STATE OF MARYLAND
PUBLIC SCHOOL LABOR RELATIONS BOARD

IN THE MATTER OF:	*	
WASHINGTON COUNTY	*	
EDUCATIONAL SUPPORT	*	
PERSONNEL, INC.,	*	
		PSLRB Case No. N 2019-03
Employee Organization,	*	
and	*	
BOARD OF EDUCATION OF	*	
WASHINGTON COUNTY,	*	
Public School Employer.	*	

* * * * * * * * * * * * *

OPINION OF MEMBER CHANIN DISSENTING IN PART AND CONCURRING IN PART

I. INTRODUCTION AND LEGAL FRAMEWORK

In this case, the Public School Labor Relations Board ("PSLRB") is asked to resolve three negotiability issues. I have filed this Dissenting Opinion for two reasons. One is because the PSLRB has wrongly decided two of those issues. This is a matter of great concern, and would in and of itself provide sufficient basis for a dissent. But the second reason may be cause for even greater concern. This is because the PSLRB's reasoning has the potential to substantially undermine collective negotiations in public education, and is antithetical to the purpose and intent of the Maryland Legislature in enacting the Fairness in Negotiations Act ("FINA").

This case was commenced on March 11, 2019, when the Washington County Educational Support Personnel, Inc. ("WCESP") filed with the PSLRB Form PSLRB-04 ("REQUEST TO RESOLVE A DISPUTE AS TO NEGOTIABILITY") ("NEGOTIABILITY REQUEST"). Form PSLRB-04 is designed to implement the responsibility of the PSLRB under Education Article, Title 6, Subtitle 5, Section 6-510 (c)(5) (dealing with noncertificated employees). This case arises under Section 6-510 (c)(5)(i), which provides as follows:

> 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.

In order to deal with a NEGOTIABILITY REQUEST, the PSLRB must address, in sequential order, the following three questions:

QUESTION NO. 1. What are the topic or topics in regard to which the filing party is asking the PSLRB to make a negotiability determination?

The starting point in attempting to answer this question is Section IV of the NEGOTIABILITY REQUEST, captioned TOPICS IN DISPUTE, which asks the filing party to:

> List topic or topics as to which the requesting party(ies) contend that there is a dispute as to negotiability ("Topics in Dispute"), and the position of the requesting party with regard to the negotiability of each of the Topics in Dispute (i.e,, mandatory, permissive, or illegal).

Although the information provided in this Section of the NEGOTIABILITY REQUEST is the starting point, the PSLRB may, in order to obtain further clarity, consider other sources, including the written briefs that the parties are required to file with the PSLRB setting forth their positions regarding the negotiability of the Topics in Dispute, and other relevant documents.

QUESTION NO. 2. Are the topic or topics identified in response to Question No. 1 appropriate for inclusion in a NEGOTABILITY REQUEST?

In order to answer this question, it is necessary to consider the prerequisites in Section 6-510(c)(5)(i): whether there is a "dispute" between a public school employer and an employee organization regarding the negotiability of "a proposed Topic for negotiation." Phrased otherwise, the PSLRB is not authorized to issue advisory opinions regarding negotiability, but may consider the negotiability of a topic only if that topic actually has been raised in the course of ongoing negotiations, and if the parties involved in those negotiations disagree as to whether it is a mandatory, permissive, or illegal topic. Again, documents filed, actions taken, and statements made by the parties, in writing or verbally, may be relevant in this regard.

The prerequisite of ongoing negotiations requires special attention in this case because the existing Negotiating Agreement between the WCESP and the Washington County School District ("WCSD") continues in effect through June 30, 2021, and negotiations for a successor agreement will not take place until the 2020/2021 school year. See, Article 17, DURATION, of the Negotiated Agreement. The negotiations currently taking place are pursuant to a reopener in Article 17 of the Negotiating Agreement, which provides in relevant part that "during the 2018/2019 school year, salary will be negotiated and each party will have the option to open one sub-article." The WCESP has reopened Sub-Article 6.3. Workdays/Months/Hours; the WCSD

has not reopened any sub-article. See, PSLRB Decision, at fn.5.

QUESTION NO. 3. If the PSLRB concludes that a topic is properly before it, how should the PSLRB determine whether that topic is a mandatory, permissive, or illegal topic of negotiation?

In making this determination, the PSLRB begins with Section 6-510(c)(1), which states that a school district, if requested to do so by an employee organization that is the recognized representative for a unit of its employees, must negotiate with that employee organization "on all matters that relate to salaries, wages, hours, and others working conditions, including the discipline and discharge of an employee for just cause." If this Section stood alone, NEGOTIABILITY REQUESTS made to the PSLRB could be relatively easily resolved. When it enacted FINA in 2010, the Maryland Legislature did not coin this formulation of the scope of negotiations, but rather used terminology that has been used for many years in both public and private labor relations statutes that have been enacted by the Federal government, other states, and Maryland itself. The terms "salaries", "wages", and "hours" are self-explanatory, and there is an abundance of legislative history, judicial and agency precedent, and legal commentary fleshing out the phrase "other working conditions."

But Section 6-510(c)(1) does <u>not</u> stand alone, and the mandatory scope of negotiations set forth in that Section is expressly limited by Section 6-510(c)(3), which prohibits negotiation regarding certain topics that may be encompassed in Section 6-510(c)(1), and makes them "illegal" topics of negotiation. Section 6-510(c)(3) provides:

> 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.

The references to the "school calendar" and "the maximum number of students assigned to a class" are not problematic. The controversy in NEGOTIABILITY REQUESTS generally centers on whether a topic that would otherwise be a mandatory topic of negotiation under Section 6-510(c)(1) is made an illegal topic by Section 6-510(c)(3) because it is "precluded by applicable statutory law."

Two other provisions of FINA relate to a determination of negotiability. One of those provisions is Section 6-510(c)(2). This Section discusses "permissive" topics of negotiation, which are topics that are not mandatory or illegal, and may be negotiated by a school district and an employee organization if they "mutually agree" to do so.

The other provision of FINA that relates to a determination of negotiability is Section 6-510(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 employees.[1]

The foregoing three questions provide the framework for the analysis used in this Opinion.[2]

II. ANALYSIS

In Section IV, TOPICS IN DISPUTE, of the form PSLRB-04 that it filed with the PSLRB, the WCESP lists three topics as to which it requests a negotiability determination. The PSLRB's formulation of these three TOPICS IN DISPUTE is set forth at the bottom of page 4 and the top of page 5 of its Decision, and, for purposes of coordination between this Opinion and the PSLRB's Decision, those formulations will be used in this Opinion.

TOPIC 1. ASSIGNMENT OF PAY GRADES TO NEW AND EXISTING BARGAINING UNIT POSITIONS

This caption does not accurately reflect the first topic for which the WCESP seeks a negotiability determination from the PSLRB. In Section IV of the Form PSLRB-04 that it filed with the PSLRB, the WCESP describes that topic as follows:

> [WCSD] has taken the position that they do not have to negotiate the pay grade assignment during negotiations for salary; and consistent with its belief [WCSD] had advertised "new" positions with salaries, but to date, [WCSD] has refused to negotiate the new salaries for these newly created positions with WCESP. (See

---

1 On April 10, 2019, the WCSD filed with the PSLRB a Motion to Conduct an Evidentiary Hearing in this case. The PSLRB properly declined to accept this Motion, and it is not included in the official record of this case. See, PSLRB Decision, at fn.1. Documents filed by the WCSD in connection with that Motion are nonetheless cited in this Opinion because they reflect the positions taken by the WCSD. On page 4 of the brief submitted by the WCSD in support of its Motion, the WCSD criticizes the PSLRB because "it has yet to [fulfill its statutory obligation to] develop a 'balancing test'" to use in making negotiability determinations. The statutory language used in this regard is somewhat inapt, inasmuch as Section 6-510(c)(vi)(2) is itself a "balancing test," which the PSLRB applies as needed to the facts in any particular case. And, indeed, the WCSD acknowledges this on page 8 of its brief, when it refers to Section 6-510(c)(vi)(2) as the "statutory 'balancing test.'" Nor does the PSLRB resort to the balancing test when the negotiability issue can be resolved based on statutes alone.

The WCSD is likewise off the mark when on page 5 of the brief in support of its Motion, the WCSD criticizes the PSLRB for failing to comply with the statutory "directive" to "adopt the regulations, guidelines and policies to carry out its rights and responsibilities under this section." The WCSD misreads the statute: this so-called "directive" provides that the PSLRB "may adopt".

2 The FACTUAL BACKGROUND of this case is accurately set forth in Section I(b) of the PSLRB's Decision and need not be repeated here.

attached Ex.1).[3]

Moreover, the brief that the WCESP filed with the PSLRB on March 15, 2019, in support of its NEGOTIABILITY REQUEST asks for the following relief:

> Based upon the foregoing, we respectfully request the PSLRB to conclude that grade, hours, and working conditions of newly-created positions are mandatory subjects of bargaining pursuant to the plain language of Section 6-510(c)(1) of the Education Article; and the parties should be directed to negotiate the subject matter addressed herein. (Emphasis added) See, WCSD Brief at p.7.

Finally, in Section I.b. of its Decision, the PSLRB reviews the negotiations that took place between the WCESP and the WCSD prior to the March 18, 2019, filing of the WCESP's NEGOTIABILITY REQUEST with the PSLRB. Included in that review is a summary of the proposals regarding the assignment of pay grades that were made by the WCESP. These proposals dealt specifically with the newly created positions.

In its Decision, the PSLRB devotes only one sentence to the negotiability of pay grade assignments. That sentence, which appears on page 8 of the Decision, draws no distinction between newly created and existing negotiating unit positions. The WCESP's request with respect to "pay grade assignments for each bargaining unit position" is "denied" because the topic is "included under Sub-Article 2.11 of the Negotiated Agreement, and [does] not fall within the scope of Sub-Article 6.3", which is the sub-article that the WCESP opened pursuant to the reopener in Article 17 of the Negotiated Agreement. The PSLRB ignores the fact that, in addition to the reopened Sub-Article, Article 17 also provides that "[d]uring the 2018/2019 school year, salary will be negotiated." And, as the WCESP correctly points out in Section IV. TOPICS IN DISPUTE, Topic in Dispute #1 of the Form PSLRB-04 that it filed:

> [T]he current WCESP pay scale consists of fifteen different pay grades. Each individual is assigned a grade under Article 2.11. The grade each position is assigned is a matter of salary. (Emphasis added).

The PSLRB's analysis of the negotiability of Topic 1 is doubly flawed. The PSLRB errs by first misstating the negotiability question that the WCESP is asking. That question is not, as the PSLRB puts it, the negotiability of the assignment of pay grades to both new and existing positions, but is rather limited to new positions. Because the PSLRB also misstates the scope of the reopener in Article 17 of the Negotiated Agreement, it would also have "denied" the more focused topic in the question that it actually has been asked because that topic does not fall within the scope of the reopened Sub-Article 6.3.

It is instructive for future reference, and because of its relationship to the subsequent discussion in this Opinion of Topic 3, to indicate how this type of negotiability request should

---

3 The WCESP's attached Exhibit 1 is the position description that was used by the WCSD to recruit applicants for the newly created Print Shop Lead position.

have been analyzed—more specifically, how to interpret and apply the reference to "precluded by other applicable statutory law" in Section 6-510(c)(3). The purpose of FINA is to stabilize labor relations in public education by endorsing and encouraging collective negotiations. Consistent with that purpose, Section 6-510(c)(3) should be narrowly construed. Toward that end, it is important to emphasize the Legislature's use of the qualifying term "statutory" before the term "law" in Section 6-510(c)(3), because it reflects the legislative judgement that a ruling by a state agency, such as the Maryland State Board of Education, or even a decision by a Maryland court, will not suffice. A statute should not be considered to preclude negotiation simply because it authorizes a school district to take some action with regard to a particular topic. The phrase "applicable statutory law" should be construed to refer only to statutes that take the same approach that is taken in Section 6-510(c)(3) with regard to the "school calendar" and the "maximum number of students assigned to a class," and expressly provide that the parties "may not negotiate" regarding the topic or contain equivalent language to that effect, or clearly indicate that the school district is given the authority to act unilaterally in regard to the topic.

Because the PSLRB's Decision unduly limits the scope of the reopener, the Decision does not reach the question of whether there is any Maryland statute that makes the pay grade assigned to newly hired school district employees or the initial salary paid to such employees an "illegal" topic of negotiation.

TOPIC 2. SALARY AND WORKING CONDITIONS OF NEWLY CREATED BARGAINING UNIT POSITIONS

The PSLRB deals with this topic as part of a single paragraph on page 8 of its Decision. The PSLRB states that 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 do not fall within the scope of Sub-Article 6.3." For this reason, the PSLRB concludes that "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 6-150(c)(5)(1)", and the WCESP's Disputed Topic #2 Negotiability Request is "denied." Although the PSLRB is correct with regard to Sub-Article 6.3, it once again omits the fact that the reopener in Article 17 also includes "salary." But this omission does not alter the conclusion reached by the PSLRB. Because the other "working conditions" listed in the WCESP's NEGOTIABILITY REQUEST do not fall within the Article 17 reopener for salary or Sub-Article 6.3, they do not meet the prerequisites for inclusion in the WCESP's NEGOTIABILITY REQUEST to the PSLRB. Accordingly, I concur with the PSLRB's resolution of Topic 2.

TOPIC 3. NUMBER OF HOURS, DAYS, AND MONTHS WORKED

In Section IV. TOPICS IN DISPUTE of Form PSLRB-04, the WCSD lists as Topic in Dispute #3 "The negotiation of the hours worked, number of days worked, and months worked of bargaining unit positions." Pursuant to the reopener in Article 17 of the Negotiated Agreement, the WCESP has opened Sub-Article 6.3. This Sub-Article is captioned "Workdays/Months/Hours", and it sets forth the days, months, and hours worked by specific

positions in the negotiating unit. It is therefore clear that TOPIC IN DISPUTE #3 is included within the scope of the reopener.

There is a threshold question as to whether the parties disagree that the number of days and months worked are mandatory topics of negotiation. Thus, in Section V of Form PSLRB-04, POSITION OF OTHER PARTY WITH REGARD TO NEGOTIABILITY OF TOPICS IN DISPUTE, the WCESP indicates that the parties have been engaged in negotiations regarding Sub-Article 6.3, and that:

> During negotiations, [WCSD] has repeatedly asserted that it is under no obligation to negotiate number of hours worked in a day. [WCSD] made this assertion on January 9, 2019, January 15, 2019, and February 6, 2019 while at the bargaining table. (Emphasis added)

In contrast, there is no indication in the record of this case that the WCSD took a similar position with regard to the negotiation of the number of days and months worked.

Perhaps the most definitive statement of the WCSD's position regarding the negotiability of Topic 3 appears in footnote 4 of the brief submitted by the WCSD in support of its April 10, 2019, Motion to Conduct an Evidentiary Hearing:

> In fact, the sole issue to be resolved regarding this particular subject of bargaining [the "negotiating of the hours worked, number of days worked, and months worked of bargaining unit positions"] is the [WCESP's] insistence that the [WCSD] engage in bargaining over the minimum number of hours to be assigned to specific bargaining unit positions. There is no actual dispute over the negotiability of the number of months or days worked. (Emphasis added)

Section 6-510(c)(5) requires that there be a "dispute" as to whether a "proposed topic for negotiation is a mandatory, a permissive, or an illegal topic of bargaining" in order for the PSLRB to make a negotiability determination. To be sure, there is a "dispute" in this case, but that dispute is not, as the statute requires, between a school district and an employee organization. The WCESP and the WCSD agree that the number of days and months that employees work is a mandatory topic of negotiation, and the dispute is between them and the PSLRB, which, in its Decision, concludes otherwise.[4]

We are left then with the question of whether the topic of hours worked is, as the WCESP contends, a mandatory topic of negotiation. Because "hours" are expressly listed in Section 6-

---

[4] Although the argument has not been made in this case, a question may be raised as to whether negotiation regarding months and days worked is an illegal topic of negotiation because it is encompassed within the term "school calendar", which is expressly precluded from negotiation by Section 6-510(c)(3). The answer is "no", inasmuch as both the PSLRB and the Maryland courts have held that the term school calendar refers to the days on which a school district is or is not open to perform its function of providing educational services, and this is distinct from the months and days that employees may or may not be required to work.

510(c)(1) as a "mandatory" topic of negotiation, the number of hours that the employees represented by the WCESP work can be an "illegal" topic only if such negotiation is "precluded by applicable statutory law" under Section 6-510(c)(3).

As noted previously, see p.6, supra, it is important to focus on the Legislature's use of the qualifying term "statutory" before the term "law" because it reflects the legislative judgement that a ruling by a state agency, such as the Maryland State Board of Education, or even a court opinion, will not suffice. It may be for this reason that the PSLRB does not follow the lead of the WSCD and rely on the 1987 decision by the Maryland Court of Appeals in Montgomery County Educators Association, Inc. v. Board of Education of Montgomery County or the 1999 decision by the Maryland State Board of Education in New Board of School Commissioners of Baltimore City v. Baltimore Teachers' Union. The PSLRB searches instead for "statutory law", and it cites in this regard Section 4-103(a) and Section 6-201(f) of the Education Article.[5]

In order to determine the possible preclusionary effect of these two statutes, they must be viewed in context. Section 4-103 is captioned "Appointment and salaries of principals, teachers, and personnel." Section 4-103 (a) is captioned "Appointments by County Board", and provides in relevant part:

> 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;
> 2. Set their salaries.

Section 6-201 is captioned "Appointment of employees by county board." Section 6-201(f) is captioned "Qualifications, tenure, and compensation of appointees", and provides:

> Subject to the provisions of this article, the qualifications, tenure, and compensation of each appointee[6] shall be determined by the county board.

Despite the fact that neither Section 4-103(a) nor Section 6-201(f) makes any reference to hours worked or to hourly as opposed to salaried employees, the PSLRB attempts to use these factors as its bridge to relevancy. In its Decision, the PSLRB devotes only a single paragraph (on page 9) to explaining why these two statutes make hours worked an illegal topic of negotiation:

> Because Sections 4-103(a) and 6-201(f) grant the County Board the express authority to set compensation for public school employees, the County Board is precluded from negotiating over the number of hours worked. This is due to

---

5 The failure to deal in this Opinion with the two cases cited in text is not meant to suggest that the WCSD's argument regarding these cases has merit. The cases are not dealt with because Section 6-510(c)(3) specifically refers to "statutory law."

6 Pursuant to Section 6-201(c)(1), the term "appointee" includes "clerical and other nonprofessional personnel."

> 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 the 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.

The first point to note in responding to the PSLRB's argument is that Sections 4-103(a) and 6-201(f) both deal with the appointment of employees to County Board positions. In the terminology of this case, this means that the authority that these statutes grant to a County Board relates only to newly hired employees, and the PSLRB's assertion in the argument quoted above that these statutory sections "grant the County Board the express authority to set compensation for public school employees" is therefore incorrect. Indeed, if this assertion were to be taken at face value, it would logically follow that these Sections also make the salaries, wages, and other forms of compensation paid to "public school employees" illegal topics of negotiation, which would in effect render FINA a virtual nullity.

Equally unfounded in the argument quoted above is the statement that the hourly 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." More accurately, the compensation of these hourly employees is linked both to the number of hours that they work and to the amount that they are paid per hour. In neither of these respects are they materially different from "other salaried employees," whose compensation is inextricably linked to the days and months that they work and the amount that the negotiated salary schedule indicates they will be paid for each day or month.

The PSLRB concludes its discussion of this point by "reject[ing] the WCESP's argument that hours worked is a 'working condition,' and, therefore, a mandatory topic of negotiation." The hours that employees work is a mandatory topic of negotiation not because the WCESP argues that it is a "working condition" (which, of course, it is), but because "hours" is one of the four topics that are expressly listed by name in Section 6-510(c)(1) as mandatory topics of negotiation.

In sum, to the extent that Section 4-103(a) and Section 6-201(f) constitute "applicable statutory law" under Section 6-510(c)(3), they at most preclude the negotiation of the initial compensation paid to newly hired employees.[7]

---

[7] The WCSD itself appears to be somewhat uncertain about whether hours worked is an illegal topic of negotiation, stating on page 2 of the brief that it filed with the PSLRB on March 15, 2019, in response to the WCESP's NEGOTIABILITY REQUEST, that such negotiation "is either an ILLEGAL or PERMISSIVE topic of bargaining." But the WCSD can in this case take no comfort in the distinction. The parties are not negotiating a successor agreement to the existing Negotiated Agreement, but are rather

III. CONCLUSION

The PSLRB is wrong in finding that Topic 1 (Assignment of Pay Grades to New and Existing Bargaining Unit Positions) and Topic 3 (Number of Hours, Days, and Months Worked) are illegal topics of negotiation. I dissent from this finding. The PSLRB is correct in finding that Topic 2 (Salary and Working Conditions of Newly Created Bargaining Unit Positions) is not included in the reopener, and in denying the WCESP's NEGOTIABILITY REQUEST for a ruling as to that topic. I concur with this finding.

Robert H. Chanin, Member
Date: May 3, 2019

negotiating pursuant to the reopener in a Negotiated Agreement in which the parties already have "mutually agreed" in accordance with Section 6-510(c)(2) to negotiate the hours worked by employees.