IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

MONTGOMERY COUNTY CHAPTER AAUP, Plaintiff,	:	
v.	:	Civil No. 443221
MONTGOMERY COMMUNITY COLLEGE, ET AL., Defendant.	:	

HEARING

Rockville, Maryland June 19, 2018

DEPOSITION SERVICES, INC.
12321 Middlebrook Road, Suite 210
Germantown, Maryland 20874
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IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

MONTGOMERY COUNTY CHAPTER AAUP, Plaintiff, v. MONTGOMERY COMMUNITY COLLEGE, ET AL., Defendant.	:	Civil No. 443221

Rockville, Maryland

June 19, 2018

WHEREUPON, the proceedings in the above-entitled matter commenced

BEFORE: THE HONORABLE TERRENCE J. MCGANN, JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

H. DAVID KELLY, JR., Esq.
Beins Axelrod, PC
1030 15th Street Northwest #700E
Washington, District of Columbia 20005

FOR THE DEFENDANTS:

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I N D E X

P R O C E E D I N G S

THE COURT: Gentlemen, you are?

MR. KELLY: Good morning Your Honor David Kelly of Beins Axelrod I have the privilege to represent the Montgomery County Chapter of the American Association University Professors plaintiff in the case before you today.

THE COURT: Good morning Mr. Kelly.

MR. VANDEUSEN: Good morning Your Honor, Darrel VanDeusen representing the defendants with me is Gary Wozniak.

THE COURT: Good morning, gentlemen.

MR. WOZNIAK: Morning.

THE COURT: Are we ready to proceed?

MR. WOZNIAK: I believe we are, Your Honor.

THE COURT: Okay, we are on the defendant's motion to dismiss and or the alternative for summary judgment.

MR. WOZNIAK: Correct.

THE COURT: So, since Mr. VanDeusen is standing, he's going to tell me what I need to know, in addition to what you met it briefly but both sides did a very nice job and I appreciate it.

MR. KELLY: Thank You, Your Honor.

MR. VANDEUSEN: Thank you, Your Honor.

THE COURT: Makes it easier to make the decision.

MR. VANDEUSEN: Very well, and since you've read it and since I just listened to the preceding case and

demonstrated familiarity with exactly what's going on I'll be very brief.

THE COURT: Well, I can say I'm familiar with the other case, I have not demonstrated in this case, but I'm prepared to demonstrate. Unfortunately, I can't rule in favor of both sides.

MR. VANDEUSEN: That would be awkward.

THE COURT: Okay.

CLOSING ARGUMENT BY DARRELL VANDEUSEN, ESQ.

ON BEHALF OF THE DEFENDANT

MR. VANDEUSEN: But for me to help you in analyzing what's going on here --

THE COURT: Yes.

MR. VANDEUSEN: -- the union representing the full-time faculty at the college has requested that you compel arbitration of a class grievance relating to a financial exigency that made it necessary to address that issue through the process that exists to deal with precisely those sorts of things. Now we filed a motion to dismiss or alternatively for summary judgment and help deal with both of those issues separately.

First the motion to dismiss, the collective bargaining agreement between the parties and specifically the grievance procedure does not provide for a class action grievance and we have an obligation when any grievance is

brought to take that through the grievance process, but it's well-established law, both as a general principle of contract law arbitration law and labor law that a party is not obligated to arbitrate something that is not agreed to arbitrate.

In this case, the grievance that was brought by the union, by the union president is a class grievance saying that all faculty did not get the six and a quarter percent pay increase that had been previously agreed to in a three-year wage agreement that had come about in 2015.

Now, in its opposition to our motion to dismiss, the union recognizes there's no class action grievance provision in Section 3.1 of the contract and that's on page 21 of their opposition and in paragraph 28 of the affidavit filed by the union president, Mr. Zarin he recognizes that, but says, it doesn't say it can't include class actions. But that's not the way the law works.

The Supreme Court in 2010 and Scott Nielsen against American Feeds and in the Messersmith case which we've cited specifically talked about, and Scott Nielsen, specifically said that if the parties have agreed class actions weren't anticipated in the collective bargaining agreement, and we do here, then those claims can't be arbitrated. So, you can dismiss this case for failure to state the cause of action in which the plaintiff can be granted because class-action arbitration is not permitted.

Now, we also brought the claim, the motion to dismiss alternately for summary judgment to help the Court recognize that there is an alternative mechanism for dispute resolution. Arbitration is not appropriate here but the method in which the college and the union can work with issues of financial exigency are specifically set forth in Section 8.5 of the contract and that is what gives life to the section of the Education Article 16-412(G)6 that provides that if funds are reduced by the county, there's more to it, but the college has an obligation to reopen, and so that's what's happened we've used this process in the past when funds have been reduced, when there's been a finance exigency.

In this case, it's undisputed the only material fact that you need to be looking at for with respect to this issue is whether Section 8.5 was the way in which this method for resolution could be invoked and the undisputed fact is that the county gave the college $2.2 million less than the amount requested by the college for fiscal year 2018. Once that happened under the education Article obligation exists to reopen.

The method by which the obligation to reopen is accomplished is Section 8.5 of the contract that was used in the prior year and it's been used be for with respect to wage adjustments when there was financial impediment. So, we find ourselves now with that particular issue and while the union

brought the lawsuit asking you to compel arbitration on the merits and then in its opposition says no that's an issue of arbitrability for the arbitrator, that's not the case.

The Messersmith case and then the Fraternal Order of Police Lodge Four case that they cite from 2012 in the Court of Appeals which cites Messersmith with approval says if the issue is did the parties agree to arbitrate this issue, and it doesn't require interpretation of the contract, and it doesn't require an interpretation of the merits, then the decision rests with the Court.

In this case, class actions not contemplated by the contract, agreed to by the parties, not contemplated. So, motion to dismiss on that ground is appropriate and it doesn't leave the union with without a viable means for dispute resolution that's been used before. So, because of that, we believe that it's appropriate for the complaint to be dismissed. Thank you.

THE COURT: All right, I appreciate it, thank you. Nice and succinct.

MR. VANDEUSEN: Yes, that's our goal we appreciate that you've taken --

THE COURT: Well, the goal is to turn me around or to turn me in your direction.

MR. VANDEUSEN: Well, I'm confident --

THE COURT: I like succinct.

MR. VANDEUSEN: -- I'm confident you'll find --

THE COURT: You did both, it's really a great accomplishment.

MR. VANDEUSEN: Very good.

THE COURT: I'll stop talking and let you talk, Mr. Kelley I'm sorry.

CLOSING ARGUMENT BY H. DAVID KELLEY, ESQ.

ON BEHALF OF THE PLAINTIFF

MR. KELLY: No, that's fine, happy to hear whatever. First of all, I would dispute the suggestion by counsel for the defendants that plaintiffs agree that the contract prohibits what they characterize as a class grievance. The contract is a very specific definition, obviously in addressing any matters regarding what's permitted or authorized by the contract or by the statute, we start with the specific language.

The grievance Article 3.1(A) is described as an allegation by a faculty member that management has violated an express provision of this agreement and such faculty member has been personally aggrieved thereby. It doesn't say, doesn't speak to the scope of relief. Clearly president Zarin who's not able to be here because he's working as a counselor at school today, he provided the affidavit.

He filed the grievance alleging the violation after the college determined it wouldn't make the salary adjustments required under Section 8.2(A). Section 8.2(A), which is at the

center of the dispute, is the obligation undertaken in this collective bargaining agreement which was reached following negotiations and entered into March of 2015, effective August 23rd of 2015. So, the college knew what level of financial commitment it would make in agreeing to this specific salary adjustment.

The salary adjustment is as I say found on page 30 of the collective bargaining agreement section 8.2(A) for fiscal academic year 2017. We wrote, the chapter relies upon that, they're about five hundred, a little more than five hundred individuals employed by the college as instructional faculty or faculty counselors who are covered by this agreement. That was a schedule increase entered to a collective bargaining agreement, executed by the chairman of the board.

We believe it was a binding obligation, looking at the statute that provided that collective bargaining was available to employees of the college, that was passed twenty years after the state legislature created college community colleges, it provides the structure, it makes clear their written agreement. Any agreements reached through collective bargaining good faith, regarding wages, hours, and other terms and conditions of employment, shall be incorporated in a written agreement.

It provides explicitly that arbitration may be provided for, final and binding arbitration. In that 2015

collective bargain agreement, which is in effect now, arbitration was included by the parties. The arbitration provision 3.2 has no express exclusion, it's just what the case law tells us we should expect. The parties can control it.

Messersmith is not a labor case, it doesn't involve the legislature's determination that as is the case for 80 years now in America where there's labor and management in a collective bargaining relationship, there's an explicit preference for providing labor arbitration and the benefits of that process which are perceived to be expedition, determination of what the parties meant by their collective bargaining agreement, where there's a sincere question by skilled arbitrators.

It's not to say judges couldn't make those determinations but in the first instance, arbitrators should. In the arbitration provision and nowhere else in the collective bargaining agreement, you'll find no word indicating that any arbitrability issue that might arise should be decided by the Court. Judicial precedents suggest that two would be expected if it were to be the Court to make that decision.

More specifically, in the Baltimore County FOP Lodge Four Case from our Court of Appeals 429 Md. 533 issued in 2012, the Court made clear that given the presumption by the legislature that arbitration was the preferred mechanism, the Court should be mindful not to intrude upon the merits to reach

a determination, but rather where issues relating to the language of the collective bargaining agreement are at heart and here we rely upon 8.2 and Section 3.1 that provides that the parties agree to arbitration and the explicit refusal by the college to participate in that arbitration, we selected the arbitrators at the time the contract was entered into.

So, we know who should just be deciding this case assuming she's still in position to hear it but we've been delayed because of these assertions that there's some generalized fiscal exigency that permits the college to revoke this binding agreement and modify its terms through what we're told as a dispute resolution mechanism, but as I emphasized in our brief to the Court, somehow the college never felt the need to substantiate or even articulate quite how 8.5 comes into play.

8.5 appears on page 30, it begins on 32 and goes on to 33 in the collective bargaining, the entire collective bargaining agreement was provided as an attachment to the complaint but portions have been provided by both of the parties with their briefing on defendant’s motion. The language starts and if I may enter into the record?

THE COURT: Sure.

MR. KELLY: This Agreement, capital a, and throughout this document, a legal document, a binding contract, agreement capitalized is explicitly about this in its obligations --

THE COURT: Where are you reading from?

MR. KELLY: Page 32 in the collective bargaining agreement.

THE COURT: All right let me get there.

MR. KELLY: Certainly.

THE COURT: Okay.

MR. KELLY: Okay. The text reads, "This agreement is dependent upon receipt by a Montgomery College of the revenues projected by Montgomery College as necessary to implement the agreement. First one, should revenues fall below the levels necessary to implement this agreement, management shall immediately notify the chapter of the shortfall and revenues and of its proposals if any for such modifications."

I read from that first there must be established what revenue the college is receiving in relationship to the financial obligation it undertook voluntarily, because let's be clear under the statute requiring collective bargaining, education Article 16-412, no part to collective bargaining is obligated or compelled to reach any particular agreement.

So, when it reached the agreement to provide for a salary increase to the individuals the chapter and I represent, that it exercises its powers regarding its budget and its financial resources, to commit to make these payments, to offer these things provide these increases. This is the limiting circumstances in which that might change.

What actually happened? As we've heard today, the obligation the college undertook the fully fund the chapters collective bargaining agreement with the college? Approximately 2.7 million, although we now think it's actually lower due to some it further attrition during the course of this academic year. They've withheld any of that increase throughout this time, all other non-management employees received increases while the college faculty and faculty counselors were deprived, allegedly because 8.5 supersedes or provides the alternative way.

Bear in mind there's nothing in this provision that talks about if this provision is applicable, no matter can be arbitrated regarding the college's financial scion. But where do we go? Again, they received not fully what they said they sought from the county five point, they sought 7.3, we're not entirely sure what those other monies beyond 2.7 were for, the college had not yet completed negotiations with either the other two labor organizations that represent other employees. Those are the only two assertions we're aware of from which the college would have incurred a financial obligation effective during this academic year. So, it had one particular --

THE COURT: You're losing me on that last part.

MR. KELLY: All right I'll try to -- as of the date it had to file its budget request to the County Council in February of 2017, it had a collective bargaining agreement with

the chapter that included 8.2. It had two other unions representing other employees on the college with whom they were in negotiations, they didn't have a contract that affected this academic year.

THE COURT: Okay.

MR. KELLY: That came later.

THE COURT: All right.

MR. KELLY: So, when they made their budget request, we believe they were obligated and we were ultimately told they had requested the amount necessary to implement the agreement from the county. In the ultimate event, the county didn't provide them the 7.3 million they said they need it for compensation benefit increases, it provided 5.7.

Well, it's true, it didn't get all the revenues had sought, but the only revenue that’s applicable for the application of 8.5 are the revenues to fund this agreement and it clearly got all of that. There's no provision for pro rata splitting it, the College had voluntarily entered into this agreement, they committed it to make these salary increases at the start of last fall's academic term and it simply chose not to do so. It decided it would use those monies for other things, presumably some of that went to other employees, we believe it did, but doesn't obviate or eliminate this obligation under this Agreement.

THE COURT: You're saying as long as you can show

there's money in there, in the coffer you should get --

MR. KELLY: Absolutely, I think it confirms that they -- only if they didn't receive 2.7 million. Let's say County Council said, as it did the year before, we're not going to give about some particular level, there was then concrete evidence the chapter leadership could look at, confer with representatives of the college and agree okay we think 8.5 is applicable here, let's talk about what you can do. But we weren't at that point, and they never ever attempted to explain --

THE COURT: And that's not before me.

MR. KELLY: No, we're not able to, because we have the arbitration provision on our collective bargaining agreement, labor law for the last 80 years in which these matters haven't been addressed, makes clear any claim of a violation of the collective bargain agreement must go to the arbitrator in the first instance, that's why we're here.

We couldn’t, we'd like to be able to say order them to live by the contract, but they've raised questions about that contract like allegedly there's no opportunity to bring what they call it class grievance. They characterize the grievance as a class grievance, we think that's mischaracterization. The agreement and the union determine what the grievance is, the college has the opportunity respond, this one wasn't resolved at all satisfactorily and we seek to

have an arbitrator, a trained arbitrator selected already by the parties, wrestle with these issues.

We think our Court of Appeals decision in Baltimore County FOP Lodge Four makes it explicit that this is a type of decision where both parties are relying upon different provisions of the collective bargaining agreement. Now I regard their provision, their suggestion that 8.5 is implicated, that's nearly frivolous, but that's an issue that's certainly appropriate for an arbitrator to address and the context of the chapter's request that the arbitrator find that 8.2 has to be carried forward, but it's for the arbitrator to do that.

We have this structure. Obviously, there's an opportunity to have that reviewed due to a depth, under a deferential standard should the college, should either the parties be dissatisfied with the ultimate award issued by the arbitrator. But we're eager to get to that process and we've been delayed. We think the law is quite clear that this is -- in Messersmith as they cite, that's an individual business case.

There was a real question whether there was any agreement to arbitrate because the documents didn't have it. Here we have a written agreement consistent with the statute, its explicit, it doesn't have any exclusion, it doesn't say oh if this -- we're here, this is it and I think you should, Your

Honor I urge you to recognize this and compel the college to participate in the labor arbitration they voluntarily agreed would be the final and binding step where a grievance is presented and unresolved, thank you.

THE COURT: Thank you Mr. Kelly. Mr. VanDeusen?

REBUTTAL ARGUMENT BY DARRELL VANDEUSEN, ESQ.

ON BEHALF OF THE DEFENDANT

MR. VANDEUSEN: Briefly on rebuttal Your Honor. First of all, the grievance filed by the union president, the remedy sought is to pay full-time faculty the increment and general wage adjustment required. So, it is applying it to the entire bargaining unit, not to the individual. The only issue was I have an individual grievance where I personally, a faculty member, claimed I didn't get what I should have. That's different, that's not what we have here, that's not what the grievance says. Second, Section 8.5 Mr. Kelly read part of it, but he didn't read all of it.

THE COURT: Is that intentional, Mr. Kelly?

MR. KELLY: Absolutely, no. I'll keep going, Your Honor, I can make sure it's all on the record.

MR. VANDEUSEN: I'm sure, it's already in the record, but I want to point out --

THE COURT: It's also in my hand.

MR. VANDEUSEN: Very good. That the issue then really after he gets through, you know, if the revenues are

there or not there, then it goes to say in --

THE COURT: The judgment of management --

MR. VANDEUSEN: -- in the judgment of management made necessary by the estoppel. That's what I was looking for, thank you.

THE COURT: Sure.

MR. VANDEUSEN: Thank you too. So, that's what we started doing and had a negotiation reopener under 8.5 we had an effort of mediation under 8.5 all in August of last year and we said okay that wasn't successful, let's go forward. It wasn't at that point where the union says no, they filed a grievance, but they refused to engage in the 8.5 process as we had the previous year.

So, it's not as if this is this is something new and different that's never been used for precisely this sort of issue before. If anything, I think what I'm hearing is maybe you know, no good deed goes unpunished because it started earlier than the final amount, but under 16-142(G)6, the amount given by the county was less by 2.2 million, the amount in the amount requested by the college.

That does create an 8.5 issue and it provides for a fact finder. It provides for an impartial fact-finder to be selected and to address the issue and once that's done, we have the remedy out there for dealing with this particular circumstance.

THE COURT: Rather unique one.

MR. VANDEUSEN: Indeed, and it's been in effect in since first contract was --

THE COURT: You agree, no you agree, you disagree, I'm going to the press.

MR. VANDEUSEN: That's been in the agreement since it was first --

THE COURT: I'm not commenting I'm --

MR. VANDEUSEN: That's the result because and because Montgomery County, FOP case for 2013 from the Court of Appeals makes clear in Maryland, in the public sector the purse strings are sitting with the County Council, they are sitting with the County Executive are sitting with the Board of Trustees and that's why it says in the judgment of management 8.5.

The amount was reduced we're trying, we've been trying, as Mr. Kelly says we've been unable to get wage increases. We've been trying to give them an amount, negotiated amount, since before last August when we sat down to try to sit down for the reopener.

THE COURT: Well I'm not caught upon to --

MR. VANDEUSEN: You're not.

THE COURT: -- judge sincerity here, am I?

MR. VANDEUSEN: No, and you are not, nor are you required to delve into the underlying facts. The argument that they've made is one they can make to the fact-finder 8.5.

MR. KELLY: Your Honor, if I may?

THE COURT: And sure, they'll make it eloquently, Mr. Kelly.

MR. VANDEUSEN: Thank you Your Honor, I'm done.

THE COURT: Come on Mr. Kelly, you're dying to say something. Of course, of course.

THE COURT: Go ahead.

MR. KELLY: We pointed out in our opposition because it came after we had received motion to dismiss. With these other cases that they cite regarding FOP versus Montgomery County and the Baltimore County police case, those, if one examines the actual case law, in those cases those governmental entities Montgomery County and Baltimore County respectively, created the legal framework for collective bargaining with regard to their employees and they retained in that legal document the right to sort of have a second chance to decide whether the negotiations had worked.

In this case, Montgomery Community College, now called Montgomery College colloquially, was created by the state legislator as enactment back in mid twentieth century. It later decided collective bargaining was a desirable tool to facilitate its operations. We've been living with that now. They don't get, to the extent they have certain powers the Board of Trustees, those are clearly adjusted by this subsequent more specific legislation.

Though the two cases Mr. VanDeusen just cited are under very different legal regimes. So, the findings or the holdings of the Court in those cases, they are upon that particular statutory structure. The statute that was enacted and remains the law with regard to Montgomery College and affects the chapter and the other bargaining units here is a distinct one, again created by the state legislature. Those aren't applicable, we have a very clear structure here.

8.5 is an is truly an exigent circumstance when at the conclusion of the budgeting process, because it's expected that what primary budget requests were made to the county and the college is charged with completing its negotiations with any bargaining and it's prior to the budgetary process so the numbers can be clear and they were told don't exclude anything, the County Administrative Officer made clear Mr. Firestone, don't exclude anything that relates to your collective bargaining obligations when you make your budget requests.

So, ultimately it's clear they ask for it, and they got it, but somehow in the mix they came to believe they could change that based upon some other goal. The state law said the goal. Meet your obligations, carry out in good faith. They're seeking to deviate from that, they're seeking to re-characterize the grievance, it's for an arbitrator to decide whether a grievance brought by one member can provide relief under the same provision of the contract to others.

We'll see how that happens. I'm aware of a vast array of cases that found exactly that. So, when I read oh it prohibits because it's silent, I was troubled. Again, thank you for your hearing today Your Honor.

THE COURT: Mr. VanDeusen, in all fairness since you're the moving party, you would normally have rebuttal. So, is there anything else you want to say? I'm not suggesting you should.

MR. VANDEUSEN: No, Your Honor.

THE COURT: All right, I'm going to take a five minute recess, I got to change my glasses, official timer, thank you.

(Recess.)

THE BAILIFF: All rise, Circuit Court for Montgomery County is now back in session.

JUDGE'S RULING

THE COURT: All right. Please be seated, everybody. I appreciate the argument and briefs, gentlemen. Your clients are well served by your representation and I'm sure they know that. The parties are Montgomery College and I'll refer to them as the college and the full-time Montgomery College professors and I'll refer to them as professors.

Their common purpose is to provide an outstanding education for all their students. The college has a stellar reputation and can only be achieved and maintained if the

college continues to hire the very best professors and compensate them commensurate with their qualifications and teaching ability. I'm told that the Mothership, the University of Maryland will automatically accept a student who maintains B average during the student's two years at Montgomery College.

That's unassailable proof that the product in Montgomery College is excellent. The parties before me this morning agree in this conflict to the following, one, the agreement executed by the college and faculty controls this dispute, two, that the contract contains the express provisions to deal with this situation, three, that the Court is not a proper forum to hear the merits of this dispute and that the faculty wants arbitration and the college wants a submission to a fact finder.

We also agree that I will not be asked to compare and contrast the benefits and liabilities of arbitration versus submission to a fact finder. Although that one does not have to be a college grad to conclude that the faculty believes it will fare better with an arbitrator and the college believes they have a better shot with a fact-finder. Preliminarily, I find the following, that despite the common goal the two sides have in achieving academic excellence, they had different interests when it comes to salary, the agreement was negotiated arm's length by both sides and agreed to in a 38 page document.

Caption agreement between the Board of Trustees and

Montgomery Community College of Montgomery College Chapter American Association of University Professors. I'll refer to it as the agreement. The Court also concludes that the parties know the difference between arbitration and submission to a fact finder. There are languages used in the contract to different places. They are not used anywhere interchangeably.

The question the Court is being asked is whether the faculty has filed a grievance under Article 3, grievance procedure and if so they'd be entitled to arbitration under Section 3.2 or is this a salary dispute under Article 8 and if so the issue is to be submitted to a fact finder under 8.5 titled failure to achieve projected revenues. Well, the parties certainly foresaw that faculty members may have grievances because a very elaborate process was inserted in Article 3.

The parties must have also anticipated a time or times when college revenues might fall below projections and levels necessary, levels necessary to implement the agreement because section 8.5 sits boldly at the bottom of page 32. Question one, is it a grievance as the faculty, full-time faculty maintains? Well let's see, we have the agreement, we have the bible, we have all the information we need.

So, the Court goes to this grievance procedure, I look at the definition of a grievance, the parties' arm's length negotiating what a grievance is. They can call a

grievance what they want, here they defined it. A grievance is an allegation by a faculty member singular that management has violated an express provision of this agreement and that such faculty member individually has been personally aggrieved thereby.

Now this has specific language because you can argue that anything under the sun that deals with the university or the college, one can be affected by it. So, you have to look at it in context. This lawsuit was not brought by an individual faculty member, the lawsuit which is before me -- okay, it says plaintiff Montgomery College Chapter of the American Association of University Professors, in bracket chapter or MC-AAUP by and through its undersigned counsel alleges and states worth complaint.

So, this was brought by the American Association of University Professors. This was brought by the faculty. I look at and look at the procedures of under Article 3, grievance procedures and I look at step one. The agreed faculty member may submit written grievance to the faculty member's immediate supervisor, now why would you do that?

The immediate supervisor is not paying a salary, the immediate supervisor's not paying any percent increase, with our copy to the Director of Employee Relations Diversity and Inclusion. Now why would you do that? They have absolutely nothing to do that I can read this agreement with respect to

compensation or raises. I look at step two, step two deals with dealing with the Vice President or Provost with a copy to the Director of Employee Relations Diversity and Inclusion.

There again, for what purpose if it is a dispute with respect to the pay increase? Then you schedule a meeting under step two with a meeting, Provost designee schedule with the meeting would be aggrieved faculty member, not with the whole class, not with all the professors. Step three also repeats and talks about a copy to the Director of Employee Relations Diversity and Inclusion.

If it's a grievance, then arbitration is approved, if they get to that step and there's obviously all the steps before that which were negotiated and listed. And you look at page six and seven which talks about jurisdiction of the arbitrator under the agreements, specifically at the top of page seven, the arbitrator shall not hear or decide more than one grievance at a time without the mutual consent of management in union.

So, what that’s saying is, if both sides don't agree the arbitrator, and I'm told are 500 people involved, would have a separate arbitration hearing which each of the 500 when it does not make sense to the Court, because all the faculty in the full-time faculty are subject to the same percentage of raise. Why in the world with the arbitrator be dumped arbitration be done on an individual basis?

It's not dealing with his or her performance, it's not dealing with a specific grievance that that person has that doesn't affect all of the members of that class. You can't place a square peg in a round hole, no matter how I look at this, no matter what angle I view it, even if you use convoluted logic and dwell on the fact that the faculty feels aggrieved, one can't logically or legally transform a salary dispute into a grievance.

It would be hard to imagine that when the provisions of grievances are viewed alongside those of Article 8's salaries, that anyone unless engaging in extreme mental gymnastics, could conclude that the dispute is a grievance. It's clearly not designed as a grievance. The grievance has its place, has its role, and there may be members here, or members here that know of members that have filed a grievance, which suggests to me if someone doesn't get a chairmanship, somebody doesn't get a promotion, it's an individual thing.

It's an individual grievance and it could be under an umbrella a lot of different things and there is a process built in for that, but it's not designed for a class response it's an individual thing if you look at the definition of a grievance, that the parties negotiated arm's length negotiation, which I assumed took some time and a lot of back and forth before this document was typed and presented and signed by the parties that represented it.

On the contrary, and consistent with my decision, this dispute finds its natural home in Article 8, ironically titled salary. How odd, how peculiar, when you're dealing with salaries and you're dealing with an increase in salary that we look to salaries? A 6-year-old can tell you this is where this belongs, it's a salary issue, no more no less. It is not a grievance under this document, that's what we're talking about.

And the issue is does the full-time faculty member get, or members get the percentage raise they negotiated in this contract as binding contract, or is the college is justified in paying less because of a purported revenue decline. 8.5, I don't believe was put in in the middle of the night by the college. It was put in there for a purpose under salaries. Lo and behold, we have our heading salaries we have 8.5. We don't have 8.5 under grievances.

Grievances and salaries are not interchangeable, the framers of this were pretty intelligent, they knew grievance from south 8.5 was inserted the process is well planned and easy to follow and if you go to Section 8, which I happened to have here, before you get to the infamous or famous 8.5, you look at 8.2 fiscal academic years, (a) talks about academic year 16 and 17 and 18, the years that are in play and lo and behold, they deal with percentage wage adjustments, fiscal year 16, 2.5 adjustment who have been in the bargaining unit for at least one year, 3.5, to the extent employee’s salary does not

exceed a maximum salary range.

These numbers just weren't thrown out, this wasn't just done running to a ball game, this was sat down, these percentages were exact and thought out and both sides were represented competently I may add, and then in academic 18 we had the 2.7 wage adjustment we had the 3.5. All under the big heading, the big umbrella, the arena known as salaries.

The Court in no way is suggesting that what was negotiated wasn't done in arm's length fair negotiations and I am not in any way saying that the teachers aren't entitled to those raises. Mr. Kelly points out, direct me to the 8.5 and I gleaned from his argument, that his defense is going to be there's money there, it should be paid and he made me victorious. I am not here analyzing with a spreadsheet of what that university is doing with its money.

I don't know what they pay the gardener, I don't know what they pay with a (unintelligible) for security, I don't know what they paid for painting, I don't know what the basketball coach gets, I don't know any that and I'm not here to make that decision, but it says it's not, it doesn't say the agreement is dependent upon having money somewhere in the bank. It says necessary to implement the agreement, that's an exact phrase subject to interpretation and that's why there's an elaborate process that one would have to go through after not one, 500 ones.

Appendix says that it gives the management, management shall immediately notify the chapter of the shortfall and you could put purported, alleged, made up, whatever you want, revenue of its proposal and if for such modifications is this agreement as are in the judgment of management maybe necessary by the shortfall. This agreement allows management to make to use its judgment to determine to go through this process. It doesn't take two people, two sides to agree if you had to have two.

Professors, quite frankly, if I was on your team I would never agree to it either. It gives them the understanding it they can implement it. Then what happens? This is a very detailed process and I'm told from the briefs and it hasn't been argued that the parties have engaged and a lot of the activities all but the last one already. In fact, indicated that that the parties engaged in renegotiations already and that they had mediation and now they have the third step which the college wants to be which is mediation.

The -- ironically, I look at the 8.5 and the fact finders under 8.5 are furnished from the American Arbitration Association, presumably the same stable from which the arbitrator would hail if the faculty got their wish at the complaint right here, and they have a very elaborate process. The American Arbitration sends over seven qualified and impartial persons and then you have this striking out of seven

men or women, you go back and forth like picking a jury and last man or woman standing is your fact finder.

So, this wasn't negotiated on the fly, this was something that smart attorneys that deal with labor, deal with wages, deal with universities put in there and so this was the best way to represent the college and the faculty members and it also says after that fact finder files the report, there's the management in Chapter then try to reach the agreement within three days after that.

Boy, there are so many requirements which are good for the parties that sit down and get together and try to negotiate and then it's released to the public. Well if in fact the faculty can show that the college is improperly or impermissibly or withholding money that they're obligated to pay, that's going to come out of the fact finders report and conversely if in fact the college can show that the money is just not there, it's tight we're only getting it from three sources I'm told.

The generous taxpayers of the state of Maryland, the generous tax payers of Montgomery County and the tuition that the children pay, maybe I shouldn't call them student pay. So, those three sources and I'm assuming it's an open book as to what comes in, everybody could look at it see what it's going out. If there's some somebody on the management is flying first class all around the world with all his family and

spending all kinds of money, that's going to come out and the fact finder is going to put that on the front page of the post.

So, I don't know how this will shake out. What I'm not doing is cutting anybody's salary, I'm not giving anybody a raise. I'm not making any determination, it could matter less to me actually who wins the process, the process is a good one it's there, it's ready to go, but it's not the grievance process even though the faculty may feel aggrieved and it's from the same base word, it's not a grievance.

That's the way I see it and I'll therefore find under both, I'll find that the plaintiff failed would state a claim upon which relief can be granted because you can't grant relief or arbitration when the subject matter is salary it's not an aggrieved faculty member, but I'll also grant summary judgment because I don't believe, I find that there are no genuine disputes of any material facts.

And as a matter of law under the contract, me anyway, it's just one person that happened to get this case, this is the way I see it, that there's no genuine dispute of any material facts. It's little bit under the law, this is a salary dispute and 8.5 is flashing like a neon light, this is where we go. I'll sign the appropriate order for there, I wish everybody good luck and we'll recess, thank you everybody.

MR. KELLY: Thank you Your Honor.

MR. VANDEUSEN: Thank you, Your Honor.

(The proceedings were concluded.)

√ Digitally signed by Deidre Davidson

DIGITALLY SIGNED CERTIFICATE

DEPOSITION SERVICES, INC. hereby certifies that the foregoing pages represent an accurate transcript of the duplicated electronic sound recording of the proceedings in the Circuit Court for Montgomery County in the matter of:

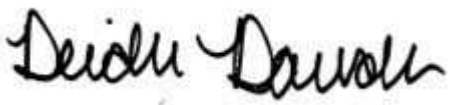
Civil No. 443221

MONTGOMERY COUNTY CHAPTER AAUP

v.

MONTGOMERY COMMUNITY COLLEGE, ET AL.

By:



DEIDRE DAVIDSON
Transcriber