STATE OF MARYLAND
PUBLIC SCHOOL LABOR RELATIONS BOARD

IN THE MATTER OF:

HARFORD COUNTY EDUCATION	*	
ASSOCIATION, INC.,	*	
	*	PSLRB Case N-2016-01
Employee Organization,	*	
and	*	
	*	
BOARD OF EDUCATION OF	*	
HARFORD COUNTY,	*	
	*	
Public School Employer.	*	

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DECISION AND ORDER ON REQUEST TO RESOLVE DISPUTE AS TO NEGOTIABILITY

I. PROCEDURAL BACKGROUND

On December 22, 2015, the Harford County Education Association ("HCEA") 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 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. § 2-205(e)(4)(i). This authority extends to disputes over the negotiability of specific 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); *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," Md. Code Ann., Educ. § 6-408(c)(5)(v)(2), and "[i]ssue the written decision to the parties within 14 days after receiving the written briefs." Md. Code Ann., Educ. § 6-408(c)(5)(v)(2). The legislature has further determined that a "decision of the Public School Labor Relations Board is final." Md. Code Ann., Educ. § 2-205(e)(4)(ii). That opinion is embodied herein.

On December 28, 2015, the PSLRB requested HCEA and the Board of Education of Harford County ("Board of Education") to submit written briefs in support of their respective positions. The parties submitted their briefs on January 4, 2016. On January 19, 2016, the PSLRB issued its decision in this matter.[1] In this decision, a copy of which is attached hereto, the PSLRB held that the proposal at issue is a mandatory subject of negotiation, noting that an opinion setting forth its reasoning would be issued subsequently.

II. FINDINGS OF FACT

The facts in this case are not in dispute and may be summarized as follows. Pursuant to Section 6-405 of the Education Article, HCEA is the exclusive representative of classroom-based certificated employees of the Board of Education. The Board of Education is a public school employer as defined in Section 6-401(f) of this Article.

HCEA and the Board of Education are parties to a collective bargaining agreement in effect from July 1, 2015, to June 30, 2016. The parties entered into negotiations for the 2016-17 agreement on December 1, 2015. During the initial negotiation session, the parties exchanged respective proposals. One of HCEA's proposals included an addition to language contained in Article 11.1 of the existing collective bargaining agreement, which provides in relevant part:

> 11.1 **Sick Leave.** Sick leave shall be defined as personal illness of the teacher. Teachers shall be granted sick leave at a rate of one (1) day per month during the first two (2) years of service with the Harford County Public Schools. Beginning in the third year of service in Harford County, sick leave shall be granted at a rate of one and a quarter (1.25) days per month of regular employment, the annual total of which shall be available at the beginning of the school year.

HCEA's proposed addition states: "Teachers shall not be required to produce a physician's note for absences not exceeding four (4) days due to personal illness."

At the initial negotiating session, Jeffrey Fradel, chief negotiator for the Board of Education, represented that he did not believe HCEA's proposal was a mandatory subject of bargaining. He asserted that certain provisions of the Code of Maryland Regulations

[1] Pursuant to Section 6-408(c)(5)(v)(3), the PSLRB "shall… [i]ssue the written decision to the parties within 14 days after receiving the written briefs." The PSLRB's January 19, 2016, decision was timely because the Birthday of Martin Luther King, Jr. was observed on January 18, 2016, as a state and federal holiday.

("COMAR"), which were enacted by the Maryland State Board of Education ("MSBE" or "State Board of Education") and pertain to sick leave of its employees, precluded the parties from negotiating the minimum number of sick days an employee must use before an employer can ask for documentation. On December 2, 2015, Mr. Fradel cited and produced specific regulations that he believed precluded the parties from bargaining the subject matter covered in the proposal. On December 8, 2015, Mr. Fradel produced, in writing, the Board of Education's position that it "will not negotiate" over the subject matter of the proposal.

In response, HCEA filed Form PSLRB-04 requesting that the PSLRB render a final determination regarding the negotiability of the proposal.

III. POSITIONS OF THE PARTIES

The Board of Education argues that the proposal constitutes an illegal subject of bargaining under Section 6-408(c)(3) because it is "precluded by 'applicable statutory law' and, therefore, may not be the subject of negotiations." Alternatively, the Board of Education also asserts that if the PSLRB does not find the proposal to be an illegal subject of bargaining, "this proposal is, at best, a permissive subject of bargaining…."

In support of its argument that the proposal is an illegal subject of bargaining because it is precluded by "applicable statutory law," the Board of Education cites the following MSBE regulations, COMAR 13A.07.03.02(B) and (E), which it contends preclude the negotiability of HCEA's proposal:

> B. Absence for Illness.
>
> (1) Certificated employees in the local school systems in the State shall be allowed minimum sick leave at the rate of 1 work day per month, the annual total of which shall be available at the beginning of the school year.
>
> (2) Each certificated employee who shall submit to the local board of education satisfactory proof of illness requiring absence from work shall be paid full salary for the allowed sick leave in any school year plus the minimum cumulative sick leave hereinafter specified. At the discretion of the local board, full, partial, or no salary may be paid for absence because of illness in excess of the allowed minimum annual sick leave and accumulated sick leave.
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> * * * * * * * *
>
> E. Deductions for Absences. For each day's absence without good and sufficient reason accepted by the local board of education, the board shall deduct the daily rate of pay for that certificated employee.

The Board of Education argues that COMAR 13A.07.03.02(B) was "clearly intended" to give superintendents "the unimpeded right to demand 'satisfactory proof of illness requiring absence from work' as a quid pro quo to teachers' receipt of accumulated paid sick leave." The Board of

Education further asserts that COMAR 13A.07.03.02(E) "reinforces this notion, for it mandates… the forfeiture of compensation to teachers who are absent 'without good and sufficient reason accepted by the local board of education.'"

In support of its argument, the Board of Education relies on the PSLRB's recent decision in *Board of Education of Frederick County v. Frederick County Teachers' Association* for the proposition "that a governmental agency does not, without authority, abdicate or bargain away its statutory discretion." PSLRB Case No. N 2014-02 (2014) (*citing Montgomery County Education Association v. Board of Education of Montgomery County*, 311 Md. 303, 313 (1987)).

In addition, the Board of Education argues that "an impingement on the right of school officials to demand 'proof' or 'reasons' for absences due to illnesses would risk running afoul of the spirit, if not the letter, of Educ. Art. § 6-410(a), which strictly prohibits strikes by Maryland public school employees."[2]

Finally, the Board of Education asserts that, in the absence of a determination that the matter is precluded by "applicable statutory law," the PSLRB must "develop a balancing test to determine whether the impact of the matter on the school system as a whole outweighs the direct impact on teachers or employees." The Board of Education further asserts that "the application of the test should plainly tip in favor of 'the school system as a whole,' as opposed to any 'direct impact on teachers or employees.'" In support of this assertion, the Board cites the "significant" cost of paid sick leave, the "potential for disruption that… could significantly hurt the ability of HCPS [Harford County Public Schools] to deliver consistent, continuous quality education," and the "fundamental aspect of managerial control" resulting from "[t]he right to ask an employee to support, with medical evidence, a paid absence…."

In contrast, HCEA argues that the proposal "is a mandatory subject of bargaining pursuant to the plain language of §6-408(c)(1) of the Education Article," and, as a result, "the parties should be directed to engage in negotiations on the topic."

In support of its argument, HCEA asserts that the Board of Education has misplaced its reliance on COMAR 13A.07.03.02. HCEA contends that COMAR 13A.07.03.02(B)(2) "places the onus on the employee and guarantees employees with satisfactory proof of illness the ability to utilize all sick leave, earned and unearned, in order to maintain salary," but that it is "devoid of any language that suggests that employees are required to produce proof of illness… or that the employer must demand proof of such an illness in order for the employee to utilize sick leave." HCEA also claims that this regulation "leaves the subject of 'who' shall be required to submit to medical documentation and under what circumstances a medical note may be required in order to utilize sick leave open for negotiation" between the Board of Education and HCEA.

Furthermore, HCEA asserts that COMAR 13A.07.03.02(E) "addresses solely the validity of the *reason* for the absence, i.e. is it 'sufficient,'" and does not require, or even reference, "proof" in the form of a doctor's note. As a result, HCEA contends that the only requirement an

[2] At best, this argument is spurious. The mere possibility that an otherwise mandatory subject of bargaining might, if adopted, cause disruption, does not make that proposal an illegal subject of negotiation.

employee must meet to be compensated in the event he/she is absent from work is that he/she provides "sufficient *reason* that is ultimately accepted by the local board of education."

Finally, HCEA argues that the subject matter of the proposal constitutes a "working condition" because it "has a direct impact on a teachers' quality of life at work, a teacher's personnel file reflecting absences, as well as salary," and is therefore a mandatory subject of bargaining.

IV. ANALYSIS

The Education Article establishes constraints within which the PSLRB must exercise its authority to render decisions on negotiability disputes. Section 6-408 states 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 salaries, wages, hours, and other working conditions, including procedures regarding employee transfers and assignments. [Topics in this category are referred to as mandatory subjects of negotiation/bargaining.]
>
> (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. [Topics in this category are referred to as permissive subjects of negotiation/bargaining.]
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> (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 subjects of negotiation/bargaining.]

Md. Code Ann., Educ. § 6-408(C)(1)-(3). Section 6-408(c)(5)(vi)(2) further 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."

The PSLRB finds that the proposal at issue is clearly a "working condition" within the meaning of Section 6-408(c)(1). This conclusion is supported by decisions of the National Labor Relations Board ("NLRB"), which the PSLRB has relied on in previous decisions, and which has long held that proposals concerning sick leave are mandatory subjects of bargaining. *See Kendall College of Art & Design*, 288 NLRB 1205, 1213 (1988) (changes in "sick leave and sick leave reporting procedures" are mandatory subjects of bargaining). Moreover, the U.S. Supreme Court upheld a decision in which the NLRB found that an employer's unilateral change to a sick

leave policy violated the statutory duty to bargain collectively. *National Labor Relations Board v. Katz*, 82 S. Ct. 1107 (U.S. 1962).

Similarly, several state public sector labor relations boards have also determined that proposals concerning sick leave are mandatory subjects of bargaining. *See e.g., IAFF Local 1650, Augusta Fire Fighters v. City of Augusta*, Maine Lab. Rel. Bd. Case No. 11-03SQ (2011) (sick leave, including the pay out of accrued sick time, is a mandatory subject of bargaining); *In the Matter of Town of Newton, and, Local 3153, Council 15, AFSCME, AFL-CIO*, Connecticut Dept. Lab. Decision No. E4112 (2006) ("It is well established that 'sick leave' is a mandatory subject of bargaining and thus, an employer cannot unilaterally implement changes in policies regarding sick leave without negotiating with its employees' collective bargaining representative."); *Fraternal Order of Police, Lodge 41 v. The County of Scotts Bluff, et al.*, Nebraska CIR Case No. 977 (2000) (reduction in sick leave accumulation cap, disallowance of sick leave accumulated prior to specified date, and deletion of 48 hours payment per year to those who have reached the sick leave cap are mandatory subjects of bargaining).

Even more directly on point are decisions by the state public sector labor relations boards in Iowa and Washington that have held that policies requiring doctor's verification for sick leave, like the proposal at issue in the instant case, are mandatory subjects of bargaining. *See Cedar Rapids Association of Firefighters, Local 11, IAFF v. City of Cedar Rapids*, Iowa PERB Case No. 4610 (1993) (administrative regulation requiring an employee to submit a doctor's certificate after a requisite number of days absent is a mandatory subject of bargaining); *Inlandboatmen's Union of the Pacific and District No. 1, Marine Engineers Beneficial Association v. Washington State Ferries*, Washington Pub. Emp. Rel. Com. MEC Case No. 12-99 (2000) (requiring doctor's verifying statement to support claims for sick leave on weekends is a mandatory subject of bargaining).

In sum, the proposal at issue in this case is clearly a "working condition," and would under Section 6-408(c)(1) -- standing alone -- clearly constitute a mandatory subject of negotiation. But Section 6-408(c)(1) does not stand alone and must be viewed in conjunction with Section 6-408(c)(3). More specifically, the question is whether negotiation over the proposal at issue is "precluded by applicable statutory law" within the meaning of Section 6-408(c)(3).[3] As explained below, the answer to this question is no.

Black's Law Dictionary defines "statutory law" as "[t]he body of law derived from statutes rather than from constitutions or judicial decisions." Black's Law Dictionary 667 (2nd Pocket Ed. 2001). Reading this definition in conjunction with Section 6-408(c)(3), it is clear that only those laws enacted by statute or legislative action have the power to preclude negotiations over an otherwise mandatory subject of bargaining. Regulations adopted by a state agency, which are similar to constitutions and judicial decisions in that they have the force and effect of

[3] Proposals that are mandatory subjects of negotiation cannot also be permissive subjects of negotiation. Thus, the question of whether the proposal is a permissive subject of negotiation under Section 6-408(c)(2) is irrelevant to our analysis. In addition, as noted above, Section 6-408(c)(5)(vi)(2) directs the PSLRB to establish a balancing test to resolve negotiability disputes. The balancing test is only relevant to the PSLRB's analysis if there is any question as to whether a proposal is a mandatory or permissive subject of negotiation. Because there is no question as to whether the proposal is a mandatory subject of negotiation, the directive to develop a balancing test is not applicable in this case.

law, do not fall within the definition of "statutory law" because they are not enacted by statute or legislative action. Because COMAR 13A.07.03.02(B) and (E) are regulations adopted by the Maryland State Board of Education, a state agency, and not derived from statute or legislative enactment, the Board of Education fails to cite any "applicable statutory law" that precludes HCEA and the Board of Education from negotiating over the proposal.

The legislative history of Section 6-408 further supports this conclusion. In 2002, Senate Bill 233 ("SB 233") was introduced to amend several sections of the Education Article. S.B. 233, 2002 Regular Session (Md. 2002). At the time of introduction, SB 233 did not specifically exempt subjects from negotiation, but instead gave the State Board of Education broad discretion to determine what matters may not be negotiated because they are "precluded by applicable law." Notably absent from the language of SB 233 was the word "statutory" before "applicable law." In reference to this language, the House Ways & Means Committee sought advice from the Attorney General on whether the term "applicable law" would include court decisions. The Attorney General issued a letter concluding:

> While the term 'applicable law' would ordinarily be read to include decisions of higher courts, in this instance such a reading would render the bill internally inconsistent. Therefore, while the matter is not free from doubt, it is my view that 'applicable law' should be read to apply only to statutory law.

Att'y Gen. Ltr. (Mar. 8, 2002). Thereafter, SB 233 was amended to include the term "applicable statutory law" and was enacted. Thus, looking to the legislative history, it is clear that in amending Section 6-408 in 2002 that the legislature intended to narrowly construe this term to mean only statutes.

When in 2010 the Fairness in Negotiations Act -- the statute creating the PSLRB -- was enacted, the same term -- "applicable statutory law" -- was used in Section 6-408(c)(3). Moreover, in a recent decision, the Maryland Court of Appeals held, "with respect to resolution of disputes regarding the topics that may be the subject of collective bargaining, the General Assembly has designated the [PSLRB] – and not the State Board of Education – as the agency empowered to decide what is a 'matter precluded by statutory law.'" *Board of Education of Howard County v. Howard County Education Association-Esp, Inc.*, 2015 WL 9265333 (2015).

The Board of Education concedes that there is no statute (or, indeed, any act of the Maryland state legislature) that in any way precludes negotiation of the proposal at issue here. The Board of Education relies instead on regulations adopted by the State Board of Education, COMAR 13A.07.03.02(B) and (E), which it asserts "have the force and effect of statutory law." The Board -- and HCEA as well -- then proceed in their briefs to the PSLRB to debate at length the meaning and intent of these State Board of Education regulations. This debate is misdirected. The operative language in Section 6-408(c)(3) is ***not***, as the Board of Education would have it, "the force and effect of statutory law," but rather "applicable statutory law."

To hold otherwise would render the authority of the PSLRB to determine negotiability disputes ineffective. If it were found that the regulations adopted by the Maryland State Board of Education constituted "applicable statutory law" within the meaning of Section 6-408(c)(3),

the Maryland State Board of Education could simply amend its regulations to reverse the decisions of the PSLRB. Allowing anything other than a statute or legislative enactment to constitute "applicable statutory law" would, simply stated, be absurd.

Furthermore, the PSLRB has previously held that "the more consistent reading of the statutory framework as a whole is that the 'applicable statutory law' is limited to statutes addressing a specific subject of bargaining." *Teachers Association of Anne Arundel County v. Board of Education of Anne Arundel County*, PSLRB Case No. N 2014-02 (2014). A decision holding that regulations adopted by the Maryland State Board of Education are not "applicable statutory law" is dictated by this holding.

Finally, the Board of Education misplaces its reliance on the PSLRB's recent decision in *Board of Education of Frederick County v. Frederick County Teachers' Association* for the proposition "that a governmental agency does not, without authority, abdicate or bargain away its statutory discretion." PSLRB Case No. N 2014-02 (2014). Unlike the proposal before us, that case involved proposals that were in direct conflict with statutory provisions of the Education Article, *not* mere regulations. As a result, that case is easily distinguishable from the issue at hand, and has no bearing on our decision here.

V. Conclusions of Law

As demonstrated above, the proposal at issue is a "working condition" pursuant to Section 6-408(c)(1) of the Education Article, and, therefore, a mandatory subject of negotiation unless it is precluded from negotiation by "applicable statutory law" under Section 6-408(c)(3). We hold that this proposal is not precluded by applicable statutory law.

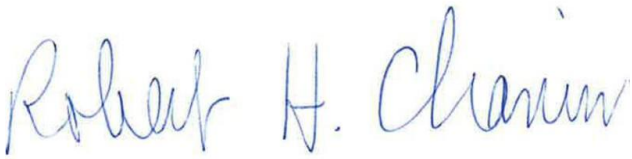
VI. Order

Having considered HCEA's request to resolve a dispute as to the negotiability of its proposal and the parties' briefs in support of their respective positions, it is hereby ORDERED that the dispute as to negotiability, in PSLRB Case No. N-2016-01, is resolved in accordance with the PSLRB's decision of January 19, 2016. The proposal constitutes a mandatory subject of negotiation.

BY ORDER OF THE PUBLIC SCHOOL LABOR RELATIONS BOARD

Seymour Strongin, Chairman

Ronald S. Boozer, Member



Robert H. Chanin, Member

Donald W. Harmon, Member

John A. Hayden, III, Member

Annapolis, MD

February 24, 2016

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).