

STATE OF MARYLAND
PUBLIC SCHOOL LABOR RELATIONS BOARD

IN THE MATTER OF: *

WASHINGTON COUNTY *

EDUCATIONAL SUPPORT *

PERSONNEL, INC., *

Employee Organization, *

and * PSLRB Case No. N 2019-03

BOARD OF EDUCATION OF *

WASHINGTON COUNTY, *

Public School Employer. *

* * * * *

**DECISION AND ORDER ON REQUEST
TO RESOLVE DISPUTE AS TO NEGOTIABILITY**

I. DECISION

a. INTRODUCTION AND PROCEDURAL BACKGROUND

On March 11, 2019, the Washington County Educational Support Personnel, Inc. (“WCESP”) filed with the Public School Labor Relations Board (“PSLRB”) Form PSLRB-04 (“Request to Resolve a Dispute as to Negotiability”). Form PSLRB-04 reflects the authority granted to the PSLRB by the Education Article of the Annotated Code of Maryland (“Education Article”) to “decide any controversy or dispute arising under Title 6, Subtitle 4 or 5 of this Article.” Md. Code Ann., Educ. Art. § 2-205(e)(4)(i). Upon receipt of this request, PSLRB Executive Director Erica Snipes captioned this matter PSLRB N 2019-03.

On Form PSLRB-04, under Section IV (“TOPICS IN DISPUTE”), the WCESP lists the following three topics, which it contends are in dispute: (1) “salary for bargaining unit positions; specifically, the grade to which various classifications are assigned;” (2) “salary and working conditions of newly created bargaining unit positions;” and (3) “hours worked, number of days, and months worked of bargaining unit positions.” The WCESP asserts that these topics are mandatory topics of negotiation.

The parties involved in PSLRB N 2019-03 are the WCESP and the Board of Education of Washington County (“County Board”).

On March 11, 2019, in accordance with Section 6-510(c)(5)(iii) of the Education Article, Executive Director Snipes sent a letter to the parties requesting that, within 7 days after receipt of her letter, they submit written briefs in support of their respective positions.

On March 15, 2019, the WCESP submitted its written brief.

On March 18, 2019, the County Board submitted its written brief.

On March 29, 2019, in accordance with Section 6-806 of the Education Article, the PSLRB extended the deadline for which a written decision in this matter was due to April 29, 2019.

On April 10, 2019, the County Board sent to the PSLRB a Motion to Conduct an Evidentiary Hearing.¹

b. FACTUAL BACKGROUND

The WCESP is the exclusive negotiating agent of a negotiating unit of approximately 1,319 non-certificated, hourly employees of the Washington County Public School System. The WCESP and the County Board are parties to a collective negotiations agreement effective July 1, 2017, through June 30, 2021 (“Negotiated Agreement”).

Under Sub-Article 2.11 of the Negotiated Agreement, the current pay scale for non-certificated employees consists of fifteen different pay grades, and each bargaining unit position is assigned a specific pay grade. In addition, Sub-Article 2.11 sets forth the “Employees Covered Under This Agreement” and further indicates that “new job titles will be added upon written notice to WCESP and annually.”

During the 2018-2019 School Year, the County Board created new job titles, including “Print Shop Lead,” “Itinerant Paraprofessional,” and “Paraprofessional General Ed/Special Ed Itinerant Adult Support.” The County Board assigned a pay grade to each of these positions.

The parties are currently engaged in collective bargaining negotiations for Fiscal Year 2020 through a limited reopener under Article 17 (“Duration”) of the Negotiated Agreement, which states in relevant part, “During the 2018/2019 school year, salary will be negotiated and each party will have the option to open one sub-article.” The parties’ bargaining history is outlined below.

In a letter dated October 24, 2018, from the WCESP to the County Board, the WCESP stated, “It has come to WCESP’s attention that... [the County Board] has created and posted new

¹ Neither the Education Article nor the regulations pertaining thereto provide the PSLRB with the authority to consider a motion to conduct an evidentiary hearing in negotiability disputes; therefore, the PSLRB declines to accept this motion, and the County Board’s motion will not be included in the record of this case.

bargaining unit positions. The positions are titled ‘Print Shop Lead’ and ‘Itinerate Paraprofessional.’ As the exclusive bargaining agent, WCESP demands to bargain over the new positions including their salary.” The County Board did not agree to the WCESP’s bargaining demands.

On November 14, 2018, the WCESP presented a proposal to modify Sub-Article 6.3 (“Workdays/Months/Hours”) of the Negotiated Agreement. Sub-Article 6.3 establishes the number of “Paid Days,” “Duty Days,” “Months,” and “Standard Hours” for certain bargaining unit positions.² The WCESP’s proposal restated the existing pay grades to which bargaining unit positions are assigned as currently set forth under Sub-Article 2.11 of the Negotiated Agreement, but it did not propose modifications to those assignments. The proposal did, however, propose to establish a minimum number of “Standard Hours” under the Negotiated Agreement, as well as the number of “Paid Days,” “Duty Days,” and “Months” for each bargaining unit position thereunder.³

On this same day, the WCESP verbally requested negotiations over the use of school system vehicles, reimbursement for mileage, and participation in the involuntary transfer process for the newly created positions. The County Board did not agree to negotiate over these topics.

In a proposal dated December 6, 2018, the WCESP proposed that the position of Print Shop Lead be assigned to Pay Grade 13, and that the position of Itinerate Paraprofessional be assigned to Pay Grade 7. The County Board did not provide a counter-proposal to the WCESP’s December 6, 2018, proposal.

On January 15, 2019, the WCESP again verbally requested negotiations over the use of school system vehicles, reimbursement for mileage, and participation in the involuntary transfer process for the newly created positions. Again, the County Board did not agree to negotiate over these topics.

On January 23, 2019, the WCESP provided to the County Board a modified version of its November 14, 2018, proposal, which, again, proposed to establish a minimum number of “Standard Hours” under the Negotiated Agreement, as well as the number of “Paid Days,” “Duty Days,” and “Months” for each bargaining unit position. However, unlike the November 14, 2018, proposal, the January 23, 2019, proposal did not restate the pay grades to which each bargaining unit position is assigned.

In response to the WCESP’s January 23, 2019, proposal, the County Board sent to the WCESP a letter, dated January 30, 2019, stating in relevant part:

² The terms “standard hours,” “paid days,” “duty days,” and “months” as they appear in the Negotiated Agreement are not defined. Based on the briefs submitted by the parties, we conclude that the term “standard hours” refers to the number of hours worked by bargaining unit employees each day, that the term “paid days” refers to the number of days per year for which bargaining unit employees are paid, that the term “duty days” means the number of days that bargaining unit employees are on duty or required to work, and that the term “months” refers to the number of months worked by bargaining unit employees each year (i.e., whether the position is a 10, 11, or 12-month position).

³ It is unclear from the record whether the County Board provided the WCESP with a counter proposal to its November 14, 2018, proposal.

The... [County Board] negotiating team has reviewed WCESP's... [January 23, 2019] counter proposal for sub article 6.3 Workdays/Months/Hours. The WCESP has mentioned numerous times that you do not have access to some of the information you have brought forth as a negotiable item, specifically employee work hours per day. Not having this information readily available has prevented you from providing the... [County Board] with a clear and employee specific depiction of the exact nature of your proposal.

To aid you in providing a proposal that contains the most up to date information, I am supplying you a list that includes all columns you have included in your proposals... You may use this information to update your... [January 23, 2019,] proposal. Likewise, the... [County Board] team will review and make adjustments to our recommendation if necessary. Again, we ask that any change you are requesting from current practice (the supplied list) be highlighted in some manner on your next proposal.

The WCESP did not provide the County Board with an update to its January 23, 2019, proposal.

Not receiving an updated proposal, the County Board responded to the WCESP's January 23, 2019, proposal with a counterproposal, dated February 6, 2019, which stated:

Employees covered under this Agreement shall have workdays and months as established below. Employee standard daily hours will be 8 hours per day or less. Initial assignment of and adjustment to standard daily hours may be made to support the needs of the school system pursuant to Article 6.4.

Per fiscal year, ten (10)-month employees will maintain 180 duty days of 195 paid days or 190 duty days of 206 paid days. Eleven (11)-month employees will maintain 222 duty days of 238 paid days. Twelve (12)-month employees will maintain 243 duty days of 260 paid days.

As of March 18, 2019, the date on which the WCESP filed its brief in support of its Request, there have been no further negotiations between the parties.

c. POSITIONS OF THE PARTIES

i. Position of the WCESP

1. Assignment of Pay Grades to New and Existing Bargaining Unit Positions

The WCESP contends that the pay grade to which various classifications are assigned – for both existing and newly created bargaining unit positions – is a mandatory topic of negotiation.

2. Salary and Working Conditions of Newly Created Bargaining Unit Positions

The WCESP contends that the salary and working conditions of newly created bargaining unit positions, and more specifically, “the use of school system vehicles, reimbursement for mileage, and participation in the involuntary transfer process,” are mandatory topics of negotiation.

3. Number of Hours, Days, and Months Worked

The WCESP contends that the number of hours, days, and months worked by each bargaining unit position covered under the Negotiated Agreement are “working conditions” under Section 6-510(c)(1)(i), and therefore mandatory topics of negotiation. More specifically, the WCESP asserts that “[t]he County Board must negotiate, at the very least, a minimum number of standard hours for WCESP’s bargaining unit members....”

In addition, the WCESP argues that the negotiated agreement between the WCESP and the County Board “clearly characterizes hours as a type of working condition and clearly states that all working conditions must be negotiated.”

ii. Position of the County Board

At the outset, the County Board argues that the WCESP’s proposals with regard to the assignment of pay grades to bargaining unit employees, as well as the working conditions of newly created bargaining unit positions “have arisen outside the scope of the current bargaining process.” Furthermore, the County Board asserts that while the “number of hours assigned to a particular bargaining unit positions [*sic*] has arisen during presently conducted collective bargaining between the parties,” the WCESP “acted outside of its contractual right to reopen” the Negotiated Agreement “rendering this issue premature for consideration by the PSLRB in the context of collective bargaining.”

The County Board goes on to make the following arguments.

1. Assignment of Pay Grades to New and Existing Bargaining Unit Positions

The County Board states that “[u]nder Section 6-201(f) of the Education Article... ‘the qualifications, tenure, *and compensation* of each appointee [of the Board of Education] *shall be determined by the county board.*’” The County Board contends that “[t]his language unequivocally delegates the determination of initial compensation of newly hired employees or newly created positions to the sole discretion of the Board...,” and “[s]ince Section 6-510(c)(3) prohibits negotiations over ‘... *any matter that is precluded by* [applicable] *statutory law*’...

Section 6-201(f) plainly precludes negotiations over the initial rate of pay to be assigned to a newly created position.”

Relying on this same rationale, the County Board also cites Section 4-103(a) of the Education Article, which it argues “clearly states that ‘each county board shall: (1) appoint all principals, teachers, and other certificated and non-certificated personal [sic]; and (2) **set their salaries.**’”

2. Working Conditions of Newly Created Bargaining Unit Positions

The County Board asserts that the “‘working conditions’ affecting... newly created positions, specifically ‘the use of school system vehicles, reimbursement for mileage, and participation in the involuntary transfer process’” are illegal topics of negotiation.

With regard to reimbursement for mileage, the County Board asserts that the use of school system vehicles is already addressed in a longstanding County Board policy, and that “[t]here is no evidence that... [the WCESP] has ever attempted to negotiate changes to” this policy, “much less that such [p]olicy needs to be modified in order to address the peculiarities of the three (3) newly created positions....” The County Board further argues that “to negotiate a separate mileage rate for these newly created positions would not only run afoul of this already existing” provision, “but would create separate conditions of employment for designated employees, to the detriment of others in the bargaining unit.”

With regard to the involuntary transfer process, the County Board contends that “the transfer process for *all* members of the bargaining unit is thoroughly addressed” in the Negotiated Agreement.

Finally, the County Board asserts that the failure of the WCESP to insist upon negotiating over these topics “upon the creation of myriads of other jobs over the years constitutes evidence of its acquiescence in the practice of applying previously negotiated terms and conditions of employment (other than starting salaries) to newly created jobs.”

3. Number of Hours Worked

The County Board asserts that the “minimum number of hours assigned to each bargaining unit position is either an illegal or permissive subject of bargaining...,” but that “it is plainly not a mandatory subject of bargaining.”

In support of this position, the County Board cites the Maryland State Board of Education’s (“MSBE”) decision in New Board of School Commissioners of Baltimore City v. Baltimore Teachers’ Union, MSBE Opinion No. 99-53 (1999), which it asserts held that the reclassification of a position from a twelve month to a ten month position is an illegal subject of bargaining. Relying on this case, the County Board argues that “[w]hether it is reducing an employee from 12 months to 11 months or reducing the number of daily hours from 8 to 7.5, such change constitutes a form of reclassification as that term has been defined by the State

Board and PSLRB...,” and further, that “[t]here is fundamentally no difference between reducing an employee’s number of duty days... and the reduction from year to year of the number of daily hours based upon the needs of the schools.” The County Board contends, “[a]s such, it should at least be deemed a permissive subject of bargaining.”

The County Board also argues that “should the PSLRB apply the balancing test prescribed by law to the subject of minimum hours, it would undoubtedly fall on the side of impacting the school system as a whole, such as to render the topic at best a PERMISSIVE subject of bargaining, or even possibly an ILLEGAL subject of bargaining.”

d. ANALYSIS

i. Proposed Topics for Negotiation

Section 6-510(c)(5)(i) of the Education Article states, “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.” (Emphasis added.) Under this Section, in order for the PSLRB to consider a request to resolve a dispute as to the negotiability of a particular topic, that topic must be a “proposed topic for negotiation” within the scope of ongoing negotiations between the parties and must also be in “dispute.”

In order to determine whether a topic has been proposed within the scope of ongoing negotiations, we must look to the relevant language of the parties’ Negotiated Agreement.⁴

As indicated above, Sub-Article 2.11(A) is titled, “Employees Covered Under This Agreement” and states that “new job titles will be added upon written notice to WCESP and annually.” Looking to the plain language of this contractual provision, the County Board is given the express authority to create new job titles upon written notice by the County Board to the WCESP, and upon creation, such new job titles are automatically subject to the Negotiated Agreement in place between the parties.

As previously discussed, Article 17 of the Negotiated Agreement states, “During the 2018/2019 school year, salary will be negotiated and each party will have the option to open one sub-article.” Therefore, the scope of negotiations for the 2018/2019 school year – for both existing bargaining unit positions, as well as any newly created bargaining unit positions – is limited to salary and one sub-article opened by each party.

⁴ We note that, in the past, the PSLRB has held that contract administration and interpretation fall outside of the scope of the PSLRB’s jurisdiction. However, in those cases, the PSLRB was tasked with reviewing charges of statutory violations, not resolving negotiability disputes. Because the WCESP and the County Board are parties to an existing Negotiated Agreement that may only be reopened pursuant to Article 17 and the terms contained therein, it is necessary in this case for the PSLRB to interpret the meaning of that article and any relevant contractual provisions to resolve this dispute.

As aforementioned, in accordance with Article 17 of the parties' Negotiated Agreement, the WCESP reopened Sub-Article 6.3.⁵ As indicated above, Sub-Article 6.3 establishes the number of hours, days, and months worked by employees in various bargaining unit positions. Therefore, these topics constitute "proposed topic[s] for negotiation" within the meaning of Section 6-510(c)(5)(1). Furthermore, the parties disagree whether these topics are mandatory, permissive, or illegal topics of negotiation, rendering them in "dispute" within the meaning of that Section. As a result, the number of hours, days, and months worked is properly before the PSLRB for consideration.

In contrast, pay grade assignments for each bargaining unit positions are included under Sub-Article 2.11 of the parties' Negotiated Agreement, and do not fall within the scope of Sub-Article 6.3. Likewise, the other "working conditions" listed in the WCESP's Request – i.e., the use of school system vehicles, reimbursement for mileage, and participation in the involuntary transfer process – also do not fall within the scope of Sub-Article 6.3. Because these topics have not been proposed within the scope of Article 17 of the parties' Negotiated Agreement, they do not constitute "proposed topic[s] for negotiation" under Section 6-510(c)(5)(1). As a result, the WCESP's Request with respect to these topics is denied.

We now turn to a discussion concerning the negotiability of the number of hours, days, and months worked by hourly employees in bargaining unit positions covered by the Negotiated Agreement.

ii. Number of Hours, Days, and Months Worked

As explained above, the WCESP contends that the number of hours, days, and months worked by bargaining unit employees is a "working condition," and therefore, a mandatory topic of negotiation within the scope of Section 6-510(c)(1)(i).

The Education Article establishes constraints within which the PSLRB must exercise its authority to render decisions on negotiability disputes. Sections 6-510(c)(1) and (3) state in relevant part:

(c)(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: (i) Salaries, wages, hours, and other working conditions, including the discipline and discharge of an employee for just cause... [Topics in this category are referred to as mandatory topics of negotiation.]

⁵ Neither party has indicated whether or not the County Board has reopened a sub-article of the Negotiated Agreement pursuant to Article 17. Therefore, for purposes of our analysis, we conclude that the only relevant sub-article that has been reopened during current negotiations is Sub-Article 6.3.

(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. [Topics in this category are referred to as illegal topics of negotiation.]

Md. Code Ann., Educ. § 6-510(c)(1), (3).⁶ Read together, these Sections require that, upon request by an exclusive negotiating agent, a public school employer is required to negotiate “on all matters that relate to... hours,” except where such negotiations are “precluded by applicable statutory law.”

As cited in the County Board’s brief, two separate statutes grant the County Board the express authority to set compensation for public school employees. Section 4-103(a) of the Education Article states, “On the written recommendation of the county superintendent and subject to the provisions of this article, each county board shall: (1) Appoint all principals, teachers, and other certificated and noncertificated personnel; and (2) Set their salaries.” Section 6-201(f) of the Education Article states, “Subject to the provisions of this article, the qualifications, tenure, and compensation of each appointee shall be determined by the county board.”

Because Sections 4-103(a) and 6-201(f) grant the County Board the express authority to set compensation⁷ for public school employees, the County Board is precluded from negotiating over the number of hours worked. This is due to the fact that the employees covered under the Negotiated Agreement are distinguishable from other salaried employees in that their compensation is inextricably linked to the number of hours that they work each day. Because the compensation of these hourly employees depends directly on the number of hours worked, negotiation over the number of hours worked would interfere with the County Board’s statutory authority under Sections 4-103(a) and 6-201(f) to set compensation. As a result, we conclude that negotiation over the number of hours worked by hourly employees is illegal, and reject the WCESP’s argument that hours worked is a “working condition,” and therefore, a mandatory topic of negotiation.⁸

Furthermore, we conclude that the number of days and months worked by each bargaining unit position is analytically indistinguishable from the number of hours worked, in that the number of days and months worked also has a direct impact on compensation. Therefore, to the extent that negotiations over the number of days and months worked interferes with the authority of the County Board to set compensation under Sections 4-103(a) and 6-201(f), those topics are also illegal topics of negotiation.

⁶ Section 6-510(c)(5)(vi)(2) further provides, “To resolve disputes under this section, the... [PSLRB] 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.”

⁷ Nowhere in the Education Article is “compensation” defined. Black’s Law Dictionary defines compensation as, “[r]emuneration and other benefits received in return for services rendered; esp., salary or wages.” Black’s Law Dictionary 118 (18th ed. 2005).

⁸ The PSLRB has held that where, as here, a dispute can be resolved on statutory grounds, application of the balancing test to determine negotiability is unnecessary. The Baltimore Board of School Commissioners v. Baltimore Teachers Union, American Federation of Teachers, Local 340, PSLRB N 2015-01 (2015).

In addition, we note that our conclusions are further bolstered by the existence of several other statutory provisions vesting with the County Board with the responsibility and authority to implement the Education Article. More specifically, Section 4-108 states in relevant part, “[e]ach county board shall: (1) [t]o the best of its ability carry out the applicable provisions of this article and the bylaws, rules, regulations, and policies of the State board; [and] (2) [m]aintain throughout its county a reasonably uniform system of public schools that is designed to provide quality education and equal educational opportunity for all children....” Similarly, Section 4-204(b)(1) states, “[a]s the executive office of the county board, the county superintendent shall see that the following are carried out: (1) [t]he laws relating to the schools....” Were the PSLRB to conclude that negotiation over the number of hours, days, or months worked was a mandatory, or even permissive topic of negotiation, such negotiations, were they to occur, would interfere with the County Board’s obligations under these Sections.

Finally, we address the WCESP’s argument that the negotiated agreement between the WCESP and the County Board “clearly characterizes hours as a type of working condition and clearly states that all working conditions must be negotiated.” Where a topic is determined to be an illegal topic of negotiation, it cannot also be considered a “working condition” within the meaning of Section 6-510(c)(1)(i), regardless of the language contained in the parties’ collective negotiations agreement. Therefore, we reject the WCESP’s argument in this regard.

e. CONCLUSION

Based on the foregoing, the PSLRB denies the WCESP’s Request with regard to the assignment of pay grades to new and existing bargaining unit positions, the use of school system vehicles, reimbursement for mileage, and participation in the involuntary transfer process. Furthermore, the PSLRB finds that the number of hours, days, and months worked by hourly public school employees are illegal topics of negotiation.

f. ORDER

Having considered the WCESP’s Request to Resolve a Dispute as to Negotiability with regard to the number of hours, days, and months worked by public school employees in PSLRB N 2019-03, the PSLRB finds that the topics at issue are illegal topics of negotiation.

BY ORDER OF THE PUBLIC SCHOOL LABOR RELATIONS BOARD:



Elizabeth Morgan, Chair



Ronald S. Boozer, Member



R. Allan Gorsuch, Member



Philip S. Kauffman, Member

Annapolis, MD

May 2, 2019

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).