STATE OF MARYLAND
PUBLIC SCHOOL LABOR RELATIONS BOARD

IN THE MATTER OF:	*	
HOWARD COUNTY EDUCATION ASSOCIATION	*	
	*	
Petitioner,	*	
v.		PSLRB Case No. N 2014-01
	*	
BOARD OF EDUCATION OF HOWARD COUNTY	*	
Respondent	*	

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DECISION AND ORDER ON REQUEST
TO RESOLVE DISPUTE AS TO NEGOTIABILITY

I. INTRODUCTION

On October 18, 2013, the Howard County Education Association ("Association") filed a "Request to Resolve a Dispute as to Negotiability" ("Form PSLRB-04"), with the Public School Labor Relations Board ("PSLRB").[1] Form PSLRB-04 reflects the authority granted to the PSLRB by Section 6-408(c)(5)(i) of the Education Article to decide disputes over the negotiability of bargaining topics:

> 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 Board for final resolution of the dispute.

[1] The Association has also filed a Charge of Violation of Title 6, Subtitle 4 or 5, of the Education Article. *See* PSLRB Case No. N 2014-07 (2013). The Charge of Violation arises out of the same facts and circumstances as those set forth herein.

Education Article, Section 6-408(c)(5)(i).

Section 6-408(c)(5)(v) of the Education Article states that "the [PSLRB] shall … [r]ender a decision determining whether the topic of negotiation is mandatory, permissive, or illegal," and "[i]ssue the written decision to the parties within 14 days after receiving the written briefs."

On October 22, 2013, the PSLRB requested the Association and the Board of Education of Howard County ("County Board") to submit written briefs in support of their respective positions. The parties submitted their briefs to the PSLRB on October 28, 2013.[2]

II. FINDINGS OF FACT

The facts herein are not in dispute and may be summarized as follows. Pursuant to Section 6-405 of the Education Article, the Association is the exclusive representative for a bargaining unit of approximately 4,800 certificated professional employees of the County Board. The County Board is a public school employer as defined in Section 6-401(f) of the Education Article.

The Association and the County Board are parties to a Collective Bargaining Agreement in effect from July 1, 2013 through June 30, 2014. Article 2 (C) of the Agreement provides as follows:

> Negotiation sessions shall be closed meetings held as frequently as necessary, at a time other than the regular school day for students, to complete the negotiations by the stated completion date.

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[2] This Final Decision and Order follows the Summary Decision that was issued by the PSLRB on November 12, 2013.

Article 2 (C) has contained the same language for many years.

By letter dated October 11, 2013, Ernesto Diaz, Director of Staff Relations for the Howard County Public School System, informed the Association "of the [County] Board's decision on Thursday, September 26, 2013 to conduct collective bargaining in open session for FY15." In response to the Diaz letter, the Association on October 18, 2013, filed its Request to Resolve a Dispute as to Negotiability with the PSLRB.

III. POSITIONS OF THE PARTIES

The Association contends that procedures for the conduct of negotiations are mandatory subjects of bargaining. In support of this position, the Association points to "the plain wording" of Section 6-408(c)(1), and the historic interpretation of this provision by the State Board of Education that "has mandated negotiations around procedures as distinct from substance."[3]

The Association draws further support for its contention that negotiation procedures are mandatory subjects from the balancing test set forth in Section 6-408(c)(5)(vi)(2).[4] Applying this test, the Association contends that "the conduct of negotiations directly affects the employee's relationship with the employer because it

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[3] *See Howard County Education Association – ESP v. Board of Education of Howard County*, MSBE Op. 89-32 (1989) (procedures for conduct of observation and evaluation are mandatory bargaining subjects); *Harford County Board of Education v Harford County Educational Services Council*, MSBE Op. 05-24 (2005) (procedural due process found to be a lawful subject of bargaining).

[4] "To resolve disputes [between mandatory and permissive subjects] under this section, the Board shall develop a balancing test to determine whether the impact of the matter on the school system as a whole outweighs the direct impact on the teachers or employees." Md. Code Ann., Educ. § 6-408(c)(5)(vi)(2).

contributes to more stable relations in efforts to obtain or improve terms or conditions of employment," and "more directly impacts on the employees because without negotiations employees lose defined terms and conditions of employment."

The Association rejects the assertion that the Open Meetings Act mandates that bargaining sessions be held in open meetings, and maintains that the Act's provisions permit the parties to meet in closed session consistent with Article 2 (C) of the Collective Bargaining Agreement.[5] The Association also notes that Section 4-107 of the Education Article provides that "[a] county board may meet and deliberate in executive session if the matter under consideration is … labor relations," and that the parties have engaged in closed session negotiations for more than 40 years consistent with the provisions of Article 2 (C). The Association therefore argues that the County Board may agree to negotiate in closed session, and that Article 2 (C) is, therefore, valid and enforceable.

The Association also maintains that the Court of Appeals decision in *Carroll County Educ. Assoc., Inc. v. Board of Educ. of Carroll County*, 294 Md. 144 (1982) does not require the parties to conduct negotiations in open session, or even address the issue of whether the topic of open meetings is an illegal subject of bargaining. Rather, the Association contends that the *Carroll County* Court simply held that a local board of education, consistent with the statutory requirement to bargain in "good faith," could unilaterally decide to conduct collective bargaining negotiations in open session.

The County Board contends that the PSLRB does not have jurisdiction over this

[5] The Open Meetings Act provides that "a public body may meet in closed session or adjourn an open session to a closed session only to … conduct collective bargaining negotiations or consider matters that relate to the negotiations." Md. Code Ann., State Govt. § 10-508(a)(9).

matter. In this regard, the County Board asserts that the PSLRB's statutory authority is confined to matters arising under Title 6, Subtitles 4 or 5, of the Education Article, and that there is nothing in these provisions that "discusses, much less purports to limit, the [County] Board's authority" under the Open Meetings Act.

Even if the PSLRB had jurisdiction over this issue, the County Board states that "[t]he decision to conduct collective bargaining in open or closed session is a decision that is statutorily vested in the [County] Board alone, and one that the Board cannot legally contract away." To this end, the County Board notes that the Open Meetings Act "clearly vests the Board, and only the Board, with the statutory discretion to determine whether to go into closed session to discuss permissible items such as collective bargaining."

Accordingly, the County Board contends that it has the "non-negotiable statutory authority" under the Open Meetings Act "to conduct collective bargaining in open session," that the Court of Appeals decision in *Carroll County* gives "the [County] Board … unilateral authority to determine whether to open or close its negotiations session," and that this "authority is not subject to negotiation." The County Board therefore maintains that Article 2 (C) of the Collective Bargaining Agreement involves an illegal subject, and asks the PSLRB to declare it null and void.

IV. ANALYSIS

A. Jurisdictional Issue

Because a jurisdictional issue has been raised, we shall revisit the General Assembly's statutory pronouncements on the PSLRB's authority over negotiability

disputes between public school employers and employee organizations.

In enacting the Fairness in Negotiations Act,[6] the General Assembly determined that the "Public School Labor Relations Board shall decide any controversy or dispute arising under Title 6, Subtitle 4 or Subtitle 5" of the Education Article. Title 6, Subtitle 4, expressly includes disputes over the negotiability of bargaining topics:

> 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 Board for final resolution of the dispute.

Md. Code Ann., Educ. § 6-408(c)(5)(i).

Accordingly, when a party requests the PSLRB to issue a "final resolution" on a negotiability dispute, Md. Code Ann., Educ. § 6-408(c)(5)(i), the General Assembly has stated "that the [PSLRB] shall … render a decision determining whether the topic of negotiation is mandatory, permissive, or illegal," Md. Code Ann., Educ. § 6-408(c)(5)(v)(2). In rendering such decisions, the General Assembly has instructed the PSLRB that certain bargaining topics are outside the scope of lawful negotiations:

> 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.

Md. Code Ann., Educ. § 6-408(c)(3).

The General Assembly has therefore mandated that the PSLRB render decisions on negotiability disputes and, in so doing, determine whether the topic of negotiation is

[6] Senate Bill 590/Chapter 324 and House Bill 243/Chapter 325 (2010 Session).

"precluded by applicable statutory law."

In short, there is no dispute that the Fairness in Negotiations Act gives the PSLRB authority to determine whether a topic is "a mandatory, a permissive, or an illegal topic of bargaining," Md. Code Ann., Educ. § 6-408(c)(5)(i). To properly exercise this statutory authority, the PSLRB must decide whether negotiation of the topic at issue "is precluded [from negotiation] by applicable statutory law" within the meaning of Section 6-408(c)(3).

The County Board contends that the Open Meetings Act is "applicable statutory law" that precludes the parties from negotiating over the topic of open or closed negotiation sessions. It follows that, in order to address that contention, the PSLRB necessarily must consider the restraints *vel non* that the Open Meetings Act imposes in regard to negotiability. Accordingly, we dismiss the County Board's motion to dismiss this Request for lack of jurisdiction.

B. Negotiability Issue

Moving to the underlying negotiability issue, we first consider whether the subject of open negotiation sessions is an illegal bargaining topic because it is "precluded by applicable statutory law" within the meaning of Section 6-408(c)(3) of the Education Article.

The County Board devotes much attention to the argument that it has the "non-negotiable statutory authority" under the Open Meetings Act "to conduct collective bargaining in open session," and that "[t]he decision to conduct collective bargaining in open or closed session is … one that the [County] Board cannot contract away." Phrased

otherwise, the County Board is in effect contending that it cannot delegate the statutory authority given to it by the Open Meetings Act. But the question in this case is not, as the County Board would have it, whether the Open Meetings Act allows the County Board to delegate its statutory authority to decide whether negotiation sessions should be open or closed. We need not reach that question in this case because there has been no delegation. In agreeing to Section 2 (C) in the Collective Bargaining Agreement, the County Board has exercised its statutory authority and itself made the determination to have closed negotiation sessions.

Moreover, the case on which the County Board most strongly relies, *Carroll County*, does not so hold. To be sure, the *Carroll County* Court stated that a local school board's decision to conduct negotiations in open session was not a *per se* violation of the collective bargaining statute:

> It is axiomatic that the [County] Board's action in directing that the collective bargaining meetings be open to the public, taken pursuant to the requirements of the [Open Meetings] Act, may in no event be construed to constitute a per se violation of its statutory mandate to negotiate in good faith under § 6-408 of the Education Article.

However, nowhere in the Court's decision did it conclude that the subject of open negotiation sessions was "illegal" or "non-negotiable." Indeed, the Court left open the possibility that a local school board's decision to conduct negotiations in open session, while not a *per se* violation, could nonetheless constitute a violation of the statutory duty to bargain in good faith:

> [W]e do not consider the question of whether the [County] Board, in conducting open collective bargaining sessions, would violate the good faith requirement of § 6-408 where it

> was shown, on a proper record, that the board's motivation in holding open meetings was not in furtherance of the purpose underlying enactment of the Open Meetings Act, but rather was for the purpose of subverting or undermining the meaningful course of the collective bargaining process itself.

Nor has the County Board otherwise explained how the *Carroll County* decision – or the Open Meetings Act itself – precludes it from agreeing to hold closed bargaining sessions as it did in Article 2 (C) of the Collective Bargaining Agreement. To be sure, the County Board's agreement to hold closed sessions must comply with the requirements of the Open Meetings Act.[7] That these requirements must be met does not, however, render an agreement to hold closed negotiation sessions "null and void as a matter of law" as the County Board suggests. For all of these reasons, we conclude that the subject of open bargaining sessions is not precluded by applicable statutory law and is consequently not an illegal topic of bargaining.

We next move to the issue of whether the topic of open bargaining sessions is a mandatory or permissive subject. In doing so, we are guided by the General Assembly's instruction that the PSLRB "develop a balancing test to determine whether the impact of

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[7] Section 10-508(d) of the Open Meetings Act provides as follows:

> (1) Unless a majority of the members of a public body present and voting vote in favor of closing the session, the public body may not meet in closed session.
> (2) Before a public body meets in closed session, the presiding officer shall:
> (i) conduct a recorded vote on the closing of the session; and
> (ii) make a written statement of the reason for closing the meeting, including a citation of the authority under this section, and a listing of the topics to be discussed.
> (3) If a person objects to the closing of a session, the public body shall send a copy of the written statement required under paragraph (2) of this subsection to the [Open Meetings Act Compliance] Board.
> (4) The written statement shall be a matter of public record.
> (5) A public body shall keep a copy of the written statement made under paragraph (2)(ii) of this subsection for at least 1 year after the date of the session.

the matter on the school system as a whole outweighs the direct impact on the teachers or employees." Md. Code Ann., Educ. § 6-408(c)(5)(vi)(2).

The Association contends that "the conduct of negotiations directly affects the employee's relationship with the employer because it contributes to more stable relations in efforts to obtain or improve terms or conditions of employment," and "more directly impacts on the employees because without negotiations employees lose defined terms and conditions of employment." The County Board simply states that "[t]he decision to conduct collective bargaining in open or closed session is a decision that is statutorily vested in the [County] Board alone …."

While the Association suggests that the "direct impact on the teachers or employees" of holding open negotiation sessions outweighs the impact on the County Board, it has provided little support for this contention. By contrast, the direct impact on the County Board of holding open or closed sessions is more evident. For example, the Open Meetings Act expressly provides that the County Board "***may*** meet in closed session or adjourn an open session to a closed session" in order to "conduct collective bargaining negotiations or consider matters that relate to the negotiations." Md. Code Ann., State Govt. § 10-508(a)(9) (emphasis added). The County Board therefore has the discretionary authority to decide this issue. Adopting the Association's position that negotiation on this subject is mandatory would remove the County Board's authority to exercise its discretion in such matters.

Moreover, Section 6-408(c)(1) of the Education Article states that the parties "shall meet and negotiate … on all matters that relate to salaries, wages, hours, and other

working conditions, including procedures regarding employee transfers and assignments." Notably, Section 6-408(c)(1) does not identify the topic of open bargaining sessions as a matter that falls within the scope of the mandatory bargaining obligation. Nor are we are persuaded that this matter sufficiently "relate[s] to" salaries, wages, hours, and other working conditions to support a finding that they are mandatory subjects of bargaining.

That the topic of open bargaining sessions is non-mandatory is also supported by public sector labor relations boards in New York and Ohio. *See, e.g., Charlotte Valley Central School District and Charlotte Valley Teachers Association, NYSUT, AFT, Local 2556,* 17 PERB ¶ 4601 (1984) (bargaining over open meeting policy not mandatory); *Town of Shelter Island*, 12 PERB ¶ 4550 (1979) (open meetings for negotiations is a non-mandatory subject of bargaining); *City of Dayton*, 1 OPER ¶ 1541 (2011) (open negotiating sessions is a permissive subject of bargaining).

For all of these reasons, we find that the impact of depriving the County Board of its statutory discretion to decide whether to hold negotiations in open session "outweighs the direct impact on the teachers or employees." We therefore conclude that negotiating over open bargaining sessions is a permissive subject of bargaining.[8] We consequently find that Article 2 (C) of the Collective Bargaining Agreement is valid having been

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[8] Having found the topic of open negotiation sessions to be a permissive subject of bargaining, and because it is not a violation of Title 6, Subtitle 4, of the Education Article to unilaterally change a permissive subject, *see e.g., Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 187-188 (1971); *Pall Corp. v. NLRB*, 275 F.3d 116 (2002), we therefore dismiss the Charge of Violation filed by the Association in PSLRB Case No. N 2014-07.

"mutually agreed to by the employer and employee organization" in accordance with Section 6-408(c)(2) of the Education Article.

V. CONCLUSIONS OF LAW

We conclude that the PSLRB has jurisdiction to resolve the negotiability dispute presented by the Association's Request to Resolve a Dispute as to Negotiability, and therefore reject the County Board's Motion to Dismiss the Association's Request.

As to the underlying negotiability issue, we conclude that the topic of open or closed bargaining sessions is a permissive subject of negotiation, and that Article 2 (C) of the 2013-14 Collective Bargaining Agreement between the parties is, therefore, a valid and enforceable provision. [9]

BY ORDER OF THE PUBLIC SCHOOL LABOR RELATIONS BOARD[10]

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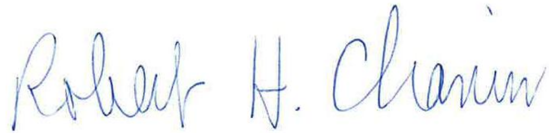
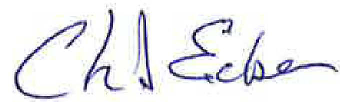
[9] Member Harmon dissents, concluding that open/closed negotiation sessions are "an illegal topic for negotiation." In support of this conclusion, Member Harmon cites the *Carroll County* case. As explained on pages 8 and 9 of the majority decision, however, this is not what the court held in that case. What the court held was that – in a case, we might note, that did not involve a contractual agreement to the contrary – it was not a *per se* unfair labor practice for the school board to unilaterally decide that negotiations be held in open session. Member Harmon is likewise mistaken when he suggests that the majority decision sanctions the delegation by the County Board of its statutory authority to decide whether to hold open or closed negotiation sessions. As noted on page 8 of the majority decision, we need not reach the question of delegation in this case because there has in fact been no delegation. Member Harmon concedes that negotiation sessions may be closed if "the decision to close is made by the statutorily authorized public body," and that is precisely what happened in this case. The decision to close was made by the "statutorily authorized body" when the County Board agreed to Section 2 (C) in its collective bargaining agreement with the union.

[10] Member Simms resigned effective November 20, 2013, and did not take part in this decision.

Seymour Strongin, Chairman



Robert H. Chanin, Member



Charles I. Ecker, Member

Annapolis, MD
December 3, 2013

APPEAL RIGHTS

Any party aggrieved by this action of the PSLRB may seek judicial review in accordance with Title 10, Subtitle 2 of the State Government Article, Annotated Code of Maryland, Sec. 10-222 (Administrative Procedure Act—Contested Cases), and Maryland Rules CIR CT Rule 7-201 *et seq.* (Judicial Review of Administrative Agency Decisions).

MEMBER HARMON, dissenting

I disagree with the majority that the decision to open or close negotiating sessions is a permissive subject for negotiation. It is my opinion that the decision to open or close negotiation sessions is an illegal topic for negotiation because it is clearly precluded by an applicable statute, in this case the §10-501, *et. seq.*, State Government Article, *Annotated Code of Maryland*. Accordingly, it is my opinion that the collective bargaining agreement language at issue in this case is illegal and therefore unenforceable.

The aforementioned State Government Article delegates to the public body, the local board of education, the sole authority and responsibility for opening or closing its public meetings, including negotiating sessions, in accordance with the provisions of that statute. Moreover, the facts of this case closely resemble an earlier case on this same matter in which the Maryland Court of Appeals rendered a judgment that the decision to open or close negotiating sessions is an illegal subject for negotiation (*Carroll County Education Association v. Carroll County Board of Education*, 294 Md. 144 (1982)). I find nothing in this record, or in the 2010 changes to the public education collective bargaining law, that now would render that decision of the Court moot.

To the contrary, the Court's decision in that case is, to me, definitively clear and instructive to the Board in this case. The Court reviewed the construction of the State Government Article and noted that §10-504 pre-emptively addresses any conflicts with other statutes; "whenever this subtitle and another law that relates to meetings of public bodies conflict, this subtitle applies unless the other law is more stringent." However, just as the Court found in *Carroll*, in this case I find absolutely no conflict to exist

between the public education negotiations law and the State Government Article that would require a closer examination. The Education Article at §6- 408(c)(3), which did not change with the 2010 statutory revisions, stipulates 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***." On its face, the State Government Article at §10-508 clearly delegates to the local board of education the sole statutory authority and responsibility to determine when to close its public meetings.

The Court of Appeals definitively answered that question in *Carroll*. The Court noted the union's argument in that case that the State Government Article did not apply to the function of collective bargaining and the local board's concession that "if collective bargaining sessions are not within the coverage of the Open Meetings Act, a unilateral decision by the public school employer to negotiate only in public may violate the 'good faith' requirement." In other words, if the Open Meetings Act did not apply to negotiations then the disputed provision held and bad faith could exist. Conversely, if the Act did apply to negotiations, then the matter was ***precluded*** by law and no bad faith claim could exist because the matter was not negotiable. The Court then definitively answered that question of law ruling that the Open Meetings Act does apply, that the board's negotiating team is a public body under the Act, that negotiations is a quasi-legislative function under the Act, and that negotiation sessions, like all other meetings of the public body, shall be open to the public unless the decision to close is made by the statutorily authorized public body.

> "Where, as here, 'representatives' of the Board are authorized by statute
> . . . to engage in collective bargaining negotiations with employee organizations, they plainly exercise 'quasi-legislative' functions under §8 (i) of the Act because they are involved in the process of approving, disapproving, or amending a contract. In so acting, the Board's representatives constitute a 'public body,' as defined in §8 (g) of the Act . . . while §10 requires that 'meetings' of the public body shall be open to the public."

Thus, the Court of Appeals has already addressed the matter before this Board in this case and answered the question of law presented here. The State Government Article precludes negotiations on the decision to close a public meeting of the local board and no statutory revisions since 1982 to either the Education Article or the State Government Article change the fundamental statutory language that led the Court to its decision.

Within the majority's conclusion that the decision to close a public meeting is a permissive topic of negotiations, I dissent from the distinction made between process and substance. If this case were about language addressing the process of the decision to close a public meeting, I likely would not be the minority. For instance, procedural aspects that would be negotiable might include the amount of time required of a local board to inform the union of its decision to hold open negotiations. However, that is not the issue here. This case addresses not the process, but the decision-making authority of the proper public body to close or keep open its public meetings. This decision-making authority is delegated by statute to the public body, the local board, and precluded by law from being negotiated away. Therefore, I dissent from the majority's distinction between process and substance.

Donald W. Harmon

Donald W. Harmon, Ed.D, Member

December 3, 2013

Annapolis, MD