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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 CLEAR CHANNEL OUTDOOR, INC.,

9 Plaintiff,

10 v.

11 DRIVERS SALES AND WAREHOUSE
12 LOCAL UNION NO. 117,

13 Defendant.

CASE NO. C04-253RSM

ORDER ON CROSS MOTIONS FOR
SUMMARY JUDGMENT

14 This matter is now before the Court on the parties' cross-motions for summary judgment. The
15 matter has been fully briefed, and oral argument on the motions was heard on August 24, 2004. For the
16 reasons set forth below, the Court now GRANTS defendant's motion for summary judgment, and
17 DENIES plaintiff's cross-motion.

18 DISCUSSION

19 Plaintiff Clear Channel Outdoors ("the Company") filed this action seeking to vacate an
20 arbitration award in favor of defendant Union, sustaining a grievance filed on behalf of former employee
21 William Roach. The arbitrator found that the Company violated its own drug and alcohol policy
22 ("DAP") when it discharged Mr. Roach for violating that same policy. Plaintiff contends that the
23 arbitrator's decision is void because he "exceeded his powers with respect to interpretation and
24 application of the substantive provisions of the collecting bargaining agreement and Plaintiff's Drug and
25 Alcohol Policy." Complaint, p. 7. There are no material factual issues in dispute, and the matter is
26 appropriate for resolution by summary judgment.

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1 The facts are well-known to the parties and will only be briefly summarized. Plaintiff is in the
2 business of outdoor advertising. Prior to his termination, Mr. Roach had been employed by plaintiff or
3 its predecessor for over twenty years. His job required him to climb up on billboards to scrape and re-do
4 them. In late October of 2002, after being issued new safety equipment, he complained several times to
5 his supervisor Dan Tefft of discomfort from the safety harness. On October 30, 2002, he went home
6 early with back pain and, after finding no relief with ibuprofen, took one tablet of Vicodin, which had
7 been prescribed for him fifteen months earlier following a wisdom tooth extraction. He reported for
8 work around 6 a.m. the next morning, and attended a short safety meeting. After that, he met privately
9 with Mr. Tefft and Company president Frank Podany, and then went with Mr. Tefft to adjust his safety
10 harness. Mr. Tefft then informed Mr. Roach that he must fill out an incident report because of the back
11 pain which caused him to leave work early the previous day. As they sat down to fill out the incident
12 report, Mr. Roach told Mr. Tefft of the Vicodin he had taken the previous evening. Mr. Tefft then
13 informed Mr. Roach that he would be sent for a medical evaluation, including a drug test. The drug test
14 was positive for a small amount of Vicodin. The company doctor prescribed Vicodin and cleared Mr.
15 Roach for work while taking the medication. Mr. Roach returned to work on the following day, and
16 worked until November 6, when he was suspended and then ultimately terminated for violating
17 Company drug policy.

18 Mr. Roach applied for unemployment benefits, and a hearing was held on his claim in April of
19 2003. His union also pursued a grievance regarding the termination, and the matter went to arbitration.
20 The arbitrator selected, Professor Edwin Render, was the Company's own choice. The arbitration
21 hearing was held August 11 and August 29, 2003. Testimony included that of Mr. Roach, Mr. Tefft,
22 and James Poage, the director of safety and training from the Company's corporate office in Phoenix,
23 Arizona. Mr. Poage testified at length regarding the Company's drug and alcohol policy ("DAP"),
24 which had been implemented in September of 2002, with employee training on September 23, 2002.
25 Dkt. # 19, Exhibit C, p. 70-94, 100-104. Testimony was also heard from a medical doctor and a
26 pharmacologist regarding the effects of the drug Vicodin. *Id.* at 94-100, 113-123.

1 On November 22, 2003, the arbitrator issued a fifty-two page decision in which he quoted
2 relevant portions of the collective bargaining agreement ("CBA") and the Company's DAP, recited his
3 factual findings, and then thoroughly set forth the positions of the Company and the Union on the issues
4 presented. Arbitrator Render described the issues as follows:

5 The first set of issues in this case concerns whether there is a valid grievance before
6 the Arbitrator challenging the reasonableness of the company's drug and alcohol policy
7 which became effective in September 2002. If such a grievance is before the Arbitrator,
8 the next question is whether he has authority to rule on the unreasonableness of that
9 policy and finally whether the policy is indeed a reasonable policy and constitutes part
10 of the bargaining agreement. The second issue is whether the company had just cause
11 to discharge the grievant for violation of its drug and alcohol policy on November 18,
12 2002, and if not, what is the appropriate remedy.

13 Dkt. # 1, Exhibit 2, p. 2. In the final few pages of his decision, however, the arbitrator found that he did
14 not need to address the reasonableness of the Company's DAP, because the matter could be decided on a
15 very narrow, fact-specific basis. He found that Mr. Tefft's sworn testimony at the earlier unemployment
16 compensation hearing, which he determined to be credible, showed that Mr. Roach's disclosure of
17 Vicodin use was voluntary because it was made *before* he was told he must have a medical evaluation,
18 Id. at 50. Under Article VI.1 of the DAP, an employee who "comes forward on a voluntary basis, prior
19 to notification of a testing. . . will receive reasonable accommodation. . ." Dkt. # 1, Exhibit 3.
20 Therefore, it was unreasonable for Mr. Poage to determine that the disclosure was not voluntary and
21 terminate Mr. Poage's employment for violation of the DAP, and the Union's grievance was
22 accordingly sustained. Id. It is this decision which plaintiff seeks to vacate.

23 Federal labor policy strongly favors the resolution of disputes such as this through arbitration. In
24 furtherance of that policy, "judicial scrutiny of an arbitrator's decision is *extremely* limited." Southern
25 California Gas Co. v. Utility Workers Union, Local 132, 265 F 3d 787, 792 (9th Cir. 2001) (emphasis in
26 original). Provided he has acted within the scope of his authority, where the arbitrator has "even
27 arguably" construed and applied the contract, even a serious error will not lead a court to overturn his
28 decision. Id., quoting Eastern Associated Coal Corp. v. Mine Workers, 531 U.S. 57, 62 (2000). "As
long as the arbitrator's award 'draws its essence from the collective bargaining agreement,' and is not
merely 'his own brand of industrial justice,' the award is legitimate." United Paperworkers International

1 Union, et al., v. Misco, Inc., 484 U.S. 29, 36 (1987); quoting Steelworkers v. Enterprise Wheel and Car
2 Corporation, 363 U.S. 593, 596 (1960).

3 It is plaintiff's position in this lawsuit that the arbitrator exceeded his authority in overriding Mr.
4 Poage's determination that the disclosure was not voluntary. Under the DAP, the Company has the sole
5 power to "modify, interpret, implement, and administer" the DAP. Article II of DAP, Dkt. # 1, Exhibit
6 3. Plaintiff argues that this means that only management has the right to determine the voluntariness of
7 a disclosure. Thus, in making his own credibility determination about that disclosure, the arbitrator
8 improperly interpreted the DAP, and his determination is void. This court finds otherwise.

9 In finding that Mr. Roach's disclosure was voluntary, the arbitrator did not modify or interpret
10 the terms of the DAP; he simply applied those terms to the facts as he found them. A "voluntary"
11 disclosure is defined in the DAP as one which is made prior to the employee's knowledge of a drug test
12 requirement. DAP Article III.16; DAP Article VI.1, Dkt. # 1, Exhibit 3. Plaintiff asserts that only
13 management has the right to determine what is voluntary and what is not, based on the "interpret" and
14 "implement" language in the above-quoted Article II of the DAP. However, that interpretation must be
15 reasonable in light of the facts. Here, it appears that Mr. Poage's determination with respect to the
16 voluntariness was based on an incorrect understanding of the sequence of events. At the arbitration
17 hearing, Mr. Poage testified in response to the following question:

18 Q. And what did they [local Company management] eventually tell you about the timing
19 of his disclosure?

20 A. That the disclosure had occurred after the employee had been at the work facility for
21 approximately an hour and that it was done after the notification of the need to fill out
22 paperwork *to send the employee down for evaluation.*

23 Dkt. # 19, Exhibit C, p. 78 (emphasis added). This was not a correct characterization of the facts, nor
24 of Mr. Roach's understanding, based on his experience, of the incident report he was going to fill out.
25 The arbitrator noted that Mr. Tefft had previously testified under oath that Mr. Roach disclosed his use
26 of Vicodin after mention of an incident report, but *before* he was told of the need for a medical
27 evaluation. Dkt. # 1, Exhibit 2, p. 50. Mr. Tefft also testified at the previous hearing, consistent with
28 Mr. Roach's own testimony, that prior incident reports were not associated with medical evaluations or

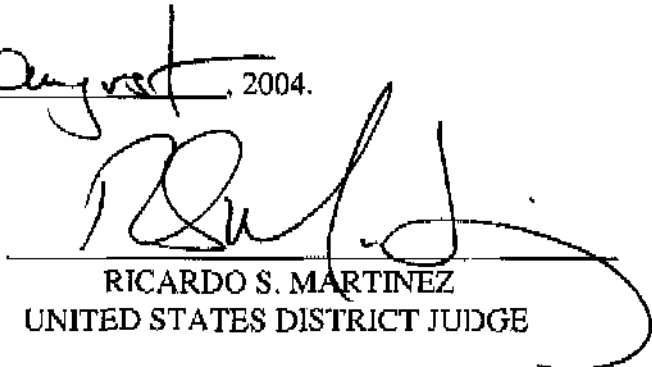
1 drug tests. Dkt. # 19, Exhibit C, p. 90. Therefore there was no factual basis for Mr. Poage's belief that
2 Mr. Roach already knew he was facing a drug test when he disclosed, based solely upon being asked to
3 fill out an incident report. It was within the arbitrator's authority to correct this factual error, and then
4 apply the terms of the DAP to the facts he determined. Under the legal standards set forth above, the
5 court finds no basis whatsoever for vacating the arbitrator's award.

6 A peripheral issue was presented at the hearing by defendant's request to strike the Declaration of
7 Theodore Shults, presented by plaintiff in response to defendants' summary judgment motion. The
8 court declines to strike the declaration, but notes that Mr. Shults' legal conclusions are not binding on
9 this court.

10 Accordingly, defendant's Motion for Summary Judgment is GRANTED, plaintiff's cross-motion
11 is DENIED, and the arbitrator's award shall be enforced. Further, the court finds that plaintiff's effort
12 to vacate the valid decision of the arbitrator was unjustified and caused needless expense to defendant,
13 such that an award of attorneys' fees is appropriate. While the general requirement for an award of
14 attorneys' fees, absent contractual or statutory authorization, is a showing of bad faith, "[a]n unjustified
15 refusal to abide by an arbitrator's award may equate an act taken in bad faith, vexatiously or for
16 oppressive reasons." Sheet Metal Workers International Association Local Union 359 v. Madison
17 Industries, Inc., 84 F. 3d 1186, 1192 (9th Cir. 1996); quoting International Union of Petroleum and
18 Industrial Workers v. Western Industrial Maintenance, Inc., 707 F. 2d 425, 428 (9th Cir. 1983).

19 Defendant shall present, on or before October 1, 2004, a petition for attorneys' fees and costs
20 for the court's approval, and plaintiff shall have two weeks thereafter to object to the amount requested.

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22 DATED this 26th day of August, 2004.

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26 RICARDO S. MARTINEZ
27 UNITED STATES DISTRICT JUDGE

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