STATE OF MARYLAND
PUBLIC SCHOOL LABOR RELATIONS BOARD

IN THE MATTER OF:	*	
HOWARD COUNTY EDUCATION ASSOCIATION – EDUCATIONAL SUPPORT PROFESSIONALS (ESP),	*	
Requesting Party,	*	
and	*	PSLRB Case No. N 2012-01
BOARD OF EDUCATION OF HOWARD COUNTY,	*	
Public School Employer.	*	

* * * * * * * * * * * *

DECISION

A. Introduction

Section 6-510(c)(5)(i) of the Education Article[1] provides as follows:

> If a public school employer and an employee organization dispute whether a proposed topic for negotiation is a mandatory, a permissive, or an illegal topic of bargaining, either party may submit a request for a decision in writing to the [Public School Labor Relations] Board for final resolution of the dispute.

In implementation of this statutory responsibility, the Public School Labor

1. Unless otherwise indicated, all statutory citations are to the Education Article.

Relations Board ("PSLRB") has promulgated Form PSLRB-04, "Request to Resolve a Dispute as to Negotiability." See, COMAR 14.34. 02.02. This case is before the PSLRB pursuant to a Form PSLRB-04 that was filed by the Howard County Education Association-ESP ("HCEA-ESP") on June 20, 2012.

B. Background

HCEA-ESP is recognized pursuant to §6-505 as the exclusive representative for a negotiating unit consisting of non-supervisory, non-certificated, employees of the Howard County Board of Education ("County Board"), including nurses. Pursuant to §6-510(c)(1), the County Board is required, if requested to do so by HCEA-ESP, to negotiate "on all matters that relate to salaries, wages, hours, and other working conditions, including the discipline and discharge of an employee for just cause" (emphasis added) for employees in the unit.

Following negotiations that commenced in October 2009, HCEA-ESP and the County Board, in spring 2010, entered into a Master Agreement, effective from July 1, 2010 through June 30, 2013 ("Master Agreement"). Two provisions of the Master Agreement are relevant for purposes of this case:

1. Article 2, Grievance Procedure, defines a "grievance" as a dispute "involving the express provisions of the terms of" the Master Agreement, and

establishes a multi-step procedure for resolving grievances. The final step of the grievance procedure is Section 2.2,C,3, which provides in relevant part as follows:

> In the event that the employee and the Association are not satisfied with the decision at Step II, the grievance may be submitted to arbitration under the Voluntary Labor Arbitration Rules of the American Arbitration Association within 40 calendar days from the date the decision at Step II was forwarded via certified mail. Grievances filed by the Association are not subject to binding arbitration. The arbitrator's decision shall be final and binding on all the parties.

2. Article 4, Employee Rights, Section 4.1, provides as follows:

> No employee will be discharged without cause. This shall not apply to the discharge of a probationary employee.

In January 2012, Karen Alban, a nurse employed by the Howard County Public School System and a member of the HCEA-ESP negotiating unit, was terminated. Alban filed a grievance alleging that her termination violated Section 4.1 of the Master Agreement. The County Board denied the grievance on the ground that the existence vel non of cause for the discharge of a nurse or other non-certificated employee is an illegal subject of bargaining, and that Section 4.1 of the Master Agreement is therefore unenforceable.

Following the denial, HCEA-ESP filed a demand for arbitration on behalf of Alban pursuant to Section 2.2 C, 3, of the Master Agreement, and the arbitration was scheduled for June 7, 2012. Reasserting its position that Section 4.1 of the Master Agreement involves an illegal subject of bargaining, the County Board refused to participate in the arbitration, and in May 2012 filed a motion for injunctive relief with the Howard County Circuit Court. On June 1, the court

granted a stay of the scheduled arbitration so that HCEA-ESP and/or the County Board could "file a request with the Maryland State Board of Education or the Public School Labor Relations Board for statutory interpretation."

C. Analysis

1. The June 1, 2012, Order of the Howard County Circuit Court – which invited HCEA-ESP and the County Board to "file a request with the Maryland State Board of Education or the Public School Labor Relations Board for statutory interpretation" – sparked a threshold issue of administrative agency jurisdiction. We begin by addressing that issue.

On June 7, 2012, the County Board filed a Petition for Declaratory Ruling with the State Board of Education ("State Board"). In its Petition, the County Board asserts that Section 6-201(c)(1) -- which states in pertinent part that "[e]xcept in Worcester County and Baltimore City, the county superintendent shall appoint clerical and other nonprofessional personnel"—is the controlling statutory provision in this case, that the State Board is authorized to interpret Section 6-201(c)(1), and that the State Board's interpretation of that Section is dispositive of the negotiability dispute in this case.

On June 20, 2012, HCEA-ESP filed a Form PSLRB-04 with the PSLRB. In this Form, HCEA-ESP contends that the controlling statutory provision is Section 6-510—which expressly provides that the PSLRB shall determine "whether a

proposed topic for negotiation is a mandatory, a permissive, or an illegal topic of bargaining." Because the PSLRB is authorized to administer and enforce the provisions of Subtitle 5, it is the position of HCEA-ESP that the PSLRB –not the State Board – has jurisdiction over the negotiability dispute. We agree.

Section 6-510(c)(5)(i) expressly charges the PSLRB with responsibility for resolving the type of negotiability dispute that is presented in this case. Section 6-201(c)(1), by contrast, does not by its terms even mention negotiations, much less the distinction between mandatory and illegal subjects of bargaining. To be sure, the State Board's interpretation of Section 6-201(c)(1) may (or may not) have some bearing on whether Section 4.1 of the Master Agreement deals with a mandatory or an illegal subject of bargaining, but under the express language of Section 6-510(c)(5)(i), the authority to resolve that question resides with the PSLRB.

2. We turn now to the negotiability dispute in this case: specifically, whether Section 4.1 of the Master Agreement -- which provides in relevant part that "[n]o employee will be discharged without cause"-- deals with a mandatory subject of bargaining (as contended by HCEA-ESP) or an illegal subject of bargaining (as contended by the County Board). At first glance, this question hardly would seem to warrant extended discussion in light of Section 6-510(c)(1), which provides in relevant part that a public school employer and the exclusive

negotiating representative "shall meet and negotiate...on all matters that relate to salaries, wages, hours, and working conditions, including the discipline and discharge of an employee for just cause." (Emphasis added)[2]

3. Under the traditional rules of statutory construction, when statutory language is as clear and unambiguous as it is in Section 6-510(C)(1), there is no need to resort to legislative history or other extrinsic evidence as interpretive aids. As the Maryland Court of Appeals put it in Kushell v. DNR, 385 Md. 563, 576-77, 870 A.2d 186 (2005):

> If statutory language is unambiguous when construed according to its ordinary and everyday meaning, then we give effect to the statute as it is written. *Collins*, 393 Md. at 688-89, 861 A.2d at 730. "If there is no ambiguity in that language, either inherently or by reference to other relevant laws or circumstances, the inquiry as to legislative intent ends; we do not need to resort to the various and sometimes inconsistent, external rules of construction, for the 'Legislature is presumed to have meant what it said and said what it meant.' *Arundel Corp. v. Marie*, 383 Md. 489, 502, 860 A.2d 886, 894 (2004 (quoting *Witte v. Azarian*, 369 Md. 518, 525, 801 A.2d 160, 165 (2002))."

In the instant case we depart from this traditional rule of statutory construction and review the events that led to enactment of the underscored provision in Section 6-510(c)(1). We do so not only because these events conclusively eliminate any lingering doubt that may exist as to the meaning and intent of that provision, but because they also make clear the relationship between that provision and the State Board's conclusion that the topic of "discharge of an

[2] Because "discipline and discharge for just cause" is made a mandatory subject of bargaining by express statutory language, the directive to the PSLRB in Section 6-510(c)(5)(vi)(2) to "develop a balancing test to determine whether the impact on the school system outweighs the direct impact on the employees" is not applicable in this case.

employee for just cause" is an illegal subject of bargaining

For many years prior to the 1990s, Maryland's collective bargaining statute provided only for mandatory subjects of bargaining, defined as "all matters related to salaries, wages, hours, and other working conditions." At that time, both the State Board and the courts permitted boards of education and exclusive representatives to negotiate a just cause standard for discipline and discharge, and to arbitrate such disputes. In 1994, however, the Maryland Court of Special Appeals, in *Livers v. Board of Educ. of Charles County*, 101 Md.App. 160 (1994), deferred to the interpretation of the State Board of Education, which held that "the remedies or means by which a non-certificated employee may challenge a discipline or discharge decision are non-negotiable matters of educational policy," and therefore an illegal subject of bargaining. *Id.* at 409. While many agreements, including those between HCEA-ESP and the County Board, continued to include language regarding just cause for discipline and discharge, such language was no longer enforceable , and disputes were subjected to the administrative appeal process in Section 4-205.

In 2002, the General Assembly made significant changes to the collective bargaining statute by creating mandatory, permissive, and illegal subjects of bargaining. At that time, Section 6-510(b) was amended to read as follows (added language in Section 510(b)(2) in italics):

> (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 other matter that is precluded by applicable law.

(2008 Repl. Vol.). Thus, "due process for discipline and discharge" was made a permissive subject of bargaining, but there was no reference to any substantive standard that a public school employer was required to meet in order to discipline or discharge a non-certificated employee.

It was under that statutory framework that the State Board, in 2005, decided the case of *Harford County Board of Education v. Harford County Educational Services Council,* MSBE Opinion No. 05-24, which the County Board relies on so heavily in the July 3, 2012, Memorandum that it filed with the PSLRB in this case. In the Harford County Board of Education case, the State Board concluded that the phrase "due process for discipline and discharge" as used in Section 6-510(b)(2) encompassed only the procedural aspects of due process. *Id.* at 7. In reaching this conclusion, the State Board opined that a superintendent had the exclusive

authority to appoint non-certificated personnel pursuant to Section 6-201(c)(1), and the power to remove should be incident to the power to appoint. Based upon that interpretation, the State Board held that "the 'due process' reference in Section 6-510(b)(2) does not encompass substantive due process concerns. Rather, we find it specifically refers to the procedural aspects of due process." *Id.* at 7.

In 2009, exclusive representatives of non-certificated employees approached the General Assembly in an effort to overturn the State Board's decision in the *Harford County Board of Education* case. That effort was successful. Senate Bill 569 amended Section 6-510(b) as follows(added language in Section 6-510(b)(1) in italics; deleted language in Section 6-510(b)(2) in brackets):

> (b)(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, including the *discipline and discharge of an employee for just cause*.
>
> (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.

In short, the State Board's decision in the *Harford County Board of Education* case was overturned by statute: the 2009 amendments limited a superintendent's authority to discipline and discharge non-certificated employees by making both

the procedural and substantive aspects of due process mandatory subjects of bargaining.

The testimony of the Maryland Association of Boards of Education ("MABE") recognized the implication of these amendments in the written testimony that it submitted to the Senate Finance Committee on March 5, 2009, in opposition to Senate Bill 569. MABE, speaking on behalf of "all of the state's boards of education," noted that Senate Bill 569 would:

> limit the superintendent's discretion to discipline or discharge support staff. MABE strongly opposes the mandated negotiation of the subjects of discipline and discharge of non-certificated staff. And yet again, this bill goes further. Senate Bill 569 would impose the standard of employee rights under disciplinary or termination actions to be "just cause." MABE has consistently opposed legislation proposing this standard of review for superintendent decisions regarding non-tenured, non-teaching staff.[3]

4. If there was nothing more involved, our analysis could begin -- and end -- with Section 6-510(C)(1). But the County Board asserts that there is "more involved" -- citing section 6-510(C)(3), which provides that:

> 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. (Emphasis added)

[3] The Montgomery County Board of Education was the only board of education to submit written testimony in support of Senate Bill 569, albeit with a proposed amendment. At the urging of Montgomery County, the Legislature included a provision providing for the amendments to have only prospective application. This is not an issue in the present case, inasmuch as Senate Bill 569 became effective on October 1, 2009, and the Master Agreement was ratified in spring 2010.

In its July 2, 2012, submission to the PSLRB, the County Board contends that -- notwithstanding the 2009 amendments -- the State Board's 2005 interpretation of Section 6-201(c)(1) in the Harford County Board of Education case -- *i.e.*, that the statutory authority of the county superintendent to "appoint clerical and other nonprofessional personnel" includes the power to remove such personnel -- is "applicable statutory law" that precludes the negotiation of a just cause standard for discharge. Accordingly, the County Board argues, Section 4.1 of the Master Agreement is unenforceable.[4]

We need not for present purposes debate the merit of the State Board's interpretation of Section 6-201(c)(1). We acknowledge that the State Board has the authority to interpret the provisions of the Education Article other than those in Title 6, Subtitles 4 and 5. But the operative provision -- *i.e.*, "any matter that is precluded by applicable statutory law" -- appears in Title 6, Subtitle 5, and, as the County Board concedes, it is the PSLRB that has the authority to interpret the provisions of that Subtitle. This means that the PSLRB has jurisdiction to determine what does and does not constitute "applicable statutory law." We conclude that the State Board's interpretation of Section 6-201(C)(1) does not constitute "applicable statutory law" precluding the negotiation of "the discipline and discharge of an employee for just cause." The "applicable statutory law" for

[4] Although the State Board initially took this position prior to the 2009 amendments to Section 6-510(c)(1), the State Board re-affirmed the position in the opinion that it issued on July 24, 2012, in response to the County Board's Petition for a Declaratory Ruling.

purposes of this negotiability dispute is Section 6-510(c)(1), and the clear and unambiguous language of that Section provides that "the discipline and discharge of an employee for just cause" is a mandatory subject of bargaining.[5]

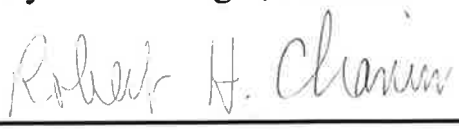
D. Conclusion

The PSLRB concludes that the topic of "discipline and discharge of an employee for just cause" is a mandatory subject of bargaining. In the context of this case, that means that Article 4.1 of the Master Agreement is enforceable, and the grievance involving that provision is subject to arbitration under Section 2.2 of the Master Agreement.

[5] Even if we were to assume, arguendo, that there is merit to the State Board's interpretation of Section 6-201(c)(1), and that it could be construed to mean that Article 4.1 of the Master Agreement deals with an illegal subject of bargaining, our decision would be the same. To begin with, Section 6-510(c)(1) specifically states that "the discipline and discharge of an employee for just cause" is a mandatory subject of bargaining. Section 6-201(c)(1), on the other hand, is a general statute that does not by its terms refer either to employee discipline or discharge or negotiations, relying instead on an implication drawn from a superintendent's power to appoint non-certificated employees. In *Lumbermen's Mutual Casualty Company v. Insurance Commissioner,* 302 Md. 248,268 (1985), the Maryland Court of Appeals held that "where one statutory provision specifically addresses a matter, and another more general statutory provision also may arguably cover the same matter, the specific statutory provision is to be held applicable and the general provision is deemed inapplicable." *See also, Smack v. Dept. of Health*, 378 Md. 298, 306 (2003). Moreover, to the extent that Section 6- 510(c)(1) and Section 6-201(c)(1) are deemed to be conflicting statutes, Section 6-510(c)(1) as the more recently enacted statute would be given effect. As the Maryland Court of Appeals put it, while two statutes in pari materia are to be given full effect whenever possible, "where the provisions of such statutes are irreconcilable, the later statute governs to the extent of the conflict." *Dept. of Motor Vehicles v. Greyhound Corp.,* 247 Md. 662, 666-67 (1967). *See also, State of Maryland v. Harris*, 327 Md. 32, 38 (1992).

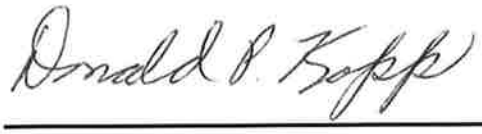
DECISION BY THE PUBLIC SCHOOL LABOR RELATIONS BOARD

Seymour Strongin, Chairman

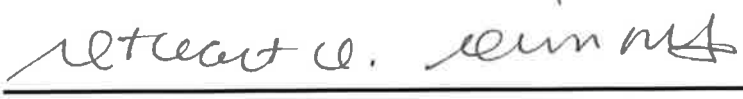


Robert H. Chanin, Member

Charles I. Ecker, Member



Donald P. Kopp, Member



Stuart O. Simms, Member

Glen Burnie, MD

August 2, 2012