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October 27, 1987

Dr. Robert C. Rice
President, Public School
Superintendents Association
of Maryland
2644 Riva Road
Annapolis, Maryland 21401

Re: Dorchester County (Hubbard)

C
O
P
Y
Dear Bob:

I am happy to report that Mitch Cooper decided that the issuance of a second class certificate is not subject to binding arbitration. He based his decision on the "compelling fact . . . that an inherent and vital part of a superintendent's statutory responsibility is to classify a teacher's certificate in accordance with the standards set forth in the law and in the policies of the local board. This responsibility is unique to him, and it cannot be delegated to others." This was precisely the argument that we made to him. If he had stopped there, it would have been fine. But he didn't.

While the issue involved the arbitrability of a substantive decision on a second class certificate, during the hearing Mr. Cooper made comments and asked questions suggesting that he might have a different view of the arbitrability of a superintendent's failure to comply with a local board's rules or labor agreement with respect to the procedures to follow in evaluating teachers. I tried to steer him away from this since the issue in the case was the Superintendent's decision in rating the certificates, not how he proceeded to make the ratings.

Nonetheless, while acknowledging that the issue was not before him, his written opinion called attention to a clause in the Baltimore County Board of Education's labor agreement which confines grievances on teacher evaluation to grounds of "arbitrariness, discrimination, or failure to follow procedures."

Mr. Robert C. Rice
October 27, 1987
Page Two

Without giving any explanation, Cooper said this was "at least one alternative approach to the problem." I do not know what he meant by this, particularly since the issue raised by the Dorchester teachers arguably related to arbitrariness. But it is clear that Mitch was off the target if he would support arbitration of an alleged arbitrary superintendent's action. The State Board should leave no doubt in its decision that a superintendent's rating of a teacher's certificate, whether allegedly arbitrary or discriminatory, can only be appealed to the local board of education and the State Board.

Nor do I understand Cooper's further finding that since a second class certificate impacts on salary and working conditions, "such a matter may be subject to negotiation provided no standards are set inconsistent with those of the statute . . ." This comment is even more difficult to understand since he followed up by saying that "the substantive decisional authority remains within the chain of command of Superintendent to County Board to State Board and is not ceded to an arbitrator."

It is unfortunate that Mitch took the occasion to make confusing comments on what was a clear-cut issue. The matter is going to be argued before the full State Board on December 8 at 1:00 p.m. I am sending you a copy of the decision. I look forward to hearing from you to discuss it.

Yours truly,

Edward J. Gutman

EJG/ig
Enclosure

cc: Superintendents of Schools

DORCHESTER EDUCATORS, et al,

Appellants

v.

BOARD OF EDUCATION OF
DORCHESTER COUNTY

RECEIVED

HE-9-87-MC

OCT 14 1987

Respondent

Office of
Maryland State Board of Education

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The issue in this case is whether the 1981-1984 collective bargaining agreement between the Dorchester County Educators and the Board of Education of Dorchester County lawfully encompasses the downgrading of teachers' certificates to second-class and, if so, whether the classification of teachers is subject to arbitration under the agreement's grievance procedure.

The Maryland Association of Boards of Education and the Public Schools Superintendents Association of Maryland were granted the right to appear as amici in view of the state-wide significance of the ultimate decision. A hearing was held September 2, 1987, and on the basis of the testimony, exhibits and briefs of the parties and amici, this Examiner makes the following

FINDINGS OF FACT

The Dorchester Educators, the exclusive representative of

all professional certificated teachers, and the Dorchester Board of Education negotiated an agreement in 1981 which included a grievance procedure containing an arbitration clause. A grievance was defined as a "...dispute...of any kind...arising out of or in any way involving interpretation or application of the terms of this Agreement." The arbitrator's powers were "confined to the express...provisions of this Agreement at issue" between the parties. Further, "he shall have no authority to add to, alter, detract from, amend, or modify any provision of this Agreement, or to make any award which will in any way deprive the Board of any of the powers delegated to it by law and not encompassed in this Agreement." The Agreement also contained a provision that "No teacher will be disciplined or reduced in rank or compensation without just cause."

In the course of the 1982-1983 school year, two Dorchester teachers, having been subject to formal observation and evaluation, were downgraded by the County Superintendent to second-class certificates. They both filed grievances under the collective bargaining agreement, but the Superintendent refused to consider such grievances on the ground that the classification of a teacher's certificate is not subject to the procedures set forth in the Agreement. When Appellants sought to bring the matter to arbitration, Respondent filed a complaint in the Circuit Court for Dorchester County seeking to stay arbitration and alleging that the collective bargaining agreement did not

cover the dispute, that the authority to rate a teacher's certificate is vested by statute in the Superintendent and cannot be delegated to an arbitrator, and that any review of the Superintendent's decision can be made only by the County and State Boards of Education.

The Circuit Court denied the request for a stay and held that the disputes in question are subject to arbitration. Respondent thereupon appealed. The case was taken directly to the Court of Appeals, which held that the case was not ripe for its determination in that the Board had not exhausted its administrative remedy, namely an appeal to the State Board of Education.¹ This then was the route by which the case came to this Hearing Examiner.

The sole witness at the hearing was Assistant Superintendent William Potter who supervised the observations and evaluations of the teachers in question, and who recommended to the Superintendent that they be downgraded to second-class certificates. Dr. Potter described the observation and evaluation procedures, and stated that they were written so as to implement the teaching standards expected by the Board of Education. He called attention to the statutory authority for the Superintendent to rate certificates and he asserted that this

¹Board of Education for Dorchester County v. Hubbard et al., Ex. 34 to J. Ex.1.

is not a matter which can be delegated to an arbitrator. His attorney added that although the statutory authority is the Superintendent's, his decision can be appealed to the County Board and, if necessary, to the State Board of Education. (Record, pp. 3-51)

In reply to questions from the Hearing Examiner, Dr. Potter testified that the standards and procedures governing the classification of teachers are embodied in documents adopted by the County Board. He agreed that once a teacher is placed on a second-class certificate, his or her rights to continued employment are comparable to those of a probationary employee. He stated that action short of a second-class certificate, such as a written warning or an unsatisfactory evaluation, also cannot be made subject to arbitration. Dr. Potter said that the Board's collective bargaining relations with Dorchester teachers goes back to about 1970 and that his own involvement goes back to 1975; he added that he has no recollection of any discussion with the Teachers Association during those years about the arbitrability of a teacher's unsatisfactory performance. (R. 51-60)

On cross-examination Dr. Potter agreed that a teacher on second-class certificate does in fact remain in a tenured position. He also agreed that the teacher's record would reflect the downgrading and that that would be taken into account

together with any other relevant matter if the teacher were subsequently to be considered for promotion. He further stated that one effect of being on second-class certificate is the denial of step increments in salary for the duration of that certificate. He did not agree that a second-class certificate is a disciplinary action. (R. 60-81).

CONCLUSIONS OF LAW

Section 4-107 of the Maryland Code provides that each County Board shall "determine, with the advice of the County Superintendent, the educational policies of the County school system."

Section 6-103 provides that "each County Superintendent shall classify the certificate of each teacher employed by the school system of his county at least once every two years", and sets forth standards to guide his determination.

Section 6-408 provides for negotiations between a County Board and the designated representative of its employees "on all matters that relate to salaries, wages, hours, and other working conditions," states that an agreement may provide for binding arbitration of grievances, and provides that the County Board shall have the final authority on matters that have been the subject of negotiation.

Section 6-410 prohibits strikes by public school employee organizations.

Section 6-411 provides that the negotiations law "does not supersede any other provision of the Code or the rules and regulations of public school employees that establish and regulate tenure."

Despite the seeming clarity of these statutory provisions, there is a lack of explicitness in the use of critical terms. This has resulted in a tension between those provisions dealing with the authority of a county board over matters of educational policy and the rights of a designated collective bargaining representative to negotiate on "all matters that relate to salaries..and other working conditions...." How should one strike a balance between these provisions? This is the underlying question which confronts the State Board in the instant case and will soon confront it in the case of Garrett County Teachers Association v. the Board of Education of Garrett County (HE-10-87) now pending before this hearing examiner.²

² The question posed in Frederick County Teachers Association v. the Board of Education of Frederick County (HE-2-87) currently before the Board is in my view distinguishable from the question in both the instant case and Garrett County since Frederick County, again in my view and contrary to the position of the County Board, involves an issue of negotiability but not one of educational policy.

The State Board has grappled with this general question in earlier cases. In Montgomery Education Association v. Board of Education of Montgomery County, 1 Op MSBE 35 (1970), the Teachers Association appealed the refusal of the County Board to negotiate the school calendar and the reclassification of certain positions. The State Board ruled that the school calendar falls in the prerogative of local Boards, "since not only are the teachers affected, but all school employees and the community at large...are affected...." The Board further ruled that "The right of classifying all jobs...rests in the complete control of the County Boards of Education."

The Montgomery County case was revisited some fourteen years later. In Montgomery County Education Association v. Board of Education of Montgomery County, 3 Op MSBE 602 (1984), Hearing Examiner Nilson recommended that the Board affirm the school calendar aspect of its 1970 decision on the basis of the rationale quoted above, and the Board adopted that recommendation. As for the classification question, the Board reaffirmed its view that classification is a management function, but it held that the local Board could--but does not have to--negotiate a provision to protect incumbent teachers from salary decreases which would result from reclassification.

Further, in Bricker v. Frederick County Board of Education, 3 Op MSBE 99 (1982), the State Board rejected the view that the

question of reviewing the contract of a probationary teacher should be subject to negotiation. In doing so, it adopted the conclusion of Ms. Nilson to the effect that permitting such an issue to be subject to arbitration would limit the authority of County Boards to review teacher qualifications and to exercise their discretion in the renewal of probationary contracts.

The probability that the instant case and the Garrett County case now in the pipeline will be followed by other appeals dealing with the conflict between the educational policy provision and the collective bargaining provision suggests the advisability of a further attempt at resolving the conflict, particularly in light of the Court of Appeals mandate to this Board to use its expertise to attempt such a reconciliation. It should be noted that then-Attorney General Sachs and then-Assistant Attorney General Heller filed an amicus curiae brief with the Court of Appeals in behalf of the State Board (Ex.35 to J.Ex.1). That brief advocates the view that the scope of bargaining under Section 6-408(b) should be narrowly construed so as to exclude matters relating to educational policy. It argued that the classification of teacher certificates is such a matter, and indeed that all so-called managerial duties should remain the exclusive prerogative of the school board. This brief also stresses the power of the State Board to review controversy over educational policies and emphasizes that this is not a power which can be delegated to an outside arbitrator. These views of

the Attorney General are entitled to great respect, particularly since Assistant Attorney General--now Judge--Heller brought to this¹ brief an extraordinary background of expertise in and sensitivity to the administration of the laws dealing with education. But the issue here, as the Court of Appeals recognized, is one of policy as well as law, and while deference must be paid the Attorney General's Office as to legal interpretations, the State Board is of course free to make a policy determination not inconsistent with its legal obligation.

The fact is that the statutory language lends itself to more than one interpretation, based on the desired policy result. Thus, if we were to accept the view of Appellant that all matters other than tenure are subject to negotiation and may be arbitrated, the Code's grant of educational policy authority to county boards could be emasculated. Similarly, if we were to accept the broad view of Respondents and amici that any issue which affects the learning process must be excluded from negotiations, the provision which permits negotiation "on all matters that relate to salaries, wages, hours and other working conditions" would be seriously weakened. The parties found it difficult to suggest an "educational policy" that does not to some degree impinge upon "working conditions." The line between the two concepts is at best blurred in part because of the

difficulty of defining "educational policy."³

Nor is our task made easier by seeking guidance from decisions in other jurisdictions. Appellants, Respondent and amici (including the Attorney General in his brief to the Court of Appeals) have cited cases from other states with persuasive language--on both sides of the question.

Our responsibility is to determine the best policy for Maryland under the Maryland statutory scheme. In Board of Education of Garrett County v. Lendo, 295 MD 55 (1982) the Court of Appeals laid out rules of statutory construction for the guidance of the State Board of Education. In the course of its discussion the Court stated that "Where two statutes deal with the same subject matter, they must be construed together if they are not inconsistent with one another....Absent a clear indication to the contrary, a statute, if reasonably possible, is to be read so that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless, or nugatory." Here, however, we must deal with inconsistent and overlapping statutes. I suggest that the closest we can come to Lendo's guidelines and to the exercise of the State Board's responsibility for policy is a case-by-case approach, with each

³As I write this, I cannot help but be reminded of the problem Justice Stewart had in Jacobellis v. State of Ohio, 378 US 184 (1964). In his effort to define hardcore pornography, he was reduced to the statement that "I know it when I see it."

decision based on whether the impact on educational policy would or would not be greater than the impact on working conditions.

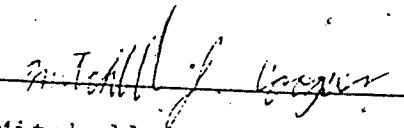
Applying this test to the instant case, I conclude that the issuance of a second-class certificate cannot be made subject to the binding arbitration provision in the Agreement of these parties. It is true that a second-class certificate has a significant impact on salary and working conditions, for the affected teacher suffers a permanent lag in step increases, is subject to more frequent observations, and will have this evidence of inadequate teaching skills placed in his or her personnel file. A more compelling fact, however, is that an inherent and vital part of a Superintendent's statutory responsibility is to classify a teacher's certificate in accordance with the standards set forth in the law and in the policies of the local board. This responsibility is unique to him, and it cannot be delegated to others. It goes to the heart of the narrowest interpretation of "educational policy" since it involves the quality of teaching. It requires a consistency of approach and an adherence to local board standards which cannot be anticipated from arbitration outside the system, the more so when successive cases may go to different arbitrators.

While this conclusion sets a limit on the statute's endorsement of arbitration as an option for the resolution of grievances, I stress that it is a limited limit, called for by

the specific statutory authority given to Superintendents and by the obvious significance of teacher quality to educational policy.

The objection I have voiced goes to the broad arbitration clause in this case. Appellants' brief calls attention to a much narrower clause in the Agreement of the Board of Education of Baltimore County and the Teachers Association of Baltimore County confining grievances on teacher evaluations to grounds of "arbitrariness, discrimination, or failure to follow procedures." This clause is not before me and I do not pass judgment on it; I merely point out the existence in Maryland of at least one alternative approach to the problem.

Finally, in view of the fact that a second-class certificate does impact on salary and working conditions, I conclude that such a matter may be subject to negotiation provided no standards are set inconsistent with those of the statute, and provided that the substantive decisional authority remains within the chain of command of Superintendent to County Board to State Board and is not ceded to an arbitrator.


Mitchell J. Cooper
Hearing Examiner

October 10, 1987