

BOARD OF EDUCATION OF HOWARD COUNTY,

Appellant

v.

HOWARD COUNTY EDUCATION  
ASSOCIATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

Opinion No. 09-08

### OPINION

#### INTRODUCTION

The Board of Education of Howard County (local board) has filed a Petition for Declaratory Ruling on whether a particular topic is an illegal topic for collective bargaining. The Howard County Education Association (HCEA) has filed a Verified Answer in response to the Motion.

#### FACTUAL BACKGROUND

This case began when Kenneth Hovet, a certificated teacher and coach of the varsity football team, allegedly required two junior varsity football players to do "up downs" for 40 minutes as punishment for misbehaving in his class earlier that day. About a month later, Hovet received a letter of reprimand from the high school principal for using physical exercise as punishment in violation of the school system's rules and regulations. (*See* Petition, Attachments 1 & 2).

Mr. Hovet did not agree with the reprimand. He filed a grievance asserting that the reprimand letter contained "inaccurate, misleading and unsubstantiated information." (Motion, Attachment 3). He also asserted that the reprimand was issued in violation of Article 5, Section M of the Collective Bargaining Agreement (CBA) which states "No teacher will be disciplined or reprimanded without cause." Petition, Ex. 4.

The principal, as well as the superintendent's designee, each denied the grievance. (Denials not in the record). Thereafter, HCEA filed a Demand for Arbitration alleging that the reprimand was issued "without cause." The local board then filed this Motion for Declaratory Ruling.

#### STANDARD OF REVIEW

This case presents a question of law. The State Board shall exercise its independent judgment on the record before it in the explanation and interpretation of the public school laws. COMAR 13A.01.05.05 E.

## LEGAL ANALYSIS

Under the collective bargaining laws that govern public school employment, there are three types of topics. There are mandatory topics (salary, wages, hours and working conditions) and permissive topics over which the parties mutually agree to bargain. Those topics are legal topics of bargaining. There are illegal topics - - class size, school calendar, and "any matter precluded by applicable statutory law." Md. Educ. Code Ann. § 6-408(b).

The question before this Board is whether the Article 5(M) of the CBA ("No teacher will be disciplined or reprimanded without cause") concerns a legal or illegal topic of bargaining. If it concerns an illegal topic, the discipline matter here is not arbitrable.

The local board argues that Article 5(M) concerns an illegal topic because it is a topic that is "precluded by applicable statutory law" and is thus illegal under Md. Educ. Code Ann. 6-408 (b)(3). HCEA argues that, because there are no statutes applicable to teacher reprimands, the topic is either mandatory or permissive and, thus, a legal topic for bargaining. We address each argument.

The local board points to several statutes that it asserts are applicable to preclude negotiation over teacher discipline or reprimand. First, the local board argues that § 7-306 of the Education Article, which prohibits corporal punishment in Maryland public schools, is such a statute. The counsel to local board asserted in oral argument that when all is said and done this case is about whether the punishment Mr. Hovet meted out was corporal punishment. Counsel argued that the statute gives the local board sole authority to decide such a matter. That argument, if taken to its logical conclusion, requires the arbitrability of every discipline case to depend on the substance of the particular offense and whether there is a particular statute addressing it. We do not believe that that is the intent of the collective bargaining law. The topic of bargaining at issue here is not corporal punishment, it is teacher discipline. The corporal punishment statute is not an "applicable statutory law."

Next, the local board argues that Section 6-202 of the Education Article prohibits negotiation on the topic of teacher discipline. That statute sets forth the specific grounds and procedures for "suspension or dismissal" of a certificated employee. Section 6-202 is indeed a specific statute about teacher discipline, but it is limited to suspension or dismissal. In our view, that statute takes the topic of teacher suspensions or dismissals off the negotiating table (and out of the grievance/arbitration process) as an illegal topic. But this is not a case about suspension or dismissal.

HCEA recognizes that § 6-202 would preclude negotiation over suspension and dismissal matters, but they assert that there is no similar statute that governs the imposition of disciplinary action in the form of a verbal warning, written warning, or reprimand. (Verified Answer at 4 and 8.) HCEA asserts that in the 35 years in which Article 5(M) has been in the Collective Bargaining Agreement it "has never been interpreted . . . to apply to suspensions and dismissals. . . ." *Id.* at 9. If the Article 5(M) were interpreted to apply only to lower forms of discipline, we agree with HCEA that there is no statute that specifically addresses the grounds and procedures for issuing reprimands or warnings.

The local board argues that the term “discipline” in Article 5(M) should be read broadly to include suspensions and dismissals as well as reprimands and warnings. Therefore, the local board reasons, “[a]t minimum, Article 5(M) intrudes into areas committed by statute to the county board . . . , Article 5(M) is . . . , therefore, *ultra vires* . . . .” (Petition Memorandum at 7).

In light of basic contract law principles, we do not agree that the term “discipline” must be read so broadly. Basic contract law principles establish that, when a contract can be interpreted in at least two ways, if one would result in a valid contract and the other would cause the agreement to be void or illegal, the former interpretation is preferred. *See generally*, 5 Corbin on Contracts § 24.22 (1998); *see also Walsh v. Schlecht*, 429 U.S. 401, 408 (1977) (when a CBA can be interpreted in a way that does not violate the law, the interpretation should prevail over one that would violate the law); *see also Garfinkel v. Schwartzman*, 253 Md. 710, 720 (1969).

It is our view that the term “discipline” in Article 5(M) of the CBA can be interpreted narrowly to exclude the grounds and procedures for suspension and dismissal because including them would make Article 5(M) void and illegal. Moreover, it is our view that Article 5(M) can and should be interpreted to cover oral and written warnings and reprimands only. When article 5(M) is interpreted in that way, we must conclude the § 6-202 is not an “applicable statute” that would preclude negotiation or arbitration of this discipline issue.

We have concluded that two of the statutes cited by the local board, § 7-303 (student discipline) and § 6-202 (teacher suspension and dismissal), are not “applicable statutes.” HCEA argues, therefore, that the local board’s failure to identify an “applicable statute” requires a determination that the topic at issue is a legal subject of bargaining and thus a matter for negotiation and arbitration. It is their view that only a statute specifically addressing the topic of reprimands or warnings can be an “applicable statute.”

The local board, however, also invokes the statutes that grant it authority over the educational policy matters of the county school system. Md. Ed. Code Ann. §§ 4-108; 4-101. Section 4-101(a) states, “Educational matters that affect the counties shall be under the control of a county board of education in each county.” Section 4-108(3) states, “Each county board shall, subject to [the Education Article] and applicable bylaws, rules, and regulations of the State Board, determine . . . the educational policies of the county school systems.” Those statutes take us to the heart of this case which is the HCEA position that “educational policy” matters can no longer be deemed an illegal topic of bargaining. (Verified Answer at 5-7).

In order to understand that position, we need to go back to 2002. Prior to October 1, 2002, the collective bargaining statute defined only mandatory topics for negotiation. They were (and remain today) salaries, wages, hours and other working conditions. The State Board consistently used a two-step test to determine whether a topic was mandatory and thus a legal topic or not mandatory and thus an illegal topic of negotiations:

First, the Board looked to see whether a statute precluded negotiation on the subject by delegating that authority to the local board; if yes, the subject was an illegal topic of bargaining and fell within the scope of unilateral decision-making by the local board and local superintendent.

If there was no statute that specifically addressed the topic at issue, the State Board looked at whether the topic was more like salary, wages, hours, working conditions or whether it was a topic reserved to the local board under the category of "educational policy." The State Board applied a balancing test weighing the interests of the employee in the matter against the interests of the school system as a whole. If the employees' interests outweighed the interests of the school system as a whole, the matter was within the mandatory topics. If the school system's interests predominated, the issue was a non-negotiable matter of educational policy within the full control of the local board.

Using that approach, the State Board declared many topics to be illegal topics because they fell within the purview of educational policy matters. That approach was affirmed by the Maryland Court of Appeals in 1987 in *Montgomery County Educators' Association v. Montgomery County Board of Education*, 311 Md. 303 (1987). In affirming the test, the Court also held that in Maryland there was no statute granting local boards the authority to designate some topics that might be illegal educational policy topics as on "permissive" topics for negotiation. *Id.* at 313.

In its 2002 session, the General Assembly passed SB 233, amending the collective bargaining law by defining certain topics of bargaining as illegal and by recognizing that there could be permissive topics of collective bargaining. The entirety of § 6-408(b), the statute applicable to the issue in this appeal, is as follows:

(b) *Representatives to negotiate.* - (1) On request, a public school employer or at least two of its designated representatives shall meet and negotiate with at least two representatives of the employee organization that is designated as the exclusive negotiating agent for the public school employees in a unit of the county on all matters that relate to salaries, wages, hours, and other working conditions.

(2) Except as provided in paragraph (3) of this subsection, a public school employer or at least two of its designated representatives may negotiate with at least two representatives of the employee organization that is designated as the exclusive negotiating agent for the public school employees in a unit of the county on other matters that are mutually agreed to by the employer and the employee organization.

(3) A public school employer may not negotiate the school calendar, the maximum number of students assigned to a class, or any matter that is precluded by applicable statutory law.

(4) A matter that is not subject to negotiation under paragraph (2) of this subsection because it has not been mutually agreed to by the employer and the employee organization may not be raised in any action taken to resolve an impasse under subsection (d) of this section.

HCEA argues that the changes in the collective bargaining statute in 2002 (SB 233) made educational policy matters legal topics for bargaining. We, therefore, review Senate Bill 233 and the changes it made.

Senate Bill 233, Acts of 2002, Ch. 287<sup>1</sup>, did not amend the section of the existing law concerning mandatory topics of bargaining (salaries, wages, working conditions), but it did add two new sections. First, SB 233 added permissive topics establishing that the public school employer and the union may negotiate on “other matters,” if they “mutually agree” to do so. The statute does not define what those “other matters” might be. Md. Educ. Code Ann. § 6-408(b)(2). SB 233 also listed for the first time specific categories of illegal topics of bargaining -- class size, school calendar and “any matter that is precluded by applicable statutory law.” *Id.* at § 6-408(b)(3). Because “educational policy” is not on the list of illegal topics, HCEA asserts that educational policy matters are either a mandatory or a permissive topic and thus a legal topic for bargaining.

HCEA is adamant that educational policy issues are a legal topic of the bargaining because the general educational policy statutes do not fall within the definition of “applicable statutory law.” We do not believe that the statute is that clear.

It is the cardinal rule of statutory interpretation to ascertain and effectuate the intent of the Legislature. To do so, we must begin with the plain language of the statute. *See, e.g., Kushell v. Department of Natural Resources*, 385 Md. 563, 576-77 (2005). The words of § 6-408(b)(3) are plain - “a public school employer may not negotiate the school calendar, the maximum number of students assigned to a class or any matter that is precluded by applicable statutory law.” But the statute contains no definition of “applicable statutory law.” It is our view that that term could be interpreted narrowly, as HCEA advocates, to mean only statutes that address the specific topic at issue. Or the statute could be interpreted broadly to include those statutes that give local board’s sole authority over educational policy matters. The plain language of the statute does not elucidate which interpretation the Legislature intended.

HCEA asks that we review the legislative history of the statute, which they assert, will “confirm the fact that ‘educational policy’ is no longer an illegal subject of bargaining . . . .” (Verified Answer at 5-7).

To support that position, HCEA submitted an advice of counsel letter from Assistant Attorney General, Kathy Rowe, concerning SB 233. HCEA referred to that letter several times in oral argument as support for the HCEA position. We have reviewed that letter and considered its meaning. We note first that, when SB 233 was first proposed, §6-408 of the bill read that a local board “may not negotiate any matter that is precluded by applicable law.” (Legis. History, Ex. 2). Soon after the original bill was filed, Delegate Hixon requested that Counsel to the General Assembly clarify the term “applicable law.” Assistant Attorney General, Kathy Rowe, responded to Delegate Hixon on March 8, 2002. (Ex. 1 attached hereto). As she explained, “the term “law” ordinarily includes the rules of court decisions, as well as legislative acts.” Yet, she noted previous court decisions had held that there were no permissive topics under Maryland collective bargaining law, and the bill now recognized the validity of permissive topics. She

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<sup>1</sup> We have added SB 233 to the record in this case.

discussed the court cases affirming this Board's use of the balancing test to distinguish between topics encompassed in "working conditions" and those encompassed in "education policy." She pointed to two instances of tension between the case law and the new bill:

- The bill expressly makes discipline and discharge for just cause of noncertificated employees the subject of mandatory negotiation while the *Livers* case clearly stated that they are not mandatory topics.
- If case law were included in the definition of "applicable law," all the topics previously identified as illegal topics in the case law would remain illegal topics. Thus "inclusion of a particular topic would depend on whether it happened to have been litigated prior to the amendment of the law."

Those problems lead her to the conclusion that the term "applicable law" meant only statutory law.

HCEA argues that that letter clearly shows that the intent of SB 233 was to include as illegal topics only those topic for which a specific statute existed giving sole authority over the topic to the local board. As to the general statutes that give local board's the authority over educational policy matters, HCEA argues that the Rowe letter clearly eliminates the power of those statutes to preclude any educational policy topic from the negotiating table.

We do not believe the Rowe letter can or should be read so broadly to take all educational policy matters out of the control of local boards and place them on the negotiating table as either mandatory topics covered under the umbrella of "salary, wage, hours, and working conditions" or permissive topics. The letter does not purport to do so. It merely concludes that the prior rulings of the courts and the State Board were not intended to be incorporated into the statute thorough the term "applicable law."

HCEA also argued that the legislative history would show that only specific statutes could establish an illegal topic of bargaining. We have reviewed the legislative history in some detail.<sup>2</sup> The legislative history reveals that, when SB 233 was introduced, many groups expressed significant concern that the bill would deprive local boards of their authority over education policy matters.

**Group**

**Legislative History SB 233**

- |                                                 |                   |
|-------------------------------------------------|-------------------|
| • Maryland Association of Boards of Education - | Ex. 4, 35, 47, 53 |
| • St. Mary's County Public Schools -            | Ex. 9             |
| • Dorchester County Commissioners -             | Ex. 8, 10         |
| • Dorchester County Superintendent -            | Ex. 29            |

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<sup>2</sup> HCEA's brief did not contain any discussion about the actual legislative history of the bill. Nor did the HCEA make the Legislative History part of the record. We have obtained the Legislative History and reviewed the complete Legislative History file. We add it to the record in this case.

- Harford County Public Schools - Ex. 18
- Eastern Shore of Maryland Educational Consortium - Ex. 30
- Maryland Chamber of Commerce - Ex. 37
- Baltimore County Public Schools - Ex. 23
- Howard County Board of Education - Ex. 25
- Baltimore City Board of School Commissioners - Ex. 40
- Public School Superintendents of Maryland (PSSAM) - Ex. 41

Likewise, the written testimony of the various local teacher's union reflect a consistent position that creating the permissive topic category for bargaining would lift the "gag rule" that stifled full discussion at the bargaining table over issues such as education reform, professional development, safety, classroom management, school calendar, class size, planning time, high stakes tests, assessments, curriculum, text books, teacher charter schools, technology, shared leadership, peer review, mentoring, and best practices. Those views and suggested permissive topics are set forth in, *inter alia*:

Frederick County Teachers Assoc.	Ex. 5
Dorchester County Teachers Assoc.	Ex. 6
St. Mary's County Teachers Assoc.	Ex.10
Prince George's County Teachers Assoc.	Ex. 12
Carroll County Teachers Assoc.	Ex. 14
Wicomico County Teachers Assoc.	Ex. 19
AFT-MD	Ex. 20
BTU	Ex. 24
Charles County Teachers Assoc.	Ex. 31
Howard County Teachers Assoc.	Ex. 33
MSTA	Ex. 38

On March 14, 2002, Governor Glendenning, whose Administration sponsored SB 233, submitted a Position Statement to the Senate Finance Committee. On expanding the scope of collective bargaining by adding permissive topics, the Position Statement said:

Of the 34 states and District of Columbia that have collective bargaining laws for public school teachers, 31 permit agreements on "permissive" issues that are outside the mandatory scope of bargaining. Only Maryland, Hawaii and New Jersey do not allow permissive bargaining . . . In Maryland, the State Board of Education and local school boards operated under the assumption that permissive bargaining was legal from 1968 until 1987, when the State Court of Appeals ruled that there was no statutory basis for a permissive category. This legislation permits Maryland to rejoin the vast majority of states that allow, but do not require, bargaining agreements on issues beyond salaries, hours and other conditions of employment.

Legislative History, Ex. 32 at 3.

The Position Statement listed examples of matters that the Administration considered “permissive” topics for bargaining:

- mentoring for new teachers
- professional development and training
- peer assistance and review
- shared leadership
- instituting best practices in the classroom
- education reform and innovation, and
- quality of instruction

Legislative History, Ex. 32 at 2.

The Position Statement also addressed matters that the Administration explained may not be negotiated. It noted that the statute included, as an illegal topic for bargaining, any matter “precluded by applicable law.” It went on to explain:

Senate Bill 233 does not specifically exempt subjects from being negotiated, but instead, gives the State Board of Education broad discretion to determine what matters may not be negotiated because they are “precluded by applicable law.” Matters precluded by law fall into two categories: First, a specific statutory duty relating to an issue may preclude it from being negotiated. An example is teacher discipline and suspension where procedures are already spelled out in State law. *Second, a county school board has a general statutory duty to determine and control matters of educational policy. Some education matters are so intrinsic to this duty that they may not be superseded by a county's bargaining obligations.* Examples of this include the student calendar and student school day.

*Id.* (emphasis added).

The Position Statement reflects the “applicable law” language of the original bill. The original bill stated “a public school employer may not negotiate any matter that is precluded by applicable law.” (SB 233, Legis. History, Ex. 2). As explained above, the March 8, 2002 Rowe letter advised that, in interpreting the original bill, the word “law” should be read to mean statutory law. Thereafter, on March 21, 2002, the Senate adopted an amendment to the bill. The amended bill stated, “a public school employer may not negotiate the school calendar, the maximum number of students assigned to a class on any matter that is precluded by applicable *statutory* law.” (Legis. History, Ex. 45 & 46).

After that amendment, the Maryland Association of Boards of Education (MABE) attempted to amend the bill to state “any matter precluded by applicable statutory law or the State Board of Education.” *Id.* Ex. 47. MABE expressed its continuing concern that SB 233 meant that all educational policy matters were now legal topics of bargaining and all of the previous decisions of the State Board employing the balancing test to determine if a topic were a



mandatory “working condition” or an illegal “educational policy” matter would have no force and effect. MABE asserted that all those topics previously classified by the State Board as illegal would be relitigated.

The Maryland Negotiating Service (MNS), an organization of labor relations professionals representing the boards of education in Maryland, also proposed an amendment to the bill - - “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, reserved, or otherwise delegated by applicable statutory law.” This amendment they said would preserve the previous State Board of Education and Court rulings on the scope of negotiations that were based on specific delegation of responsibility in the law, but would not preserve the rulings based on the balancing test.” *Id.* at Ex. 48. The Public School Superintendents Association of Maryland (PSSAM) echoed the same concerns and issues. *Id.* at Ex. 49. Neither of the suggested amendments passed.

In oral argument, HCEA pointed to the failure of the amendments as proof that the legislative history supported their position that SB 233 eliminated all educational policy matters from the illegal category. In general, however, the failure of a bill or amendment is not evidence of the intent of the legislature. *See, e.g.*, 80 Op. Atty. Gen. 173 (1995). The reasons for the defeat of a particular bill or amendment are pure speculation. We could just as easily speculate that the amendment was not necessary because the legislature understood that some educational policy matters remained within the purview of the local board.

On April 3, 2002, the House Ways and Means Committee held a hearing on the companion bill to SB 233, HB 290. At that hearing, Kevin Hughes from the Governor’s Legislative Office testified, but his testimony is not in the record we received. His testimony is referred to in a letter to him from MABE and PSSAM. Those two organizations state in that letter that Kevin Hughes, as spokesman for the Governor, told the Ways and Means Committee that one of the intents of the bill was to continue to allow the State Board to determine that “other topics are precluded by the statutory authority of local boards to establish educational policy” pursuant to Education Article § 4-101. (Legis. History Ex. 53 p.2). That, indeed, was part of his initial testimony on March 14 before the Senate Finance Committee. (*Id.* Ex. 32).

In summary, we find in the legislative history three views: (1) the oft-repeated view of MABE, MNS, and PSSAM that creating permissive topics would eliminate the local boards control over educational policy matters; (2) the view of the teacher’s unions that the creating permissive topics would open up the possibility of discussion and collaboration on all educational policy issues; (3) the view of the Governor’s Office, the sponsor of the bill, that there remained some educational policy issues that “were so intrinsic” to the local board’s duty to determine “general statutory and control matters of educational policy,” that they could not be bargained over. (Legis. History, Ex. 22).

To us, the Administration sponsoring the bill was the voice of reason here. In our view, it made clear that the statute was not intended to place all educational policy matters in the permissive category. It recognized that some educational policy matters would be illegal topics of bargaining. It left it to the State Board to determine into which category a matter fell.

In short, it is our view that the term “applicable statutory law” should be interpreted as the Administration’s Position Statement recognizes - - to encompass §4 -101 and § 4-108 which establish the local boards’ authority to determine and control matters of educational policy.

We are cognizant, however, that local boards could interpret the term “educational policy” so broadly that it would engulf as illegal all the possible permissive topics for discussion in public education. That would not be an appropriate course. SB 233 carved out a place for permissive topics and it is up to the State Board to identify that place. It is our view, that some educational policy topics can be permissive, legal topics for bargaining, and some will be illegal topics for bargaining.

That conclusion leads directly to HCEA’s final argument that the balancing test that the State Board has consistently used to determine on which side of the line a particular topic would fall is no longer legally valid. The balancing test that the State Board adopted long ago looks at the direct fundamental interests of the employees in the topic and the interests of the school system community as a whole. If the interests of the employees in the matter outweigh those of the school community, the matter is negotiable and arbitrable. If the matter is one that effects the school community more generally, it is not negotiable or arbitrable. *Gerald Einem v. Board of Education of Howard County*, MSBE Op. No. 89-13. *Kent County Board of Education v. Kent County Teacher’s Association*, MSBE Op. No. 08-26.

We understand that HCEA abhors the concept of a balancing test. In this case, HCEA stated at oral argument that, in its view, the discipline issue in this case was a mandatory topic of bargaining under the “working conditions” category not a permissive topic. The local board hotly contests that position, calling the discipline topic an education policy matter. This type of dispute is common in all states using language such as “working conditions” and “educational policy” in their laws. Therefore, we have reviewed cases from other jurisdictions to determine if there is a different way to approach the issues here without using a balancing test of some type.

For the following historical explanation on the use of a balancing test in collective bargaining, we quote liberally from the excellent analysis done by the Supreme Court of Iowa in *Waterloo Education Association v. Iowa Public Employment Relations*, 740 N.W. 2d 418 (Iowa 2007). As that court explained, with the passage of the National Labor Relations Act (NLRA), mandatory bargaining over wages and conditions of employment became the law of the land for the private sector, but not public sector employees because “It was feared that collective bargaining would intrude too deeply upon public policy matters that should be decided by responsible public officials.” *Id.* at 420.

Under the NLRA, from the very beginning of collective bargaining, “the question of what subject matters are mandatory subjects . . . sparked considerable litigation . . .” *Id.* at 422. Although the United States Supreme Court construed the NLRA broadly, it established limits on the phrase “other terms and conditions of employment” because that phrase could consume all of industry practice. Justice Potter Stewart advanced the concept that there were certain core entrepreneurial activities that were not subject to collective bargaining. This line drawing however, between bargaining “terms and conditions” and core entrepreneurial activities was to be done on a case-by-case basis. Ultimately, the United States Supreme Court articulated a balancing test for scope-of-bargaining issues in which the benefits for labor-management

relations must be greater than the burdens placed on an employer subject to bargaining. *Id.* at 422. Thus, as we can see, even if the question was only where does “terms and conditions of employment” begin and end in the private sector, the balancing test came into use early, carving out a place for management’s entrepreneurial issues.

Public sector collective bargaining entered the scene in 1959 beginning in Wisconsin. By 1974, forty states had enacted collective bargaining in the public sector. Most of them included the broad language used in NLRA authorizing mandatory bargaining over wages, hours, and other terms and conditions of employment. “Many state public collective bargaining statutes, however, also included management rights provisions designed to reserve certain managerial and policy decisions. The goal seems to have been to allow public employees to collectively bargain to improve their economic well-being without unduly sacrificing the ability of politically responsible officials to manage public bodies and establish the broad contours of public policy.” *Id.* at 421.

As the Iowa Supreme Court explains it, the use of the NLRA phrase “other terms and conditions” in combination with management rights provisions, “intertwined and entangled” terms and conditions of employment “with public policy issues that have traditionally been within the purview of public employers.” *Id.* at 422-23. “Thus, in cases involving statutes with expansive NLRA-type scope-of-bargaining provisions, there is a conflict between the expansive concepts of employee rights and traditional public employer prerogatives. These are two highly territorial pikes at large in the legal pond of collective bargaining, each with the capacity of devouring the other. In order to avoid the predominance of either management or employee rights, state courts have concluded that they have no other choice but to engage in balancing of some kind.” *Id.* at 423.

Not that balancing such interests is anything but difficult. There are no objective measures and the possibility of bias is ever-present. *Id.* at 424. Yet, as the Supreme Court of Iowa explained, balancing tests appear necessary when the collective bargaining statute uses the broad NLRA language. *Id.* at 423-24.

Some states, like Iowa and Kansas identify specific topics for bargaining, creating a laundry list. “Thus, instead of dealing with two pikes in a pond legislatures that have adopted a ‘laundry list’ have gone to dry land and established a legal shooting range with a series of legislatively established targets of mandatory bargaining. Proponents of mandatory bargaining must hit one of the targets, or come close enough to one, in order to avoid characterization of the proposal as permissive. The role of the courts in this setting is not to balance the pikes, but to judge the accuracy of the proponent’s legal shot.” *Id.* at 425.

Maryland is not a “dry land” laundry list state, however. The Maryland statute contains the broad NLRA language “other working conditions,” which many state courts have balanced against educational policy matters. *See id.* at 422-423 citing cases. States explain their balancing tests in different ways. As the Court of Appeals of Tennessee explained in *Polk County Board of Education v. Polk County Education Association*, 139 S.W.2d 304, 307 (Tenn. 2004):

Various tests have been adopted by other states to determine when an issue is a working condition subject to mandatory bargaining, one of which is the "rational relationship" test, which states that an issue is bargainable if it bears a rational relationship to the employee's duties-but where the managerial policy concerns substantially outweigh any impact the issue will have on employees, the issue is not bargainable. *Delaware County Lodge N. 27 v. Penn. Labor Relations Board*, 722 A.2d 1118 (Pa.Comm.w.Ct.1998). A (similar) test is the "primary relation" test, which states that a mandatory subject of bargaining is one which "primarily" or "fundamentally" relates to wages, hours and conditions of employment. *City of Brookfield v. Wisc. Employment Relations Comm.*, 87 Wis.2d 819, 275 N.W.2d 723 (1979). In other words, the policy's direct effect on employment conditions should outweigh the policy's effect in furthering the public policy considerations for the issue to be a subject of mandatory bargaining. *School Districts of Drummond v. Wisc. Employment Relations Comm.*, 120 Wis.2d 1, 352 N.W.2d 662 (App.1984).

South Dakota employs a three-prong test, which states that a subject must be negotiated if the subject intimately and directly affects the work and welfare of public employees, the issue has not been preempted by statute or regulation, and the negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy. *Webster Educ. Ass'n. v. Webster School District #18-4*, 631 N.W.2d 202 (S.D.2001).

The common theme in these tests, is that "the paramount concern must be the public interest in providing for the effective and efficient performance of the public service in question." *Penn. Labor Relations Board v. State College Area School District*, 461 Pa. 494, 337 A.2d 262 (1975). Thus, the school board must be left with managerial prerogatives in determining policy issues and those issues which impact on the efficient operation of the school system.

We believe that the use of some type of balancing test stands the test of time and statutory change. The legislative history of SB 233 reveals that. The Administration's Position Statement recognized that, "Some education matters are so intrinsic to this duty" to [determine and control matters of educational policy], they cannot be bargained over. (Legislative History, Ex. 32 at 3). In our view, SB 233 left to the State Board the determination of which matters were "so intrinsic" to the duty of a local board to determine and control matters of educational policy that they could not be bargained over and which were not. We believe some type of a balancing test is necessary to make that decision.

But, we also believe that the balancing test this Board used in the past does not adequately reflect the concept envisioned by the Bill's sponsor - - that the educational policy matter must be "intrinsic" to the legal duty of a local board to determine and control matters of educational policy. Something that is "intrinsic" is part of the "essential nature" of the matter. American Heritage Dictionary, 2<sup>nd</sup> College Edition, at 673 (1982).

The balancing test we have used in the past, we believe, is a looser test than one that would require the educational policy matter to be intrinsic to or an essential part of the local board's duty to control and administer the school system. Closer to that standard, we believe, are the rules articulated by the court in *Rapid City Education Ass'n. v. Court in Rapid City School District No. 51-4*, 376 N.W.2d 562, 564 (S.D. 1985) and adopting the balancing test set forth in *In re Local 195, IFPTE, AFL-CTO v. State*, 443 A2d. 187 (N.J. 1982).

There are three rules:

First, a subject is negotiable only if it "intimately and directly affect[s] the work and welfare of public employees . . . ."

....

Second, an item is not negotiable if it has been preempted by statute or regulation. . . .

Third, a topic that affects the work and welfare of public employees is negotiable only if it is a matter "on which negotiated agreement would not *significantly* interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy.

*Id.*

For use under the Maryland collective bargaining law, we would articulate the rules this way:

First, a matter is illegal if it is class size, schedule or if there is a specific statute, excluding § 4-101 and 4-108, addressing the matter at issue. The proponent must show, by a preponderance of the evidence, that a topic falls into one of those categories. If it does not, the topic is arguably permissive subject to mutual agreement to bargain over it. No balancing test will be applied.

Second, a matter is mandatory if it relates directly to salary, wages, hours. The proponent of the proposition must show, by a preponderance of the evidence, that a topic falls into one of those categories. If it does not, it is arguably a permissive topic for bargaining subject, of course, to mutual agreement to bargain over it. No balancing test will be applied.

Third, any other matter, including an educational policy matter, is a legal topic if the parties mutually agree that it is a permissive topic of bargaining. If the parties do not agree, the

matter is final and closed. There is, by law, no opportunity to go to impasse and, we conclude, there is no opportunity to request a declaratory ruling from this Board because the Board cannot direct the parties to "agree."

Fourth, there will be topics, however, that the Teachers' Union believes fall under the mandatory "other working conditions" topic (like the discipline issue here), but the local board believes are illegal because they are under the educational policy umbrella (like the discipline issue here). When we are faced with such a dispute, we will employ a balancing test because, no matter how we look at it, any topic in education could fall easily into those two categories. We must have some way to make distinctions. Therefore, we will balance the "intimate and direct affects" of the issue on the work and welfare of the teachers against the extent to which negotiating on the matter *significantly* interferes with "intrinsic, essential" management prerogatives governing the operation of the school system.

We turn now to apply the new rules to the discipline issue in this case:

- (1) Is there a specific statute addressing the issue? No.
- (2) Does the topic relate directly to salary, wages, or hours? No.
- (3) Do the parties agree it is a permissive topic? No.

In answering those three questions, we conclude that the matter is neither obviously illegal, nor mandatory. Because we have a dispute between the parties, *i.e.*, working condition v. educational policy, we turn to the rule that sets forth the new balancing test.

First, we look at whether there is a direct, intimate effect of the issue on the teacher's welfare in the workplace.

We believe that teachers have a direct and intimate interest in maintaining a good professional reputation - - something that warnings and written reprimands can tarnish. Teachers have a direct and fundamental interest in defending their reputations when they believe, as Mr. Hovet did, that the facts do not support the warning or reprimand.

Teachers also have a direct interest in access to a fair process through which to challenge the warning or reprimand. We point out here, as HCEA recognizes, that there is an avenue available to a teacher to challenge warnings or reprimands. Under § 4-205 of the Education Article, teachers may appeal a discipline decision, such as a reprimand, to the local superintendent and then to the local board. Ultimately, the teacher could appeal to the State Board. (In *Robert Laurence v. Calvert County Board of Education*, MSBE Op. No. 08-14, this Board explained how that process works.) HCEA argues that even if § 4-205 provides an avenue for appeal, the employee should have the right to choose the grievance/arbitration process instead.

In our view, therefore, a teacher's interest in his professional reputation is directly related to his welfare in the work place because it is related to his ability to keep his job. We are not convinced however, that access to § 4-205 appeal process rather than an arbitration grievance

process deprives a teacher of the ability to protect his professional reputation. Indeed, at oral argument we pressed counsel for the HCEA to explain why a § 4-205 appeal was not a fair process. Counsel stated that usually the local board upheld the Superintendent's decision. To us, that does not mean that the process is not a fair one, however. For that reason, the balance here tips, but not heavily, in favor of the teacher's union.

We now turn to the local board's arguments looking to determine whether it would significantly interfere with intrinsic, essential management prerogatives governing the operation of the school system if the substance of the lower-level discipline were negotiable and arbitrable.

The local board argues, that allowing employees to negotiate about and chose arbitration for discipline matters such as warnings and reprimands would be inconsistent with sound educational policy. The local board states:

The causes for discipline, which is a part of Article 5M and which include suspension and dismissal, cannot be the subject of bargaining. Similarly, it would be inconsistent with sound educational policy for the State Board to determine whether particular conduct is cause for discipline when the sanction is suspension or dismissal and then permit an outside arbitrator to determine whether particular conduct is cause for discipline when the sanction imposed is less than suspension or dismissal. The sanction may be different, but the causes are those set forth by statute and it is clearly the county superintendent, the local board of education, and ultimately the State Board of Education that has the responsibility for deciding whether the conduct is one for which discipline may be imposed. An arbitrator should have no right to make decisions regarding the wrongfulness of conduct ("cause") simply because the sanction imposed by the county superintendent is less than suspension.

Petition Memorandum at 10.

In essence, the local board is asserting that a consistent approach to discipline, governed by the local superintendent and board, subject to review by this Board, is essential for the proper administration of the school system as a whole. Such consistency, the local board believes, cannot be maintained if arbitrators, not the local board, make those determinations in lower level discipline cases.

We concur with the local board that consistency in defining the causes for discipline is essential to the operation of the system as a whole. For example, in this case the definition of corporal punishment has been established by the local board and it applies to all personnel in all the schools in Howard County. That definition likely reflects community standards and community expectations of teachers in Howard County. This discipline case will require a ruling that the up-down exercises imposed were or were not corporal punishment. We believe that decision is intrinsic to the management prerogative.

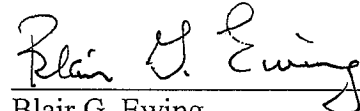
Second, the appropriateness of the discipline chosen is a matter of consistent application across all schools in the system. The local board can review and control consistency only if it has the opportunity in a § 4-205 appeal to review each case in which a teacher challenges the appropriateness of the discipline. Consistent, fair discipline practices is one of the hallmarks of effective management. It is an essential, intrinsic function of management, in our view. Therefore, given all the arguments, we find the balance tips toward the local board's position here. Lower level discipline is an illegal topic of bargaining not a mandatory topic.

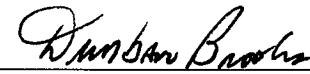
### CONCLUSION

For all the reasons stated herein, we declare that low level discipline, such a warnings and reprimands, is not a matter for negotiation or arbitration. It is an illegal topic of bargaining.

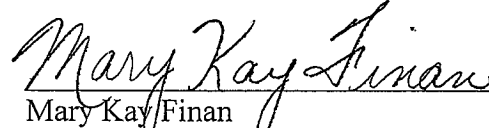
In so ruling, we have recognized the position of HCEA that the 2002 collective bargaining law opened up the opportunity for negotiation on education policy issues as permissive topics of bargaining. We have likewise recognized the position of the local board that some educational policy issues are illegal topics of bargaining, and we will apply a new balancing test when there is a dispute between the union and the local board on whether the topic falls within "other working conditions" or "educational policy."

  
James H. DeGraffenreidt, Jr.  
President

  
Blair G. Ewing  
Vice President

  
Dunbar Brooks

  
Charlene M. Dukes

  
Mary Kay Finan



*Rosa M. Garcia* <sup>TPS</sup>  
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Rosa M. Garcia

*Richard L. Goodall*  
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Richard L. Goodall

Abstained  
\_\_\_\_\_  
Ivan C.A. Walks

*Kate Walsh*  
\_\_\_\_\_  
Kate Walsh

Dissent:

It is my view that when an employee is disciplined the opportunity and procedure for redress are matters that are negotiable because they are matters based in process, not on the education policy topic itself. In deciding this case, I would declare that whether a particular action is subject to discipline is an education policy decision that is non-negotiable, but that the process for imposing such discipline is a legal matter for negotiation because no statute, including the educational policy statutes, precludes negotiation over such process and procedure.

Specific to the facts of this case, I would declare that, if the matter were to go to arbitration, the local board's policy on what is considered corporal punishment could not be challenged, but the employee could challenge whether his conduct violated that policy and the remedy imposed.

For these reasons, I respectfully dissent.

*Karabelle Pizzigati*  
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Karabelle Pizzigati

March 24, 2009

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THE ATTORNEY GENERAL OF MARYLAND  
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

March 8, 2002

The Honorable Sheila Ellis Hixson  
100 Lowe House Office Building  
Annapolis, Maryland 21401-1991

Dear Delegate Hixson:

You have asked for advice concerning the meaning of the term "applicable law" as used in House Bill 290. Specifically, you have asked whether the term would include court decisions under the current law. While the term "applicable law" would ordinarily be read to include decisions of higher courts, in this instance such a reading would render the bill internally inconsistent. Therefore, while the matter is not free from doubt, it is my view that "applicable law" should be read to apply only to statutory law. ★

House Bill 290 amends Education Article, §§ 6-408 and 6-510 to alter provisions relating to collective bargaining. Section 6-408, which relates to negotiation with certificated employees, is amended to permit negotiation on matters that are mutually agreed to by the employer and the employee organization and are not subject to mandatory negotiation. The section further states that a "public school employer may not negotiate any matter that is precluded by applicable law." Section 6-510, which relates to negotiation with noncertificated employees, is amended in a similar manner. In addition, discipline and discharge for just cause are added to the list of subjects as to which negotiation is mandatory.

A statute should be construed according to the ordinary and natural import of its language. *Guy v. Director*, 279 Md. 69, 72 (1977). The ordinary meaning of the term "law" ordinarily includes the rules of court decisions as well as legislative acts. *Warren v. United States*, 340 U.S. 523 (1951); *Erie R. Co. V. Tompkins*, 304 US 64, 79 (1958). Thus, if the words of House Bill 290 are to be given their ordinary meaning, the ability to engage in permissive negotiation granted by the bill would be subject to prior case law to the extent that it holds that any "matter" is not subject to negotiation. ★ It is not clear, however, how existing case law would interact with the provisions of the bill.

In *Montgomery County Educational Ass'n v. Board of Education*, 311 Md. 303 (1987) the Court of Appeals interpreted current law to permit negotiation only on those matters as to which negotiation is mandated by statute, and held that, as to all other matters, negotiation is impermissible. As explained by the court, issues are divided into two categories: salaries, wages, hours, and other working conditions are negotiable, while matters of educational policy are not. *Id.* at 315. To

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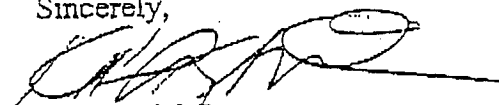
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The Honorable Sheila Ellis Hixson  
March 8, 2002  
Page 2

determine which matters fall within "educational policy" instead of into the broad category of "working conditions," the Court adopted the balancing test developed by the State Board under which the interests of employees are balanced against the school system as a whole. *Id.* at 316. The Court described this approach as exempting "from collective bargaining those matters that predominantly concern the determination of educational policy but preserv[ing] the local board's duty to negotiate matters of direct fundamental concern to employees." *Id.* at 317. Application of this approach lead to the conclusion that the school calendar and reclassification are not negotiable.<sup>1</sup> Subsequent cases have found that other matters fall within the class of educational policy. In *Livers v. Board of Education*, 101 Md.App. 160, *cert. denied*, 336 Md. 594 (1994), the Court held that discipline and dismissal were not negotiable in a case involving a noncertificated employee. See also, *Board of Education of Dorchester County v. Hubbard*, 305 Md. 774 (1986) (Class size and unilateral reclassification); *Washington County v. Board of Education*, 97 Md.App. 397, *cert. denied*, 333 Md. 201 (1993) (Reclassification).

A careful look at these cases reveals a tension between the provisions of the bill and its prohibition on the negotiation of matters that are precluded by the applicable court cases. The most obvious evidence of this is that the bill expressly makes discipline and discharge for just cause of noncertificated employees the subject of mandatory negotiation, while the *Livers* case clearly states that they are not permissible subjects of negotiation. An additional problem arises with respect to what issues are to be negotiable under the newly created permissible negotiation. One approach would be to read the language of the bill to preclude negotiation on the specific matters that have already been held not to be permissible subjects of negotiation by the appellate courts. Under this approach, matters such as class size, calendar and reclassification would not be proper subjects of negotiation. This approach, however, ignores the fact that the analysis under which these subjects were excluded was based on current law, under which there is no discretionary negotiation. That analysis would never give rise to a finding that a matter falls under the discretionary negotiation, because the analysis is based on the lack of discretionary negotiation. Yet that analysis, as well as the specific holdings, is a part of the "applicable law." Application of the current analysis would \*render the provisions of the bill meaningless. Application only of the specific holdings would mean that the inclusion of a particular topic would depend on whether it happened to have been litigated prior to the amendment of the law. These facts, together with the direct conflict between the provisions of the bill and the conclusions of the *Livers* case, lead me to the conclusion that the term "applicable law," in this context, is intended to reach only statutory law.

Sincerely,



Kathryn M. Rowe  
Assistant Attorney General

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<sup>1</sup> The Court also noted that reclassification was not negotiable because the statute placed the issue of reclassification in the local board's complete control. *Id.* at 321, n. 6, citing Education Article § 6-201.