

WASHINGTON COUNTY BOARD
OF EDUCATION,

Appellant,

v.

WASHINGTON COUNTY
TEACHERS ASSOCIATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 11-05

OPINION

INTRODUCTION

The Board of Education of Washington County (local board) filed a Petition for Declaratory Ruling seeking a declaration that matters related to the content of a teacher's evaluation are not arbitrable. The Washington County Teachers' Association (WCTA) filed a Motion to Dismiss to which the local board filed an Opposition. WCTA filed a Response to the local board's Opposition.

FACTUAL BACKGROUND

On January 12, 2010, the WCTA filed an "association grievance" asserting that specific content included in two teachers' evaluations violated the Collective Bargaining Agreement. The content at issue was: information related to employee discipline, and the test scores of students taught by the two teachers. (Petition, Ex. 4). The grievance was heard at the Step II and Step III levels. The school system denied the grievance at both Steps. (*Id.*, Exs. 5 & 7). The WCTA advised the local board that it would proceed to arbitration. (*Id.*, Ex. 8). Thereafter, the local board filed this Petition for Declaratory Ruling.

On May 6, 2010, WCTA informed the school system that it withdrew its request for arbitration of the grievance. It explained that the underlying issue of the grievance was moot "due to the passage of the Education Reform Act" which allows local boards and unions "to mutually agree" to performance evaluation criteria for teachers and principals. (Motion, Ex. 1).

The local board asked WCTA to withdraw its grievance "with prejudice." When WCTA declined to do so, the local board declined to withdraw the Petition for Declaratory Ruling. WCTA, thereafter, filed a Motion to Dismiss the Petition on the grounds that the case became

moot when WCTA withdrew its request to arbitrate the grievance. The local board, arguing that the matter was not moot, has opposed that Motion.

STANDARD OF REVIEW

The State Board exercises its independent judgment on the record before it when it explains and interprets public school law and State Board regulations. COMAR 13A.01.05.05.

LEGAL ANALYSIS

Jurisdiction

In a Memorandum dated June 23, 2010, this Board asked the parties whether this case should be retained by the State Board for final decision or transferred to the newly created Public School Labor Relations Board for handling.

The Labor Relations Board was established by the Fairness in Negotiations Act, House Bill 243/Senate Bill 590, Acts of 2010. The Act provides in Section 3:

AND BE IT FURTHER ENACTED, that this Act shall be construed to apply only prospectively and may not be applied or interpreted to have any effect on or application to any negotiations requested or entered before the effective date of this Act.

A review of the record shows that the matters giving rise to this Petition for Declaratory Ruling arose prior to July 1, 2010, which is the effective date of the Act. Thus, the State Board retains jurisdiction of this case for a final decision.

Mootness

WCTA asserts that there is no longer a live controversy between it and the local board because it has withdrawn the grievance that gave rise to the Petition for Declaratory Ruling. The WCTA asserts that, because the new Education Reform Act now allows the local board and WCTA to “mutually agree” to the substantive content of performance evaluation criteria of teacher evaluations, the grievance is no longer necessary. The local board argues that there is no guarantee there will be “mutual agreement” and thus there will be future disputes and controversies over the performance evaluation criteria. (Opposition at 4). The local board states:

It was for this reason that upon receiving the WCTA's May 6th letter withdrawing its grievance the Board requested confirmation that the withdrawal was *with prejudice*, rather than *without prejudice*.¹ If WCTA had committed, in writing, to the withdrawal of its grievance *with prejudice*, *i.e.*, affirming its intention not to refile its grievance at any time in the future, the matter might well be considered moot under common judicial principles. But WCTA resisted the Board's request to withdraw its grievance with prejudice, leaving this matter open for future grievances.

The possible existence of a future live controversy does not necessarily preclude the current action from being moot. A case is moot when "there is no longer an existing controversy between the parties so that there is no longer any effective remedy which the courts [or agency] can provide." In *Re: Michael B.*, 345 Md. 232, 234 (1997); *Janelle D. v. Howard County Bd. of Educ.*, MSBE Op. No. 10-22. In our view, when WCTA withdrew the grievance, the current controversy between the parties no longer existed, and the case here became moot.

The local board raises various arguments against mootness. First, it argues that this type of controversy is "capable of repetition, yet evading review." That doctrine applies when the defendant (or a local board) unilaterally and quickly fixes the immediate problem evident in the case. Another case, however, will likely arise, only to be extinguished in the same way, in order to evade review. That is not the scenario here. We do not agree that a viable controversy over the content of teachers' performance evaluations is such that it would "evade review" in the future. If the WCTA files such a grievance, the local board cannot "extinguish" it. Unless the

¹The withdrawal of a grievance or lawsuit "with prejudice" bars a party who initiated the proceeding from refiling the matter on the same claim. As the Maryland Court of Appeals explained in *Gilmer v. State*, 389 Md. 656, 668 (2005), "the term 'dismissal' has different meanings, depending on whether the dismissal is entered with or without prejudice as explicated by the Court of Special Appeals in *Parks v. State*, 41 Md.App. 381, 397 A.2d 212 (1979), *aff'd*, 287 Md. 11, 410 A.2d 597 (1980):"

"The words 'with prejudice,' when used in that context, have, of course, a well-established meaning in the law. They signify that the dismissal is final, that the controversy is concluded and cannot be reopened by a new or subsequent action. A dismissal 'with prejudice' has been held to be as conclusive of the rights of the parties as if the action had been prosecuted to a final adjudication on the merits adverse to the complainant."

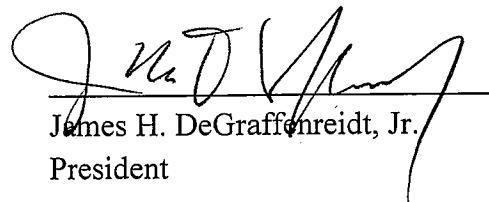
WCTA withdraws the grievance as it did in this case, the grievance and its validity can be heard in the appropriate forum.

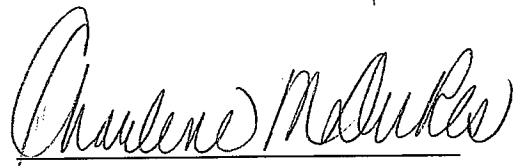
Next, even if the case is moot, the local board asks this Board to issue an advisory opinion because the case involves "matters of important public concern that, if decided, will establish a rule for future conduct." (Opposition at 8, citing *Colman v. Coburn*, 342 Md. 244, 250 (1966). It appears that the local board is asking for an opinion whether the Education Reform Act allows or requires collective bargaining over the content of the performance evaluation criteria of teachers' evaluations. It is our view that the Education Reform Act itself provides the answer.

Specifically, although the Act allows local boards and unions, within the confines of general standards adopted by the State Board, to come to mutual agreement about the terms of the performance evaluation criteria, the statute makes it abundantly clear that mutual agreement does not mean that substantive performance evaluation criteria are subjects for collective bargaining. Section 6-202(c)(3) of the Education Reform Act states, "Nothing in this paragraph shall be construed to require mutual agreement to be governed by" the bargaining provisions in Subtitles 4 and 5 of Section 6 of the Education Article. In short, the plain words of the statute say it all - - the term "mutual agreement" is not meant to impose the collective bargaining rules and procedures on the discussions about performance evaluation criteria.

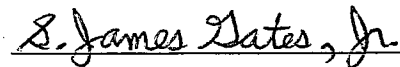
CONCLUSION

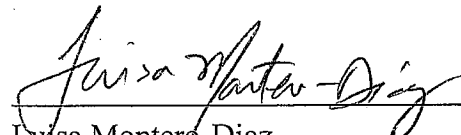
For all the reasons stated herein, although the case before us is moot, we conclude that it presents a matter of important public concern. Therefore, this Board declares, for the reasons stated herein, that the substantive performance evaluation criteria that may be mutually agreed to under the Education Reform Act are not legal topics for collective bargaining.

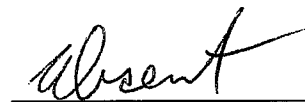

James H. DeGraffenreidt, Jr.
President



Charlene M. Dukes
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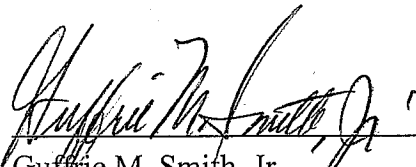

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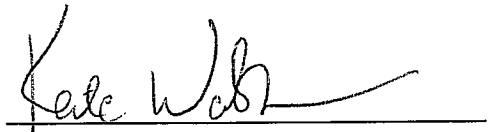

Sayed M. Naved


Madhu Sidhu


Guffie M. Smith, Jr.


Donna Hill Staton


Ivan C.A. Walks

A handwritten signature in black ink, appearing to read "Kate Walsh", written over a horizontal line.

Kate Walsh

January 25, 2011