

HARFORD COUNTY BOARD OF
EDUCATION

Appellant

v.

HARFORD COUNTY EDUCATIONAL
SERVICES COUNCIL,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 08-35

OPINION

INTRODUCTION

The Harford County Board of Education (local board) has filed a Petition for Declaratory Ruling presenting a question about the proper subject for collective bargaining. Harford County Educational Services Council (HCESC) has filed a Motion to Dismiss the Petition based on a failure to exhaust the statutorily prescribed impasse procedures. The local board has filed an Opposition to the Motion.

FACTUAL BACKGROUND

Harford County Educational Services Council is the exclusive bargaining representative of certain non-certificated employees of the local board, including school nurses.

HCESC and the local board have engaged in collective bargaining pursuant to §6-510 of the Education Article for over 20 years. The Negotiated Agreement between HCESC and the local board, covering the period from July 1, 2006 to June 30, 2009, provides for negotiations during FY08 and FY09 on the subjects of salary and insurance as set forth in Article 1.4 of the Agreement. (Agreement at 5).

As part of collective bargaining over salaries, HCESC submitted the following proposal on or about December 11, 2006:

All nurses shall receive credit on the salary schedule for all similar work experience prior to employment with HCPS. Each year of similar work experience shall equal one step on the salary schedule, up to a maximum of four (4) years.

* For nurses, this shall be applied to current employees who have not received prior credit.

(Proposal, 12/11/06).

The local board interpreted the proposal as dictating where the local board would place a new employee on the bargained salary schedule and as shifting incumbent nurses to a higher placement on the existing salary schedule. The local board took the position that the proposal pertained to illegal topics of collective bargaining. (Fradel Letter, 1/12/07).

The local board's chief negotiator, Jeffrey M. Fradel, clarified the local board's position to HCESC. With regard to new hires, he explained that negotiation was inappropriate because initial salary determination is made at the time of the job offer, when the individual is not yet a school system employee, and is therefore not represented by the bargaining unit. He further explained that §6-201(f) of the Education Article invests the local board with the sole authority to determine proper salary placement for each new employee. He also stated that the proposal was illegal because "its essence is not that of wages or salary structure, but rather classification." (*Id.* at 1-2). With regard to incumbent nurses, Mr. Fradel stated that the proposal was a matter of classification because it relates to shifting incumbent nurses to a higher placement on the existing salary schedule. (*Id.* at 2).

HCESC maintained that the proposal addressed the current salary impact of having prior similar experience and was, therefore, a mandatory subject of collective bargaining. (Anderson Letter, 2/2/07). Ultimately, HCESC withdrew its proposal. (HCESC Reply at 2).

The dispute reemerged in bargaining for fiscal year 2009. HCESC submitted its proposed opener for the FY09 negotiations on or about February 5, 2008. The opener, which is nearly identical to the December 11, 2006 proposal, proposed the following:

All nurses and team nurses shall receive credit on the salary schedule for all similar work experience prior to employment with HCPS. One year of similar work experience shall equal one step in the salary schedule, up to a maximum of four(4) years.
*For nurses, this shall be applied to current employees who have not received prior credit.

(HCESC Proposal). As with the earlier proposal, the local board maintains that it pertains to illegal subjects of collective bargaining, while HCESC maintains that it pertains to mandatory topics of bargaining.

The local board filed this Petition for Declaratory Ruling asking that the State Board do the following:

- Enter a decision declaring that the demand to recalculate the manner in which incumbent nurses are compensated

using credit for pre-HCPS years of employment is not a mandatory subject of negotiations;

- Enter a decision declaring that the local board is not obligated to engage in collective bargaining over the manner in which the superintendent determines starting rates for newly hired school nurses;
- Enter a decision declaring that neither subject may be raised in any action taken to resolve an impasse under §6-510(d) of the Education Article; and
- Issue such other and further declarations or directives that the State Board deems necessary and appropriate for a resolution of this dispute.

STANDARD OF REVIEW

In a case in which the State Board is asked to declare the intent and meaning of an education law, the State Board exercises its independent judgment on the record before it in the explanation and interpretation of the public school laws and State Board regulations. COMAR 13A.01.05.05(D).

LEGAL BACKGROUND

In this case, the local board asks for a decision on whether the topic concerning nurses receiving credit on the salary scale for similar work history is a mandatory or illegal topic of bargaining. HCESC, however, has asserted that, until the parties proceed through the impasse process, local school board cannot invoke this Board's power to issue a declaratory ruling on that question. In essence, the Union has asserted that the local board must first exhaust the statutory impasse remedy before seeking relief from this Board. The statutory scheme governing collective bargaining is described below.

The General Assembly enacted a comprehensive statutory scheme providing for collective bargaining between public school employees and local boards of education.¹ See Title 6, subtitles 4 and 5 of the Education Article. Under §6-510(b), a public school employer must

¹Subtitle 5, which provides the scheme for non-certificated employees, is the subtitle applicable to this case. Nonetheless, the analysis in this memorandum also applies to Subtitle 4, which provides the scheme for certificated employees, because Subtitle 4 contains identical provisions to the provisions from Subtitle 5 that are cited herein.

meet and negotiate in good faith with representatives of the employee organization that has been designated as the exclusive negotiating agent for public school employees on "all matters that relate to salaries, wages and other working conditions." These are mandatory subjects of collective bargaining. A public school employer may not negotiate the school calendar, the maximum number of students assigned to a class, or any other matter that is precluded by applicable statutory law. §6-510(b)(3). These are illegal subjects of collective bargaining.

In its 2002 session, the General Assembly amended Title 6, Subtitles 4 & 5 of the Education Article by recognizing other topics as legitimate subjects of collective bargaining. The statute states that the parties may negotiate other mutually agreed to matters, including due process for discipline and discharge. §6-408(b)(2) & §6-510(b)(2). With this change, a new category of collective bargaining subjects emerged - - permissive topics.

The statutory scheme also includes a process for the resolution of labor disputes that arise during the collective bargaining process. Section 6-510(d) sets forth the specific administrative procedure for dealing with an impasse.² It states that either party in collective bargaining can request the State Superintendent to declare an impasse. After she does so, a panel of three individuals is chosen, and the panel meets with the parties to resolve the impasse. If the panel cannot resolve the impasse, it issues a report to the parties within 30 days. Md. Educ. Code Ann. § 6-510(d). The statute reserves to the public school employer the right to make a final determination on the matter. §6-510(d)(7). That determination is subject to appeal to this Board.

With regard to the impasse procedure, when the General Assembly amended the statute in 2002 to add permissive topics, it made clear that if the parties did not agree that topic was "permissive," that topic could not be taken to impasse for resolution. Thus, if a topic is neither mandatory nor illegal, but falls within the permissive category, the matter cannot be raised in an action to resolve an impasse under §6-510(d) if the parties have not mutually agreed to negotiate on the topic.

ANALYSIS

HCESC's Position

HCESC has filed a Motion to Dismiss the Petition for Declaratory Ruling based on the local board's failure to exhaust the impasse procedure under §6-510(d) of the Education Article. HCESC maintains that only after impasse has been declared by the State Superintendent and the impasse procedures have been completed, is it appropriate for a party to request a declaratory

²Section 6-510(d) is identical to 6-408(d) in all respects, except that it applies to negotiations between an employer and an organization of certificated employees.

ruling on whether the topic at issue is a mandatory, permissive, or illegal topic for collective bargaining.

HCESC relies on the State Board's ruling in *Talbot County Education Association, Inc. v. Talbot County Bd. of Educ.*, 4 Ops. MSBE 398 (1986). The Union argued in *Talbot* that the Court of Appeals' decision in *Board of Educ. v. Hubbard*, 305 Md. 774 (1986), required the State Board to decide what matters may or must be negotiated under Maryland law prior to initiation of the impasse procedures. In rejecting this contention, the State Board explained:

We agree with TCEA (the Union) that *Hubbard* requires this Board's initial determination on 'what matters may or must be negotiated under Maryland law' prior to judicial intervention. This determination would also include 'the duty to determine what constitutes conferring in good faith' pursuant to § 6-408(a)(1)(i) of the Education Article. However, this duty does not arise in the context of collective bargaining until after the mandatory impasse procedures have been exhausted. At that point, if TCEA is still dissatisfied with the county board's position, it may appeal to this Board.

Finally, it would be more expedient for the impasse procedure to be followed in view of the time restraints imposed by the budgetary process in Talbot County. It is very possible that the parties may resolve their differences once the impasse panel has been able to work with them. The law requires that if the matter is not resolved, the panel must make its recommendation within thirty (30) days.

Therefore, we conclude that when parties have reached a deadlock or impasse in negotiations, the statutory plan for resolution of their dispute set forth in § 6-408(d) must be followed. . . .(Citations omitted).

4 Op. MSBE at 406.

The State Board's holding in *Talbot* was grounded in canons of statutory construction. Those principles require that "where a statute authorizes or permits a person or agency to take a certain type of action in a particular manner, such manner becomes a mandatory limitation, and the action must be taken in conformity with it." *Talbot County Education Association, Inc. v. Talbot County Bd. of Educ.*, 4 Ops. MSBE at 403, citing *Office and Professional Employees Intern'l. Union, Local 2 (AFL-CIO) v. Mass Transit Administration*, 295 Md. 88, 96 (1982); *Trust Co. v. Ward Bakery Corp.*, 177 Md. 212, 220 (1939). The State Board found that, because the collective bargaining statute specifies the process to be followed for resolution of collective

bargaining disputes, that was the process must be exhausted before seeking relief from the State Board.

The State Board noted in *Talbot* that there were educational policy considerations for requiring the parties to invoke the impasse procedures for the resolution of disagreements. The Board stated, for example, that valuable information can be provided on the scope of bargaining and issues which can and cannot be topics of negotiation, that the process encourages the parties to formulate their own collective bargaining agreement, that it may help create a more cooperative atmosphere, and that it may produce alternatives that were not previously addressed by the parties. 4 Ops. MSBE 404-405.

HCESC also relies on *City Union of Baltimore and American Federation of State, County and Municipal Employees Council 67 and Local 44 v. Baltimore City Bd. of School Commissioners*, MSBE Opinion No. 04-29. In *City Union*, the unions filed a case with the State Board charging unfair labor practices against the local board during negotiations. Relying on the statutory scheme that sets forth the impasse procedures and on its holding in *Talbot*, the State Board found that the unions had failed to exhaust the statutory impasse procedure, and that “the action before the State Board . . . [was] a means to bypass the already established procedures enacted by the General Assembly.” MSBE Opinion 04-29 at 7. The State Board dismissed the appeal for failure to exhaust the impasse procedures.

Local Board's Position

The local board here maintains that the State Board's resolution of the negotiability of the topic is required prior to the declaration of impasse. The local board argues that the 2002 change in the collective bargaining law, recognizing permissive topics of collective bargaining, supercedes the State Board's 1996 holding in *Talbot*. The local board explains that §6-510(b)(2) prohibits the initiation of impasse procedures for topics that the parties have not “mutually agreed” are permissive topics. That is a correct reading of the law. It is only when both parties reach such agreement that a topic becomes a permissive topic for bargaining.

We point out, however, that the local board has asserted that the topic at issue is an illegal topic. They have not argued that the topic is or is not a permissive one. Indeed, they could not make that argument because there never has been “mutual agreement” between the parties that the topic is a permissive one.

Decision

In our view, in order for the parties to engage in collective bargaining, there must be an understanding of what is and is not a negotiable topic for bargaining. Because it is sometimes not clear whether a topic is mandatory or permissive (and thus subject to bargaining), or illegal (and not subject to bargaining), the parties must first grapple with those issues at the bargaining table. If they cannot resolve whether the topic is one subject to bargaining, the question remains

- - must they first take that topic through impasse procedures before seeking a declaratory ruling on the issue from this Board. As to this question, the law provides a clear answer only as to topics that might be permissive topics - - the statute says that such topics cannot go to impasse for resolution unless parties have mutually agreed (before needing impasse) that the topic was a permissive topic. We point out, if the parties have agreed that a topic is permissive, nothing in the law prevents that topic from going through impasse procedures for resolution.

As to mandatory or illegal topics, the statutory law is silent about impasse. But, the State Board has ruled on the issue in *Talbot*. As set forth previously, the *Talbot* case requires scope of bargaining issues to proceed through the impasse process prior to coming to the State board.

Because the local board has argued that the State Board has not followed the *Talbot* case, we reviewed State Board decisions over the past five years to see how the State Board has handled the exhaustion/impasse issue on scope of bargaining issues arising during the collective bargaining process - - whether the Board has resolved the negotiability dispute or has required the parties to first proceed to impasse. Although the State Board has decided several scope of bargaining cases since the 2002 change in the collective bargaining law, none of those cases addressed the impasse/exhaustion issue because they were not in the same procedural posture as this case.

In *Kent County Bd. of Educ. v. Kent County Teachers' Ass'n*, MSBE Opinion No. 05-12 (2005), the issue between the parties arose out of the superintendent's decision to redesignate special education teachers as case managers for which extra-duty pay was not available. The union filed a grievance under the provisions of the collective bargaining agreement. The local board filed a petition for declaratory ruling asking the State Board to find that the dispute concerned an illegal subject of collective bargaining, and was therefore not subject to the grievance procedures.

In *Harford County Bd. of Educ. v. Harford County Educ. Serv. Council*, MSBE Opinion No. 05-24 (2005), the issue between the parties arose during negotiations over the collective bargaining agreement. The union filed a grievance claiming that the local board had violated a provision of the collective bargaining agreement by declining to negotiate on the union's proposed opener seeking a "just cause" provision for employee discipline and discharge. The local board filed a petition for declaratory ruling with the State Board seeking a declaration regarding the negotiability of the "just cause" language in order to determine whether the grievance process should proceed.

In *Allegany County Teachers Ass'n v. Allegany County Bd. of Educ.*, MSBE Opinion No. 05-27 (2005), the issue between the parties arose when two teachers filed grievances alleging that the local board violated a provision of the collective bargaining agreement when it denied their requests to be transferred. The Circuit Court for Allegany County stayed arbitration, the final stage of the grievance process, until the matter of negotiability was decided by the State Board.

The union thereafter filed a request that the State Board rule that the provision at issue was a legal topic of collective bargaining, and thus subject to arbitration.

In *Calvert County Bd. of Educ. v. Calvert Educ. Ass'n and Calvert Ass'n of Educ. Support Staff*, MSBE Opinion No. 07-05, the issue between the parties arose out of the superintendent's request that the local board transfer money from the health insurance fixed charges category of the budget to categories running a deficit. The unions filed a grievance under the terms of the collective bargaining agreement alleging that the superintendent's action was a violation of the agreement's Rate Stabilization Reserve Fund provision. The local board filed a petition for declaratory ruling asking the State Board to rule on the negotiability of the provision to determine whether the grievance process should proceed.

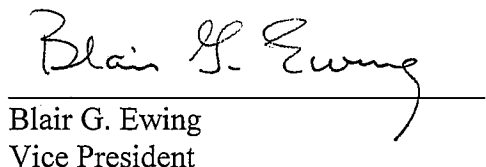
These cases, and others like them, came before the State Board through the grievance or arbitration process provided for under the collective bargaining agreement between the parties. They are procedurally different from this case.

Therefore, finding no State Board cases to overrule it, we conclude that the State Board's holding in *Talbot* requiring parties to exhaust the statutory impasse procedures for scope of bargaining issues remains good law. We agree with the reasoning of the State Board in that case. Because the Legislature provided a process to resolve impasses that arise during collective bargaining, that process cannot be sidestepped by coming directly to this Board. As the State Board said in *Talbot*, "[v]aluable information can be provided . . . on the scope of bargaining and issues which can and cannot be topics of negotiation," . . . "the process encourages the parties to formulate their own collective bargaining agreement," . . . "it may help create a more cooperative atmosphere," and . . . "it may produce alternatives that were not previously addressed by the parties." 4 Ops. MSBE 404-405.

CONCLUSION

For all of these reasons, we grant HCESC's Motion to Dismiss the Request for Declaratory Ruling.


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