NOT FOR PUBLICATION

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GENE COLLINS, DBA Southern Nevada Flaggers & Barricades,

Plaintiff-Appellant,

and

SIX STAR CLEANING & CARPET SERVICE, INC.; et al.,

Plaintiffs,

v.

LABORERS INTERNATIONAL UNION OF NORTH AMERICA LOCAL NO 872; et al.,

Defendants-Appellees.

No. 21-16819

D.C. No. 2:11-cv-00524-GMN-DJA

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Gloria M. Navarro, District Judge, Presiding

Argued and Submitted December 6, 2022
San Francisco, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: LUCERO,[**] BRESS, and VANDYKE, Circuit Judges.

Plaintiff-Appellant Gene Collins, doing business as Southern Nevada Flaggers & Barricades, appeals the district court's order denying his and his co-plaintiffs' motion to vacate an arbitrator's decision ruling against them on three of their claims. We issued a limited remand for the district court to consider issuing a partial final judgment on those three claims, which it did, giving us jurisdiction over this appeal under 28 U.S.C. § 1291. We now affirm the district court's denial of vacatur.

We review de novo a district court's "decision to vacate or confirm an arbitration award." *PowerAgent Inc. v. Elec. Data Sys. Corp.*, 358 F.3d 1187, 1193 (9th Cir. 2004).

A district court may vacate an order "where there was evident partiality or corruption in the arbitrators." 9 U.S.C. § 10(a)(2). A plaintiff can establish evident partiality based on an arbitrator's failure to disclose facts that create "a reasonable impression of partiality." *Schmitz v. Zilveti*, 20 F.3d 1043, 1046 (9th Cir. 1994) (citation omitted). Collins contends that certain facts the arbitrator, Dennis Kist, failed to disclose meet that standard. But all the undisclosed facts are either too insubstantial or too "long past" to create a reasonable impression of partiality,

[**] The Honorable Carlos F. Lucero, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

whether considered individually or cumulatively. *Monster Energy Co. v. City Beverages, LLC*, 940 F.3d 1130, 1135 (9th Cir. 2019) (citation omitted).

Kist disclosed that he was president of another union, Local 720, but apparently provided the wrong date for when he finished that role, stating that he stopped being president two years earlier than he actually did. But this was a trivial omission, particularly since Kist accurately conveyed the total number of years he served as president and because he completed his tenure more than two decades before his involvement in this case. *See New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1110 (9th Cir. 2007) (citation omitted).

Kist also did not disclose that, during his presidency, Local 720 was subject to a consent decree prohibiting racial discrimination. The plaintiffs' claims in this case involve racial discrimination, but the undisclosed decree does not create a reasonable impression of bias. The decree was issued ten years prior to Kist's tenure as president, was against a variety of entities, and was not a "finding on the merits" of any legal violation. *See Lagstein v. Certain Underwriters at Lloyd's, London*, 607 F.3d 634, 646 (9th Cir. 2010). Moreover, Collins offers no evidence of how the consent decree was relevant to Kist's role as president over a decade after it was entered. *See id.*

Collins also argues that undisclosed facts about Kist's relationship with Local 872's counsel, David Rosenfeld, create a reasonable impression of bias. In a 1996

lawsuit in which Rosenfeld was representing Local 720, he examined Kist as a witness. The examination lasted for approximately twenty-one pages of the hearing transcript. Rosenfeld's law firm also worked with Kist as co-counsel in four cases decades ago, but Collins fails to show that Rosenfeld himself worked with Kist on these cases. Neither Kist's involvement in the 1996 lawsuit as a witness nor the fact that Rosenfeld's firm was co-counsel with arbitrator Kist in a few cases that ended twenty years ago creates a reasonable impression that Kist was biased in favor of Rosenfeld or his client. *See In re Sussex*, 781 F.3d 1065, 1074 (9th Cir. 2015) (rejecting the petitioner's evident bias argument as "attenuated and insubstantial" (cleaned up)).

A district court may also vacate an award "where the arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4). An arbitrator exceeds his power "when it is clear from the arbitral opinion or award that the arbitrator did not base his decision on an interpretation of the collective bargaining agreement or that he disregarded what the parties put before him and instead followed his own whims or biases." *Garvey v. Roberts*, 203 F.3d 580, 588–89 (9th Cir. 2000). Collins's arguments that Kist exceeded his powers are not persuasive, particularly given the "nearly unparalleled degree of deference" we afford arbitrator decisions. *Stead Motors of Walnut Creek v. Auto. Machinists Lodge No. 1173, Int'l Ass'n of Machinists & Aerospace Workers*, 886 F.2d 1200, 1205 (9th Cir. 1989).

Kist concluded that all three of the plaintiffs' claims failed because their contract with Local 872 required that they exhaust their remedies by filing grievances with Local 872, which they never did. Kist rejected the plaintiffs' argument that filing grievances would have been futile. Although Kist noted that some plaintiffs had asked two business agents for Local 872 to file a grievance on their behalf against the union, he concluded these facts did not demonstrate futility because those agents represented Local 872, and Local 872 "does not file grievances against itself." Contrary to Collins's assertions, Kist based his decision on his interpretation of the contract and did not act merely on his "whim" when he concluded that these agents were not the appropriate parties to file grievances against Local 872. *Garvey*, 203 F.3d at 588–89. We cannot conclude Kist exceeded his powers when he determined that the plaintiffs failed to demonstrate it would have been futile for them to properly file grievances.

Kist also rejected the plaintiffs' argument that submitting grievances would have been futile because of Local 872's racial animus. John Stevens (a former Local 872 field representative) testified before Kist that Defendant Tommy White (Local 872's business manager and treasurer) told Stevens that Stevens "should not deal with these 'n****r' contractors and that they will stab him in the back." (Alteration made). Kist discredited Stevens's testimony, however, because it was vague and contradictory. The record reflects that Stevens's testimony was inconsistent and

vague at times, so we cannot conclude that Kist was acting on his mere whim when he discredited Stevens's testimony. Collins has not shown that Kist exceeded his authority in rejecting the plaintiffs' racial animus argument for futility.

AFFIRMED.