

CITY UNION OF BALTIMORE,
LOCAL 800, AFT, AFL-CIO

Appellant
v.

BALTIMORE CITY BOARD OF SCHOOL
COMMISSIONERS,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 11-51

OPINION

INTRODUCTION

City Union of Baltimore, Local 800, AFT, AFL-CIO (“CUB”) has filed an appeal from the final decision of the Baltimore City Board of School Commissioners (“local board”) to re-designate the composition of the CUB. The local board filed a Motion for Summary Affirmance. CUB responded and the local board replied.

Meanwhile, the Baltimore Teachers Union (BTU), and Sharon Blake and Larry Gaines filed separate motions to intervene in the case. CUB opposed BTU’s motion, but the local board did not. The local board and BTU opposed Blake’s and Gaines’ motion, but CUB did not.

FACTUAL BACKGROUND

On November 10, 2008, the local board informed the representatives of the five bargaining units¹ in which Baltimore City Public School employees are placed, among them CUB and BTU, that pursuant to the local board’s authority under §6-404(b) and §6-505(b) of the Education Article, it was planning to make adjustments to the current composition of the five bargaining units in order to comply with Maryland law. (Motion, Ex. 3). Specifically, it was the local board’s position that certain positions were not properly placed in the units in accordance with the statutory requirements. The local board explained its concerns as follows:

¹ The organizations are CUB; Baltimore Teachers Union (“BTU”) – Paraprofessional Chapter and Teachers Chapter; Public School Administrators & Supervisors Association (“PSASA”); and Council 67, AFSCME, AFL-CIO (“AFSCME”). (Motion, Ex. 3).

- Certain positions included in both the BTU/Teachers and PSASA units did not require MSDE certification. Both units were required to be composed solely of certificated professional employees.
- Maryland law prohibits units of noncertificated employees from having supervisory and nonsupervisory employees in the same unit. The units, as represented by CUB and Local 44, had a number of both supervisory and nonsupervisory employees in them.
- There were some positions in the Unaffiliated group that either (1) required MSDE certificates and did not meet any of the qualifications for exclusion from one of the units of certificated employees, or (2) did not require MSDE certificates and did not meet any of the qualifications for exclusion from one of the noncertificated bargaining units. Thus, these employees were “eligible public school employees” under the collective bargaining statutes that were required to be in one of the bargaining units. (Motion, Ex. 1).

The local board invited each employee organization to negotiate on the composition of the units. It stated in its letter:

Maryland law provides that the Board of School Commissioners “shall determine the composition of the unit[s] in negotiation with any employee organization that requests negotiation concerning the composition of the unit[s].” Since your organization is one of the exclusive representatives designated by the board to represent one of its current bargaining units, this is to inform you of the Board’s intention to make adjustments to its bargaining units, which adjustments may impact the composition of the unit that your organization represents. If it is your organization’s desire to enter into negotiations with the Board concerning any adjustments to the composition of its bargaining units, it is necessary for you to inform me in writing (by either letter or email) of your request for such negotiations no later than Monday, November 17, 2008.

(Motion, Ex. 3). It was the local board’s intent to complete the process necessary for adjusting the unit composition prior to the onset of substantive contract negotiations on the collective bargaining agreements which would take effect on July 1, 2009.²

Legal counsel for the other bargaining units responded to the local board via letter, availing the organizations of the opportunity to negotiate. (Motion, Ex. 4). Negotiation discussion began subsequent to the receipt of all correspondence.

² All five bargaining units were subject to collective bargaining agreements in effect until June 30, 2009.

CUB, on the other hand, took the position that no changes should be made at all to the composition of the CUB unit because the bargaining unit had already been properly established. CUB's legal counsel stated:

[I]t is the Union's position that the composition of the bargaining unit has already been established, initially at the formation of the unit through the appropriate union representation election process in 1988 pursuant to existing law. The composition was again ratified by the General Assembly of Maryland in 1997. Since then, the parties have engaged in several regular cycles of bargaining, as authorized by statute, and the Board, in negotiation with the Union, again authorized the existing composition which was ratified by the membership, and memorialized in the present MOU between the parties and set forth in Article 2, Article 11, and Addendum B. Consistent with the history of negotiations between the parties, it is clear that the "public school employer" (the Board) "in negotiation with the employee organization" (the "Union") has determined that none of the classifications making up the present composition of the bargaining unit are "supervisory employees" as that term is defined in §6-501(h) of the Education Article.

(Motion, Ex. 5).

On June 8, 2010, the local board voted to recompose the recognized bargaining units for Baltimore City Public Schools. (Appeal, Ex. 1). CUB became the non-certificated "supervisory unit" and AFSCME, Local 44 became the non-certificated "non-supervisory" unit. (CUB Opp. to Mtn., p.2). The recomposition resulted in approximately 500 out of the CUB's 700 members being transferred to other bargaining units – some to BTU's paraprofessional Chapter and some to AFSCME's school based bargaining unit. (Appeal, p.2).

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

Motions to Intervene

BTU has filed a motion to intervene in this case. BTU represents school system employees in its teachers chapter and its paraprofessional chapter. By virtue of the local board's decision, BTU's paraprofessional bargaining unit gained positions that were previously contained in CUB's bargaining unit. BTU's motion to intervene pertains to CUB's appeal as it relates to the local board's decision involving the composition of CUB's bargaining unit. CUB opposes the motion to intervene, but the local board does not.

The State Board may allow any person to intervene in an appeal and participate as a party. *See* COMAR 13A.01.05.01(B)(8). Certainly BTU has a direct interest in this matter, considering the apparently negative impact that this case could have on the composition of its paraprofessional bargaining unit. It is our view that the motion to intervene should be granted.

Blake and Gaines filed a motion to intervene in this matter as interested members of BTU.³ Their motion to intervene adopts the arguments of CUB challenging the legality of the local board's decision. Their motion to intervene also challenges various amendments made by BTU to its constitution. Blake and Gaines have no role in the statutory process for determining bargaining units and have no standing to participate in the appeal. As for their disagreement with the internal operations of BTU and its decision to amend its Constitution to insure that employees in the recently adjusted bargaining unit would have full and fair representation, such issues are not subject to review by the State Board and were not a part of the reconstitution decision with the local board. The motion to intervene should be denied.

Merits

CUB argues that the local board's decision to determine the composition of the bargaining units was illegal for the following reasons:

- (1) The authority to determine the composition of the bargaining unit is limited and is not exclusive to the local board as set forth in §6-505 of the Education Article .
- (2) The local board's authority to determine the composition of the bargaining unit is extinguished upon making an initial determination. Thereafter, the provisions of §6-506 and §6-507 become controlling.
- (3) The local board's action violates the provisions of §6-502 and §6-506 of the Education Article and the public policy set forth in §4-301 *et seq.* of the Labor and Employment Article.
- (4) None of the positions contained in CUB's bargaining unit are supervisory within the meaning of the term as defined in §6-505(c)(1) of the Education Article.

Under Maryland law the local board determines "the composition of the unit in negotiation with any employee organization that requests negotiation concerning the composition of the unit." Md. Educ. Code Ann. §6-404(b) (certificated employees); §6-505(b)(non-certificated employees). All eligible public school employees are to be included in one of the "units." *Id.* §6-404(d); § 6-505(d).

³ The local board maintains that Blake is not a BTU member. (BTU Mtn. To Intervene, p.1, fnnt. 1).

One of the rules governing the composition is that a unit of non-certificated employees “may not include both supervisory and non-supervisory employees.”⁴ *Id.* §6-505(c). CUB explains that in 1988 it was certified pursuant to the provisions of the Municipal Employee Relations Ordinance (Article 1, §119-137 of the Baltimore City Code, 1983 Replacement Volume, as amended). CUB is the exclusive representative of general office, clerical, and administrative classifications throughout the various agencies of Baltimore City, including without limitation: Police Department civilian employees, Fire Department civilian employees, Department of Public Works, Department of Transportation, Department of Education, Department of Recreation and Parks, Department of Health and Human Services, and others. In each bargaining term, the parties memorialized their agreement in the form of a Memorandum of Understanding (“MOU”) between the parties. All classifications certified to its unit were specifically identified and appended by list to each successive MOU between the parties.

In 1997 and during the five (5) year period in which the BCPSS transitioned from Baltimore City to its current independent entity status, the composition of both the CUB’s and the BTU’s Paraprofessional units were preserved by specific ‘grandfather’ provisions contained in Senate Bill 795 §§10-11 as enacted by the 1997 General Assembly (hereafter “SB 795”). (Appeal, Ex. 3). Upon the sunset of SB 795’s five year term in 2002, the composition of the bargaining units became subject to the provisions of Maryland Education Article, §6-501 *et seq.* (Appeal, p.3). Thereafter, it appears that the supervisory/non-supervisory prohibition in §6-505 became applicable to the non-certificated employee units, at least, as of 2002.

CUB argues that §6-505(b) prohibits the local board from unilaterally re-composing the composition of the CUB unit. Section 6-505(b) states as follows:

(b) Composition of unit. – The public school employer shall determine the composition of the unit in negotiation with any employee organization that requests negotiation concerning the composition of the unit.

CUB argues that CUB and only CUB could request negotiation concerning composition of its unit. In our view, however, the plain language of the statute permits any employee organization to request negotiation concerning the composition of the unit. That is what happened here. Under the belief that the existing composition of the bargaining units violated the law, the local board invited all employee organizations to request negotiation on the issue. CUB chose not to negotiate and removed itself from the process while the other employee organizations requested negotiation. Thus, the local board complied with the provisions of §6-505(b) and did not unilaterally determine the composition of the bargaining unit.

⁴ Despite CUB’s claim that the phrase “may not” as used in §6-605(1)(c) is permissive, based on the rules of statutory construction the phrase “may not” is mandatory in establishing a prohibition. Md. Ann. Code Art. 1§26.

CUB also argues that the local board has no authority to re-compose the CUB bargaining unit because once a union is certified as the exclusive bargaining representative of the unit, the law governing composition of the unit no longer controls, but rather the provisions of Education Article §§6-506 and 6-507 control.

§6-506 Method of designating exclusive employee representative

- (a) The designation of an employee organization as an exclusive representative shall be made as provided in this section.
- (b) If an employee organization certifies to the public school employer that it has a membership enrollment of at least 30 percent of the total number of public school employees in a specified unit . . . this certification is a request for recognition as exclusive representative of all public school employees in the specified unit in the county.
- (c) If another employee organization certifies that it has membership enrollment of at least 10 percent of the total number of public school employees in the unit . . . an election shall be held in which the public school employees in the unit shall be offered the opportunity to choose:
 - (1) One of the employee organizations as the exclusive representative of all public school employees in the unit; or
 - (2) Not to have exclusive representation.

....

§6-507 Period of representation.

- (a)(1) The designation of an exclusive representative shall be for at least 2 years.
- (b) After this initial period, the organization **shall be the exclusive representative until another election is held.** (Emphasis added).

Based on those statutes, CUB asserts, after certification and following a two year initial period, “the organization **shall be the exclusive representative until another election is held.**” §6-507(a)(1) and (2). Because no election has been held to change the exclusive representative, CUB argues that the CUB bargaining unit could not legally be recomposed.

CUB’s argument conflates the law governing composition of the unit with the law governing exclusive representation rights of the union. We agree with BTU that the former has no effect on the latter. (BTU Mtn. to Intervene, p. 2). The fact that employees voted for CUB to be their exclusive representative does not mean that the composition of the bargaining unit is frozen in time until there is another election. There may be appropriate legal reasons for

modifying the composition of a bargaining unit. If no modification is possible until there is a call for a subsequent election, a scenario that might never occur, that would essentially extinguish the ability to ever re-compose a bargaining unit. That result would not comport with reason or with the history of recomposition in Baltimore City.

This point is highlighted by the fact that the local board has previously negotiated with CUB and other employee organizations representing Baltimore City Public School System employees over the composition of their bargaining units without the holding of an election. CUB recounts that it has negotiated with the local board at least three times since the sunset of SB 795, making additions to the unit during the negotiations leading to the FY 2007-2009 MOU with the local board. (Appeal, p.6). CUB acknowledges that the local board negotiated with BTU and AFSCME over the composition of their units in a similar fashion. (*Id.*, p. 7). Thus, it is our view that the local board may negotiate the re-composition of its bargaining units whenever any employee organization requests to negotiate the composition of any unit.

Although CUB maintains that *Charles County Supporting Serv. Employees Local Union 301 v. Board of Educ. of Charles County, Maryland*, 48 Md. App. 339 (1980), supports its view, we disagree. The *Charles County* case related to an effort by the union to become the recognized bargaining representative for certain school system employees where there was no designated exclusive representative. The *Charles County* case fails to address the situation that exists here where a bargaining unit has already been composed and an exclusive representative for the bargaining unit has already been designated.

CUB also relies on the State Board's decision in *Carroll Association of School Employees (CASE) v. Carroll County Board of Education*, MSBE Op. No. 04-41 (2004), but again the reliance is misplaced. *CASE* involved a dispute over the process for determining the composition of a bargaining unit. The union requested that the State Board interpret §6-505(b) as requiring the local board, upon request from an employee organization, to engage in bargaining unit determinations prior to and separate from substantive contract negotiations. The State Board declined to do so, holding that §6-505(b) does not require that negotiation on unit composition be separate from and precede substantive contract negotiations. MSBE Op. No. 04-41 at 7. That case is not applicable here.

CUB also contends that the local board's decision contravenes the right of its members to select the bargaining representative of their own choosing in violation of §§6-503 and 6-506 of the Education Article and the public policy pronounced in §4-302 of the Labor and Employment Article. Section 6-503 sets forth the public school employees' right to "form, join, and participate in the activities of employee organizations of their own choice for the purpose of being represented on all matters that relate to salaries, wages, hours, and other working conditions." Section 6-506 sets forth the process for elections of exclusive representatives. Section 4-302 of the Labor and Employment Article sets forth the State's public policy supporting the right of workers to freely associate, organize, and designate representatives to negotiate terms and conditions of employment, and to be "free from coercion, interference, or

restrain by an employer” as it concerns “designation of a representative; self organization; and other concerted activity for the purpose of collective bargaining.”⁵

The local board’s decision placed certain positions within designated bargaining units. It did not void the individual employee’s right to “form, join and participate” in the activities of an employee organization of the employee’s choosing or the right to participate in elections. Nor did it prohibit employees from freely associating, organizing or designating a representative. These opportunities remain. Employees may still choose to join, or not, an employee organization. Employees may still petition, or not, for the election of another exclusive representative. The local board’s decision does not preclude these actions.

CUB also argues that recomposition of the unit was unnecessary because none of the positions that were in the unit were supervisory within the meaning of §6-501(h). CUB bases this claim on the fact that the local board had previously permitted the inclusion of the positions at issue in the unit. Section 6-505(c)(1) states that a unit of non-certificated employees “may not include both supervisory and non-supervisory employees.” The fact that the local board had previously permitted inclusion of supervisory and non-supervisory positions in the unit does not preclude it from determining at a later time that the unit composition was improper and violated the law.

CUB argues that the local board could have found that the unit contained only non-supervisory positions because the term “supervisory employee” is subject to interpretation, thus giving the local board leeway to conclude that the positions certified to CUB were not supervisory. CUB argues that the positions were not supervisory within the meaning of the term because the positions had no authority to “hire, fire, demote, promote or otherwise affect the terms and conditions of employment of their co-workers in a meaningful way.” (CUB Opp. to Mtn., p.14).

CUB’s argument lacks merit. Section 6-501(h) states “‘supervisory employee’ includes any individual who responsibly directs the work of other employees, as determined by the public school employer in negotiation with an employee organization that requests negotiation on this issue.” For the majority of the positions the local board found to be supervisory, the job descriptions alone demonstrate that the positions are responsible for directing the work of other employees in some capacity. It is unclear how the local board could have interpreted the definition of “supervisory employee” to exclude those positions. Further, the job descriptions for the positions the local board deemed not supervisory reflect the fact that those positions did not supervise other employees. To the extent that the supervisory or non-supervisory nature of a position may be questionable based on the job description alone, CUB has offered nothing to explain why any specific position should be considered non-supervisory. As for the authority to hire, fire, demote, promote, and the ability to affect the terms and conditions of employment for a position, it is the local board and the local superintendent who ultimately possess such authority.

⁵ Section 4-302 is the stated policy of the General Assembly relevant to the construction of Title 4, Subtitle 3 of the Labor and Employment Article which deals with certain types of injunctive relief in labor disputes. See §4-303, Md. Code Ann., Lab. & Empl.

Those decisions do not necessarily fall within the purview of a position by virtue of the position being deemed supervisory.

CONCLUSION

For all of these reasons, we affirm the decision of the local board.


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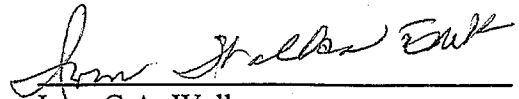
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December 6, 2011