

HARFORD COUNTY
BOARD OF EDUCATION

Appellant

v.

HARFORD COUNTY
EDUCATIONAL SERVICES COUNCIL,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 05-24

OPINION

The Harford County Board of Education has filed a Petition for Declaratory Relief asking the State Board to determine whether “just cause” language proposed by the Harford County Educational Services Council (“HCESC”) as a contract opener is an illegal or permissive subject of collective bargaining. The local board maintains that the proposed language is an illegal subject of collective bargaining. Alternatively, the local board argues that even if the “just cause” language is a permissive topic, there is nothing that mandates the local board to negotiate the issue.

HCESC maintains that the “just cause” language is a permissive subject of collective bargaining and that the local board is required to negotiate on the topic based on a non-specific contract opener provision negotiated in the current collective bargaining agreement. Oral argument by counsel for the parties took place before the Maryland State Board of Education on June 28, 2005.

FACTUAL BACKGROUND

HCESC is the exclusive bargaining representative of certain noncertificated employees of the Harford County Board of Education including clerical/secretaries, paraeducators, nurses, health technicians, instructionally-related technicians, buyers, school bus driver instructors, transportation specialists, transliterators, sign language interpreters, Braille technicians, inclusion helpers, and related personnel.

HCESC and the local board have engaged in collective bargaining pursuant to § 6-510 of the Education Article for over 25 years. The negotiated agreement between the local board and HCESC, covering the period from July 1, 2004 through June 30, 2006, contains the following articles which are relevant to the dispute currently before the State Board:

- 1.4 **Dates For Negotiations.** Negotiations for a succeeding year shall begin not later than the week following the Thanksgiving holiday and conclude by the end of the week following the winter holidays, unless mutually agreed by

both parties. *The Board and the Association agree that for FY06, salaries, insurance, and one additional opener for each party will be negotiated.* (Emphasis added).

* * *

- 4.10 **Disciplinary Action.** An employee may be dismissed, suspended without pay and/or demoted in step and/or grade for misconduct, incompetency, insubordination, willful neglect of duty, repeated unauthorized absence, unsatisfactory work performance, or any other good and sufficient reason. For this section, the grievance procedure will apply only through Step 3. Following the Step 3 meeting, the Superintendent will make the determination. This section will not be subject to the grievance procedure; however, it will be subject to the administrative appeal procedure.

See Negotiated Agreement at pp. 5, 12.

HCESC submitted its proposed opener on or about December 17, 2004, seeking to negotiate a “just cause” provision for employee discipline and discharge.¹ The opener proposed the following:²

- 4.10 Disciplinary Action. An employee may **not** be dismissed, suspended without pay and/or demoted in step and/or grade for misconduct, incompetency, insubordination, willful neglect of duty, repeated unauthorized absence, unsatisfactory work performance **without just cause** or any other good and sufficient reason. For this section, the grievance procedure will apply only through Step 3. Following the Step 3 meeting, the Superintendent will make the determination. This section will not be subject to the grievance procedure; however, it will be subject to the administrative appeal procedure.

Whenever an employee is required to appear before an administrator for the purpose of discussing discipline, suspension, or dismissal, the employee shall be given the opportunity to have an Association representative present. Any

¹ The opener also sought to negotiate the mandatory subjects of salary and benefits.

² The new language is in bold and underlined and the language to be deleted has a strike through it.

disciplinary actions, including suspension and termination, shall be with full pay and benefits pending the outcome of an investigation.

See HCESC proposal (12/17/04).

By letter dated January 4, 2005, Jeffrey M. Fradel, the local board's Chief Negotiator, advised UniServ Director Timothy Thornburg that "§ 6-510(b)(2) of the Annotated Code lists due process for discipline and discharge as a permissive category that may only be bargained if ' . . . mutually agreed to by the employer and the employee organization'" and that the local board "declines to negotiate this topic and will not discuss it at the bargaining table". See 1/4/05 letter from Fradel to Thornburg. Fradel further indicated that the local board would respond to all of the other items at the bargaining table. In response, HCESC filed a grievance alleging that the local board's negotiation team violated Article 1.4 of the Negotiated Agreement by refusing to bargain HCESC's "just cause" language opener for Article 4.10. HCESC proposed that the parties advance the issue immediately to binding arbitration on the question of whether the "just cause" language was negotiable.

In reply to HCESC's suggestion that the parties proceed to arbitration, legal counsel for the local board advised Mr. Thornburg that the "just cause" language was an illegal subject of bargaining in light of the State Board's decision in *Livers v. Board of Education of Charles County*, 101 Md. App. 160 (1994), or if permissive, the local board could decline to negotiate a permissive one that has not been mutually agreed upon by the parties. The local board's legal counsel requested a voluntary stay of the grievance pending disposition of the issues by the State Board. Rather than agree to a stay, HCESC filed its Demand for Arbitration with the American Arbitration Association. Thereafter, the local board filed this Petition for Declaratory Relief with the State Board.³

LEGAL BACKGROUND

Prior to October 1, 2002, all topics proposed for negotiation in local school systems fell into one of two categories: mandatory topics of negotiation and illegal topics of negotiation. The State Board used a two-step test to determine whether a subject was a mandatory or an illegal topic of negotiation:

- 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.

³ Subsequently, on April 27, 2005, the Circuit Court for Harford County entered an Order staying the arbitration until such time as the State Board determined whether or not the dispute at hand is a legal subject for arbitration under Maryland's public school laws.

- If there was no statute that precluded negotiation, 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 a mandatory subject of bargaining. 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.

The two-step test was affirmed by the Maryland Court of Appeals in 1987 in the case entitled *Montgomery County Educators' Association v. Montgomery County Board of Education*, 311 Md. 303 (1987).

Applying this balancing test, the State Board held in *Livers v. Board of Education of Charles County*, 6 Op. MSBE 407 (1992), *aff'd* 101 Md. App. 160, *cert. denied* 336 Md. 594 (1994), that "the remedies or means by which a noncertificated employee may challenge a discipline or discharge decision are non-negotiable matters of educational policy within the exclusive province of the local school system" *Livers* at 409 (Emphasis added).

In its 2002 session, the General Assembly amended Title 6, Subtitles 4 & 5 of the Education Article (collective bargaining statutes for the public school systems in Maryland) by recognizing, with certain specified exceptions, permissive topics as legitimate subjects of collective bargaining, provided that both sides voluntarily agree to engage in such negotiation. The entirety of § 6-510(b), the statute applicable to the issue in the 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, *including due process for discipline and discharge, 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. (Emphasis added.)

ANALYSIS AND CONCLUSIONS

The local board maintains that the “just cause” language for the discipline and discharge of noncertificated employees which was proposed by HCESC is an illegal subject of collective bargaining in light of the statutory appointment power of the local superintendent set out in § 6-201(c) of the Education Article as well as the State Board’s opinion in the *Livers* case, despite the legislative change now recognizing permissive topics of collective bargaining. The local board argues that the addition of “just cause” language to the collective bargaining agreement would illegally negotiate away the statutory powers and duties of the superintendent, local board, and State Board. The board further argues that the “due process for discipline and discharge” language in § 6-510(b)(2) refers only to procedural due process which would include procedures such as the requirement for notice of charges against an employee prior to termination and the opportunity to be heard on such charges, but not a substantive topic such as “just cause” as a permissive topic for negotiation.

Alternatively, even if it were a permissive topic, the local board maintains that it is not bound to negotiate the “just cause” language because the topic was not mutually agreed upon by both parties.

HCESC maintains that the holding in *Livers* is no longer applicable given that permissive topics of collective bargaining are now recognized under 6-510(b). HCESC argues that the “due process for discipline and discharge” language encompasses not only procedural due process matters as noted by the local board, but also issues of substantive due process which would include “just cause.” Therefore, HCESC reasons that § 6-510(b)(2) specifically recognizes substantive due process issues as permissive topics on which the parties may negotiate.

Further, because the local board and HCESC had previously agreed through article 1.4 of the collective bargaining agreement to negotiate “one additional opener for each party,” the local board was required to negotiate the “just cause” proposal submitted by the union as a contract opener.

Local Superintendent's Non-delegable Statutory Authority to Appoint and to Remove

It is a well established legal principle that the power to appoint includes the power to remove. This principle goes back at least to the earliest days of the Republic, preceding the creation of public education in Maryland with the Constitutions of 1864 and 1867. For example, in *Ex Parte, In the Matter of Duncan N. Hennen*, 38 U.S. 230 (1839), the Supreme Court addressed the issue of a court clerk who was dismissed by a United States District Court Judge and expressed the following reasoning: "In the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule, to consider the power of removal as [sic] incident to the power of appointment." *Id.*, 38 U.S. at 259. Subsequently, in *Keim v. United States*, 177 U.S. 290 (1900), the Supreme Court reasoned:

The appointment of [sic] an official position in the government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore it is one of those acts over which the courts have no general supervising power.

In the absence of specific provision to the contrary, the power of removal from office is incident to the power of appointment.

Id. 177 U.S. at 293-294; *see also* 63C Am. Jur. 2d *Public Officers and Employees* § 171 (2004)(discussing generally the accepted proposition that "[w]hen the term or tenure of a public officer is not fixed by law, and the removal is not governed by a constitutional or statutory provision, as a rule, the power of removal is incident to the power to appoint"). Likewise, this principle has long been accepted in Maryland. *See, e.g., Stubbs v. Vestry of St. John's Church*, 96 Md. 267 (1903)(providing that the power to appoint includes the power to remove from office).

In Maryland, the power to appoint is statutorily vested in the local Superintendent pursuant to Md. Code Ann., Educ. § 6-201(c) which provides:

- (1) Except in Worcester County and Baltimore City, the county superintendent shall appoint clerical and other nonprofessional personnel.
- (2) In Worcester County, the County Superintendent shall appoint clerical and other nonprofessional personnel with the advice and consent of the County Board.
- (3) Notwithstanding any provision of local law, in Baltimore City, the appointment, tenure, and compensation of clerical and other

nonprofessional personnel shall be determined in accordance with the personnel system established by the Baltimore City Board of School Commissioners under § 4-313 of this article.

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 the Education Article.

Procedural and Substantive Due Process

Procedural due process refers generally to what process is due an individual prior to deprivation of a liberty or property interest. *See Samuels v. Tschechtelin*, 135 Md. App. 483, 523, 529 (2000). In the context of public employment, procedural due process involves notice of charges against an employee and the opportunity to be heard on those charges prior to termination. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-41 (1985). In contrast, substantive due process goes beyond procedural requirements and protects against a public official arbitrarily depriving an individual of a constitutionally protected interest even if the proper procedures are followed. *Samuels* at 533.

Unlike procedural due process, substantive due process is founded upon notions of fundamental personal interests derived from the United States Constitution. *See Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 228 (1985)(Powell, J., concurring). In *Samuels*, the Maryland Court of Special Appeals held that a State contract right of employment is not so fundamental as to require substantive due process protection. *Samuels v. Tschechtelin*, 135 Md. App. 483 (2000). Thus, in the context of public employment, substantive due process is generally not recognized in Maryland.⁴

Based on this precedent, coupled with the nondelegable statutory authority of the local superintendent to appoint and the power to remove incident thereto, we find that the “due process” reference § 6-510(b)(2) does not encompass substantive due process concerns.⁵ Rather, we find it specifically refers to the procedural aspects of due process.

⁴There is a split of opinion on this issue in other state courts throughout the country.

⁵The Court of Appeals has long held that when construing an unambiguous statute, it “will not ‘divine a legislative intention contrary to the plain language of a statute or judicially insert language to impose exceptions, limitations or restrictions not set forth by the legislature’.” *Nesbit v. Government Employees Insurance Company*, 382 Md. 65, 75 (2004), quoting *Langston v. Langston*, 366 Md. 490, 515 (2001). *See also, Carroll Association of School Employees v. Carroll County Board of Education*, MSBE Opinion No. 04-41 (December 8, 2004)(reiterating the well-established rules of statutory construction). Because the language of § 6-510(b)(2) is clear and unambiguous, there is no need to look at the legislative history.

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

NEGOTIATION OF NON-SPECIFIC CONTRACT OPENER

As to the union’s argument that the non-specific contract opener requires that the local board must negotiate any permissive topic that the union suggests, we do not agree. Here, a plain reading of the statutory language of §6-510 is controlling. That language provides that the local board and the union “may negotiate” on permissive topics “that are mutually agreed to by the employer and the employee organization”.

We therefore determine that with respect to the negotiation of contract openers, the first step is to determine whether the topic is a mandatory, permissive, or an illegal subject of negotiation. If the answer is that the topic is a mandatory topic of negotiation such as salary, the parties must negotiate the topic. If the answer is that the topic is permissive, the next step is for the local board and the union to mutually agree to negotiate the matter. If one of the parties does not agree to negotiate, there is no negotiation on the permissive topic for that year. If the topic is an illegal subject of negotiation because it deals with the school calendar, class size, or a matter precluded by applicable statutory law, there is no negotiation ever on the topic.

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July 20, 2005