**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**

---

# REPLY 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

PAGE

## TABLE OF AUTHORITIES

PAGE

**CASES**



**STATUTES**

**MISCELLANEOUS**

The Montgomery College Chapter, American Association of University Professors, by its undersigned counsel, submits this Reply Brief in response to the College's Brief filed on April 15, 2019.

## A. Section 8.5 of the Agreement Does Not Apply Because the College Obtained Enough Money from the Council to Fund the Required Salary Increase

Article 3, Section 3.1(A) defines a grievance as "an allegation by a faculty member that Management has violated an express provision of this Agreement ...." [App. 29]. Section 3.2 is an "express provision" in the Agreement. Section 8.5 is also "an express provision" of the Agreement. Therefore, the College and the AAUP have agreed that a dispute concerning non-payment of salary increases required by Section 3.2 and the application of Section 8.5 should be resolved through the grievance-arbitration system, not through the judicial system, when, as here, the College has arguably received sufficient money from the Council to fund the compensation requirements of the Agreement.

Section 8.5 states that "This Agreement is dependent upon receipt by Montgomery College of the revenues projected by Montgomery College as necessary to implement the Agreement." [App. 57-58 (emphasis supplied)]. It is undisputed that the College received more money from the Council than the College projected as necessary to fund the Agreement, even if it was less than the College requested to fund compensation for employees not covered by the Agreement. [*See* AAUP Opening Brief at 12-13].

The College ironically argues that "The material undisputed fact is that the College received $2.2 million less from the County than it had asked for to provide wage adjustments

in FY 18." [College Brief at 15 (emphasis supplied)]. That "undisputed fact" is fatal to its interpretation of Section 8.5. But the Circuit Court accepted this argument without looking at the language in the Agreement. Both the College and the Circuit Court would delete the phrase "as necessary to implement the Agreement" from the Agreement.

Section 16-412(g)(6) of the Maryland Education Code does not grant the College any authority greater than Section 8.5: "[i]f the request for funds necessary to implement the agreement is reduced, modified, or rejected by the governing body of Montgomery County, either party may, no later than 20 days after final budget action by the governing body, reopen the agreement." [App. 172 (emphasis supplied)].[1] The Education Code does not require reopening a collective bargaining agreement where the College receives enough to fund contractually required salary increases, but not enough to fund equivalent salary increases for employees not covered by the Agreement.

The College falsely criticizes the AAUP's position, claiming "the union could always claim that 'you of course have enough to pay us if you simply don't pay the utility bill or pay other employees.'" [College Brief at 18]. Both Section 8.5 and Section 16-412(g)(6) refer only to the funding of the Agreement. Neither provision authorizes the AAUP to claim any entitlement to funds obtained for non-compensation purposes. And neither provision

[1]The College erroneously argues that Section 16-412(g)(6) applies whenever the Council "reduces" the College's request. [College Brief at 7, n. 4]. The Section expressly applies only to a reduction in "funds necessary to implement the agreement ...." [App. 172 (emphasis supplied)].

obligates the AAUP to agree to salary reductions so that the College can award across-the-board salary increases to all College employees. The AAUP has a quasi-fiduciary obligation to protect the contractual interests of its constituents. The AAUP owes no obligation to non-constituent College employees.

Equally without merit is the College's argument [College Brief at 4, 15-17] that the Management Functions article trumps the salary provisions in the Agreement. Section 2.1 begins with a stringent limitation on management rights: "All management functions, rights, and prerogatives, written or unwritten, which have not been expressly modified or restricted by a specific provision of this Agreement, are retained and vested exclusively in Management and may be exercised by Management at its sole discretion." [App. 28 (emphasis supplied)]. Simply stated, the College has no right to "allocate and expend funds" to violate Section 3.2.[2]

Both the Education Code and Section 8.5 apply only if the College cannot fund the Agreement. They do not apply when the College will not fund the Agreement.

The question erroneously resolved by the Circuit Court was the identity of the decision-maker. The AAUP argued that only an arbitrator could decide. Although the

---

[2]Nor does Section 16-412(h) of the Maryland Education Code authorize the College to breach the Agreement. In *FOP v. Montgomery County,* 437 Md. 618, 89 A.3d 1093 (2014), the Court of Appeals held that under the Police Labor Relations Act, the County Council, as the funding authority, could refuse to fund the benefits in a recently negotiated contract. But the Education Code has different language, the College is not the funding authority, and the College received enough to fund the Agreement. Equally distinguishable are *Koontz v. Assoc. of Classified Employees*, 297 Md. 521, 527, 467 A.2d 753, 756-57 (1983); *Montgomery Cty. Council of Supporting Servs. Emps., Inc. v. Bd. of Educ.*, 277 Md. 343, 347, 354 A.2d 781, 783 (1976).

Circuit Court rejected the AAUP's position, it became the decision-maker without addressing the triggering of Section 8.5: "I am not here analyzing with a spreadsheet of what that university is doing with its money." [App. 163]. The Circuit Court decided the case without considering the impact of the language in the Agreement. That alone is cause for reversal.

## B. The Grievance Is Arbitrable

### 1. The Agreement Contains a Broad Arbitration Clause

The Maryland Uniform Arbitration Act does not govern all aspects of arbitration even where the Act applies. For example, the Act does not mention whether the presumption of arbitrability applies. As argued in the AAUP's Opening Brief [at 7-8], when considering cases covered by the Act, Maryland courts have adopted the common law presumption of arbitrability derived from the federal common law of labor relations. *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986). Maryland courts have applied this presumption regardless of whether the Arbitration Act applied.

Within this context, the College's assertion that the Agreement does not contain a "broad arbitration clause" [College Brief at 20] must fail. Any faculty member may grieve and the AAUP may arbitrate the alleged violation of any provision of the Agreement. That the Agreement does not permit the arbitration of statutory claims (such as Title VII discrimination violations, which are not prohibited by the Agreement) does not make the grievance provision less broad. The presumption of arbitrability is unaffected by Section 8.5, which is inapplicable to this dispute.

Contrary to the College's assertion [College Brief at 21], the AAUP has never argued that an arbitrator should decide the question of arbitrability. The AAUP has argued only that an arbitrator has authority to decide whether Section 8.5 applies. But the AAUP has conceded that the Court can also interpret that Section in ruling on the appeal. The Circuit Court simply got it wrong.

**2. An Arbitrator Has Authority to Resolve the Grievance**

The Agreement does not restrict an arbitrator's authority to remedy the grievance. The AAUP does not, as the College contends [College Brief at 14, 19], request an arbitrator to "alter any wage rate or wage structure ...." The only remedy requested is an order compelling the College to comply with the wage rate and structure required by Section 3.2. To the extent that the Circuit Court adopted the College's argument to conclude that the AAUP did not state a claim, the Circuit Court erred.

**3. Procedural Disputes Concerning Grievances Are Resolved by the Arbitrator**

The College wastes numerous pages reciting the processing of the grievance and contending either that the grievance was untimely or that the AAUP violated some other requirement of the grievance procedure. Such procedural matters are resolved by an arbitrator. *John Wiley & Sons v. Livingston*, 376 U.S. 543, 557 (1964).

The College's contention that it was obligated to process the grievance even if the grievance was not arbitrable [College Brief at 23] contrasts with the Circuit Court's conclusion that the AAUP did not really file a grievance. [App. 166].

### 4. Maryland Common Law Allows Class Grievances

The College curiously argues that "president Zarin's grievance did not state (as the union claims at App. Br. 16-17) that he was filing the grievance for himself individually and all other faculty." [College Brief at 9, n. 6]. Yet the College later admits "There is no dispute that the grievance filed by president Zarin was a class grievance." [College Brief at 23].

The AAUP believes that courts properly determine whether a class grievance is appropriate under the contractual grievance-arbitration scheme. In reaching this decision, the Court must apply the common law.

When adopting the Maryland Uniform Arbitration Act, the legislature determined that the Act would not apply to labor disputes without the express written approval of both union and employer. The legislature knew that there was a difference between statutory law and common law and permitted employers and unions to elect to be covered by the common law. Had the legislature believed that the proposed Uniform Arbitration Act fully incorporated the common law, the exception for collective bargaining agreements would have been unnecessary. The Maryland Uniform Arbitration Act does not apply to the present dispute.

This simple premise requires the Court to skeptically review the College's reliance [College Brief at 23-24] on the Supreme Court's decisions holding that the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, prohibits class grievances without the express agreement of both parties. *Lamps Plus, Inc. v. Varela*, 587 U.S. ---, 203 L. Ed. 2d 636 (2019); *Stolt-Nielsen v. Animal Feeds, Int'l Corp.*, 559 U.S. 662, 684 (2010).

The College does not argue that the Maryland common law also prohibits class grievances. Discerning common law is unlike litigation involving statutory law, where courts attempt to discern the intent of the legislators. As Oliver Wendell Holmes, wrote about the common law,

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

Holmes, THE COMMON LAW (1881). The Court of Appeals has recently acknowledged that

> Holmes' insight is that it is the wisdom of the common law that a doctrine developed by the courts to decide cases may begin as an elegant theoretical construct, but is often modified and thereby rendered less elegant, or discarded entirely, to accommodate actual experience or changed conditions.

*Seaborne-Worsley v. Mintiens*, 458 Md. 555, 567, 183 A.3d 141 (2018).

When the parties negotiated and executed the Agreement in 2015, *Stolt-Nielsen* provided some guidance. There, the Court criticized the Second Circuit for acting

> as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation. Perceiving a post-*Bazzle* consensus among arbitrators that class arbitration is beneficial in "a wide variety of settings," the panel considered only whether there was any good reason not to follow that consensus in this case.

559 U.S. at 673-674. Declining to address whether the Maryland Arbitration Act should apply, the College and AAUP agreed upon a grievance-arbitration system which did not

expressly prohibit or approve class grievances.[3]

Because this Court is a common law court, its task is to "develop ... the best rule to be applied" concerning the arbitration of class grievances.

When the Federal Arbitration Act was adopted in 1925, Congress was concerned with commercial arbitration, not labor arbitration. The federal common law of labor arbitration springs from a series of Supreme Court decisions in 1957 and 1960. [AAUP Opening Brief at 16 and n. 7]. Indeed, in 1957 the Supreme Court held that the federal common law, not the Federal Arbitration Act, "furnishes a body of federal substantive law for the enforcement of collective bargaining agreements ...." *General Electric v. IUE Local 205*, 353 U.S. 547, 548 (1957). Not until *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 40 (1987), did the Court even consider the application of the Federal Arbitration Act in litigation involving an arbitration governed by the federal common law; the Court concluded that the Act did not apply. Twenty-two years later, in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009), the Court implicitly held that the Federal Arbitration Act applied to arbitration under a collective bargaining agreement and the federal common law.

In this context, it is significant, but not surprising, that none of the Court's decisions

[3]In *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452 (2003), the Court held that in such cases arbitrator should determine whether a class grievance was permissible. Justice Stevens, concurring, stated that the Federal Arbitration Act was silent on the issue. *Id.* at 454-455.

concerning the Federal Arbitration Act and class action arbitrations[4] arose from cases involving collective bargaining agreements. Indeed, the dissenting opinions in *Lamps Plus* emphasize the harm in applying the Federal Arbitration Act to contracts, including collective bargaining agreements, executed by parties without "roughly equal bargaining power." 203 L. Ed 2d at 651.

In *Epic Systems*, the Court considered whether the Federal Arbitration Act prohibited class arbitration by a group of employees with identical individual employment agreements. The Court majority opinion opened with a remarkable concession: "As a matter of policy these questions are surely debatable. But as a matter of law the answer is clear." 200 L. Ed. 2d at 896.

This case allows Maryland courts to address the policy questions left unresolved by the Court and to avoid the harm created by the Supreme Court's interpretation of the Federal Arbitration Act. By fashioning a common law which adopts the *Green Tree* holding that where a contract was silent an arbitrator should determine whether a class arbitration was permissible, the Court can "accommodate actual experience or changed conditions." *Seaborne-Worsley v. Mintiens.* The Court can ensure that the common law protects unionized workers in Maryland.

---

[4]*Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003); *Stolt-Nielsen v. Animal Feeds, Int'l Corp.*, 559 U.S. 662 (2010); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Epic Systems Corp. v. Lewis*, 584 U.S. —, 200 L. Ed. 2d 889 (2018); and *Lamps Plus, Inc. v. Varela*, 587 U.S. —, 203 L. Ed. 2d 636 (2019).

## CONCLUSION

For the reasons stated herein and in our Opening Brief, the Court should conclude that the grievance is arbitrable and should be arbitrated as a class grievance. Alternatively, the Court should conclude that the grievance should be arbitrated as an individual grievance filed by AAUP President Harry Zarin.

Respectfully submitted,

/s/ H. David Kelly, Jr.
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

## Statement of Font and Type Size

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

## Certification of Word Count and Compliance with Rule 8-112

1. This brief contains 2,459 words.
2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

/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 29th day of May 2019, two copies of the Reply Brief of Appellant 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