Circuit Court for Caroline County
Case No. C-05-CV-19-62

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 1342 and 2124

September Term, 2019

CAROLINE COUNTY EDUCATORS' ASSOCIATION, INC.

v.

BOARD OF EDUCATION OF CAROLINE COUNTY

Arthur,
Beachley,
Wilner, Alan M. (Senior Judge, Specially Assigned)

JJ.

Opinion by Wilner, J.

Filed: September 16, 2020

This is a dispute between the Board of Education of Caroline County (School Board) and the Caroline County Educators' Association (CCEA) over whether a grievance emanating from a reprimand issued to a public-school employee is subject to binding arbitration. In an action brought by the School Board to enjoin CCEA from proceeding to arbitration, the Circuit Court held that the grievance was not subject to arbitration.

We have two appeals from that decision, one challenging the grant of a preliminary injunction on September 17, 2019 (No. 1342), and the other from a declaratory judgment and permanent injunction entered on December 20, 2019 (No. 2124). We shall dismiss the first appeal as moot and address the only live dispute in the second appeal.

BACKGROUND

The Collective Bargaining Agreement

The legal issue before us arises from a collective bargaining agreement entered into by the School Board and CCEA on July 1, 2011 that, by its terms, remained in effect until June 30, 2020 but, by subsequent agreement, was extended for two additional years. Four provisions are particularly relevant. The first is Section 11.2, which provides that "[n]o teachers will be disciplined or reduced in rank or compensation without just cause." That is under the general heading of Article 11, captioned

"PROTECTION OF UNIT MEMBERS." The term "disciplined" is not defined, either in Article 11 or, indeed, anywhere in the Agreement.

The second provision of special importance appears in Article 19, which sets forth a grievance procedure. Section 19.1 states that the purpose of the procedure is "to secure, at the lowest possible administrative level, an equitable solution to the problems that may occur in the administration of [the] Agreement." Section 19.2.2 defines a "grievance" as "[a]n alleged violation, misrepresentation, or misapplication of this Agreement." Section 19.3 sets forth a five-step procedure, the first four of which are (1) presenting the grievance orally to the grievant's immediate supervisor; (2) presenting it in writing to the immediate supervisor; (3) providing written notice to the county Superintendent of Schools; and (4) providing written notice to the School Board.[1]

Step 5, captioned "Binding Arbitration," provides that, if the grievance is not resolved in Step 4, "the Association may move the matter to binding arbitration within ten (10) days."[2] As part of Step 5, the Agreement requires the School Board and CCEA

[1] The text regarding Steps 3 and 4 makes clear that these are not just "notice" provisions but are requests for relief. The Agreement requires the Superintendent and the School Board, within a fixed period of time, to give "a written decision after receipt of the grievance."

[2] Section 4.4 of the Agreement provides that "[a]ll employees may have the right of Association representation at each step of the Grievance procedure." The teacher is allowed to proceed with the first four steps without CCEA involvement. *See* § 19.5.1. That is not the case with respect to Step 5. Section 19.5.3 provides that "no grievance may be submitted to arbitration without the consent of and representation by the Association."

to attempt to agree on an acceptable and willing arbitrator, failing which either party can request a list of arbitrators from the American Arbitration Association (AAA) or any other agreed upon mediation organization. The language in Step 5 concludes with the statement that "[t]he decision of the arbitrator will be final and binding."[3]

Section 19.4 provides that the jurisdiction and authority of the arbitrator and any award are "confined to the express provision of this Agreement at issue" and that the arbitrator will have no authority to "add to, alter, detract from, or modify any provision of this Agreement" or "make any award that will in any way deprive the [School] Board of any of the powers delegated to it by law and not encompassed in this Agreement."

The third and fourth provisions of particular relevance deal with the scope of the Agreement. Article 2 provides:

> "CCEA recognizes that the Board of Education and the Superintendent of Schools reserve and retain full rights and discretion in the proper discharge of their duties and responsibility to control, supervise and manage the Caroline County Public Schools under applicable law, rules and procedures. Nothing in this Agreement shall otherwise be construed to limit the powers and responsibilities conferred upon the Board or the Superintendent of Schools under the statutes and laws of the State of Maryland. Any failure to enumerate in this Agreement the retained powers, rights, authority and prerogatives of the Board or the Superintendent of Schools shall not be construed as waiver of any such powers, rights[,] authority or prerogatives."

Finally, Article 24 provides that the Agreement shall remain in effect through June 30, 2020, but that "either party may reopen two articles of its choice." What that means,

[3] Md. Code, § 6-408(b) of the Education Article permits collective bargaining agreements negotiated between school employers and employee organizations to provide "for binding arbitration of the grievances arising under the agreement that the parties have agreed to be subject to arbitration."

according to the parties, is that each year, in addition to a proposed change in employee compensation, either party could propose a change to two Articles in the Agreement, which would then be a subject of negotiation. As noted, the Agreement was extended to 2022. At the time of that extension, the parties were free to propose changes to any of the provisions in the Agreement.

The Grievance

On November 1, 2018, the principal of the Denton Elementary School issued a letter of reprimand to Christina Gorsuch, a guidance counselor. The letter of reprimand is not in the record. Testimony by a School Board representative indicated that the letter accused Ms. Gorsuch of "yelling in the company of others, including students in the hallway in direct response to the request of the principal to stay to deal with a child that was in crisis" and warned her that "if she fails to correct her behavior, she would be subject to further corrective action up to and including a recommendation for termination." The letter was placed in Ms. Gorsuch's personnel file.

Contending that the reprimand was without just cause, Ms. Gorsuch invoked Steps 1 through 4 of the grievance procedure, without success. Evidence indicated that the principal's response, at either Step 1 or Step 2, was that the reprimand **was** with substantial justification. We are unable to locate that response in the record.

Unsatisfied with that response and any by the Superintendent or the School Board, which also we are unable to find in the record, on March 27, 2019, CCEA filed a demand

for arbitration on her behalf. In a letter to CCEA dated April 1, 2019, the School Board rejected that demand on the ground that written reprimands were "a matter of personnel policy and an integral and intrinsic function of school management" and were "not referenced or identified as grievable under the current [collective bargaining agreement]."

In its letter, the School Board acknowledged that, under a 2015 ruling from the Public School Labor Relations Board (PSLRB), "lesser forms of discipline, such as reprimands" were subject to collective bargaining but noted that CCEA had not chosen to propose subjecting them to the grievance procedure, and that the only further procedure available to Ms. Gorsuch was to appeal the School Board's decision to the Maryland State Board of Education (MSBE) pursuant to Md. Code § 4-205(c)(3) of the Education Article (ED). Faced with the School Board's refusal to agree upon an arbitrator, CCEA filed a demand for arbitration with the AAA which, in turn, resulted in the School Board's Petition to Stay Arbitration, followed 12 days later with a broadened Amended Petition to Stay and for declaratory and injunctive relief.

The Litigation

The amended petition alleged that, as of the time the collective bargaining agreement took effect in July 2011, MSBE, which then had the jurisdiction over public school collective bargaining that later was transferred to PSLRB, had ruled that low-level discipline, including letters of reprimand, were not subject to collective bargaining and therefore were not subject to a grievance process of the kind set forth in Article 19.

Rather, the School Board contended, that form of discipline was within the exclusive purview of the local superintendents and boards of education, and, under Article 2 of the collective bargaining agreement, CCEA recognized that the Superintendent and School Board reserved and retained their right and authority to manage and supervise the county public schools and nothing in the Agreement was to be construed to limit that authority. The School Board stated that, in entering the Agreement, it never contemplated abrogating its managerial control by submitting low-level discipline to the grievance process.

CCEA initially responded with a Motion to Dismiss the petition based on a number of procedural grounds – insufficient service, failure to exhaust administrative remedies, and failure to state a cause of action, in part, on the School Board's failure to show any irreparable harm from proceeding to arbitration. Its substantive response was that (1) it believed the reprimand issued to Ms. Gorsuch constituted discipline; (2) there was no just cause for that discipline; (3) it therefore violated § 11.2 of the collective bargaining agreement; (4) the dispute was therefore subject to the grievance procedure provided for in Article 19, of which arbitration is a part; and (5) there were no exceptions to that in the Agreement.

As noted, the School Board's amended petition first came before the court with respect to a request for a stay of arbitration and a preliminary injunction to enjoin CCEA from pursuing that remedy. At the hearing held regarding that request, the School Board's position became even more stringent. In its March 8, 2019 letter rejecting Ms. Gorsuch's

grievance at the Step 4 level (which does not appear to be in the record but is referenced in the Board's letter of April 1, 2019), the Board concluded that a reprimand was the kind of low-level discipline that was not subject to the Article 19 grievance procedure (except perhaps Steps 1 through 4 with an ultimate appeal to MSBE).

In testimony at the court hearing, the School Board's representative, Milton Nagle, gave a basis for that conclusion not mentioned in the Board's earlier letter. He claimed that the "just cause" requirement itself in § 11.2 did not apply to reprimands and that just cause was not necessary in the issuance of a reprimand. His view was that "[e]mployees need to be held accountable for their actions," and, when facing only an allegation of misconduct and not any loss of pay or position, a showing of just cause for the accusation was not necessary. He acknowledged that a reprimand could be considered discipline in a general sense but not for purposes of the Article 19 grievance procedure.

At the court's request, Mr. Nagle was questioned regarding the impact on the School Board and the public of allowing grievances based on reprimands to be submitted to arbitration. He opined that there was no budget item for arbitration and the Board would have to find money in other budget items and possibly have to stop issuing reprimands. If arbitration became the "new norm," he said, "[i]t would bog us down significantly." [4] He estimated that the number of reprimands issued in the preceding year (2018) was "well into double digits."

[4] That assertion was challenged by CCEA, which pointed out that in the preceding 13 years, CCEA had challenged only two reprimands and both had followed the grievance procedure set forth in Article 19.

The court initially questioned whether it had any authority to grant injunctive relief. It noted that Md. Code, § 4-310 of the Labor and Employment Article limits the authority of a court to issue an injunction in a labor dispute and that the Rules governing injunctions in Title 15, Chapter 500 of the Maryland Rules do not affect those limitations. The court observed as well that § 3-208 of the Courts Article, which is part of the Maryland Uniform Arbitration Act, provides that the Act does not apply to arbitration between employers and representatives of employees unless the collective bargaining agreement expressly provides that the Act **does** apply. Notwithstanding those provisions, the court nevertheless denied the motion to dismiss and granted a preliminary injunction.

Proceedings resumed on December 11, 2019, at which three witnesses testified, two for the School Board, including a reappearance by Mr. Nagle, and one on behalf of CCEA. What emerged from the testimony and from the exhibits, coupled with what was before the court at the first hearing and what we may take judicial notice of, gives a context to the conflicting interpretations espoused by the parties – a context that is not really in dispute and that we can summarize.

In 1984, the School Board and CCEA signed a collective bargaining agreement that provided for a four-level grievance procedure similar to that in the current agreement, except that there was no provision for arbitration, although such a provision was authorized by law. "Grievance" was defined as "a dispute involving the interpretation and/or application of the provisions of this Agreement." At the time, according to CCEA, reprimands were considered a mandatory subject of bargaining and

were subject to the grievance process if provided for in the collective bargaining agreement. The Agreement said nothing specific regarding reprimands, and it is not clear whether they were intended to be included within the definition of "grievance."[5] The School Board disagreed with CCEA's statement. Its position was that it never agreed to subject reprimands to the grievance procedure.

The **ability** to include them ended temporarily in 2009 when MSBE determined that "low level discipline, such as warnings and reprimands, is not a matter for negotiation or arbitration" and was "an illegal topic of bargaining." *See Board of Education of Howard County v. Howard County Education Association*, Md. State Bd. of Ed., Opinion No. 09-08 (2009). The issue there, as here, was whether a grievance based on a reprimand that the teacher claimed was without cause was subject to arbitration. The principal and the county Superintendent of Schools denied the grievance, whereupon the teacher demanded arbitration. The School Board filed a petition with MSBE for a declaratory ruling.

At the time, MSBE's broad authority under ED § 2-205 to determine the elementary and secondary educational policies of the State, explain the true intent and meaning of the education laws within its jurisdiction, and decide all controversies and disputes regarding those policies and laws included, subject to any statutory mandate,

[5] At the time, ED § 6-408 permitted School Boards and teachers' unions to negotiate all matters that relate to "salaries, wages, hours, and working conditions." Section 6-202 provided for a hearing before the local School Board or a hearing examiner in the event a teacher or administrator was suspended or dismissed.

resolving disputes regarding what issues were the proper subject of collective bargaining. *See Bd. of Ed. For Dorchester Co. v. Hubbard*, 305 Md. 774, 790-92 (1986); *Montgomery Co. Ed. Ass'n. v. Bd. of Educ.*, 311 Md. 303 (1987).

MSBE recognized that teachers had a direct and intimate interest in maintaining a good professional reputation that written warnings and reprimands can tarnish, that they had a fundamental interest in defending their reputations when they believe that the facts did not support a warning or reprimand, and that they had a direct interest in a fair process through which to challenge a warning or reprimand, all because it is related to their ability to keep their jobs. Nonetheless, MSBE determined that the appeal process then set forth in ED § 4-205 (c), which ended with the local School Board, provided better consistency and control than arbitration. It therefore concluded that low-level discipline, including warnings and reprimands, was not a matter for negotiation or arbitration and was "an illegal topic of bargaining."

That decision by MSBE took the matter off the table, but only for a year. In 2009, the General Assembly amended ED § 6-510 to add "discipline and discharge of an employee for just cause" to the list of topics local school boards must negotiate on request. The following year, through what it termed the "Fairness in Negotiations Act," the Legislature created the PSLRB and transferred to that Board the authority to decide "any controversy or dispute" arising under the public school collective bargaining law (ED. Title 6, Subtitles 4 and 5). The Act added to § 6-510 that, if the school board and union dispute whether a proposed topic for negotiation is a mandatory, permissive, or

illegal topic, PSLRB shall decide the matter and, to resolve such disputes, "it 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."

In 2014, PSLRB exercised that authority in concluding, contrary to the views of MSBE in the Howard County case, that "lower-level discipline of certificated employees, i.e., discipline less than suspension and including warnings and reprimands, is a mandatory subject of bargaining." *In the Matter of Teachers Association of Anne Arundel County v. Board of Education of Anne Arundel County*, PSLRB Case No. N 2015-02 (October 28, 2014). Applying the balancing test required under ED § 6-510(c)(5)((v), the Board concluded that "[i]n the final weighing, the impact on the school system as a whole is not great and does not outweigh the direct impact on certificated employees of lower-level discipline." *Id*. at 11. *Cf. Bd. of Ed. v. Howard Co. Ed. Ass'n.*, 445 Md. 515 (2015) (dismissal of non-certificated employee subject to arbitration). That conclusion directly contradicts the view of Mr. Nagle.

It is thus clear, at least since 2014, if not since 2009, that subjecting reprimands and warnings to an agreed-upon grievance procedure is a permissible, and, upon request, a mandatory topic in public school collective bargaining negotiations. That puts in proper focus the issue actually before the Circuit Court in this case: whether the language of Art. 19 of the collective bargaining agreement – the undefined word "discipline" – read in light of the failure of CCEA to seek more specific language, suffices to include reprimands and warnings as grievable items in general and to arbitration in particular.

The court understood the issue, at least in part. It noted that the School Board's policy objection to the arbitration of low-level discipline was its cost, both in terms of money and personnel resources, but concluded that there would be no irreparable harm to the School Board. Ignoring the 2009 legislation that specifically added "discipline" to the negotiable grievance procedure, the court declared that grieving a reprimand was not available when the collective bargaining agreement was negotiated in 2011 but acknowledged that it did become available in 2015, following the PSLRB decision in the Anne Arundel County case.

The court's decision to issue the injunction was based entirely on the fact that, although reprimands could have been specifically added as grievable items subject to Step 5 arbitration, they were not, and that the School Board could not be forced into arbitration when it had never agreed to such a procedure and likely would not have done so if the issue had been raised. The court entered a declaratory judgment that the collective bargaining agreement "does not obligate the [School Board] to arbitrate the Gorsuch letter of reprimand . . . because there is no agreement between the parties to subject such lower-level forms of discipline to the Article 19 Grievance Procedure in the Negotiated Agreement or to the remedy of binding arbitration contained therein" and, in furtherance thereof permanently enjoined CCEA from proceeding with the arbitration.

DISCUSSION

No. 1342

The appeal in No. 1342 is from the issuance of a preliminary injunction. That injunction is no longer in effect and there are no discernible collateral consequences from it. Whether it was properly granted is therefore moot. That appeal will be dismissed.

No. 2124

Standard of Review

As a general rule, the decision to issue or deny an injunction is discretionary with the trial judge, and ordinarily, therefore, we review that decision under an abuse of discretion standard. *El Bey v. Moorish Temple*, 362 Md. 339, 354-55 (2001); *100 Harborview Drive v. Clark*, 224 Md. App. 13, 63 (2015). Where an injunction is based entirely upon, and intended merely to implement, a ruling of substantive law, however, and it is that ruling that is being challenged, it is the issue of law that we review, and, as to that, we may, and, if we conclude the trial court erred, we must, substitute our judgment. A court does not have discretion to make erroneous rulings of law.

The dispositive ruling of the Circuit Court in this case was its declaratory judgment that the School Board had no obligation to submit to arbitration the dispute as to whether the reprimand issued to Ms. Gorsuch was without just cause. The injunction it issued was simply to implement that ruling. *See* Md. Code, Cts. & Jud. Proc. Article § 3-412. If, as we shall conclude, that ruling was legally in error, it must be reversed, and the injunction issued to implement it must be dissolved.

The Real Issue

The problem we have with the Circuit Court's ruling that Ms. Gorsuch's grievance is not subject to arbitration is not whether the ruling is substantively correct but that it was not for the court to make such a ruling.

There are certain fundamental facts that are in play here. Under § 11.2, a teacher may not be disciplined without just cause. No exception is stated to that provision; nor, from its text, can we discern any basis for implying one. Discipline without just cause is a violation of the Agreement, and an **alleged** violation, misrepresentation, or misapplication of the Agreement constitutes a "grievance," as defined in § 19.2.2 of the Agreement. There is no distinction in that definition between minor violations or misapplications and major ones.

As we have observed, the term "discipline" is not defined in the Agreement; nor is it defined in the Education Article. Standing alone, it could encompass any form of punishment or formal criticism for misconduct, as it does in the Rules governing the sanctioning of judges and attorneys. Webster defines "discipline," in the context we have here, in that broad fashion, as "correction; chastisement; punishment inflicted by way of correction and training." Webster's New Universal Unabridged Dictionary (2nd ed.) at 520. Black is in accord: "punishment intended to correct or instruct; esp., a sanction or penalty imposed after an official finding of misconduct." Black's Law Dictionary (11th ed.) at 582.

That the term would include formal reprimands placed in the teacher's personnel file, especially when accompanied by a warning of dismissal if the alleged conduct is repeated, is implicit, both from those definitions and from the fact that more serious sanctions, such as discharge or reduction in rank or compensation, are separately stated. The word "discipline" would be unnecessary if that were all it encompassed. Mr. Nagle's view that reprimands are permissible without just cause and for that reason do not fall within the Article 19 grievance procedure is wholly inconsistent with the purpose and text of both § 11.2 and Article 19 and with what actually occurred in this case.

That narrows the issue to what the court actually decided and what, in reality, the School Board actually was contending – that the School Board never agreed to permit a grievance based on a reprimand to be subjected to arbitration. Reading the letters and testimony from the School Board witnesses together, we think that really was their actual position. Apart from Mr. Nagle's unsupported view that reprimands were permissible without just cause, the School Board acknowledged that Ms. Gorsuch had the right, which she exercised, to challenge the reprimand before the principal, the county Superintendent of Schools, and the School Board, which is what both the Education Code and Article 19 of the collective bargaining agreement permitted. The only area of real dispute was whether CCEA could invoke arbitration on her behalf, and that is all the court decided.

The modern Maryland law regarding contractual arbitration began with *Gold Coast Mall v. Larmar Corp.*, 298 Md. 96 (1983). The principles enunciated in that case

have been confirmed and followed many times, most recently in *Bd. v. Howard Co. Ed. Ass'n.*, 445 Md. 515 (2015). We can summarize the relevant ones as follows:

(1) A party cannot be required to submit any dispute to arbitration that it has not agreed to submit, so, as a threshold, there must be an arbitration clause in the agreement.

(2) If the language of an arbitration clause is clear, and it is plain that the dispute sought to be arbitrated falls within the scope of it, arbitration should be compelled by the court. As a corollary to that, if the arbitration clause is broad and does not "expressly and specifically" exclude the dispute, arbitration should be compelled. *See Allstate v. Stinebaugh*, 374 Md. 631, 643 (2003).

(3) If it is apparent that the issue to be arbitrated lies beyond the scope of the arbitration clause, the opposing party should not be compelled to submit to arbitration.

(4) Where the language of the arbitration clause is unclear as to whether the dispute falls within its scope, "the legislative policy in favor of the enforcement of agreements to arbitrate dictates that ordinarily the question of substantive arbitrability initially should be left to the decision of the arbitrator." *Gold Coast Mall supra*, 298 Md. at 107. *See* also *FOP Lodge No. 4 v. Baltimore Co.*, 429 Md. 533, 551-52 (2012) and *Baltimore Co. v. FOP Lodge No. 4*, 439 Md. 547, 577 (2014). The basis for this principle was explained in *Gold Coast*, 298 Md. at 107:

> "Whether the party seeking arbitration is right or wrong is a question of contract application and interpretation for the arbitrator, not the court, and the court should not deprive the party seeking arbitration of the arbitrator's skilled judgment to resolve the ambiguity. Under such circumstances, arbitration should be compelled."

There clearly is an arbitration clause in the collective bargaining agreement at issue here. It is Step 5 of the grievance procedure in Article 19, and, by its terms, it covers any grievance not resolved in Step 4. It expressly permits CCEA to "move the matter to binding arbitration." There is nothing ambiguous about the text of that provision. The issue – the only issue – is whether the parties intended for Step 5 to apply to grievances based on a reprimand or warning, the School Board contending that, (1) at the time the Agreement was made in 2011, MSBE had ruled that it was impermissible to do that, and (2) the Agreement was never amended to allow it. The argument is that, despite the broad dictionary definition of "discipline," in light of the MSBE ruling and what the School Board regarded as the inordinate fiscal and personnel burden of subjecting reprimands and warnings to arbitration, "discipline," at least for arbitration purposes, was not intended to include reprimands and warnings.

At best, that is a matter of contract interpretation, which is for the arbitrator to determine, at least initially. The arbitrator certainly could consider the School Board's argument that, if CCEA wanted the ability to submit grievances based on reprimands to the grievance procedure generally or arbitration in particular, it had several opportunities to propose language to permit that. The arbitrator also could consider the converse – that,

if the School Board wanted to exclude reprimands from the broad definitions of "discipline" and "grievance," it had the same opportunities to propose such language.

APPEAL IN NO. 1342 DISMISSED. IN NO. 2124, JUDGMENT REVERSED; CASE REMANDED TO CIRCUIT COURT FOR CAROLINE COUNTY TO ENTER DECLARATORY JUDGMENT IN CONFORMANCE WITH THIS OPINION AND TO ORDER THE PARTIES TO PROCEED WITH ARBITRATION. COSTS IN BOTH APPEALS TO BE PAID BY APPELLEE.