

CITY UNION OF BALTIMORE AND
AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES
COUNCIL 67 AND LOCAL 44,

Appellants

v.

BALTIMORE CITY BOARD OF
SCHOOL COMMISSIONERS,

Appellee

BEFORE THE
MARYLAND
STATE BOARD
OF EDUCATION

Opinion No. 04-29

OPINION

This action was filed by the City Union of Baltimore (“CUB”) and the American Federation of State, County and Municipal Employees Council 67 and Local 44 (“AFSCME”) (collectively referred to herein as “the Unions”), charging unfair labor practices against the Baltimore City Board of School Commissioners (“City Board”).¹ The dispute arises from negotiations between the Unions and the City Board in an attempt to reach negotiated labor agreements for the 2003-2004 school year.² The City Board has submitted a Motion to Dismiss the Unions’ Request to Remedy Unfair Labor Practices maintaining that the Unions are first required to exhaust the impasse procedures set forth under §§ 6-408(d) and 6-510(d) of the Education Article, Annotated Code of Maryland. The Unions have submitted an opposition to the City Board’s motion maintaining that there is no regulation or rule that permits the City Board to seek dismissal of an original action before the State Board and that a factual record needs to be developed before the State Board can render a decision on whether the City Board violated its duty to bargain in good faith.

FACTUAL BACKGROUND

The Unions reached their first tentative agreements with the Baltimore City Public School System (“BCPSS”) on June 23, 2003.³ At that time, it was the Unions’ understanding that the BCPSS chief negotiator would craft the final language of the tentative agreements.

¹CUB and AFSCME are the designated exclusive representatives of certain non-certificated employees in the Baltimore City Public School System. On September 3, 2003, the Unions filed an unfair labor practice charge against the Baltimore City Board. On March 19, 2004, the Unions filed an amended request to remedy unfair labor practices.

²The Baltimore Teachers’ Union (“BTU”) was initially a party to this matter, however, BTU has since reached an agreement with the City Board and is no longer involved in this action.

³The tentative agreements were for two years and addressed a one percent increase to the employee wage scale, an increase in the employees’ percentage share of health premiums and prescription drug co-payments, and a one year freeze on sick leave conversion.

In August 2003, the Unions were informed that BCPSS needed to return to the bargaining table to continue negotiations on the second and third years of the June 23 tentative agreement. BCPSS maintained that there was a change in circumstances due to concerns about additional “Thornton” funding [State foundation aid]; BCPSS being placed in “corrective action” with potentially costly mandates; and the budget crisis. BCPSS sought to implement only the first year of the tentative agreements which was the year in which the Unions provided relief to BCPSS. *See* 8/20/03 letter from Stellman to Middleton. The Unions rejected the offer and also refused to sign agreements to extend all but the economic provisions of the agreements that expired on June 30, 2003.⁴ *See* 8/28/03 letter from Stellman to Johnson with attachments; *see also* 8/28/03 letter from Johnson to Stellman in response.

On September 3, 2003, the Unions filed an unfair labor practice charge with the State Board. Thereafter, the parties met on November 10, 2003, and reached tentative agreements pending final approval from the City Board.

Shortly after the tentative agreements were reached, the extent of the financial crisis of the school system came to light. On November 12, 2003, Dr. Bonnie S. Copeland, Chief Executive Officer, detailed the first phase of cost containment measures during a press conference. On November 25, 2003, Dr. Copeland announced that the structural deficit and cash flow problems were so severe that 700-800 temporary and permanent employees would have to be laid off.

On December 19, 2003, the City Board failed to approve the tentative agreements that were reached on November 10. The City Board maintained that it rejected the tentative agreements because it determined that the school system could not fund the economic terms of the agreements. *See* 12/30/03 letter from Stellman to Zimmerman; *see also* 12/31/03 letter from Stellman to Johnson.

In early January 2004, BCPSS announced that additional staff would be cut in the coming months. BCPSS also cut vendor contracts by approximately three million dollars. On January 22, 2004, the Unions and the City Board had a bargaining session in order to negotiate agreements. No consensus was reached at this meeting. Around the time of this meeting, BCPSS announced that it would be laying off an additional 47 administrative employees in order to help ease the school system’s fiscal situation.

Further budget cuts were necessary to help alleviate BCPSS’s financial predicament. Because approximately eighty percent of BCPSS’s budget consists of personnel costs, concessions in this area would result in significant savings. In an attempt to prevent the layoff of an additional 1,200 employees, BCPSS proposed to its employees across the board pay reductions of approximately 6.8% that would be repaid during the second half of the 2004-2005

⁴Meanwhile, BCPSS was in the process of responding to a request for information from the Unions. *See* 8/22/03 letter from Smith to Stellman; *see also* 9/8/03 letter from Stellman to Smith.

school year, or for furloughs. The Appellant Unions rejected the proposed cost containment measure.⁵

The next week, the Mayor of Baltimore City offered to give BCPSS an \$8 million loan with a proposal to the unions to agree to a smaller temporary pay reduction or furlough days. The Mayor's cost containment proposal would reduce all employee salaries by 3.5% until the end of the first fiscal year and would be repaid during the second half of the 2004-2005 school year. This proposal guaranteed that if BCPSS could not make the repayments, the Mayor and City Council would make them.

The plan was discussed on February 10, 2004, during a meeting between the Mayor and his representatives, BCPSS representatives, and Union representatives. BCPSS indicated that it wanted to make CUB's and AFSCME's agreements contingent upon each Union's acceptance of a pay reduction. CUB and AFSCME maintain that they made it clear the Unions would not accept the Mayor's cost containment proposal unless the City Board completed negotiations with respect to the 2003-2004 agreements.

The Mayor's cost containment proposal was scheduled for a vote by the Unions on February 12, 2004. On February 10, BCPSS and the Unions met at City Hall and negotiated tentative agreements. The proposed agreements were for one year, July 1, 2003 – June 30, 2004, and included longevity increases for the members of the Unions.

On February 11, it came to the attention of Donald Rainey, the City Board's designee, that the Unions felt that the tentative agreements were not contingent upon the acceptance of the Mayor's proposal. Dr. Copeland sent the Unions' presidents a letter informing them that there may have been a misunderstanding with regard to the position of BCPSS relative to the Mayor's cost containment proposal. She clarified that she would not recommend that the City Board ratify the tentative agreements unless the Unions agreed to accept the Mayor's proposal. Dr. Copeland stated that "the Board will be unable to fund the proposed Negotiated Labor Agreements for CUB and Local 44 without this compromise." *See* 2/11/04 letter from Copeland to Middleton.

Glennard Middleton, AFSCME President, sent Dr. Copeland a letter on February 12 stating that it was his position that the tentative agreement was not contingent upon the acceptance of the Mayor's cost containment proposal. He objected to Dr. Copeland's "attempt to change the terms and conditions of the 2003-2004 Negotiated Agreement that was initialed on behalf of the School Board by its negotiators. . . ." The Unions put the Mayor's proposal to their membership for a vote and the proposal was rejected. CUB's and AFSCME's memberships voted to ratify the 2003-2004 agreements.

⁵The Public School Administrators and Supervisors Association of Baltimore City was the only union that agreed to furloughs.

After a series of events transpired, the Mayor and City Council of Baltimore reached agreement with BCPSS to loan the school system 42 million dollars. The loan is to be paid back in two parts: \$36 million to be paid back on August 2, 2004, and \$8 million to be paid back with nominal interest by June 30, 2006. The Abell Foundation has also offered to loan BCPSS an additional \$8 million.

On March 15, Dr. Copeland again wrote the Unions reiterating that BCPSS could not afford to fund the terms of the February 10 tentative agreements without implementation of the Mayor's cost containment proposal. In this letter, Dr. Copeland also indicated that "the Board is willing to continue bargaining in good faith in an attempt to reach an agreement," and invited the Unions back to the bargaining table asking that they contact Mr. Rainey "as soon as possible with available dates for bargaining." See 3/15/04 letter from Copeland to Middleton. In response, the Union leaders sent letters to Mr. Rainey, demanding that BCPSS provide them with written proposals before the Unions would return to the bargaining table. See 3/26/04 letters from Carroll to Rainey and letter from Middleton to Rainey. On April 2, 2004, Mr. Rainey sent the Unions a written proposal for two year agreements and invited the Unions back to the bargaining table. See BCPSS Proposal and 4/2/04 letter from Rainey to Middleton.⁶

ANALYSIS

The Unions maintain that the City Board engaged in unfair labor practices by failing to bargain in good faith by (1) sending bargaining representatives to negotiate without adequate authority; (2) regressing from prior bargaining table agreements; (3) repeatedly withdrawing proposals; (4) offering less and less satisfactory proposals calculated to avoid agreement; (5) unduly extending the period of negotiation; (6) placing conditions on agreements after the agreements were initialed by its chief negotiator; and (7) unreasonably delaying its own ratification of the initialed agreements. The City Board maintains that it has always and continues to bargain in good faith but that its ability to accept all of the terms requested by the Unions is limited by the financial crisis faced by BCPSS.

The City Board has filed a Motion to Dismiss the Unions' Amended Request to Remedy Unfair Labor Practices. In response, the Unions argue as a preliminary issue that the motion is improper because there is no regulation or rule which permits the City Board to seek dismissal of this case which is an original action before the State Board filed pursuant to §2-205(e) of the

⁶By letter to Dr. Grasmick dated May 24, 2004, Mr. Rainey requested that the State Superintendent declare that the City Board and the Unions have reached an impasse. By letter dated May 28, 2004, Mr. Zimmerman on behalf of the Unions filed an objection to the request. By letter dated June 7, 2004, Dr. Grasmick informed the parties that pending the outcome of the action pending before the State Board, it was inappropriate for her to declare an impasse at this time.

Education Article⁷ and §10-304(a) of the State Government Article.⁸ The Unions argue that the appeal procedures contained in COMAR 13A.01.01.03 entitled “Appeals to the State Board of Education” pertain only to appeals to the State Board of a local board of education decision pursuant to §4-205(c) of the Education Article and not to an action arising under the State Board’s original jurisdiction pursuant to §2-205(e).

Although the appeal procedures contained in COMAR 13A.01.01.03 do not specifically state that the regulations apply to actions before the State Board pursuant to § 2-205(e), the statutes cited as enabling authority for the promulgation of the regulations include both §§ 2-205 and 4-205. *See* COMAR 13A.01.01, authority citation. Moreover, as a matter of practice the State Board processes appeals under § 2-205 using these same procedures. *See, e.g., In the Matter of Prince George’s County Educators’ Association*, 6 Ops. MSBE 9 (1991)(dismissing as moot pursuant to COMAR 13A.01.01.03J(1) the union’s request for a declaratory ruling on the intent and meaning of provisions of the Education Article as they apply to the conduct of representation elections); *In the Matter of COMAR 13A.07.04*, MSBE 02-46 (Sept. 25, 2002)(declaring the intent and meaning of the regulation as it applies to principals and vice principals); and *In the Petition of Dawn Rutter*, MSBE Op. 02-23 (May 22, 2002)(interpreting Educ. § 6-306(3) on eligibility for signing bonus).

Therefore, exercising our authority under §2-2-5(e), we consider the City Board’s submission as a reply memorandum to the Unions’ request for declaratory relief. In that submission, the City Board argues that the Unions have failed to exhaust the impasse procedure under §§ 6-408(d) and § 6-510(d) of the Education Article prior to filing their unfair labor practice charge with the State Board. As explained below, we concur with the City Board.

Title 6, Subtitles 4 and 5 of the Education Article provide a comprehensive scheme for collective bargaining between the local board and certificated and non-certificated public school employees, respectively. Sections 6-408(d) and 6-510(d) set forth the specific administrative procedures for impasse as follows:⁹

⁷Section 2-205(e)(1) provides in relevant part that the “State Board shall explain the true intent and meaning of the provisions of : (i) This article that are within its jurisdiction; and (ii) The bylaws, rules, and regulations adopted by the Board.” Section 2-205(e)(2) provides that the State Board “shall decide all controversies and disputes under these provisions.”

⁸Section 10-305(a) provides authority for various governmental units to issue declaratory rulings.

⁹Section 6-408(d) and section 6-510(d) are identical provisions. Section 6-408(d) applies to negotiations between an employer and an organization of certificated employees and section 6-510(d) applies to negotiations between an employer and an organization of noncertificated employees. Because CUB and AFSCME represent non-certificated individuals, the relevant provision in this instance is §6-510(d). Nevertheless, our analysis of §6-510(d) is equally applicable to §6-408(d).

(d) Impasse in negotiations. – (1) If, on the request of either party, the State Superintendent determines from the facts that an impasse is reached in negotiations between a public school employer and an employee organization that is designated as an exclusive negotiating agent, the assistance and advice of the State Board may be requested, with the consent of both parties.

(2) If consent is not given and at the request of either party, a panel shall be named to aid in resolving the differences.

(3) The panel shall contain three individuals chosen as follows:

(i) One member is to be named by each party within 3 days; and

(ii) The third member is to be chosen by the other two members within 10 days after the request.

(4) The State Board or the panel selected shall meet with the parties to aid in resolving the differences, and, if the matter is not resolved, shall make a written report and recommendation within 30 days after the request.

(5) A copy of the report shall be sent to the representatives of the public school employer and the employee organization.

(6) All costs of mediation shall be shared by the public school employer and the employee organization.

(7) Notwithstanding any other provision of this subtitle, the public school employer shall make the final determination as to matters that have been the subject of negotiation, but this final determination is subject to the other provisions of this article concerning the fiscal relationship between the public school employer and the county commissioners, county council, and Mayor and City Council of Baltimore City.

In *Talbot County Education Association, Inc. v. Talbot County Board of Education*, 4 Ops. MSBE 398 (1986), the State Board concluded as a matter of sound educational policy and as a matter of law that allegations of an employee organization whether of bad faith or of scope of bargaining cannot be used to thwart the specific procedures set out in § 6-408(d). In that case, the union sought to bypass the statutory scheme for the resolution of an impasse. It argued that the Court of Appeals decision in *Board of Education v. Hubbard*, 305 Md. 774 (1986) required that the State Board must decide, in the first instance, what matters may or must be negotiated under Maryland law which clearly included the duty to determine what constitutes conferring in good faith pursuant to § 6-408(a)(1)(i) of the Education Article. 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 406.¹⁰

Based on the statutory scheme set forth in § 6-510(d) , and on the State Board’s holding in *Talbot*, we find that CUB and AFSCME have failed to exhaust the statutory impasse procedure. Once the parties have reached impasse and trigger the procedure set forth in § 6-510(d), the Unions may raise the issue of any unresolved claims of unfair labor practices at that time, including the Unions’ claim that the City Board failed to engage in good faith bargaining.¹¹ Although CUB and AFSME maintain that they have submitted this case to the State Board in order to return to the bargaining table and avoid impasse, it appears that the action before the State Board at this juncture is a means to bypass the already established procedures enacted by the General Assembly.

¹⁰The State Board also noted in *Talbot* that there are sound policy considerations and other reasons for requiring the parties to invoke the procedures set forth in § 6-408(d) for the resolution of disagreements. For example, the mediation process encourages the parties to formulate their own collective bargaining agreement, may help create a more cooperative atmosphere, and may produce alternatives that were not previously addressed by the parties. 4 Ops. MSBE 404-405.

¹¹The obligation to bargain in good faith during the collective bargaining process does not require that the parties reach agreement, agree to a proposal, or make concessions. The process does require, however, that the parties carry on a dialogue and sincerely intend to reach agreement. Hard bargaining is not necessarily inconsistent with such intent. *See Garrett County Federation of Teachers v. Garrett County Board of Education*, 4 Ops. MSBE 581 (1986).

CONCLUSION

For all of these reasons, we dismiss the Unions' Request to Remedy Unfair Labor Practices on the basis that it is premature in that the statutorily prescribed impasse procedures have not been exhausted.

Edward L. Root
President

JoAnn T. Bell
Vice President

Philip S. Benzil

Dunbar Brooks

Calvin D. Disney

Clarence A. Hawkins

Walter S. Levin, Esquire

Karabelle Pizzigati

Maria C. Torres-Queral

John L. Wisthoff

June 16, 2004