IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

SEPTEMBER TERM, 2019
NO. 01051

MONTGOMERY COLLEGE CHAPTER, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,

APPELLANT,

v.

BOARD OF TRUSTEES OF MONTGOMERY COLLEGE, and DeRIONNE P. POLLARD, Ph. D, AS PRESIDENT OF THE COLLEGE and SECRETARY OF THE BOARD, IN HER OFFICIAL CAPACITY.

APPELLEES.

APPEAL FROM THE CIRCUIT COURT
FOR MONTGOMERY COUNTY
Judge Terrence J. McGann

BRIEF OF APPELLANT

H. David Kelly, Jr.
Beins, Axelrod, P.C.
1717 K Street, N.W. Suite 1120
Washington, D.C. 20006
telephone: 202-328-7222
telecopier: 202-328-7030
dkelly@beinsaxelrod.com

Counsel for Appellant Montgomery College Chapter, American Association of University Professors

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

MISCELLANEOUS

STATEMENT OF THE CASE

The Montgomery College Chapter of the American Association of University Professors ("AAUP") and the Board of Trustees of Montgomery Community College ("College") have been parties to a series of collective bargaining agreements covering faculty and other College employees. The current Agreement became effective in 2015. Section 8.2 of the Agreement provides that "there shall be" specified wage increases effective the first day of Academic Year 2017. [App. 19, 55, 63]. The Agreement also includes a grievance procedure culminating in binding arbitration. [App. 29-32].

When the College failed to provide the specified wage increases for Academic Year 2017, the AAUP filed a grievance. After the College denied the grievance, the AAUP demanded arbitration. Because the College refused to arbitrate, the AAUP filed suit in the Circuit Court for Montgomery County seeking to compel arbitration. After a hearing on June 19, 2018, Circuit Court Judge Terrence J. McGann orally granted the College's motion to dismiss with prejudice and for summary judgment. The Circuit Court issued an Order disposing of all claims on June 21, 2018. [App. 134-169].

The AAUP filed a timely appeal. [App. 8].

STATEMENT OF ISSUES PRESENTED

1. Whether the Circuit Court exceeded its authority by misinterpreting two contract provisions to conclude that a grievance was not arbitrable.

2. Whether the Circuit Court exceeded its authority in granting the College's motion for summary judgement without making findings of fact and where the undisputed

material facts support the AAUP's position.

STATEMENT OF FACTS

Article 8 of the Agreement governs the salary of bargaining unit faculty. Section 8.2(A) states, in pertinent part, as follows [App. 55]:

> Fiscal Academic year 2017: Effective the first day of the academic year, there shall be a two and three-quarters percent (2.75%) wage adjustment and, for faculty members who have been in the bargaining unit for at least one semester as of the beginning of the fiscal academic year, and an increment of three and one-half percent (3.5%) to the extent that an employee's salary does not exceed the maximum of the salary range. The salary range for the fiscal academic year shall be $59,863.00 to $112,243.00.

When the College reneged on this promise, AAUP President Harry Zarin filed a class grievance on September 15, 2017, alleging that the College had violated Section 8.2(A) of the Agreement. [App. 97]. The College and AAUP processed the grievance through Step 1 and Step 2 of the contractual grievance procedure. [App. 99-100].

The College and AAUP met at Step 3 on December 18, 2017. Dr. Monica Brown, the College's Senior Vice President for Student Affairs, formally denied the grievance on January 18, 2018. She asserted that the grievance was untimely. She asserted that the AAUP had not complied with the procedural requirements for Step 2 and Step 3 appeals. Finally, she asserted that Section 8.5 of the Agreement provided the exclusive method for resolving the dispute. [App. 99-100]. Section 8.5 states as follows [App. 57-58]:

> **Section 8.5 - Failure to Achieve Projected Revenues.**
> This Agreement is dependent upon receipt by Montgomery College of the revenues projected by Montgomery College as necessary to implement the

> Agreement. Should revenues fall below the levels necessary to implement this Agreement, Management shall immediately notify the Chapter of the shortfall in revenues and of its proposals, if any, for such modifications of this Agreement as are, in the judgment of Management, made necessary by the shortfall. Thereafter, Management and the Chapter shall promptly meet and bargain in good faith in an attempt to reach an agreement which can be implemented within the revenues received by Montgomery College. If Management and the Chapter are unable to reach such agreement within ten (10) calendar days, the State Commissioner of Labor and Industry, or his designee, shall participate in the negotiations as a mediator. If Management and the Chapter are unable to reach an agreement within ten (10) calendar days after the commencement of mediation, either Management or the Chapter may request fact-finding. Upon such request, Management and the Chapter shall attempt to agree to a fact finder. If Management and the Chapter are unable to agree to a fact finder they shall jointly request the American Arbitration Association to furnish a list of seven (7) qualified and impartial persons, one of whom shall be selected as the fact finder. Selection shall be made by Management and the Chapter alternately striking any name from the list, until only one name remains. The person whose name remains shall be the fact finder. The fact finder shall conduct a hearing within ten (10) calendar days of his appointment and shall issue a report containing his findings of fact and recommendations to Management and the Chapter within five (5) calendar days of the close of the hearing. If Management and the Chapter are unable to reach agreement within three (3) calendar days after receipt of the fact finder's report, either Management or the Chapter may release the report to the public.

Section 3.2(A) of the Agreement provides that only the AAUP, not the grievant, may submit a grievance to binding arbitration. [App. 31]. Accordingly, on January 29, 2018, Chapter President Zarin delivered written notice of the AAUP's intent to arbitrate to Heather Pratt, the College's Director of Employee and Labor Relations. [App. 101, 106].

When the College refused to arbitrate, on February 13, 2018 the AAUP filed a "Complaint to Compel Arbitration of a Labor Dispute." [App. 103]. The College filed a Motion to Dismiss or, in the alternative, for Summary Judgment on March 22, 2018. The

AAUP filed its Opposition on May 18, 2018. On June 19, 2018, Montgomery County Circuit Court Judge Terrence J. McGann held a hearing to consider the College's Motion. [App. 134-168].

Judge McGann concluded that, despite the parties' joint treatment of President Zarin's filing as a "grievance" and despite the parties' joint processing of President Zarin's grievance through the three steps of the contractual grievance-arbitration process, no grievance was filed. Instead, he concluded that the dispute could be resolved only through Section 8.5. Judge McGann found

> 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.

[App. 159-163, 166].

ARGUMENT

I. STANDARDS OF REVIEW

A. The Motion to Dismiss

Courts review *de novo* the grant of a motion to dismiss. *Gomez v. Jackson Hewitt, Inc.,* 427 Md. 128, 142, 46 A.3d 443 (2012). "On appeal from a decision to grant a motion to dismiss for failure to state a claim upon which relief can be granted, we must determine whether the complaint, on its face, discloses a legally sufficient cause of action." *Ransom v. Leopold*, 183 Md. App. 570, 578-79, 962 A.2d 1025 (2008) (internal citations and

quotations omitted). In considering whether a complaint states a claim for relief, "a court should assume [the] validity" of well-pleaded factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombley*, 550 U.S. 544, 555 (2007).

B. The Motion for Summary Judgment

Summary judgment may only be granted if two conditions are met. First, the moving party must establish there is no genuine dispute as to any material fact. Second, the moving party must establish that it is entitled to judgment as a matter of law. Maryland Rule 2-501(f); *David A. Bramble, Inc. v. Thomas,* 396 Md. 443, 453-54 (2007). Absent the concurrence of both elements, the motion must be denied. *Okwa v. Harper*, 360 Md. 161, 177-78 (2000), Facts are material for summary judgment purposes if they "somehow affect the outcome of the case." *King v. Bankerd*, 303 Md. 98, 111 (1985). Nevertheless, if the material facts, even if undisputed, are susceptible to more than one permissible inference, the choice between those inferences should not be made as a matter of law but should be submitted to the trier of fact. *Haas v. Lockheed Martin Corp.*, 396 Md. 469,478-79 (2007).

In considering a motion for summary judgment, the ultimate question is whether the non-moving party has adduced sufficient facts, and reasonable inferences that may be drawn from those facts, such that "the jury could reasonably find for the plaintiff." *Seaboard Surety Co. v. Richard F. Kline, Inc*., 91 Md. App. 236, 244 (1992). All reasonable inferences from the facts are to be considered in the light most favorable to the non-moving party. *Green v. H & R Block, Inc.*, 355 Md. 488, 502 (1999).

II. THE CIRCUIT COURT ERRONEOUSLY INTERPRETED CONTRACT PROVISIONS TO CONCLUDE THAT THE DISPUTE WAS NOT GRIEVABLE OR ARBITRABLE

A. The Complaint Properly Alleged That the College Refused to Arbitrate a Grievance Concerning Mandatory Salary Increases

The Circuit Court erred as a matter of law in dismissing the AAUP's Complaint because the AAUP could not arbitrate a dispute concerning salary.

The Complaint set forth "a clear statement of the facts necessary to constitute a cause of action and a demand for judgment for the relief sought" as required by Maryland Rule 2-305. The Complaint alleged the following relevant facts: (1) the AAUP and the College were parties to a collective bargaining agreement ("Agreement") which is an enforceable contract; (2) the Agreement included provisions requiring the College to pay covered employees a scheduled salary increase and for resolution of allegations that the College violated one or more specific provisions of the Agreement; (3) the College failed to pay the scheduled salary increase; (4) a grievance alleging that the College's failure to pay the salary increase when it was to commence was filed by an aggrieved faculty member; (5) the grievance was processed through all stages of the contractual grievance procedure but remained unresolved; (6) the AAUP notified the College that it invoked the arbitration provision; and (7) the College refused to arbitrate. As a result, the AAUP sued to compel the College to arbitrate. [App. 103-108]. These facts and the reasonable inferences reasonably drawn from them state a claim for relief.

However, in granting the College's motion to dismiss, the Circuit Court concluded that

> 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 ..., 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, ... [App. 166].

For the reasons stated below, the Circuit Court was wrong and its decision must be reversed.

B. Maryland Common Law Requires the College to Arbitrate the Dispute Because It Is Arguably Arbitrable

Where, as here, the Maryland Uniform Arbitration Act does not apply,[1] Maryland courts apply common law standards when considering motions to compel arbitration or to vacate arbitration awards. *Bd. of Educ. of Prince George's Cnty. v. Prince George's Cnty. Educators' Ass'n, Inc.*, 309 Md. 85, 96, 522 A.2d 931 (1987); *Anne Arundel County v. Fraternal Order of Anne Arundel Detention Officers & Personnel*, 313 Md. 98, 107, 543 A.2d 841 (1986). Several common law principles are relevant to this Court's analysis.

First, "[w]here there is a broad arbitration clause, ... all issues are arbitrable unless expressly and specifically excluded." *Gold Coast Mall v. Larmar Corp.*, 298 Md. 96, 104-105, 468 A.2d 91, (1983). In reviewing any arbitration clause, a court should order arbitration unless "it may be said with positive assurance that the arbitration clause is not

[1]Maryland Code, Courts and Judicial Proceedings, Sec. 3-202 *et seq*.

susceptible of an interpretation that covers the asserted dispute." *Mayor v. Baltimore Fire Fighters*, 93 Md. App. 604, 610, 613 A.2d 1023 (1992) (quoting *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986)).

The Agreement defines a grievance as an allegation of a contractual breach filed by an aggrieved person and permits the arbitration of all grievances. Article 3, which sets forth the Grievance Procedure culminating in binding arbitration, does not exclude any type of dispute from the grievance procedure. [App. 29-30]. Thus, the Court must conclude that the Agreement contains a "broad arbitration clause."

Second, the College and Circuit Court erroneously relied upon the general principle that where "the parties are 'in disagreement on the very question whether there exists an agreement to arbitrate the subject matter of the dispute, the resolution of that question is for the court.'" *Messersmith, Inc. v. Barclay Townhouse Assoc.*, 313 Md. 652, 661 (1988)[2] (quoting with approval *Mayor & City Council of Baltimore v. Baltimore Fire Fighters, Local 734,* 49 Md. App. 60, 65-66, 430 A.2d 99, *cert. denied,* 291 Md. 771 (1981)). In *Messersmith*, the court found that there was no written agreement to arbitrate <u>any</u> dispute. In *Baltimore Fire Fighters, Local 734*, the court found that because the collective bargaining agreement contained no provision concerning the recoupment of overpaid wages, a purported grievance protesting the recoupment did not involve the breach or interpretation of the contract and, therefore, was not arbitrable. These decisions are readily distinguishable.

[2]Unlike the instant case, the Maryland Uniform Arbitration Act applied in *Messersmith*.

Third, in deciding motions to compel or stay arbitration, the general policy in Maryland is to allow the question of arbitrability to go to the arbitrator in the first instance if it is unclear from the arbitration agreement whether the parties have agreed to submit a particular subject matter to arbitration or if the court, in addressing arbitrability, must consider the merits of the dispute. *Balt. County v. Balt. County FOP Lodge No. 4*, 439 Md. 547, 577-578, 96 A.3d 742 (2013); *Balt. County FOP Lodge No. 4 v. Balt. County*, 429 Md. 533, 538, 549, 57 A.3d 425 (2012). In the 2012 decision, the Court stated that "In accordance with the public policy favoring arbitration, the courts' role in the arbitration process—whether ruling on motions seeking to compel or stay arbitration or reviewing arbitration awards—is limited." Even in deciding arbitrability issues, however, "courts are limited to determining only one thing: whether a valid arbitration agreement exists" and must be careful not to "stray into the merits of any underlying agreements." The Court reiterated that [*Id.* at 551-552]:

> Where the language of the arbitration clause is clear, and it is plain that the dispute sought to be arbitrated falls within the scope of the arbitration clause, arbitration should be compelled. If it is apparent, on the other hand, that the issue sought to be arbitrated lies beyond the scope of the arbitration clause, the opposing party should not be compelled to arbitration, since there is no agreement to arbitrate. ... A problem is created for the court when the language of the arbitration clause is unclear as to whether the subject matter of the dispute falls within the scope of the arbitration agreement. Courts that have considered this problem have recognized that under such circumstances the question of substantive arbitrability initially should be left to the decision of the arbitrator, not the courts.

This third principle, not the second principle, controls this litigation.

Because the Maryland common law prefers arbitration as the appropriate forum for resolving contractual disputes, the Court must be skeptical of the Circuit Court's conclusion that the dispute was not arbitrable. The Circuit Court concluded that, although the parties had jointly processed the grievance through three steps of the contractual grievance procedure, the AAUP had not filed a real grievance. According to the Circuit Court, no grievance was necessary because the AAUP had committed to resolve the dispute through Section 8.5 rather than through Article 3. As we show below, the Circuit Court betrayed the first and third common law principles discussed above.

C. The Agreement Does Not Preclude the AAUP from Grieving and Arbitrating the College's Refusal to Pay a Required Salary Increase

Because the Agreement contains a "broad arbitration clause" and because Article 3 does not exclude any type of grievance from arbitration, the Court must consider whether provisions outside Article 3 exclude certain disputes from arbitrability. In Section 4.5(E), the College and AAUP arguably agreed that faculty members who are laid off or terminated for non-disciplinary reasons cannot grieve. [App. 37]. The parties knew how to expressly exclude subjects from arbitration. Nevertheless, the Agreement includes no similar provision excluding the failure to provide a contractually required wage increase from arbitration.

Unlike the situation in *Baltimore Teachers Union, Am. Fed'n of Teachers, Local 340 v. Mayor & City Council*, 108 Md. App. 167, 671 A.2d 80 (1996),[3] the undisputed facts

[3]In *Baltimore Teachers Union*, 108 Md. App. at 194, this Court found that "a legally (continued...)

prove that the College received sufficient funds to pay the increase required by Section 8.2 of the Agreement. The *Baltimore* case is distinguishable because Section 8.5 is limited and the *Baltimore* language was not.

The Circuit Court erroneously found that Section 8.5 implicitly precludes the AAUP from arbitrating the College's refusal to provide a required wage increase. But this finding was based on the Circuit Court's misinterpretation of Section 8.5, an interpretation the Court was not legally permitted to make. *Balt. County FOP Lodge No. 4 v. Balt. County*, 429 Md. at 551-552. The Circuit Court also implicitly rejected, or ignored, the AAUP's contention that the undisputed facts precluded, or arguably precluded, the College's application of Section 8.5.

Section 8.5 is clear and unambiguous. It opens with two sentences that preclude its application in the current situation: First, "This Agreement is dependent upon receipt by Montgomery College of the revenues projected by Montgomery College as necessary to implement the Agreement." Second, Section 8.5 creates a procedure only where "revenues fall below the levels necessary to implement this Agreement ...." [App. 57 (emphasis supplied)]. Because the undisputed facts show that revenue never fell below the threshold established in Section 8.5 – that "projected ... as necessary to implement this Agreement" –

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[3](...continued)
binding contract between appellee and appellant did not exist because the Board of Estimates never appropriated the funds for the wage increase." However, in *dicta*, the Court explained that an arbitrator had properly found a contract violation, but had committed a palpable error in refusing to remedy the violation. *Id.* at 183-190.

the Section cannot prohibit resort to the grievance procedure to remedy a violation of Section 8.2.

Section 8.5 is not an alternative to the grievance-arbitration process. It applies only if the College does not receive enough money to fund the Agreement and requires the parties to negotiate a new salary adjustment and, if they cannot agree, move to fact-finding. Section 8.5 does not apply when, as here, the College receives enough money, but chooses to spend the money elsewhere. The College's decision concerning the allocation of the money it received creates a grievable event.

Section 8.5 and Article 3 are designed to solve entirely different problems. Article 3 addresses breaches of contract. It applies when the College has sufficient money to honor its commitments to the faculty, but chooses not to. Section 8.5 applies when the College does not have sufficient money to honor its obligations under its Agreement with the AAUP and the parties have to negotiate to amend the Agreement. Neither the College nor the Circuit Court understand this distinction.

Contrary to the College's position, which the Circuit Court implicitly adopted, the Agreement is not dependent upon Montgomery College obtaining its complete financial request for projects related and unrelated to the funding of the AAUP Agreement. The College requested the County to provide $7.4 million "for compensation and benefits increases." [App. 68]. When it made its request, the College was negotiating collective bargaining agreements with two other unions and did not know the financial impact of those

negotiations. [App. 72-73, 119].[4]

It is undisputed that the College's $7.4 million compensation and benefits request was intended for all three union agreements and for unrepresented employees, not just for faculty represented by the AAUP. Indeed, the College told the AAUP that it required only $3.0 million to fund the increase required by Section 8.2. [App. 86]. On May 18, 2017, College President Pollard announced that the College would receive $5.2 million for benefit costs and wage increases. [App. 119-120, 174].

The College clearly received the funds it projected as "necessary to implement the Agreement." Although the College argued that it would be unfair and inequitable to comply with Section 8.2 of the AAUP Agreement while not complying with commitments it had made to other unions [App. 86], the AAUP rejected this as a defense to the breach of the Agreement. Only an arbitrator can decide whether the College's equity argument constitutes a valid defense to a breach of contract claim.

The Circuit Court implicitly adopted the College's equity argument, thereby improperly accepting the College's disputed and erroneous interpretation of Section 8.5. The College and AAUP agreed that only an arbitrator could interpret Section 8.5 and its application to disputed facts.

Nowhere did the Circuit Court consider or address the facts presented by the AAUP

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[4]The budget request included a total of $1,007,000 for non-compensation projects. The College also sought appropriations and authority to spend a total of $49.513 million for still other purposes. [App. 72-75].

when it concluded that Section 8.5 precluded arbitration. Does Section 8.5 exclude arbitration if the College gets enough to fund the Agreement, but not enough to fund wage increases for the entire College workforce? Should the Circuit Court, or even this Court, make that decision interpreting Section 8.5? Or should an arbitrator, whom the parties have agreed is the only person appropriate to interpret the Agreement, decide what Section 8.5 means? *Balt. County FOP Lodge No. 4 v. Balt. County* holds that the arbitrator must make this decision.

Therefore, this Court should conclude that, on the facts presented to it, the Circuit Court erroneously held that Section 8.5 constituted an exclusion from the grievance procedure. This Court should conclude that the grievance presents an arbitrable, or arguably arbitrable, question.

D. The College's Refusal to Pay Contractually Required Salary Increases Can Be Resolved Through a Grievance Filed by an Individually Aggrieved Faculty Member

Several facts are undisputed. Grievant Harry Zarin was"personally aggrieved" by the alleged breach of contract. Grievant Harry Zarin was also President of the AAUP. Grievant Harry Zarin intended his grievance to provide a remedy for himself and for all affected faculty represented by the AAUP.

The College erroneously argued that the collective bargaining agreement does not

permit class grievances[5] and that the Supreme Court has held that the Federal Arbitration Act does not permit imposing class arbitration on parties "unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen v. Animal Feeds, Int'l Corp.*, 559 U.S. 662, 684 (2010). We address these arguments in turn.

First, as a person "aggrieved" by the alleged violation, President Zarin had standing to grieve. Section 3.1(A) requires that the grievant be "personally aggrieved." This requirement means only that a grievant must have "skin in the game" and cannot be an unaffected representative of one or more co-workers. For example, Professor A cannot file a grievance alleging that the discharge of Professor B violated the Agreement. Thus, President Zarin's grievance is arbitrable. The AAUP properly insisted upon arbitration after the College and AAUP processed the grievance through the steps of the grievance procedure.[6]

Second, assuming, *arguendo*, that President Zarin could not file a "class" or "group" grievance, he could file a grievance for himself. In *Society of Professional Engineering Employees in Aerospace, International Federation of Professional and Technical Employees,*

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[5]Article 3, Section 3.1(A) of the Agreement states: "A 'grievance' is an allegation by a faculty member that Management has violated an express provision of this Agreement and that such faculty member has been personally aggrieved thereby." Section 3.1(B) permits the "aggrieved faculty member" to file a written grievance. [App. 29]. It does not preclude "class grievances."

[6]Although the Circuit Court did not understand this [App. 159], the Agreement expressly provides that only the AAUP (and not the grievant) can demand arbitration. [App. 31]. Therefore, only the AAUP can sue to compel arbitration.

Local 2001 v. Spirit Aerosystems, Inc., 681 Fed. Appx. 717, 722, 2017 U.S. App. LEXIS 4515 (10th Cir. 2017), the Tenth Circuit held that even if the collective bargaining agreement and *Stolt-Nielsen* prohibited class grievances,

> The grievance process contemplates complaints from individual employees like Mr. Hartig. It does not prevent a claimant from grieving an issue that may affect co-workers. Similarly, Section 3.6 requires separate and distinct arbitration hearings for each grievance, but it does not follow that resolution of a particular dispute must affect only one employee. The district court reasoned that a "class dispute over company policy is incapable of resolution" at steps one and two. ... But there is nothing in the CBA that prohibits Mr. Hartig's grievance — deductions from his personal paycheck — from being heard and decided by his supervisor. In other words, a grieving employee raising a complaint with implications for others does not render the grievance process incapable of addressing his claim.

Thus, an individual employee can grieve even if his grievance affects his co-workers. And an arbitrator may impose a remedy affecting many employees.

In one of its first decisions under the federal common law of labor arbitration,[7] the Supreme Court acknowledged that the resolution of one employee's grievance could affect the rights of other employees. The Court considered the authority of a bipartite grievance committee (which functioned as an arbitrator) to resolve the seniority rights of employees of two merging employers. The grievances had been filed by three employees of one of the merging companies, but the decision involved every employee of both employers, and was

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[7]The federal common law has its basis in four Supreme Court decisions. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957); *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

adverse to the interest of some of the affected employees. The Court concluded that the panel had acted appropriately. *Humphrey v. Moore*, 375 U.S. 335 (1964). Courts have subsequently upheld arbitrators' decisions involving the seniority impact of corporate mergers.[8]

Third, Section 3.1(A) does not expressly provide that a personally aggrieved faculty member cannot grieve on behalf of himself and others. To the contrary, the language implies that a single aggrieved employee can grieve on behalf of others. The Ninth Circuit has held that such ambiguous language does not preclude a class grievance. *Varela v. Lamps Plus, Inc.*, 701 Fed. Appx. 670, 2017 U.S. App. LEXIS 14284 (9th Cir. 2017). Thus, the Circuit Court could not properly reject arbitration because only President Zarin grieved.

The real question, therefore, is whether an arbitrator could lawfully impose a class-wide remedy where only one employee grieves. This question has been resolved under the federal common law affecting collective bargaining agreements. In *Steelworkers v. Enterprise Wheel & Car Corp.*, 353 U.S. at 597, the Court discussed the arbitrator's remedial authority:

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific

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[8]See, e.g., *Winston v. Teamsters Local 89*, 93 F.3d 251 (6th Cir. 1996); *Price v. Teamsters*, 457 F.2d 605 (3rd Cir. 1972); *In re ABF Freight Sys., Inc., Labor Contract Litig.*, 988 F. Supp. 556 (D. Md. 1997), *aff'd per curiam sub nom. Gorge v. Carey*, 166 F.3d 1209 (4th Cir. 1998).

remedy should be awarded to meet a particular contingency.

Section 3.2(C) of the Agreement defines an arbitrator's jurisdiction and authority. An arbitrator cannot decide more than one grievance at a time without the mutual consent of the College and the AAUP. The arbitrator cannot add to, detract from, or modify the Agreement. The arbitrator cannot establish or alter any wage rate set forth in the Agreement. But Section 3.2(C) does not otherwise limit the arbitrator's authority to impose a remedy for any violation. [App. 31-32].

Fourth, shortly after the Supreme Court's decision in *Stolt-Nielsen*, the Court in *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569-570 n. 2 (2013), held that "*Stolt-Nielsen* made clear that this Court has not yet decided whether the availability of class arbitration is a question of arbitrability." The Court cited the plurality opinion in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452 (2003), which stated

> The question here—whether the contracts forbid class arbitration—does not fall into this narrow exception. It concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties. Unlike [*First Options of Chicago, Inc. v. Kaplan*, 514 U. S. 938, 942-945 (1995)], the question is not whether the parties wanted a judge or an arbitrator to decide whether they agreed to arbitrate a matter. .... Rather the relevant question here is what kind of arbitration proceeding the parties agreed to. That question ... concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question. Given these considerations, along with the arbitration contracts' sweeping language concerning the scope of the questions committed to arbitration, this matter of contract interpretation should be for the arbitrator, not the courts, to decide.

Thus, where, as here, the parties dispute the interpretation of Section 3.1(A), an arbitrator, not the courts should determine whether the contract prohibits class grievances or class

remedies.

Furthermore, *Stolt-Nielsen* interpreted the Federal Arbitration Act, not the Federal common law. Assuming that the Maryland Uniform Arbitration Act incorporates the Supreme Court's interpretation, the Maryland statute does not apply. Maryland common law allows an arbitrator to resolve disputed interpretations of the scope of the grievance-arbitration process.

Maryland courts routinely enforce arbitration awards in "class grievances," rejecting a contractual argument that such claims could not be brought. *Baltimore County, Maryland v. FOP Baltimore County Lodge No. 4*, 449 Md. 713, 144 A.3d 1213 (2016) (class grievance for retirees); *Balt. County FOP Lodge No. 4 v. Balt. County*, 429 Md. 533, 540, 57 A.3d 425 (2012) (same); *Rourke v. Amchem Prods., Inc.*, 384 Md. 329, 863 A.2d 926 (2004) (class counsel can arbitrate claims of breach of a settlement agreement on behalf of "each settling plaintiff."). Even assuming that the Supreme Court's decision is incorporated into the Maryland Uniform Arbitration Act, there is no reason to incorporate it into the Maryland common law.

Fifth, the Agreement recognizes that the AAUP, as an entity, has certain contractual rights independent of the rights of individual faculty members. The Agreement gives the AAUP the right to use College meeting space, College food services, the intra-College mail system, and College bulletin boards [App. 53]. The Agreement requires the College to provide the AAUP with information concerning bargaining unit employees. [App. 53]. The

Agreement requires the College to deduct dues from members' paychecks and to transmit dues to the AAUP. [App. 52].

In addition, Maryland courts recognize that the AAUP has an obligation to administer the Agreement to prevent the College from breaching the Agreement. The duty of fair representation requires the AAUP to serve the interests of all faculty members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. See, e.g., *Stanley v. AFSCME Local No. 553*, 165 Md. App. 1, 884 A.2d 724 (2004).

The Circuit Court erroneously reasoned that because the first step in the grievance-arbitration process involves the grievant's supervisor, the grievance process was not meant to resolve salary issues which were beyond the supervisor's control. [App. at 159-160]. But if a faculty member who was an AAUP officer filed a grievance alleging that the College had refused to deduct or transmit dues, the grievance would be filed with the grievant's supervisor, even if he had no part in the dues deduction and transmission process. The parties did not negotiate a grievance process that was most effective for each possible situation. But that does not mean that breaches of contract cannot be resolved through the system they negotiated.

Indeed, it is clear that some breaches of contract are inherently class grievances. For example, in *Montgomery County v. FOP*, 427 Md. 561, 50 A.3d 579 (2012), the Court of Appeals upheld an arbitration award involving a union's grievance to protect the rights of

its stewards attempting to represent employees charged with misconduct. Arguably, an individual steward could have filed a class grievance on behalf of all stewards. Similarly, the Court of Appeals held that the continuation of retiree health was a class-wide issue. *Baltimore County, Maryland v. FOP Baltimore County Lodge No. 4*, *supra*.

In sum, the Circuit Court erroneously held that Professor Zarin's grievance was not a "grievance" and was an inappropriate attempt to resolve the salary dispute through the contractual grievance procedure. This Court should conclude that President Zarin had standing, as an "aggrieved" faculty member, to grieve and that the AAUP had the right to seek to compel arbitration.

III. THE CIRCUIT COURT ERRONEOUSLY GRANTED THE COLLEGE'S MOTION FOR SUMMARY JUDGMENT WITHOUT MAKING FINDINGS OF UNDISPUTED FACTS AND DESPITE THE EXISTENCE OF UNDISPUTED FACTS REFUTING ITS DECISION

Maryland Rule 2-501(f) authorizes a Circuit Court to grant a motion for summary judgment "if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." The Circuit Court's "RULING" [App. 156-166] did not satisfy these requirements. This Court should reverse the Circuit Court decision.

The Circuit Court granted the College's motion for summary judgment "because I don't believe, I find that there are no genuine disputes of any material facts." [App. 166].

But there were divergent facts concerning the application of Section 8.5. If there were no "genuine disputes of any material facts," it was because the AAUP produced undisputed evidence that the College had received sufficient money to render Section 8.5 inapplicable. But the Circuit Court ignored this evidence.

Nor was the College "entitled to judgment as a matter of law."

A. The Circuit Court expressly refused to address factual disputes concerning the application of Section 8.5

The parties provided divergent facts concerning the intent of Section 8.5. The College's counsel argued that [App. 140]

> 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.

Counsel for the AAUP responded that "there must be established what revenue the college is receiving in relationship to the financial obligation it undertook voluntarily ...." [App. 146]. In other words, the AAUP argued that although the College received less than it asked for, it received more than it projected as necessary to comply with Section 8.2 of the Agreement, and that Section 8.5 did not apply.

The Circuit Court acknowledged, but ignored, this dispute. The Circuit Court merely found that

- 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. [App. 162].

- 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. [App. 162 (emphasis supplied)]

- [The AAUP's counsel] 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 [*sic*]. I am not here analyzing with a spreadsheet of what that university is doing with its money. [App. 163].

- 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. [App. 164].

Thus, the Circuit Court explicitly found that it would not consider the AAUP's argument that because the College received the money it projected as necessary to finance the increase mandated by Section 8.2, Section 8.5 did not apply. Then the Circuit Court found that the College had the unilateral and unreviewable authority to invoke Section 8.5.[9]

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[9]The Circuit Court erroneously believed that the Section 8.5 fact-finder could resolve the dispute over the application of Section 8.5:

> 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. [App. 163].

Section 8.5 allows a fact-finder to address disputed facts raised during the mediation process. But Section 8.5 does not permit the fact-finder to find that the College improperly invoked Section 8.5 when it should have agreed to arbitrate. If the fact-finder did conclude that the College had the money to comply with Section 8.2, the fact-finder had no authority to impose

(continued...)

The Circuit Court explicitly ignored the language in the provision it relied upon as a dispositive exclusion from the grievance-arbitration process. The Circuit Court was more impressed by the placement of Section 8.5 than by the language of Section 8.5.

B. The College Was Not Entitled to Judgment as a Matter of Law

Because the question presented is the arbitrability of a grievance, to be "entitled to judgment as a matter of law, the College needed to prove that (a) there was no valid grievance and/or (b) the grievance was not arbitrable as a matter of law. The College failed both tests.

First, the College never argued that there was no valid grievance. It is undisputed that President Zarin was personally "aggrieved" by the alleged breach of contract. It is undisputed that the parties processed President Zarin's grievance through the three steps of the grievance system. Not once did the College assert that President Zarin could not grieve. The College's counsel repeatedly told the Court that President Zarin had filed a grievance. Despite these undisputed facts, the Circuit Court found that what President Zarin filed, and the parties processed, "is not a grievance under this document." [App. 162].

Second, to find that the grievance was not arbitrable, the Circuit Court appeared to look at Section 8.5 without carefully reading it. As shown above, Section 8.5 applies in only one situation: where the College receives less money from the County than "projected ... as

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[9](...continued)
a remedy. If the College did not comply with the fact-finder's report, the report would be made public. The College gets its way, and any bad publicity fades away.

necessary to implement the Agreement." The Circuit Court did not even attempt to discern whether this situation existed. To the contrary, the Circuit Court expressly refused to do so. Without a finding that the College did not receive the funding it projected it needed, the College is not "entitled to judgment as a matter of law."

Third, because President Zarin filed a valid grievance and because Section 8.5 does not preclude arbitration, the question is the scope of the remedy: if an arbitrator finds that the College violated Section 8.2, can the remedy extend beyond President Zarin to other aggrieved faculty? The AAUP believes that Section 3.1(A) permits an "aggrieved" faculty member, and particularly an aggrieved faculty member who is the AAUP's President, to file a class grievance. But even if Section 3.1(A) does not permit a class grievance, an arbitrator arguably has the authority to impose a class-wide remedy. And even if the remedy applies only to President Zarin, the AAUP will have proven that the College breached the Agreement.

Thus, the Court should reverse the Circuit Court's grant of the College's motion for summary judgment.

CONCLUSION

For the reasons stated herein, the Court conclude that President Zarin filed a valid grievance, that the AAUP had authority to arbitrate the grievance, and that the grievance was arbitrable. Accordingly, the Court should vacate the Circuit Court's award of summary judgment to the College and the dismissal of the complaint.

Respectfully submitted,

H. David Kelly, Jr.
Beins, Axelrod, P.C.
1717 K Street, N.W. Suite 1120
Washington, D.C. 20006
telephone: 202-328-7222
telecopier: 202-328-7030
dkelly@beinsaxelrod.com

Counsel for Appellant Montgomery College Chapter, American Association of University Professors

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This brief is printed in Times New Roman font with 13-point type.

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1. This brief contains 7,774 words.

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/s/ H. David Kelly
H. David Kelly

Certificate of Service

Pursuant to Md. Rules 1-321 and 8-502(c), I hereby certify that, on this 15th day of April 2019, two copies of the Brief of Appellant and two copies of the Appendix were served on Appellee by first class mail, postage prepaid, to its counsel of record at the following address:

Darrell R. VanDeusen, Esq.
J. Garrett Wozniak, Esq.
Kollman & Saucier, P.A.
1823 York Road
Timonium, Maryland 21093

/s/ H. David Kelly
H. David Kelly