VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 20-CV-00733

Howard Center v. Baird Education Association

DECISION ON MOTION

Howard Center imposed a five-day suspension on one of its employees, Sara Denton. Ms. Denton and her union ("Respondents") grieved the discipline, and when Howard Center denied the grievance, they submitted the dispute to arbitration. The arbitrator sustained the grievance, and Howard Center moved to vacate or modify the award. The court grants the request.

BACKGROUND

Ms. Denton is a teacher at Howard Center's Baird School, which provides alternative education to academically and behaviorally challenged students. Among other responsibilities, teachers are expected to write and input certification (CERT) notes describing student services and performance on a weekly basis. The purpose of the notes is to show Medicaid and other funding agencies that the school actually provided the student services. Periodic audits verify CERT note completion and review their content.

Between January and June 2019, for understandable reasons, Ms. Denton fell behind in completing her CERT notes. In an audit in July 2019, Ms. Denton's supervisor discovered that Ms. Denton did not submit a number of CERT notes dating back to January. The supervisor contacted Ms. Denton to arrange for completion of the notes and they set Friday, August 2, 2019 as the deadline. Ms. Denton was unable to meet that deadline; she completed her submission the following Monday, August 5th.

In September 2019, Howard Center suspended Ms. Denton for five days for her failure to complete the CERT notes by August 2nd. Respondents grieved the suspension. At each stage in the grievance process, Howard Center upheld the suspension. Per the contract, Respondents then appealed to arbitration. The arbitrator ultimately concluded that there was no just cause to discipline Ms. Denton. Accordingly, the arbitrator rescinded the suspension, and Howard Center filed this action, seeking to set aside or modify the award.

DISCUSSION

Judicial review of an arbitration award is limited. *UniFirst Corp. v. Junior's Pizza, Inc.*, 2012 VT 13, ¶ 6, 191 Vt. 603. Under the Vermont Arbitration Act, a court "must confirm an arbitration award unless grounds are established to vacate or modify it." *Id.* ¶ 7; 12 V.S.A. § 5676. Grounds for vacating or modifying arbitration awards are limited by statute. *See* 12 V.S.A. §§ 5676–5678. Review of such awards is thus confined to "(1) whether there exist statutory grounds for vacating or modifying the arbitration award, and (2) whether the parties were afforded due process." *Springfield Tchrs. Ass'n v. Springfield Sch. Directors*, 167 Vt. 180, 184 (1997). Here, Howard Center contends that the arbitrator exceeded his authority under 12 V.S.A. § 5677(a)(3), and that he manifestly disregarded the law. More specifically, it argues that the arbitrator reached out to decide an issue that was not properly before him, and that his decision on that issue misapplied the law.

Before addressing the merits of Howard Center's arguments, the court disposes of a threshold procedural issue. Respondents argue that Howard Center's challenge to the award comes too late. The Vermont Arbitration Act requires that "[a]n application to vacate an award shall be made within 30 days after delivery of a copy of the award to the applicant." Here, it is unclear when the award was "delivered"; it was dated October 8, 2020. While the court's Odyssey case management system shows the filing date as November 9, 2020—32 days later—that, in fact, is misleading. The date shown in Odyssey is not necessarily the date when a party files a paper; instead, it is the date when the clerk formally accepts the filing into Odyssey. The former, and not the latter, is the operational date for deadline-counting purposes. Thus, Howard Center's motion was timely filed. Moreover, even if filed on November 9, the application was timely. From October 8, Day 30 was November 7. Had the Union bothered to consult a calendar, it would have realized that was a Saturday. Thus, per V.R.C.P. 6(a)(1)(C), the filing period ran at least until the following Monday, November 9.[1]

Turning to the merits, Howard Center argues that the arbitrator exceeded his authority by deciding an issue that had not been framed by the grievance process. An arbitrator's authority derives from the arbitration contract and, "[a]ccordingly, the authority of the arbitrator is defined by the issues the parties agree to submit." *In re Robinson/Keir P'ship*, 154 Vt. 50, 55 (1990). Arbitration submissions are "generally construed as broadly as possible in order to quickly and economically resolve disputes." *Id.* Thus, "any doubts about the scope of the submissions . . . should be resolved in favor of coverage." *Id.* (quotations and alterations omitted). To determine if the arbitrator exceeded his

[1] In its Memorandum in Opposition, filed before the time for service had run under V.R.C.P. 3, Respondents argued that this court lacked subject matter jurisdiction because Howard Center had not effected proper service. The court need not address that argument because Respondents' counsel subsequently agreed to waive formal service.

authority, the court "must compare the arbitrator's award with the submissions of the parties." *Id.* (citing *Piggly Wiggly Warehouse, Inc. v. Piggly Wiggly Truck Drivers Union,* 611 F.2d 580, 583 (5th Cir.1980); *Cook v. Carpenter,* 34 Vt. 121, 126 (1861)). Here, because there were no separate submissions, the grievance constitutes the parties' submission. *See Piggly Wiggly*, 611 F.2d at 583–85.

At each and every step of the grievance process prior to arbitration, Respondents framed the issue as follows:

> Including but not limited to:
>
> 6.1 (Just Cause) -— The level of discipline rendered by the agency is too severe given the alleged infraction, the grievant's employment history, and the circumstances of the situation.
>
> 6.2 (Progressive discipline) -The grievant was provided with no oversight or supervision relevant to the matter at hand in the period that notes had lapsed.
> -The agency did not intervene and provide support earlier.
> -The agency leveled severe discipline without taking lesser measures earlier in order to resolve the situation.

Ex. C, E, and G to Mot. to Vacate. In contrast, the Award states, "The parties' stipulated issue is as follows: Whether the Employer had just cause to issue a five (5) day suspension to the grievant? If not, what shall be the remedy?" Ex. K at 2.[2] Ultimately, the arbitrator concluded that there was no just cause to discipline grievant because "Employer did not warn Grievant that she could be disciplined for failure to complete her cert notes by a date certain despite several opportunities to do so." Ex. K at 16–17.

Even reading the grievance "as broadly as possible," it would stretch meaning beyond the breaking point to suggest that the arbitrator's eventual framing of the issue was remotely contemplated by the parties in the grievance process. The grievance asserts that just cause is lacking, but immediately limits the just cause attack to the severity of the level of discipline imposed. While notice is unquestionably part of the just cause analysis, *see In re Brooks*, 135 Vt. 563, 568 (1977), the grievance never mentioned notice as an issue. Had Respondents stated in their grievance that just cause was lacking given "the circumstances of the situation," that might be sufficient to raise notice as an issue; instead, however, they limited the scope of their grievance by specifying the severity of the "level of discipline rendered." In its step one response, Howard Center issued a two-page letter which clearly indicates its understanding that the issue was the severity of the discipline level imposed. *See*

[2] The arbitrator's page-numbering scheme is somewhat inscrutable: he does not begin numbering his pages until five pages into the award. Thus, in referring to page numbers, the court ignores the arbitrator's numbers and looks instead to the actual document sequence.

Ex. D. This was Respondents' opportunity to clarify the issue. They, however, did not add "notice" as an issue on subsequent grievance forms; nor did those forms convey any such implication. *See* Ex. E and G. In fact, in step 2 of the grievance process, they wrote that Ms. Denton takes responsibility for the "error" and "understands that discipline in this matter may be justified," but then argued that the punishment was "too severe" because there was no injury. Ex. E. at 2. This statement undermines any notion that notice was an issue during the grievance process. Notice has nothing to do with severity of discipline. If an employee did not have notice that she or he could be disciplined for certain conduct, that does not mean that the level of discipline was too severe; rather, there is no just cause to issue any discipline for that conduct. By limiting the grievance to issues concerning severity of discipline, Respondents effectively excluded notice as an issue. The parties' CBA prohibited Respondents from then raising this issue at arbitration. Ex. A at 9 (art. 7.2(c)) ("Neither [party] will be permitted to assert any grounds before the arbitrator which were not previously disclosed to the other party unless such facts were newly discovered").[3]

Respondents do not even attempt to dispute that the issue the arbitrator decided was different than the one they had presented throughout the grievance process. Instead, they argue that Howard Center waived this argument, first by stipulating to the issue as the arbitrator ultimately framed it, and second by failing to object when they presented evidence that went beyond the question of severity. Neither of these arguments withstands scrutiny.

Beyond the arbitrator's bald assertion that the parties had stipulated to the issue he ultimately decided, the record as initially presented to the court was completely bereft of any factual support for Respondents' claim of waiver. Thus, while noting that the burden of establishing a waiver falls on the party asserting it, the court invited the parties to supplement the record. Entry Regarding Motion, Feb. 3, 2021. Those submissions took some time to complete and review.

What that review reveals is the complete lack of support for the arbitrator's assertion of a stipulation of any kind. The court has searched the record in vain for anything remotely approaching a stipulation. Rather, the arbitrator (and subsequently, Respondents in their Opposition) appears to have created a fiction from whole cloth.

Equally, the assertion of a waiver finds no support in the record. A waiver is the "intentional relinquishment or abandonment of a known right, and the act of waiver may be evidenced by express

[3] The grievance here stands in contrast with the more broadly worded grievance at issue in *Howard Ctrv. AFSCME Local 1674*, no. 20-CV-823, which the court decides contemporaneously with the present dispute. There, the breadth of the issue the parties presented in the grievance process afforded the arbitrator far broader scope than the parties' framing of the issue allows here.

words as well as by conduct." *Lynda Lee Fashions, Inc. v. Sharp Offset Printing, Inc.*, 134 Vt. 167, 170 (1976); *see also Anderson v. Coop. Ins. Companies*, 2006 VT 1, ¶ 10, 179 Vt. 288 ("A waiver is a voluntary relinquishment of a known right, and can be express or implied.") (citation omitted). Viewed in totality, the transcript designations and other materials the parties submitted demonstrate no such intention by Howard Center to waive its right to object to the notice issue. Notably, and by way of example only, after Respondents' counsel described text messages she was offering as evidence as going to "the lack of notice" that disciplinary action would result from not submitting cert notes by a certain date, Howard Center's counsel objected on the basis that this proffer didn't "come remotely close to the reasons proffered in terms of the grievances which . . . are parroted on all three forms." Tr. at 63:11–16, 65:1–8. There was no waiver, neither express nor implied. *See Anderson*, 2006 VT 1, ¶ 11 (urging caution in assessing implied waiver theory, which requires "some act or conduct . . . that was unequivocal in character"). Here, viewed most favorably to Respondents, the conduct they have shown is at best equivocal. This is insufficient to demonstrate a waiver. Thus, the conclusion is inescapable that the arbitrator exceeded his authority by reaching out to decide an issue that had not been framed by the grievance procedure.

The sole question that remains is of remedy. Howard Center suggests that the arbitrator's own findings require not merely that the court vacate and remand, but instead reverse his award. This suggestion goes too far, for two reasons. First, because the arbitrator decided the case based on his own recasting of the just cause challenge, he did not even reach the progressive discipline question. This alone warrants a remand.

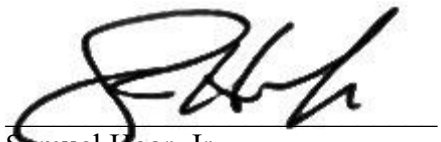
Second, contrary to Howard Center's suggestion, the arbitrator's findings do not compel reversal on the just cause question. Relying on two similar provisions in the CBA (Ex. A), §§ 6.4 ("An arbitrator ruling on a grievance shall be empowered to determine whether there was just cause but shall not be empowered to alter the level of discipline imposed.") and 7.2(e) ("The arbitrator may only uphold or deny the grievance. The arbitrator may not alter the level of discipline."), Howard Center argued in its post-hearing arbitration brief that if it "had just cause to discipline Denton to some degree, the severity of that discipline is beyond review in this arbitration." Ex. I at 23. This is a misreading of those provisions, however. The provisions limit only the arbitrator's ability to alter the discipline imposed and impose different discipline; they do not prohibit the arbitrator from reviewing the severity of the discipline imposed and subsequently upholding or denying the grievance. *See* Merriam-Webster Dictionary (online) (defining "alter" as "to make different without changing into something else"). As Respondents correctly points out in their post-arbitration brief, an arbitrator must analyze both the

offense and the specific discipline imposed when deciding just cause. *See* Ex. J at 16. Thus, severity remains an appropriate consideration in the just cause analysis. *See In re Grievance of Brown*, 2004 VT 109, ¶ 12. Otherwise, under Howard Center's construction of the CBA—and to borrow Respondents' hypothetical—an arbitrator would be powerless to remedy an employee's termination for showing up five minutes late despite no prior disciplinary record. That would be a preposterous result. The obvious solution there would be to sustain the grievance by removing the discipline altogether, and the employer—if it so desired—could start from scratch by imposing a lesser level of discipline.

ORDER

Here, quite clearly, the parties submitted the question of severity to the arbitrator. Equally clearly, because he went off on a tack of his own, he did not reach it. The remedy, therefore, is not to reverse but to vacate and remand on the just cause/severity question. *See* 12 V.S.A. § 5677(d) ("If the court vacates the award because the arbitrators exceeded their powers . . . , the court may order a rehearing . . . ."). On remand, of course, the arbitrator may also decide the progressive discipline question, which he also did not reach. Whether decision on either of these issues requires the arbitrator to take further evidence is beyond this court's purview; instead that remains a matter for the arbitrator to determine, in his sole judgment and discretion.

Electronically signed pursuant to V.R.E.F. 9(d): 9/9/2021 8:54 AM



Samuel Hoar, Jr.
Superior Court Judge