2013 WL 9958840 (Conn.) (Appellate Brief)
Supreme Court of Connecticut.

NEW ENGLAND HEALTH CARE EMPLOYEES UNION, DISTRICT 1199, Defendant/Appellant,

v.

BURR ROAD OPERATING COMPANY II, LLC, d/b/a Westport Health Care Center, Plaintiff/Appellee.

No. S.C. 19160.
September 18, 2013.

On Appeal from Decision of the Appellate Court Reversing
Judgment of Superior Court, J.D. Hartford
Confirming Arbitration Award
To be argued by Andrea Kramer, Esq. for Appellee

Brief of Plaintiff/Appellee

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*i STATEMENT OF THE ISSUE

Appellee Burr Road Operating Company II, LLC, d/b/a Westport Health Care Center agrees that, per the Order on Petition for Certification to Appeal issued on June 20, 2013, the sole issue on appeal is the following: Did the Appellate Court properly determine that the trial court improperly confirmed the arbitration award because such award violated public policy?

*1 COUNTER-STATEMENT OF FACTS

Appellee Burr Road Operating Company II, LLC, d/b/a Westport Health Care Center ("the Center") objects to Appellant's inappropriate rewriting of the facts found by the Arbitrator. [1] The Center instead adopts the facts as actually set forth in the Arbitrator's decision and the Appellate Court's nearly verbatim recounting as its statement of the facts.

The *relevant* facts, as found by the Arbitrator and repeated by the Appellate Court, are as follows:

The Center is a 120-bed skilled nursing facility located in Westport, Connecticut. Award of the Arbitrator ("AA") at 1; *Burr Rd. Operating Co. II, LLC v. New England Health Care Employees Union, Dist. 1199*, 142 Conn. App. 213, 215 (2013) ("Appellate Court Decision" or "AC"). [2] Appellant New England Health Care Employees Union, District 1199 ("the Union") represents CNAs at the Center, including Leoni Spence ("the Grievant"), who was employed in the Center as a CNA from 2002 until her termination in late March 2010. *Id.* The Union and the Center were parties to a collective bargaining agreement ("CBA") that required the resolution of grievances via binding arbitration.

*2 Ms. Spence's Poor Disciplinary History

The events leading to Ms. Spence's discharge occurred between March 20 and 24, 2010. AA at 2-3; AC at 216. Prior to that time, she had received a number of disciplinary actions that included several instances of resident-care related infractions that remained part of her file. AA at 2-3; AC at 216.

In 2005, Ms. Spence's employment was terminated after she inappropriately restrained a resident using a bedsheet to tie him to his wheelchair. AA at 2; AC at 216. Based on a voluntary agreement between the Center and the Union, Ms. Spence's discipline was reduced to a suspension and final warning, and she was reinstated. *Id.* In accordance with the CBA, because it involved an incident of patient **abuse**, that final warning was retained indefinitely, and not expunged, from her personnel file. *Id.* Specifically, the CBA provides that disciplinary warnings are expunged from an employee's personnel files after twelve months, but expungement does "not apply to disciplinary actions regarding patient **abuse**." *Id.*

In April 2009, Ms. Spence received a written warning, but was not terminated, for (a) speaking in an inappropriately rude, loud, and scolding manner to a resident and (b) being insubordinate and disrespectful to her supervisor, Gay Muizulles. AA at 2;

AC at 216. The Union grieved this warning and took it to arbitration. *Id.* The Arbitrator upheld the warning as having been imposed for just cause. AA at 3; AC at 216.

Four months later, in August 2009, Ms. Spence received a "2nd" and "final" warning for being disrespectful to a resident and for touching the resident without first explaining the procedure she was performing. AA at 3; AC at 216. This discipline was not grieved. *Id.*

***3** Ms. Spence Fails to Report Suspected Resident **Abuse** in a Timely or Proper Manner

Approximately seven months after receiving this final warning in 2009, Ms. Spence committed the infraction that resulted in her discharge. *Id.* On Saturday, March 20, while working her overnight shift from 11 p.m. on Saturday, March 20, until 7 a.m. on Sunday, March 21, Ms. Spence overheard from a resident's room in which she was working a conversation between the charge nurse assigned to the unit in which Ms. Spence was working and a CNA from another unit. During the conversation the CNA mentioned that a resident in her unit had been crying that evening. AA at 3; AC at 217. Ms. Spence also overheard that the person who had allegedly caused the resident to become upset was Gay Muizulles. *Id.* Ms. Spence came out of the room in which she was working and, suspecting that there may have been resident **abuse**, asked the two people who were speaking who had been crying. *Id.* The charge nurse did not reply, but the CNA replied that she would talk with Ms. Spence later. *Id.* Both Ms. Spence and the CNA were busy, however, and did not have the opportunity to talk further before their shifts ended. *Id.*

According to Ms. Spence, from what she heard (*i.e.*, that Ms. Muizelles was involved and a resident had been crying), she suspected that there could have been **abuse** and therefore went to the other unit to "snoop around" to try to learn more. AA at 4; AC at 217. The residents were all asleep when she went to check on them that night, though, and she went home after her shift (on the morning of Sunday, March 21) without reporting her suspicions of **abuse** to anyone. *Id.* Though she worked on March 21-22 (Sunday night/Monday morning) and March 22-23 (Monday night/Tuesday morning), she also did not report the suspected **abuse** during or immediately upon leaving work on those days. *Id.* During her shift on March 22-23, she did, however, ***4** speak with a resident who told her that on the previous Saturday night, Ms. Muizulles had been somewhat rough as she helped her in getting her legs up onto her bed, had spoken gruffly to her, and had turned down the television without asking her permission; the patient's roommate confirmed that this upset the patient. *Id.* Ms. Spence went home after that shift, and then, on Tuesday, March 23, 2010, several days after she first learned of what she deemed to be suspected **abuse**, she called the social worker at the Center to report what the patient had told her. AA at 5; AC at 218. Because the social worker did not answer, Ms. Spence left a message in her voicemail box. *Id.* She subsequently left three additional, lengthy voice messages for the social worker. *Id.*

Ms. Spence's Discharge

Once notified of the possibility of resident **abuse** by Ms. Muizulles, the Center "carried out a very thorough investigation." AA at 6; AC at 218. The investigation determined that Gay Muizulles "had acted insensitively" towards the resident, but that such insensitivity "had not risen to the level of **abuse** or neglect." *Id.* Ms. Muizulles, a 20-year employee with a clean disciplinary record, was issued a five-day suspension and final warning based on the finding of insensitivity. *Id.* In addition, one of the two employees involved in the initial conversation that Ms. Spence overheard – another employee with a clean disciplinary record – received a final warning and a two-day suspension for failing to report a complaint made by a resident regarding possible **abuse** by a staff member.[3] *Id.* The Assistant Director of Nursing, who also had a clean disciplinary record, was also suspended for her failure to inform senior management ***5** properly and immediately once she learned of the incident, as required by policy. AA at 6; AC at 219.

Unlike the other employees involved, Ms. Spence did not have a clean disciplinary record and was *already on final warning status arising from an incident of patient **abuse*** (in addition to her other final warning for being disrespectful to a patient and touching the patient without first providing an explanation) at the time of the incident. AA at 10-11; AC at 218-219. Accordingly,

she was discharged based on her late and improper reporting of suspected **abuse**. AA at 6-7; AC at 219. The Arbitrator found that the record clearly and convincingly established that Ms. Spence learned on the night of March 20-21 that her supervisor may have committed resident **abuse**, that she herself believed there could have been patient **abuse**, as evidenced by her own statements and her decision to "investigate," and that instead of reporting the **abuse**, Ms. Spence went home without reporting the information that had come into her possession, all of which was in direct violation of the Center's policies. AA at 8; AC at 219-220. The Arbitrator further found that Ms. Spence had, in fact, completed a training quiz just a few months before the March 2010 incident in which she was asked what to do if she suspects but is "not sure" if resident **abuse** has been committed by a staff member. AA at 9; AC at 220. Ms. Spence correctly answered "report it to the nursing supervisor," not the wrong answer "[do] nothing until you figure out if it was or was not **abuse**." Id. The Arbitrator confirmed that *Ms. Spence was well aware of her reporting obligations:*

I also credit the testimony of the management witnesses that the employees are trained that whenever they have information that resident **abuse** *may* have occurred, from wherever that information may have come, they must report to a nursing supervisor or higher authority. Frankly, to suggest otherwise flies in the ***6** face of why reporting is required, to maximize the protection that can be given to residents to avoid the risk of occurrences or re-occurrences or possibly **abusive** behaviors.

The testimony of the management witnesses, the norms in the training of CNA's, and simple common sense confirm that the grievant knew she had an obligation to report in a timely manner, given what she had overheard on the night of March 20/21.... AA at 9-10 (emphasis in original).

The Arbitrator also summarized the reasons for the Center's timely reporting requirement:

The Employer notes that it is under clear, statutory obligation to report immediately to the state regulatory body whenever there has been an event of possible resident **abuse**. That obligation can only be fulfilled if employees report in a timely manner. Moreover, and more fundamentally, any delay in reporting by a staff member leaves the residents at risk of possible further **abuse** by the alleged perpetrator; corrective action by the Center to assure resident well-being inevitably is delayed if reporting by staff is delayed.... Those are fair arguments in support of the requirement of immediate reporting. *Id.* at 11.

Moreover, the Arbitrator found that in addition to failing to report the suspected **abuse** for a number of days, Ms. Spence also did not report to anyone in the proper line of authority. AA at 8 n. 5; AC at 221. Specifically, instead of informing the Director of Nurses or the facility Administrator, as the Center's rules require, Ms. Spence called the social worker. AA at 5; AC at 218. The social worker is not a nursing supervisor, something Ms. Spence clearly knew, according to the Arbitrator. AA at 8 n.5; AC at 234 n.8. Moreover, she was required to report *in-person* rather than by phone message. AA at 14 (noting that the Grievant "did report in an imperfect manner, to the social worker by phone message rather than in person to a nursing supervisor or higher authority").

***7** In the end, the Arbitrator left no doubt in his Award that he found Ms. Spence to have committed the infractions that led to her discharge, failure to report timely and properly: *"Quite clearly, then, the grievant was guilty* of the offense of failing to timely report to a nursing supervisor (or higher authority) the information that had come into her possession on March 20, which information suggested to the grievant that another staff member may have committed resident **abuse**." AA at 10 (emphasis added); AC at 234.

The Arbitrator's Decision and Award

Having found that Ms. Spence was clearly guilty of the infractions for which she was disciplined, the Arbitrator determined that "the remaining question is whether that misconduct provided the Employer with just cause to terminate the grievant's employment." AA at 10; AC at 221. Turning to that question, the Arbitrator recognized that the Grievant "was under the cloud of an active 'final warning"' at the time of the March 2010 incident and that Ms. Spence had a "poor disciplinary record" compared to the "fine work records of the other employees" who had received discipline but were not discharged in connection

with the March 2010 incident. AA at 10-11. Despite these findings, the Arbitrator found that although there was just cause for suspending Grievant without pay for a month, there was not just cause for terminating her employment because, in his estimation, the fact that Grievant had eventually reported the suspected **abuse** when others did not should be a "mitigating factor," notwithstanding the fact that she was on a final warning and the others were not. AA at 14; AC at 221. He explained:

If the grievant had not come forward on March 23, it is quite likely that the Employer never would have learned of the [alleged **abuse**], nor of the failure to ***8** report by multiple staff members. It is important to recognize that contribution which the grievant made then, albeit belatedly, to help assure the well-being of the residents at The Center. AA at 11-12; AC at 221-222.

Ultimately, the Arbitrator concluded that Ms. Spence deserved credit simply for reporting the suspected **abuse**, regardless of her timing, method of reporting, or final warning status. AA at 13-14; AC at 222-223. He did so not only because of what he perceived as fairness but because of his own sense of the best policy for the Center:

[T]he Employer does not want to create a huge disincentive to reporting, if and when an employee for whatever reason has hesitated or delayed initially in reporting possible resident **abuse**. If the disciplinary approach is, once you have delayed you will be terminated even if you then make a belated report, then that creates a perverse incentive to never report. The belated reporter ends up being fired as the direct consequence of coming forward. AA at 12; AC at 222-223.

Based on the above reasoning, the Arbitrator concluded that the termination was without just cause and that some other "severe" disciplinary action was warranted, "just short of termination." AA at 14; AC at 238. The Arbitrator thus reduced Ms. Spence's discharge to a 30-day suspension. *Id.*

The Superior Court's Decision

Applying the requisite two-step process in determining whether an arbitration award violates public policy, the trial court first held that there is an explicit, well-defined and dominant public policy protecting residents of skilled nursing home from **abuse** and neglect in Connecticut. *Burr Rd. Operating Co., II, LLC v. New England Health Care Employees Union, Dist. 1199,* HHDCV116020639S, 2011 WL 5083961, *5 (Conn. Super. Ct. Sept. 29, 2011) ("Superior Court Decision" or "SC"). The trial court then added, though: "There is no established dominant public policy against reinstating an employee who was terminated for failure to promptly report suspect **abuse**. Nor is there a dominant public policy against arbitrators considering mitigating facts under ***9** circumstances where the employee does not have a record of prior **abuse**." *Id.* at 5. The Court never addressed the specific issue presented of whether ordering the reinstatement of a CNA with a documented history of **abuse** who knowingly fails to report suspected **abuse** violates public policy. Instead, attempting to apply the reasoning of *State v. New England Health Care Employees Union, District 1199,* 271 Conn. 127 (2004), the Court stated that "to conclude that the arbitrator's award violated the public policy of protecting nursing home patients from **abuse** would be to conclude that the employee's failure to timely report **abuse** is grounds for termination per se." *Id.* The trial court, therefore, concluded that there was no violation of public policy. *Id.*

The trial court also concluded that the Arbitrator did not exceed his authority. He noted that the Award responded to the submission, and he rejected the Center's argument that the Award nevertheless exceeded the Arbitrator's authority because he failed to give credit to the final warning in the Grievant's personnel file and he unilaterally created a "mitigating factor" exception that creates a new category of disciplinary infraction that does not exist in the CBA. SC at 6. He based his decision in part on his finding that the "arbitrator considered but rejected the grievant's voluntary admissions of her failure to report **abuse** and the argument that the final warning in the grievant's file created just cause for termination." *Id.*

The Appellate Court's Decision

After carefully reciting the relevant facts as found by the Arbitrator, the Appellate Court held that the Award "violates the strong public policy of protecting residents of skilled nursing facilities from **abuse**." AC at 223. The court explained:

We do so because of a confluence of factors arising under the facts and circumstances of the case. The grievant had a prior incident of patient **abuse** ***10** dating from 2005, which resulted in a final warning. Then, in April, 2009, she received a written warning for an incident that involved, in part, speaking rudely, loudly and in a scolding manner to a resident, and in August, 2009, she received a second final warning for behaving disrespectfully and inappropriately toward a resident. Finally, in the present incident, in March, 2010, despite being fully aware of her obligation promptly to report through proper channels her suspicions of patient **abuse**, and despite being aware that she was subject to two final warnings, the grievant did not report the suspected **abuse** until several days later, and then not through the proper channels. The award, requiring the reinstatement of one who, in a sensitive position of physical authority over such a vulnerable population, has by her prior record of related disciplinary actions and two prior final warnings demonstrated her inability to meet the demands of the public policy of protection and reporting, violates that policy because, in the very words of the arbitrator, "any delay in reporting by a staff member leaves the residents at risk of possible further **abuse** by the alleged perpetrator; corrective action by [the plaintiff] to assure resident well-being inevitably is delayed if reporting by staff is delayed." AC at 226 [8] (footnote omitted)

The Court further added:

In the present case, ... it was not a single case of misconduct that led to the dismissal. There was a history of three incidents of similar misconduct, including two prior final warnings, within a period of five years. In addition, the grievant's failure to report promptly was exacerbated by her failure to report through proper channels, thus increasing the risk that the suspected **abuse** would not be communicated promptly to the proper persons. AC at 229 (footnote omitted)

The Appellate Court reversed the judgment of the Trial Court and remanded the case with direction to render judgment granting the Center's application to vacate the Award and denying the Union's cross-application to confirm the Award. AC at 234. Because it held for the Center on the ground of violation of public policy, the Appellate Court did not address the Center's argument that the Arbitrator exceeded his authority by failing to give credit to the previous final warnings Grievant has received, thereby creating a "mitigating factor" that was not contained in the CBA and imposing his own view of how to enforce reporting requirements, and in refusing to consider pertinent evidence based on an investigative standard of his own creation. AC at 215, 234.

***11 STANDARD OF REVIEW**

A court's review of whether an arbitral award implicates and violates public policy is *de novo*. *Schoonmaker v. Cummings & Lockwood of Conn., P.C.*, 252 Conn. 416, 418 (2001) ("[W]here a party challenges a consensual arbitral award on the ground that it violates public policy, and where that challenge has a legitimate, colorable basis, de novo review of the award is appropriate in order to determine whether the award does in fact violate public policy."). Though deferential treatment is given to the arbitrator's factual findings, *AFSCME, Council 4, Local 1565 v. Dep't of Correction*, 298 Conn. 824, 837 (2010), "it is the role of a reviewing court to articulate the actual policy objectives that emanate from a particular rule of conduct, [and] a reviewing court [is] suited to evaluate whether certain facts, as found by the arbitrator, comport with the specific public policy at issue." *Schoonmaker*, 252 Conn. at 430.

The recitation by the Union of the deferential standard of reviewing arbitral awards and its reference to the scope of the submission (Appellant's Brief at 6) is misplaced. This Court has described the public policy exception as an exception to the rule of such deference. *See Schoonmaker*, 252 Conn. at 428, 430-31 (stating that "the public policy exception is one of three that we have identified as *exceptions to the rule of deference*" (emphasis added) and noting the "heightened standard of judicial review of arbitral conclusions, despite the traditional high level of deference afforded to arbitrators' decisions" in determining the public policy exception). Even the key cases cited by the Union in support of its misstated standard of review (Appellant's Brief at 6) make clear that a de novo standard applies in determining whether an arbitral award violates public policy, that such a determination is within the ambit of the courts, and that deference is given only to the facts found by the arbitrator. *Specifically, in* ***12** *Groton v. United Steelworkers of America*, this Court expressly stated that it was undertaking a de novo review based

on this Court's holding in *Schoonmaker*. 254 Conn. 35, 44 (2000). Applying that standard and noting that a court's review of an arbitral award on grounds of public policy is an *exception* to the general rule that an arbitrator's "award is not subject to *de novo* review even for errors of law so long as the award conforms to the submission," the Court *reversed* an arbitral award on public policy grounds. *Id.* Likewise, this Court in *State of Connecticut v. AFSCME, Council 4, Local 391,* issued just last month, applied a *de novo* standard in holding that the arbitrator's decision in that case to reduce the dismissal of the former employee to a one-year suspension without pay violated public policy. 309 Conn. 519 (2013).

ARGUMENT

A Connecticut court may vacate an award by an arbitrator when the award is in contravention of public policy. *See, e.g., Watertown Police Union Local 541 v. Watertown,* 210 Conn. 333, 339 (1989); *State v. AFSCME, Council 4, Local 387, AFL-CIO,* 252 Conn. 467, 472-23 (2000); *AFSCME, Council 4, Local 1565 v. Dep't of Correction,* 298 Conn. 824, 835 (2010). A challenge to an arbitral award on the basis of public policy "is premised on the fact that the parties cannot expect an arbitration award 'approving conduct which is illegal or contrary to public policy to receive judicial endorsement any more than parties can expect a court to enforce such a contract between them."' *Watertown Police Union Local,* 210 Conn. at 339-340 (quoting *Stamford v. Stamford Police Assn.,* 14 Conn. App. 257, 259 (1988), and *Board of Trustees v. Federation of Technical College Teachers,* 179 Conn. 184, 195 (1979)). When a challenge to the arbitrator's authority is made on public policy grounds, "the court is 'not concerned with the correctness of the arbitrator's decision but with the ***13** lawfulness of enforcing the award."' *Id.* at 340 (quoting *Board of Trustees v. Federation of Technical College Teachers,* 179 Conn. at 195). Connecticut courts apply the public policy exception where an arbitral award would violate "some explicit public policy" that is "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests."' *Id.* (quoting *New Haven v. AFSCME, Council 15, Local 530,* 208 Conn. 411, 417 (1988) (quoting *United Paperworkers Internat'l Union v. Misco, Inc.,* 484 U.S. 29, 43 (1987))).

Connecticut courts undertake a two-part inquiry to determine whether an arbitral award violates public policy: (1) whether a clear, dominant, and well defined public policy exists and (2) whether the arbitrator's award violates that public policy. *State v. AFSCME Council 4,* 252 Conn. 467, 477 (2000).

As the Appellate Court found, AC at 224, Connecticut has a clear, dominant, and well-defined public policy of protecting residents in skilled nursing homes from **abuse**. [4] The Union seems to concede this point. (Appellant's Brief at 11; *but see id.* at 17 (simply "accepting, *arguendo*")) As the Appellate Court further found, AC at 224, this public policy is derived from the state's statute mandating reporting by any employee of a nursing home facility who has "reasonable cause to suspect or believe that any **elderly** person has been **abused**, neglected, exploited or abandoned, or is in a condition which is the result of such **abuse**, neglect, exploitation or abandonment, or is in need of ***14** protective services," Connecticut General Statutes § 17b-451, and is also found more generally in the Connecticut's Patients' Bill of Rights, which provides, *inter alia,* that "any person admitted as a patient to any nursing home facility or chronic disease hospital" shall be provided with a bill of rights that such patient "is free from mental and physical **abuse**, corporal punishment...." Conn. Gen. Stat. § 19a-550(b)(8). AC at 224. *Cf. State v. New England Health Care Employees Union, District 1199,* 271 Conn. 127, 138 (2004) (agreeing with trial court that there is an explicit, well defined, and dominant public policy against mistreatment of mental health patients, notwithstanding the absence of any express legislative declaration against **abuse** of persons with mental retardation, based on, *inter alia,* statutes requiring state investigation of reports of **abuse**); *Illinois Nurses Ass'n v. Board of Trustees of University of Illinois,* 318 III. App. 3d 519 (1st Dist. 2000) (finding that a public policy favoring safe nursing care was evidenced by various sections of the Illinois Nursing Act of 1987). As the Appellate Court explained:

The obvious purpose of these provisions is to protect from **abuse** those among us who are most vulnerable and most dependent for their well-being on their institutional caregivers. And the equally obvious purpose of the concomitant prompt and proper reporting requirement is to ensure that incidents of possible **abuse** are quickly addressed by the responsible institutional actors, so that they do not leave time for their continuation or repetition before serious consequences ensue to the **abused** resident. AC at 225.

The Appellate Court then properly held that the Arbitrator's Award of reinstatement of a CNA whose employment had been terminated by the Center, a skilled nursing facility, for failure to report suspected patient **abuse** after she had received two final warnings, including one for an incident of patient **abuse** in which she tied a patient to a wheelchair with a bed sheet and one in which she touched a patient before explaining why she was ***15** doing so, violates the strong public policy of protecting residents of skilled nursing facilities. AC at 226. The Union argues that this conclusion by the Appellate Court is erroneous on two grounds.

First, the Union argues that the Appellate Court, in determining that the Arbitrator's Award of reinstatement violated public policy, independently found facts instead of giving "great deference" to the facts found by the Arbitrator. (Appellant's Brief at 9) The argument is simply inaccurate. As the Appellate Court's recitation of the facts set forth in the arbitration decision shows, its decision relied *solely* and *entirely* on the facts set forth by the Arbitrator in his decision. To the extent it drew conclusions from such facts, such conclusions do not violate the rule that the reviewing court must give deference to the facts found by the arbitrator. Drawing conclusions from a set of found facts is not fact-finding in and of itself. Indeed, despite its protestations, the Union does not identify a *single* fact that the Appellate Court relied on that was not found by the Arbitrator. Its sole complaint is its erroneous assertion that there was "a judicial interpretation of the grievant's 'prior record of related disciplinary actions' that greatly inflates the severity of the factual findings of the arbitrator." (Appellant's Brief at 11) The Appellate Court's actual decision disproves this assertion.

Second, while the Union does not dispute that there is a clear, dominant, well-defined public policy of protecting residents in skilled nursing facilities from **abuse**, it nevertheless argues that the Appellate Court decision is erroneous because there is no public policy requiring the discharge of employees who have been negligent in their duty to promptly report suspected **abuse** or requiring discharge of every employee who ever fails to report suspected patient **abuse**. (Appellant's Brief at 9, 17, 19) These arguments ***16** misstate the proper analysis of the public policy and rely on the Union's continued oversight and willful disregard of undisputed, key facts in this case. This Grievant had a disciplinary record that included previous resident care infractions, and she already had two final warning when she failed to report suspected **abuse**. [5] In this respect, Grievant was not "every employee" who merely fails to report suspected **abuse** on one occasion. The other employees whose employment the Center did not terminate are more typical of "every employee." [6] Rather, Grievant was an employee who had previously been fired for resident **abuse** and who then received a written warning and a final warning for her poor treatment of residents after she was previously reinstated. Given these key facts, the Appellate Court's decision that reinstating the Grievant violates public policy stands only for the unremarkable proposition that requiring the reinstatement of an employee with a documented history in regard to patient **abuse** violates the strong, well-established public policy of protecting residents of skilled nursing facilties.

A decision confirming the Arbitrator's Award will essentially create a *de facto* rule prohibiting the discharge of any employee who reports **abuse**, no matter how late or improperly, as long as the employee *eventually* reports the **abuse**. It will also cause the reinstatement of a particular employee who has clearly demonstrated through the facts ***17** found by the Arbitrator an unwillingness or inability to meet her obligations to ensure resident safety. The law neither requires nor sanctions such a decision, and public policy does not permit it.

I. The Appellate Court Properly Construed the Facts Found By the Arbitrator In Deciding that the Public Policy of Protecting Residents in Skilled Nursing Facilities from Abuse is Violated by Ordering the Reinstatement of An Employee Who Knowingly Failed to Report Suspected Patient Abuse and Who Already Had Three Previous Incidents Involving Resident Care, Including Two Final Warnings, One of Which Was For Patient Abuse.

Given that a clear, dominant, well-defined public policy in favor of protecting the vulnerable residents of skilled nursing facilities from **abuse** exists, the question is whether the Award violates *that* public policy in light of the Grievant's documented disciplinary history. In determining that the answer to this question is yes, the Appellate Court relied on the following facts, *all of which were found by the Arbitrator:*

• Leoni Spence, the CNA who was discharged, "[q]uite clearly ... was guilty of the offense of failing to timely report to a nursing supervisor (or higher authority) the information that had come into her possession on March 20 ... that another staff member may have committed resident **abuse**." AA at 10; AC at 221.

• There are important resident safety reasons underlying the requirement of prompt and proper reporting, and "a delay in reporting is almost as bad as not reporting all." AA at A11; AC at 221.

• Ms. Spence was fully trained regarding her reporting obligations and knew those obligations and, in fact, had been expressly trained just a few months earlier on the very infraction she committed. AA at 4 n.2, 8 n.2; AC at 220.

***18** •At the time of her March 2010 reporting failure, Ms. Spence had two prior final warnings in her file, including a prior termination stemming from a serious resident-care violation that was ultimately reduced to a suspension. AA at 2-3; AC at 216.

• Ms. Spence was on final warning status at the time of her March 2010 infraction. AA at 3; AC at 216.

• The other employees who were disciplined along with Ms. Spence for failure to report suspected **abuse** in a timely and proper manner in March 2010 all had clean records and two out of the three other employees were long-term employees, yet all of these employees nonetheless received harsh disciplinary sentences (i.e., multi-day suspensions and final warnings). AA at 6; AC at 218-19.

In concluding that the reinstatement of the Grievant in light of these facts violated the identified public policy of protecting nursing home residents, the Appellate Court discussed two cases, one from Connecticut (coincidentally involving the same union) and one from another jurisdiction: *Illinois Nurses Ass'n v. Board of Trustees of University of Illinois,* 318 III. App. 3d 519 (2001), and *State v. New England Health Care Employees Union, District 1199,* 271 Conn. 127 (2004). AC at 227, 229. As both of these cases make clear, what is at issue is not just a run-of-the-mill reinstatement of an employee who violated her employer's reporting requirements, but the reinstatement of an employee charged with caring for and protecting vulnerable residents who has repeatedly shown that she cannot be trusted to do that job.

***19** In the Illinois case, a state university hospital discharged a nurse who, among other things, failed to properly chart records of a pacemaker's functioning, failed to timely order a drug required to maintain a patient's blood pressure, charted that she hung a replacement bag of a drug when she had not done so, and left for the day without hanging the new bag, thereby endangered patients' lives. *Illinois Nurses Ass'n,* 318 III. App. at 521-522. Her union grieved the discharge, and the arbitrator, though finding that the nurse had committed all but one of the ten wrongful offenses cited by the employer, ordered her reinstated due to "mitigating factors," namely that she was a senior nurse with a good work record who could be trusted to refrain from further offending conducts as long as she was transferred to a less demanding job or retrained. *Id.* at 522-523, 531. The hospital moved to vacate the reinstatement award. The Illinois court, applying the same two-step process that Connecticut courts apply - first identifying a well defined and dominant public policy and then determining whether the arbitrator's award violated the public policy - first found a public policy favoring safe nursing care based on various sections of the Illinois Nursing Act. *Id.* at 530. The court then held that the order to reinstate this nurse violated that public policy because the arbitrator's factual findings clearly established that the nurse had repeatedly failed to provide safe nursing care and that she had endangered patients' lives. *Id.* at 531. The court found that the arbitrator lacked a rational basis for reinstating the nurse, as the *evidence in the record* did not support the arbitrator's finding that she would refrain from further offending conduct. *Id.* at 531. The court actually found evidence to the contrary in the arbitrator's findings. *Id.* The court rejected the union's argument, which is similar to one made by the Union in its brief, that no explicit provision in the Nursing Act ***20** mandated discharge for those who violated the Act, and it instead noted that the relevant question was whether her reinstatement violated a well defined and dominant public policy. *Id.* In the end, the court found that the nurse jeopardized the lives of two patients in a three-day period so her reinstatement violated the public policy favoring safe nursing care. *Id.* at 531-532.

Essentially employing the same analysis to different set of facts, this Court, in a case involving the discharge of a good, long-term employee who had mishandled a mental health patient, first found an explicit, well defined, and dominant public policy protecting mental health patients existed, but then held that the arbitrator's award reinstating the employee did not violate that public policy *because* "the record did not support a finding that continuing [the employee's] employment would place department clients at risk of **abuse**." *State v. New England Health Care Employees Union, District 1199*, 271 Conn. at 138. In that case, the grievant, a long-term employee of the Department of Mental Retardation ("DMR"), had grabbed the arm of a patient who was agitated and swinging his arms around, forced him into a chair, and pinched and cut the client's arm in the process. *Id.* at 130-131. DMR terminated the employee's employment for violating rules against using physical force. *Id.* The arbitrator reinstated the employee, finding that the employee had not deliberately hurt the patient and that not every act of patient **abuse** requires discharge. *Id.* at 130-131. In its *de novo* review of the award, this Court determined that Connecticut has a clear, well defined, and dominant public policy against mistreatment of persons in DMR's care based on the statutory and regulatory scheme to care for and protect mentally retarded persons. *Id.* at 137-138. The Court then agreed with the trial court that the arbitrator's ***21** award did not violate that public policy because the grievant had not intended to hurt the patient and he had never before been disciplined for patient **abuse**. *Id.* at 138. After spending considerable time addressing whether the employee's conduct suggested that he might harm DMR clients in the future, *id.* at 139-142, the Court emphasized that although the employee's actions were improper, "both the likelihood and potential magnitude of future harm are minimal." *Id.* at 141. With these words, the Court made clear that critical to the decision of whether the reinstatement of an employee in situations such as these violates public policy is the likelihood of future misconduct as determined by a review of not only the incident at issue, but also the employees' work history.

Based on these two cases, the Appellate Court correctly determined that Connecticut's public policy of protecting nursing home residents from **abuse** is violated when the disciplinary history of an aggrieved employee cannot provide assurances that the vulnerable population will not be at risk if the employee is reinstated. Specifically, the Appellate Court held:
The award, requiring the reinstatement of one who, in a sensitive position of physical authority over such a vulnerable population, has by her prior record of related disciplinary actions and two prior final warnings demonstrated her inability to meet the demands of the public policy of protection and reporting, violates that policy because, in the very words of the arbitrator, "any delay in reporting by a staff member leaves the residents at risk of possible further **abuse** by the alleged perpetrator; corrective action by [the plaintiff] to assure resident well-being inevitably is delayed if reporting by staff is delayed." AC at 221.

Indeed, in contrast to the employee in the Connecticut case and like the employee in the Illinois case, Ms. Spence had a prior history of resident **abuse** and care infractions. AA at 2-3; AC at 226. Also like the employee in the Illinois case and unlike the employee in the Connecticut case, Ms. Spence was amply trained on the very infraction ***22** she committed and thus did not require time to "develop more acute sensibilities" or need an "opportunity to appreciate the gravity of her error," as discussed by the trial court in *State v. New England Health Care Employees Union*, Local 1199, 2003 WL 1874769 (Conn. Super. Ct.). These facts, particularly Ms. Spence's prior history of resident care infractions, were compelling to the Appellate Court in its determination that her reinstatement violated public policy – and this point lies at the crux of the Union's argument that the Appellate Court found facts allegedly not found by the Arbitrator.

The Union takes umbrage with the Appellate Court's statement that the reinstatement of the Grievant violates public policy because of "a confluence of factors arising under the facts and circumstances of the case." (Appellant's Brief at 11 (quoting 142 Conn. App. at 226)) In arguing that this statement shows that the Appellate Court found facts not found by the Arbitrator, the Union misstates the record and ignores the undisputed fact that the Grievant had a record of not treating residents properly, including one incident in which, as a previous arbitrator found, she committed patient **abuse**. The Appellate Court focused and relied on a limited set of facts – only those facts found by the Arbitrator – concerning the Grievant's specific prior disciplinary record and what she did with regard to reporting suspected **abuse** in the situation that led to her discharge:

> The grievant had a prior incident of patient **abuse** dating from 2005, which resulted in a final warning. Then, in April, 2009, she received a written warning for an incident that involved, in part, speaking rudely, loudly and in a scolding manner to a resident, and in August, 2009, she received a second final warning for

> behaving disrespectfully and inappropriately toward a resident. Finally, in the present incident, in March, 2010, despite being fully aware of her obligation promptly to report through proper channels her suspicions of patient **abuse**, and despite being aware that she was subject to two final warnings, the grievant did not report the suspected **abuse** until several days later, and then not through the proper channels. AC at 7.

***23** Notably, these facts, taken directly from the Arbitrator's decision, are *the* facts that the Appellate Court described as the "confluence of factors" that led it to determine that the award violated public policy. *Id.* In this regard the Union's assertion that this "confluence" rests "principally upon a judicial interpretation of the grievant's 'prior record of related disciplinary actions' that greatly inflates the severity of the factual findings of the arbitrator" (at 11) is a gross misstatement. If anything, the Union's representation (or lack of representation) of the Grievant's disciplinary record does not respect the severity of her previous wrongdoing, most of which was found to exist by other arbitrators. [7]

The Union's subsidiary argument that the Appellate Court erred because the Arbitrator weighed and considered the Grievant's prior disciplinary record (Appellant's Brief at 12) is likewise mistaken. The Arbitrator considered the Grievant's prior disciplinary record *only in determining whether just cause existed for her dismissal.* The ***24** Arbitrator did *not* consider whether reinstating Ms. Spence would violate public policy given her uncontested prior disciplinary history. In this regard, this Court's explanation of why *courts, not arbitrators*, decide whether an award violates public policy is instructive:

> the identification and application of the public policy of this state presents considerations regarding which courts have greater expertise and knowledge than arbitrators, who are often drawn from the ranks of various professions including, but not limited to, the law. Because in this respect arbitrators and a reviewing court do not stand on equal ground, it comports with logic for the court to review the arbitrator's interpretation of an ethics rule de novo rather than to leave it to the arbitrators themselves to attempt to apply pertinent public policy. Moreover, given that it is the role of the reviewing court to articulate the actual policy objectives that emanate from a particular rule of conduct, so too is a reviewing court better suited to evaluate whether certain facts, as found by the arbitrator, comport with the specific public policy that is at issue. *Schoonmaker*, 252 Conn. at 430.

Importantly, *nowhere* in his findings did the Arbitrator consider the critical question of whether residents would be safe if the Grievant were reinstated. [8] Thus, that the Arbitrator considered the Grievant's prior disciplinary record for one purpose does not preclude the Appellate Court from considering it for another purpose – and its doing so is not reversible error. Further, as the Appellate Court explained in rejecting this argument, "[t]his argument fails because it overlooks the necessary consequence of the public policy exception, namely, that once a colorable, legitimate basis for the public policy exception has been established – as it has been here – de novo review, not deferential review, is applied to the ultimate question of termination." AC at 228 n.7.

***25** The Union's disappointment with the outcome of the Appellate Court's application of the proper standard of review to the facts found by the Arbitrator in no way creates a trial *de novo*, as the Union exaggeratedly claims (Appellant's Brief at 13). The Appellate Court did *not* find that the arbitrator's "no just cause" determination was erroneous, and, contrary to the erroneous characterization by the dissent to the Appellate Court's decision, AC at 239, the majority did not address the arbitrator's finding of no just cause. The Appellate Court found *only* that based on the facts found by the Arbitrator the reinstatement order violated public policy. AC at 6. At its essence, the Union's argument is simply a rejection of the exception from the general rule of deference for arbitral awards that violate public policy. That ship has long sailed, though.

Overall, Ms. Spence's poor disciplinary history provides no confidence that there will not be a repetition of her harmful behaviors toward residents, whether in actively doing the wrong thing or failing to do the right thing. She has a history that speaks of such actions, and nothing in this case – including the manner in which she ultimately reported the suspected **abuse** – suggests that she will change her ways. Indeed, the Arbitrator found no redeeming evidence whatsoever in Ms. Spence's favor, *except* for the fact

that she did in fact eventually report the suspected **abuse** (late and improperly).[9] This sole fact – eventual reporting – is not, however, supportive of an assumption that the Grievant can or will protect the Center's vulnerable residents if she is returned to work. Instead, her eventual reporting actually shows the opposite, that she *knowingly* did not meet her job requirements.

***26** Moreover, if this particular employee – *i.e.*, an employee on recent final warning status who had a history of disciplinary infractions related to resident care and who was fully trained on her reporting obligations, including very recent training on the same infraction she committed – cannot be discharged after knowingly failing to report suspected **abuse** in a timely and proper manner simply because she ultimately (though belatedly and improperly) reported the suspected **abuse**, the Arbitrator's award essentially inoculates every employee who *eventually* and *in any manner* reports suspected **abuse** by taking away the most important disciplinary tool available to an employer, the threat of discharge. In this way, the Award undercuts the Center's ability to meet the reporting requirements of Conn. General Statutes § 17b-451, thereby violating the public policy of protecting residents in skilled nursing facilities.

II. Given the Appellate Court's Finding That The Grievant's Specific History Of Warnings Involving Resident Care Indicated a Risk of Future Misconduct Involving Residents, Vacating the Arbitrator's Award Neither Requires A Prohibition Against Reinstating Any Employee Who Ever Fails to Timely and Properly Report Suspected Abuse Nor Creates A Requirement that Every Employee Who Fails to Timely and Properly Report Suspected Abuse Be Discharged.

The Union's argument that the public policy of protecting vulnerable nursing home residents "does not require the discharge of employees who have been negligent in their duty to promptly report suspected **abuse**" (Appellant's Brief at 9; *see also id.* at 15) misstates the law. The issue in this case is *not* whether there is a public policy requiring the discharge of such an employee or *prohibiting* the reinstatement of an employee who was terminated for failure to promptly report suspect **abuse**, but, as the ***27** multitude of Connecticut cases applying the public policy test to arbitral awards show, whether there is a public policy that exists that would be violated by the reinstatement. *See, e.g., State v. Connecticut State Employees Ass'n,* 287 Conn. 258, 277 (2008) (finding public policy against violence in the workplace and sexual harassment and then asking only whether the arbitrator's award violated either public policy, not whether those policies required dismissal or prohibited reinstatement). In *State v. New England Health Care Employees Union Dist., Local 1199,* which likewise addressed a public policy protecting vulnerable residents in a care-providing facility, this Court found that Connecticut has an explicit, well defined, and dominant public policy to care for and protect mentally retarded persons. 271 Conn. 127. Though, as explained above, it found that the arbitrator's award of reinstatement of the employee in that case did not violate the identified public policy because the long-term employee in that case had no previous record of patient **abuse** and had simply dealt poorly with an unknown situation, *Id.* at 142, the relevant point is that the Court never addressed whether the public policy required the employee's discharge or *prohibited* his reinstatement. *Id.* at 134-142. In the same way, the question in this case is not, as the Union suggests, whether there is a public policy "against reinstating an employee who was terminated for failure to promptly report suspected **abuse**" (Appellant's Brief at 16 (quoting the Superior Court Decision at 35)). The courts do not need to find such a public policy to find that reinstatement of this Grievant, with her three previous infractions, violates the public policy of protecting vulnerable nursing home residents. Therefore, it is sufficient for the Court to determine simply that there is public policy in favor of protecting residents in ***28** skilled nursing facilities from **abuse** (and then ascertain whether the Award violates that policy), and it has done that.

The Union also wrongly suggests that vacating the reinstatement order in this case essentially creates a requirement that all employees who fail to timely report **abuse** be discharged when it argues that there is no public policy precluding the reinstatement of an employee who fails to report suspected **abuse** (Appellant's Brief at 17, 19). Nothing could be further from reality. As the Appellate Court correctly explained, "[t]his is ... a case of an employee who had a history of three incidents of similar misconduct within five years, including two prior final warnings, who exacerbated her misconduct by failing to report through proper channels, thus increasing the risk that the suspected **abuse** would not be addressed properly and promptly."[10] AC at 231. As such, this Grievant, but not every employee who negligently fails to report suspected **abuse** in a timely or proper manner, has demonstrated her inability to meet the demands of holding a sensitive position of physical authority over such a

vulnerable population. Indeed, in this case, the Center did not discharge all the employees who failed to report the suspected **abuse**. There were three employees disciplined for failing to report the suspected **abuse**. AA at 6-7. Only one – the one with a history of failing to provide proper resident care –was discharged. *Id.* The others were given final warnings and suspensions. *Id.* The Center determined that the strongest discipline available was ***29** appropriate for each employee, but then determined what that meant for each employee based on her personal record. It did not, therefore, discharge the two employees who had clean records. *Id.* Had it done so and had an arbitrator ordered their reinstatement, an argument that such reinstatements violated the public policy of protecting nursing home residents from **abuse** would likely not succeed. It is the fact that Grievant had final warnings involving resident care in her record that makes her reinstatement a violation of public policy.

State v. New England Health Care Employees Union, District 1199 is instructive in this regard. In that case, the Supreme Court explained that because the employee at issue in that case had *no* prior patient care infractions on his record, a finding that reinstating *him* would be a violation of public policy would be tantamount to a per se rule, *not* that *every* finding of a public policy violation in a case involving patient care would create a per se rule:

> To conclude that the arbitrator's decision and award violated the public policy of protecting persons in the custody of the department from **abuse**, the court would have had to conclude that, *if a single instance of deliberate conduct results in any injury to a client, no matter how inadvertent or minor, the conduct is grounds for termination*, per se. 271 Conn. at 138 (emphasis added).

Thus, reinstatement of employees with clean records who fail only once in their duty to report suspected **abuse** in a timely and proper manner would not violate the public policy of protecting nursing home residents from **abuse**. But that is not the situation in this case: Ms. Spence's failure to report the suspected patient **abuse** was not "an isolated incident" that inadvertently led to harm by an employee with "eighteen years of satisfactory service," *id.* at 141; it was part of a continuing pattern by an employee who was, at best, indifferent to harm to residents of the Center and who had a poor record ***30** that included an incident of patient **abuse** and other incidents of mistreating residents. As such, the record indicates she is likely to continue to engage in misconduct in connection with residents, which is why giving her a free pass for belatedly but improperly reporting the suspected **abuse** violates public policy.

Overall, by considering the fact that *this employee* eventually reported the suspected **abuse** a mitigating factor[11] – after conclusively finding that the employee had failed to report it timely or properly despite knowing she should – the Arbitrator has de facto created a rule that *no employee* can be fired for failing to report **abuse** timely or properly as long as she reports it, regardless of when she reports and whether she reports it to the right people and in the right manner. This *de facto* rule is what violates public policy. The Arbitrator's award, in essence, tells all employees of skilled nursing facilities (and maybe other facilities where vulnerable populations are cared for) that they need not report **abuse** promptly, as the statute and their employer may require, as long as they do so before anyone else does. Such a regime promotes mutual silence rather than individual responsibility for the care and protection of people in skilled nursing facilities, thus violating the clear, dominant, well defined public policy of protecting them.

***31** Third, the Union's argument that the Appellate Court's decision creates a "dangerously broad and expansive power" to overturn arbitral decisions simply by "establishing a public policy against the underlying conduct" (Appellant's Brief at 16) is premised on a misunderstanding of the dominant, clear, well-established public policy that the Appellate Court found (and that the Union admit exists at one point in its Brief). That is, the public policy at issue is not the public policy of promptly reporting **abuse**: it is the public policy of protecting nursing home residents from **abuse**. As such, the Grievant's behavior did not violate the public policy, only her reinstatement did. *See Mercy Hosp., Inc. v. Massachusetts Nurses Ass'n*, 429 F.3d 338, 343 (1st Cir. 2005) ("In the context of an arbitration award that reinstates a fired employee, the question is not whether the charged conduct offends public policy or whether some remedy short of unconditional reinstatement (say, a probationary period or a suspension without pay) might have been preferable. Rather, *the sole question is whether the award itself - the order for reinstatement - gives offense."* (Emphasis added.)). In this regard, the Union's claim that the Appellate Court found that the Grievant's behavior,

rather than her reinstatement, violated public policy (Appellant's Brief at 15-16) is wrong. The Appellate Court very clearly found only that the Grievant's reinstatement violated such policy. AC at 226-27.

Finally, the Union argues that to be a violation of public policy, the employee's conduct must have been "egregious" and that the Grievant's behavior was not "egregious." (Appellant's Brief at 23) The Union's argument fails. First, *knowingly* failing to report patient **abuse** can be egregious behavior. In this case, the Arbitrator found that the Grievant knew her reporting obligations, believed there was suspected ***32** **abuse**, and offered no reason for why she failed to report it. In discussing this "egregious" standard involving the termination of a prison employee who engaged in sexual harassment, this Court found significant that the employee *knowingly* violated sexual harassment laws and his employer's policy. *State of Connecticut v. AFSCME, Council 4, Local 391*, 309 Conn. at 538.

Second, and more importantly, as this Court made clear in that same decision, "egregious" behavior is determined not only on the basis of a single event but on the entire situation or pattern of behavior by an employee. Thus, this Court found significant that the employee in that case had engaged in repeated wrongful conduct, not just one act. *Id.* at 535-6. This Court also distinguished the employee's repeated acts of sexual harassment from single acts of wrongful conduct by employees whose reinstatement courts found not to violate public policy. *Id.* at 534. In this regard, as explained earlier, this Grievant is not someone who only once engaged in wrongful behavior. Rather, as the Arbitrator acknowledged and the Appellate Court found significant, Grievant repeatedly engaged in wrongful behavior toward vulnerable patients of a skilled nursing home, whether by tying one to a wheelchair, speaking rudely to another, being disrespectful to another, or knowingly failing to report suspected **abuse** of another. Her behavior is egregious in that her overall record shows a continued disregard for the very people for whom she is supposed to care and an inability to meet inability to meet her obligations to ensure proper resident care and resident safety.

*33 CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Appellee Burr Road Operating Company II, LLC, d/b/a Westport Health Care Center respectfully requests that the Court affirm the Judgment of the Appellate Court vacating the Arbitrator's award requiring the reinstatement of grievant Leoni Spence and reversing the Superior Court's Judgment granting the Union's application to confirm the Arbitration Award.

Appellee Burr Road Operating Company II, LLC, d/b/a Westport Health Care Center further requests that if the Court reverses the Appellate Court's judgment, it remand the case to the Appellate Court for a determination on the Center's claim that the Arbitrator exceeded his authority.

Footnotes

1 Not only does Appellant recast the Arbitrator's findings to create the appearance of error where none exists, it also, like the dissent in the Appellate Court decision, focuses on facts not relevant to the determination of the issue at bar, such as the propriety of the investigation into aspects of the Grievant's conduct that were not central to either the arbitrator's award or the Appellate Court's decision. *See, e.g.*, Appellate Court Decision at 219 n.2, n.3, and 232-33(noting irrelevance of lack of investigation concerning other instances when the grievant allegedly failed to report suspected **abuse**).

2 Appellee cannot yet cite to the Record because it has not yet received the Record. Appellee is willing to file an amended brief with citations to the Record once it is received.

3 There was insufficient proof of wrongdoing to discipline the second employee involved in the initial conversation.

4 Contrary to the Union's assertion, the important public policy at issue in this case is *not* the public policy favoring arbitration of labor disputes. (Appellant's Brief at 9) If that were the public policy at issue, then the public policy exception would not exist in the context of labor arbitrations. Rather, the public policy at issue in this case is that of protecting nursing home patients from **abuse**, and the only issue on appeal is whether the arbitral reinstatement award violates *that* public policy.

5 The Superior Court likewise seemed to have overlooked these key facts.

6 This distinction from the records of the other employees was, in fact, *the* reason that the other employees received warnings and suspensions, not terminations. Grievant, in contrast, had already been given a "second chance" when her first termination was reduced to a suspension and final warning, and she even received a second "second chance" when the Center did not discharge her when she improperly touched a patient in 2009. Reinstating her now would simply because she eventually, though still improperly, reported the suspected resident **abuse** be a third "second chance."

7 Specifically, as recounted earlier and in the Arbitrator's Award, after the Union grieved the termination of Ms. Spence's employment in 2005, an arbitrator found that Ms. Spence engaged in resident **abuse** by tying the resident to a wheelchair with a bedsheet, even though it ordered reinstatement and a final warning instead of discharge. Another arbitrator found just cause for the written warning that Ms. Spence received in April 2009 for, among other things, speaking in an inappropriately rude, loud, and scolding manner to a resident, and the Arbitrator found that Ms. Spence received another final warning in August 2009 for being disrespectful to a resident and touching the resident without previous explanation, which the Union did not grieve.

The Union seems to stake much of its argument that the Appellate Court found facts beyond the Arbitrator's findings on the basis that the Appellate Court described these three incidents as being "related" or "similar" to Ms. Spence's infraction of failing to report suspected patient **abuse** (Appellant's Brief at 4 n.3 and 22). This argument seems to make much out of nothing. These infractions all in fact related and similar in that they all involve the property care of residents of the Center. Moreover, it was the existence of the actual infractions, not Appellate Court's characterization of them, that formed basis for Appellate Court's decision.

8 In this regard, the Union overstates what the Arbitrator found when it argues – without any citation to the record – that under the Arbitrator's judgment, the Grievant's reinstatement did not jeopardize the safety of residents. (Appellant's Brief at 14)

9 In fact, he found unredeeming evidence, *i.e.*, that she was untruthful at least three times. *See* AC at 234 n.8 (explaining the three occasions when the Arbitrator expressly disbelieved the Grievant).

10 In this way, this case is not, as the Union argued in the Superior Court, a "garden variety employee discharge grievance." AC at 227. Indeed, the Center's legitimate concern that reinstating this Grievant severely jeopardizes its ability to provide quality care to its patients, is why the Center, which regularly arbitrates employee discipline cases but does *not* appeal many findings of no just cause, has appealed in this case.

11 Note that the Superior Court overstated what the actual mitigating factor was that the Arbitrator considered. The "mitigating factor" was not that the Grievant was somehow prevented from reporting the suspected **abuse** or that she did not know she should report it or some other external factor that justified her delay in reporting the suspected **abuse**. As the Arbitrator himself found, the Grievant knew well that she was supposed to report suspected **abuse** yet made a conscious choice not to report it until some days later. AA at 9-10. The "mitigating factor" the Arbitrator created and considered was that the Grievant did eventually report the suspected **abuse**, albeit to the wrong person and in the wrong way, while the others never reported it. AA at 14.

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