STATE OF MARYLAND
PUBLIC SCHOOL LABOR RELATIONS BOARD

IN THE MATTER OF:	*	
TEACHERS ASSOCIATION OF ANNE ARUNDEL COUNTY	*	
	*	
Petitioner	*	
v.	*	PSLRB Case No. N 2015-02
BOARD OF EDUCATION OF ANNE ARUNDEL COUNTY	*	
	*	
Respondent	*	

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DECISION AND ORDER ON REQUEST
TO RESOLVE DISPUTE AS TO NEGOTIABILITY

I. INTRODUCTION

On October 1, 2014, the Teachers Association of Anne Arundel County, Inc. ("Association") filed a "Request to Resolve a Dispute as to Negotiability" ("Form PSLRB-04"), with the Public School Labor Relations Board ("PSLRB"). 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, 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, Educ. Art. ("Educ. Art.") § 6-408(c)(5)(i) (2014 Repl. Vol.). *See also* COMAR 14.34.02.02 ("A party requesting a resolution of a dispute as to negotiability may request relief from the Public School Labor Relations Board by completing Form PSLRB-04 and filing it with the Executive Director of the Board.").

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." § 6-408(c)(5)(i).

II. FINDINGS OF FACT

The following facts are not in dispute. Pursuant to § 6-405 of the Education Article, the Association is the exclusive representative for a bargaining unit of approximately 6,500 certificated employees who work for the Board of Education of Anne Arundel County ("County Board"). The County Board is a public school employer as defined in § 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 to June 30, 2015 ("Agreement"). Article 1 of the Agreement provides:

> D. Authority of the Board
> TAAAC recognizes the Board as the agency charged with the legal responsibility for the successful operation of Anne Arundel County Public Schools (AACPS). This responsibility shall include, but not be limited to:
>
> 1. the determination and administration of school policy;
> 2. the operation and management of the schools;
> 3. directing and scheduling the work of its employees and evaluating their performance;

4. hiring, promoting, transferring, assigning and retaining employees in positions;
5. suspending, discharging and disciplining employees for cause and;
6. determining the method, means and materials of instruction for delivery of services to students;
7. subject only to the provisions of this Agreement.

Nothing in this Agreement shall be construed as an abrogation of the legal responsibilities, powers and duties of the Board.

(Agreement, Art. 1.D).

On August 28, 2014, Timothy Smith, a guidance counselor employed by the County Board and represented by the Association received a written reprimand for failing to ensure one or more students' eligibility to participate in graduation. Based upon the circumstances surrounding the written reprimand, the Association attempted to initiate the grievance procedure, which includes binding arbitration and is set forth in Article 19 of the Agreement. The County Board asserted that the matter of reprimands of certificated employees is an illegal subject of bargaining, relying largely upon the Maryland State Board of Education (MSBE) decision in *Board of Education of Howard County v. Howard County Education Association*, MSBE Op. 09-08 (2009).[1]

III. POSITIONS OF THE PARTIES

The Association contends that the lower-level discipline of certificated employees, i.e., discipline less than suspension and including written warnings and reprimands, as that subject is encompassed within the language of Article 1.D. referring to "disciplining employees for cause," is a mandatory subject of bargaining.

[1] The PSLRB is not bound by the *Howard County* decision. Education § 6-807(d) ("A prior order, action, or opinion issued by the State Board before the enactment of this section may be considered as precedent in matters arising after the enactment of this section, but it is not binding on the Board.").

The Association dismisses as "irrelevant" the *Howard County* decision, in which the MSBE concluded that lower-level discipline is an illegal subject of bargaining. The Association cites to Education § 6-408(c)(5)(vi)(2), which provides, "To resolve disputes 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." Under this test, the Association notes the acknowledgment in *Howard County* that teachers have a "direct and intimate interest in maintaining a good professional reputation – something that warnings and written reprimands can tarnish" and that "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." With respect to the recognition in *Howard County* of a county board's interest in a "consistent approach to lower-level discipline," the Association rejects the claim that such an interest constitutes an impact on the school system as a whole that outweighs the impact on certificated employees. According to the Association, the first three levels of the grievance procedure in Article 19 provide the local board "with ample opportunity to ensure consistency of discipline before an arbitrator would review it under the long-standing, consistent 'just cause' analysis…."

The County Board contends that "reprimands and any procedures for challenging them do not fall within the 'mandatory negotiability' category." The County Board points to the difference in language between Education §§ 6-408(c)(1) and 6-510(c)(1): § 6-408(c)(1) mandates bargaining for certificated employees "on all matters that relate to salaries, wages, hours, and other working conditions, including procedures regarding

employee transfers and assignments"; while § 6-510(c)(1) mandates bargaining for non-certificated employees "on all matters that relate to salaries, wages, hours, and other working conditions, including the discipline and discharge of an employee for just cause." According to the County Board, had "the General Assembly intended the mandatory topics for certificated employees to include 'discipline and discharge,' then 6-408(c) would be symmetrical with Section 6-510(c)."

According to the County Board, it follows that "under both statutory law and State Board of Education precedent, AACPS guidance counselors and other certificated employees seeking to challenge reprimands and similar 'lower level' discipline cannot compel arbitration or other grievance procedures under Article 19 of the parties' Negotiated Agreement." Instead, according to the County Board, the proper procedure for challenging a reprimand is "via the Section 4-205(c) appeal process." [2]

IV. ANALYSIS

Sections 6-202(a) and 6-408(c) of the Education Article provide the framework for resolving the instant dispute as to negotiability. Section 6-202(a) provides in part:

(a) Grounds and procedure for suspension or dismissal. --

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[2] The County Board also makes, albeit tentatively, a waiver argument, asserting in support of that argument that Articles 2 and 19 of the Agreement do not contain a provision requiring reprimands and warnings to be subject to arbitration, and that reprimands have always been subject to the process that the County Board has attempted to follow, presumably the appeal process in § 4-205(c). The County Board also suggests that a determination of negotiability is premature because the parties have not reached impasse. Whether there was waiver is not relevant to deciding the limited question of negotiability. As for whether the Association moved prematurely in seeking a determination of negotiability prior to the parties being at impasse, we note that the parties are not in negotiations and, in any event, a determination of negotiability must be made before the Board can determine that an impasse has been reached. Education § 6-408(c)(5)(ii)(2).

(1) On the recommendation of the county superintendent, a county board may suspend or dismiss a teacher, principal, supervisor, assistant superintendent, or other professional assistant for:

(i) Immorality;

(ii) Misconduct in office, including knowingly failing to report suspected child abuse in violation of § 5-704 of the Family Law Article;

(iii) Insubordination;

(iv) Incompetency; or

(v) Willful neglect of duty.

(2) Before removing an individual, the county board shall send the individual a copy of the charges against him and give him an opportunity within 10 days to request a hearing.

(3) If the individual requests a hearing within the 10-day period:

(i) The county board promptly shall hold a hearing, but a hearing may not be set within 10 days after the county board sends the individual a notice of the hearing; and

(ii) The individual shall have an opportunity to be heard before the county board, in person or by counsel, and to bring witnesses to the hearing.

(4) The individual may appeal from the decision of the county board to the State Board.

Education § 6-202(a)(1)-(4).

Section 6-408(c) provides in part:

(c) 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, including procedures regarding employee transfers and assignments.
>
> (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.

Education § 6-408(c)(1)-(3). Also pertinent is § 6-408(c)(5)(vi)(2), which provides, "To resolve disputes 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."

Beginning with the plain language of § 6-202(a), it refers only to dismissal and suspension, not as the County Board suggests, to discipline in general. While the language of § 6-202(a) might be read to render the subject of dismissal and suspension an illegal subject of bargaining, it does not have the same effect on lower-level discipline. Had the General Assembly intended such, it would not have expressly limited § 6-202(a) to the two most serious forms of discipline, dismissal and suspension. *Office & Professional Employees International Union v. Mass Transit Admin.*, 295 Md. 88, 96 (1982) ("It is a settled principle of statutory construction that the Legislature's enumeration of one item, purpose, etc. ordinarily implies the exclusion of all others."). In short, § 6-202(a) does not constitute "applicable statutory law" for purposes of § 6-408(c)(3).

The County Board focuses on a comparison of the language in §§ 6-408(c)(1) and 6-510(c)(1). The argument is that if the General Assembly intended for lower-level discipline to be a mandatory subject of bargaining for certificated personnel, it would have done what it did for non-certificated personnel. This argument is a bit like comparing apples and oranges. Section 6-510(c)(1) includes among the mandatory topics of bargaining "the discipline and discharge of an employee for just cause." Section 6-408(c)(1) should not be expected to contain the same language, given that the authority to discharge certificated personnel is granted the superintendent under § 6-202(a). That is, against the backdrop of § 6-202(a), the General Assembly would not have considered whether to include "the discipline and discharge of an employee for just cause" in § 6-408(c)(1). The absence of such language in § 6-408(c)(1) is not dispositive, especially where, as here, the same language would not fit. *See Lussier v. Maryland Racing Comm'n*, 343 Md. 681 (1996) (agency had power to impose fines in the absence of express statutory authority, even where legislature had expressly authorized other agencies to impose fines).

The County Board also relies on the *Howard County* decision as support for the proposition that lower-level discipline is precluded by "applicable statutory law." While the MSBE concluded that the broad grants of authority in Education §§ 4-101(a) and 4-108(a)(3)[3] constitute "applicable statutory law" for purposes of § 6-408(c)(3), it

[3] Section § 4-101(a) provides: "Subject to the provisions of Subtitle 4 of this title, educational matters that affect the counties shall be under the control of a county board of education in each county." Section § 4-108(a)(3) provides, "Subject to this article and to the applicable bylaws, rules, and regulations of the State Board, [the county board shall] determine, with the advice of the county superintendent, the educational policies of the county school system;…."

ultimately decided the issue by application of a balancing test, which is what we now must do.[4]

The General Assembly has defined for us the balancing test to be used here. Section 6-408(c)(5)(vi)(2) provides, "To resolve disputes 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."

There is no gainsaying that lower-level discipline has a direct and fundamental impact upon teachers and employees. As the MSBE recognized, teachers have a "direct and intimate interest in maintaining a good professional reputation – something that warnings and written reprimands can tarnish" and a "direct and fundamental interest in defending their reputations when they believe…that the facts do not support the warning

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[4] In our view, the more consistent reading of the statutory framework as a whole is that "applicable statutory law" is limited to statutes addressing a specific subject of bargaining. If there is no such specific statute, then the PSLRB applies a balancing test to determine whether the subject is mandatory or permissive; if the latter, the county board remains perfectly free to refuse to bargain. *See City of Janesville v. Wisconsin Employment Relations Comm'n*, 535 N.W.2d 34, 38 (Wis. Ct. App. 1995), *superseded by statute on other grounds*, ("A mandatory subject of bargaining is one primarily related to wages, hours and conditions of employment. A permissive subject of bargaining is one primarily related to the management and direction of the governmental unit. A municipal employer may, but need not, bargain over this subject. A prohibited subject of bargaining is one that would violate a law.") (citations omitted).

The balancing test we apply in this case is the same whether used to differentiate between mandatory and illegal subjects of bargaining or mandatory and permissive. In this regard, any disagreement with *Howard County* might be only academic. We would reject any inference, however, that the balancing which the PSLRB must undertake is limited to determining whether a matter of educational policy is only either permissive or illegal. Since *Howard County*, the General Assembly has directed the PSLRB to use "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." In a case where the result of such a test was that the direct impact on teachers outweighed the impact on the school system as a whole, the ultimate decision would have to be that the subject in dispute was a mandatory subject of bargaining. If the ultimate decision could be only that the subject was permissive (or illegal), then the county board would be free not to bargain over a subject that had a greater direct impact on teachers than on the school system as a whole. That would be contrary to the purpose and intent of § 6-408.

and reprimand." *Howard County*, MSBE Op. 09-08 at 14. And "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." *Id.*

The MSBE, nonetheless, subtracted from the weight given the teacher's interest in reputation and job security because of the existence of procedures in § 4-205(c) to challenge lower-level disciplinary actions.[5] But even the MSBE recognizes that the § 4-205(c) procedures in and of themselves are not enough to tilt the balance against certificated employees. As the MSBE puts it, owing to the existence of these procedures, "the balance tips, but not heavily, in favor of the teacher's union." *Id.* at 15.

While the impact of lower-level discipline on certificated employees is always direct and significant, the impact on the school system as a whole, if lower-level discipline is subject to bargaining, is more remote and speculative. Section 6-202(a) sets

[5] Section 4-205(c) provides:

> (c) Interpretation of law; controversies and disputes. --
>
> (1) Subject to the authority of the State Board under § 2-205(e) of this article, each county superintendent shall explain the true intent and meaning of:
>
> (i) The school law; and
>
> (ii) The applicable bylaws of the State Board.
>
> (2) Subject to the provisions of § 6-203 and Title 6, Subtitle 4 of this article and without charge to the parties concerned, each county superintendent shall decide all controversies and disputes that involve:
>
> (i) The rules and regulations of the county board; and
>
> (ii) The proper administration of the county public school system.
>
> (3) A decision of a county superintendent may be appealed to the county board if taken in writing within 30 days after the decision of the county superintendent. The decision may be further appealed to the State Board if taken in writing within 30 days after the decision of the county board.

out five grounds for dismissal or suspension. The County Board has absolute discretion whether to pursue any instance of alleged misconduct as implicating one of these grounds and thereby removing the matter from arbitration. In this regard, the content and consistency of the approach to discipline remain totally within the County Board's control.

If the alleged misconduct is not deemed worthy of dismissal or suspension and the lower-level discipline is grieved, the Superintendent, under Article 19, decides the grievance at the third step; it is typically the case that a superintendent or designee decides the grievance at some step. Should the employee subsequently repeat the misconduct, the County Board is free to proceed against the employee under § 6-202(a) alleging, e.g., incompetency based upon repeated incidents of the misconduct. Regardless of whether or not the first discipline went all the way to arbitration and was upheld by the arbitrator, nothing would prevent the County Board from citing that incident in a subsequent proceeding against the employee under § 6-202(a).[6]

In the final weighing, the impact on the school system as a whole is not great and does not outweigh the direct impact on certificated employees of lower-level discipline. We believe that this result is consistent with the General Assembly's determination that discipline *and* discharge for just cause is a mandatory subject of bargaining for non-

[6] Conceivably, an employee might seek to use the arbitrator's prior decision, in a separate proceeding under § 6-202(a), to preclude reliance on that instance of alleged misconduct. But the extent, if any, to which there might be preclusive effect would depend on the grounds relied on for overturning the discipline. *See Ent. Wire Co.*, 46 Lab.Arb. Rep. (BNA) 359, at 363-364 (1966) (listing seven factors typically used by arbitrators in determining the existence of just cause for discipline).

certificated employees. The result is also consistent with decisions reached in other jurisdictions.[7]

CONCLUSIONS OF LAW

For the reasons stated above, the PSLRB concludes that lower-level discipline of certificated employees, i.e., discipline less than suspension and including written warnings and reprimands, is a mandatory subject of bargaining.

ORDER

Having considered the Association's request to resolve a dispute as to negotiability, and the parties' briefs in support of their positions, it is hereby ORDERED that the dispute as to negotiability, in PSLRB Case No. N 2015-02, is resolved in accordance with the Decision of the PSLRB set forth above.

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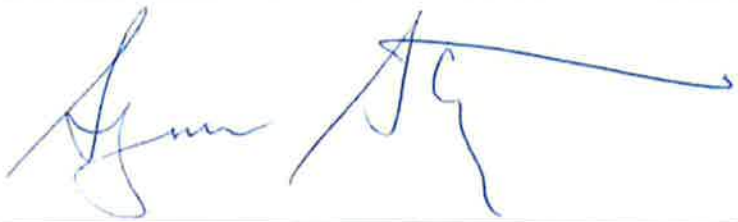
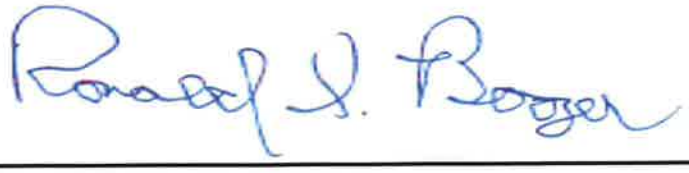
[7] *See, e.g., Beloit by Beloit City School Board v. Wisconsin Employment Relations Com.*, 242 N.W.2d 231, 238 (Wis. 1976) ("The commission held that these 'just cause' [for disciplinary action against teachers including reprimands] proposals primarily relate to 'wages, hours and conditions of employment,' and mandated bargaining. The trial court affirmed this holding."); *Springfield Education Asso. v. Springfield School Dist.*, 547 P.2d 647, 648 (Or. Ct. App. 1976) ("The following are among the subjects which ERB found to be mandatory subjects for bargaining:...a just cause provision for teacher reprimand.").

BY ORDER OF THE PUBLIC SCHOOL LABOR RELATIONS BOARD



Seymour Strongin, Chairman



Ronald S. Boozer, Member

Robert H. Chanin, Member

Charles I. Ecker, Member

Annapolis, MD

October 28, 2014

MEMBER DONALD W. HARMON dissents.

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 7-201 *et seq*. (Judicial Review of Administrative Agency Decisions).