was looking into these issues and a supervisor encouraged him not to resign.

Comparing Gelbman's testimony with what Principal originally reported, a reasonable person could easily conclude that the original statements would lead a third party to a mistaken belief about the circumstances of his termination. By saying that the investigation began with a customer complaint about fee disclosures and suitability, it could mislead a third party to think that the ultimate policy violations were of a similar seriousness or affected a customer. And given the range of egregious conduct that could violate "policies regarding discretionary trading," the original barebones explanation—especially in a report of a violation resulting in termination—could mislead one to believe that Gelbman did something much more serious than unknowingly getting a second authorization a day or two earlier than he should have.

Principal did not call any witnesses to offer a different explanation of the circumstances of Gelbman's termination or dispute the seriousness or obviousness of the violations. It just aggressively cross-examined Gelbman and submitted documentary evidence, largely focused on proving that Gelbman did

indeed violate its internal policies and should have known that he did. And the arbitrator found Principal's defense unpersuasive.

Of course, a reasonable arbitrator could have chosen not to believe Gelbman and denied his requested relief. But that's not the question. *See Ales*, 728 N.W.2d at 839. Based on Gelbman's testimony, a reasonable arbitrator *could* conclude that the challenged statements were misleading, as the arbitrator understood that term, and that the revised statements the arbitrator crafted more accurately reflected the circumstances of Gelbman's termination.[4] Indeed, we must presume that the arbitrator did so here.

The district court did not give the award this proper "reasonable presumption," even though it acknowledged that Gelbman's testimony supported the award. *Id.* at 841. Instead, it did the opposite—reasoning that the "lack of a findings in the Award is problematic" and relying on the fact that "[e]ven the Arbitrator made no finding that [Principal's] answers were defamatory in nature or tended to mislead" in support of the court's conclusion the award was not supported by substantial evidence. But absent some contrary requirement in the arbitration agreement or statute, "[a]rbitrators need not disclose the facts or

[4] So too did substantial evidence support the arbitrator's award changing the answers from "Yes" to "No" on two questions about whether the termination related to an allegation and investigation of Gelbman's violating "statutes, regulations, rules or industry standards of conduct." While Principal argued that Gelbman's contact also violated a FINRA rule, there was abundant evidence that he was terminated for violating *Principal's* internal policies—a basis not included in the questions. Principal gave the internal-policy-violation basis in letters to many regulating entities included in the record—not to mention its original explanation of termination that is the subject of this expungement challenge: "Through its review, [Principal] found Mr. Gelbman had failed to adhere to *its policies* regarding discretionary training." (Emphasis added.)

reasons behind their award." *Reicks*, 474 N.W.2d at 811 (cleaned up). Indeed, FINRA has a procedure for requesting a more robust award that Principal chose not to invoke. *See* FINRA Rule 13904(g), http://www.finra.org/rules-guidance/rulebooks/finra-rules/13904. The lack of express findings by the arbitrator is irrelevant to the proper substantial-evidence review.

Principal contends that we should ignore all these errors in the district court's substantial-evidence review because Gelbman did not preserve error. And to be sure, Gelbman's focus in resisting Principal's substantial-evidence argument in the district court was his now-abandoned contention that the statute authorizing substantial-evidence review did not apply. But in his written and oral advocacy, he argued the award should not be reversed for lack of substantial evidence, he contended that Principal was asking the court to improperly reweigh the evidence and apply Iowa tort law rather than the correct legal standard set by FINRA, and he conveyed his view of the facts in the record. And the district court managed to conduct a thorough substantial-evidence review.

I am also mindful that this is a motion-to-vacate proceeding. Thus, the arbitration award—not the district court order—is ultimately the decision under review and entitled to every reasonable presumption allowing it to stand. *Cf. Ales*, 728 N.W.2d at 841. And Principal—not Gelbman—"has the burden of proof to show" the illegality of the award. *First Nat'l Bank v. Clay*, 2 N.W.2d 85, 91 (Iowa 1942) (cleaned up). So it would be especially inappropriate to take a "hypertechnical" approach to error preservation here. *Ezzone v. Riccardi*, 525 N.W.2d 388, 403 (Iowa 1994). I would thus conclude that error is preserved.

Bottom line—substantial evidence supports this binding arbitration award. Principal has not met its heavy burden to vacate it. And so, I would reverse the district court and let the award stand.

IOWA APPELLATE COURTS

State of Iowa Courts

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