

IN RE: PETITION FOR DECLARATORY
RULING

BEFORE THE
MARYLAND
STATE BOARD
OF EDUCATION

Opinion No. 12-28

OPINION

INTRODUCTION

The Howard County Board of Education (local board) filed a Petition for Declaratory Ruling asking this Board to re-affirm its jurisdiction to interpret the true intent and meaning of § 6-201(c) as set forth in 2005 in *Harford County Board of Education v. Harford County Educational Services Council* (HCESC), MSBOE, Op. No. 05-24. The Howard County Association Educational Support Personnel (union) filed a Motion to Dismiss for Lack of Jurisdiction. The local board responded.

FACTUAL BACKGROUND

This case arose in January, 2012 when Karen Alban, a school nurse in the Howard County Public School System, was terminated for violations of the school system's Health Services Procedure Manual and the Nurse Practitioner's Regulations. Instead of appealing her termination to the local superintendent pursuant to Md. Educ. Code Ann. §4-205, Ms. Alban filed a grievance.

She alleged that her termination violated Article 4.1 of the collective bargaining agreement (CBA) between the County Board and the Howard County Education Association – Educational Support Professionals (or union). Article 4.1 states, in pertinent part, that “[n]o employee will be discharged without cause.” The superintendent denied the grievance on the grounds that termination of a non-certificated employee is an illegal subject of bargaining and thus not subject to the grievance-arbitration process.

Following the denial, the union filed a demand for arbitration on behalf of Ms. Alban. The CBA provides that:

Step III – Submitted to Arbitration – In the event that the employee and the Association are not satisfied with the decision at Step II, the grievance may be submitted to arbitration under the Voluntary Labor Arbitration Rules of the American Arbitration Association

within 40 calendar days from the date the decision at Step II was forwarded via certified mail. Grievances filed by the Association are not subject to binding arbitration. The arbitrator's decision shall be final and binding on all the parties.

See Motion, Exhibit A, Article 2.2, subsection C.3.

Prior to the arbitration, then scheduled for June 7, 2012, the local board filed a Motion for a Preliminary and Permanent Injunction with the Circuit Court for Howard County. Relying on the State Board's interpretation of §6-201 (c), as set forth in *Harford County Board of Education v. Harford County Educational Services Council*, MSBOE Op. No. 05-24 (July 20, 2005), the local board argued that the ultimate decision on the discharge of a non-certificated employee was the Superintendent's, and, therefore, the dispute was subject to appeal under §4-205(c), but could not be the subject of binding arbitration. The union opposed the injunction motion.

Following a hearing on May 31, 2012, the Circuit Court granted a stay of the scheduled arbitration to permit one or both of the parties to file for a statutory interpretation with the State Board and/or Public School Labor Relations Board (PSLRB) before expiration of the stay on June 12, 2012.

On June 7, 2012, the local board filed this Petition for Declaratory Ruling asking the State Board to declare the true intent and meaning of §6-201 of the Education Article, which it asserts, precludes the arbitrability of Ms. Alban's termination. On June 20, 2012, the union filed a Request to Resolve a Dispute As To Negotiability asking the Public School Labor Relations Board to rule on the arbitrability of Ms. Alban's discharge.

On July 16, 2012, the Public School Labor Relations Board ruled that discipline and discharge is a mandatory subject of bargaining and that the grievance involved here is "subject to arbitration."

STANDARD OF REVIEW

When the State Board explains the true intent and meaning of State education law and State Board rules and regulations, we exercise our independent judgment on the law's meaning and effect. COMAR 13A.01.05.05(E)

LEGAL ANALYSIS

This case is about the intersection of education laws under the jurisdiction of the State Board and collective bargaining laws under the jurisdiction of the Public School Labor Relations Board.

The PSLRB has jurisdiction to decide "matters covered under Subtitles 4 and 5" of Title 6 of the Education Article. Md. Educ. Code Ann. §6-807(a). Among other things, those

subtitles govern negotiations between the public school employer and its employees. Subtitle 5 applies to non-certificated employees; Subtitle 4 applies to certificated employees.

The State Board has jurisdiction to interpret the true intent and meaning of all other sections of the Education Code. Md. Educ. Code Ann. §2-205. The section that the local board asks us to interpret is §6-201 which states in pertinent part:

(c) *Appointment of clerical and nonprofessional* – (1) Except in Worcester County and Baltimore City, the county superintendent shall appoint clerical and other nonprofessional personnel.

The local board finds relevant to the interpretation a decision the State Board issued in 2005. In that case, *Harford County Board of Education v. HCESC*, the union petitioned the State Board to direct the school system to enter into negotiations about the terms for discharging non-certificated employees.¹ The State Board decided that this was a non-negotiable matter. First, the Board interpreted §6-201 to mean that the power to appoint in §6-201 includes the power to remove. Because that power is statutorily vested with the Superintendent, the Board concluded that hiring and firing was a non-delegable duty. Thus, the terms governing the firing of a non-certificated employee could not be subject to negotiation.

Second, the Board interpreted §6-510(c)(3) which states that any matter “precluded from negotiation by applicable statutory law” is an illegal topic of bargaining. The Board concluded that:

Given that the power to remove is incident to the power to appoint, we find that negotiation of the causes for the imposition of discipline or for discharge of noncertificated employees is precluded by applicable statutory law, §6-201(c) of Education Article.

Id. at 7.

Third, the Board interpreted §6-510(c)(2) which, at that time, identified “due process for discipline and discharge” as a permissive topic of bargaining. The Board defined “due process” to mean only the procedural aspects of due process, not the substantive causes for discipline or discharge. The Board said:

Therefore, under §6-510(b)(2), the phrase “including due process for discipline and discharge” refers to the process of review that applies to the discipline or discharge of an employee such as how much advance notice must be given and whether the employee is entitled to a conference or to a full evidentiary hearing prior to imposition of the sanction. These procedures are permissive

¹ The terms for discharging certificated employees are set forth specifically in statute as is the process to appeal the discharge. See Md. Educ. Code Ann. §6-202. There is no parallel statute for non-certificated employees.

subjects of negotiations; however, grounds for discipline or discharge are an illegal subject of bargaining precluded by §6-201(c) of the Education Article.

Harford County Board of Education v. Harford County Educational Services Council, MSBOE Op. No. 05-24 at 8.

In the case before us now, the union asserts that times and the statute at issue have changed. They refer to changes made to §6-510 in 2009. Specifically, “discipline and discharge for just cause” became a mandatory topic for bargaining for non-certificated employees. Md. Educ. Code Ann. §6-510(c)(1).

In addition, in 2009-2010, the legislature created the PSLRB and specifically defined its authority to decide whether a “proposed topic for negotiation is a mandatory, a permissive, or an illegal topic of bargaining” *Id.* §6-510(c)(5). To resolve these matters, the PSLRB is directed to “develop a balancing test to determine whether the impact of the matter on the school system as a whole outweighs the direct impact on the employees.” *Id.* The PSLRB may consider a prior decision of the State Board as precedent in the matter, but the decision is not binding on the PSLRB. *Id.* §6-801(d).

Those changes to the statute limit this Board’s jurisdiction over collective bargaining matters. We agree with the local board that we retain jurisdiction to explain the true intent and meaning of all other sections of the Education Article.

As we have explained herein, in the decision in the Harford County case, the State Board interpreted the true intent and meaning of §6-201 to preclude negotiations over the terms of discharge of non-certificated employees. It did so because it concluded that the decision to hire or fire was not a delegable decision. It was vested solely with the superintendent. That decision goes to the heart of the matter before us. In essence the local board is asking whether the decision to fire can be “delegated” to an arbiter’s final, binding review and decision.

The CBA governing this case contains the just cause for termination clause. It also contains a grievance procedure clause.

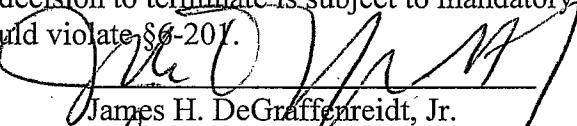
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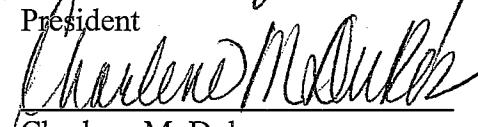
That clause essentially states that the binding arbitration is not mandatory under the CBA, but rather it is voluntary. If the Superintendent and union agree to send the grievance to arbitration,

however, the arbitrator's decision is a binding on the parties. Because the Superintendent's decision to subject a grievance to arbitration is voluntary, the arbitration becomes part of his non-delegable decision-making process. In that way, the non-delegable duty of the Superintendent is recognized as well as the statutory requirement that discipline and discharge are mandatory topics of bargaining.

CONCLUSION

Thus, we declare that the true intent and meaning of §6-201 is that the power to hire and fire is non-delegable. If the superintendent's decision to terminate is subject to mandatory binding arbitration, it is our view that that would violate §6-201.

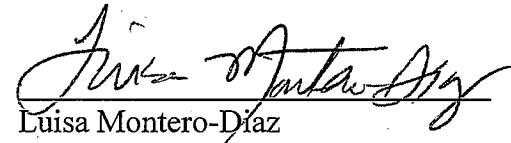

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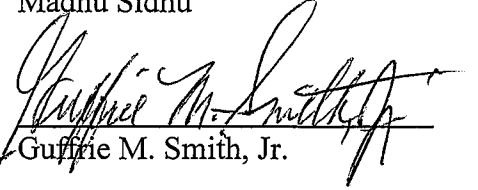
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July 24, 2012