

MONTGOMERY COLLEGE CHAPTER OF
THE AMERICAN ASSOCIATION OF
UNIVERSITY PROFESSORS ,

*

IN THE

*

COURT OF APPEALS

Petitioner,

*

OF MARYLAND

v.

*

Petition Docket No.: _____

BOARD OF TRUSTEES OF MONTGOMERY*
COMMUNITY COLLEGE,

*

Respondent.

* * * * *

PETITION FOR WRIT OF CERTIORARI

Petitioner Montgomery College Chapter of the American Association of University Professors, by its undersigned counsel, pursuant to Rules 8-301(a)(3) and 8-302(a), petitions this Court to grant a writ of certiorari to the Court of Special Appeals for review of that Court’s final opinion issued in this action on November 5, 2019.

STATEMENT OF THE CASE

The Montgomery College Chapter of the American Association of University Professors (“AAUP”) sued the Board of Trustees of Montgomery Community College (“College”) to compel arbitration of a grievance. The complaint was docketed in the Circuit Court for Montgomery County as *Montgomery College Chapter American Association of University Professors v. Board of Trustees of Montgomery Community College*, Case No. 443221. On June 19, 2018, the Court conducted a hearing on the College’s motion to dismiss and Motion for summary judgment. The Court granted both motions from the bench and did not issue a written opinion. The decision resolved all claims presented.

The AAUP appealed to the Court of Special Appeals, which on November 5, 2019, issued an unreported decision affirming the Circuit Court decision. No mandate has issued.

QUESTIONS PRESENTED FOR REVIEW

1. Where a collective bargaining agreement contains a broad mandatory grievance and arbitration procedure, did the Court of Special Appeals violate Maryland statutory and common law by holding that a union can never grieve the College's refusal to honor a contractual agreement to raise salaries.

2. Where a collective bargaining agreement permits employees to grieve but is silent about class grievances, does Maryland public policy, as stated by Attorney General Brian Frosh, permit class grievances or permit arbitrators to determine whether the contract permits class grievances?

STATEMENT OF FACTS

The AAUP and the College are parties to a collective bargaining agreement ("Agreement") covering full-time College faculty. Section 8.2(A) of the Agreement stated that effective September 2017 "there shall be a" six-and-one-quarter percent (6.25%) wage increase for most faculty. The College informed the AAUP that this contractually mandated salary increase would cost \$3.0 million.

The College requested the County to provide \$7.4 million "for compensation and benefits increases" for faculty represented by the AAUP and for other College employees who did not then have collective bargaining agreements. On May 18, 2017, College

President Pollard announced that the College would receive \$5.2 million for benefit costs and wage increases.

When the College failed to comply with Section 8.2(A), AAUP President Harry Zarin filed a class grievance on September 15, 2017. Article 3 of the Agreement permits a faculty member to grieve a contract violation and permits the AAUP to demand arbitration if the grievance cannot be resolved. Article 3 does not mention class grievances.

The College and AAUP processed the grievance through Step 1 and Step 2 of the contractual grievance procedure. At the Step 3 grievance meeting, the College asserted that Section 8.5 of the Agreement provided the exclusive method for resolving the dispute. Section 8.5 states as follows:

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. ...

If Section 8.5 applies and if the College and the AAUP cannot agree upon a proper salary increase, Section 8.5 then requires mediation and fact finding, not arbitration.

The College's refusal to arbitrate triggered this litigation.

REVIEW BY THIS COURT IS IN THE PUBLIC INTEREST

The Maryland Education Code gives College employees certain rights. They can form a union and bargain collectively with the College. Wages and benefits are mandatory

subjects of bargaining. Any agreement must be reduced to writing. If their agreement contains a grievance and arbitration system, an impartial third party issues a final and binding decision to resolve a dispute. Faculty represented by the AAUP exercised their statutory rights and negotiated annual salary increases. The Council gave the College funds necessary to honor the AAUP Agreement. But, according to the Court of Special Appeals, the faculty cannot grieve and arbitrate.

The Court of Special Appeals held that the College had unreviewable discretion to dishonor contractually mandated salary increases so that it could distribute the money provided by the Council to employees without collective bargaining agreements, even to the College President and other administrators.

Although this decision is nominally limited to Montgomery Community College and the AAUP, the decision has broader impact. The College will seek to extend the decision now that it has reached collective bargaining agreements with the Service Employees International Union (“SEIU”) for adjunct faculty and with the American Federation of State, County, and Municipal Employees (“AFSCME”) for maintenance and clerical employees. Furthermore, the decision can be applied to any public employer which is not the funding authority. For example, the language relied upon by the Court of Special Appeals is also in the Maryland Education Code for Prince George’s County Community College.

Although this decision is nominally limited to Montgomery Community College and the AAUP, the decision limits the right to file class grievances despite finding that a class

grievance is appropriate to resolve a grievance affecting hundreds of employees. The Court of Special Appeals refused to consider the public policy position recently presented by Maryland Attorney General Brian Frosh to the Supreme Court.

I. WHERE A COLLECTIVE BARGAINING AGREEMENT CONTAINS A BROAD MANDATORY GRIEVANCE AND ARBITRATION PROCEDURE, DID THE COURT OF SPECIAL APPEALS VIOLATE MARYLAND STATUTORY AND COMMON LAW BY HOLDING THAT A UNION CAN NEVER GRIEVE THE COLLEGE'S REFUSAL TO HONOR A CONTRACTUAL AGREEMENT TO RAISE SALARIES

Where a collective bargaining agreement has a broad arbitration provision, a court should not intrude in the process where the unresolved grievance involves a dispute regarding the meaning or effect of two or more provisions of the agreement and the arbitration provision does not expressly exclude either one from its reach. More specifically, in *Balt. County FOP Lodge No. 4 v. Balt. County*, 429 Md. 533, 537, 57 A.3d 425 (2012), this Court emphasized that although courts determine the substantive arbitrability of a grievance,

when deciding the issue of arbitrability requires interpretation of the underlying agreement and consideration of the merits of the dispute, the issue of arbitrability should be initially determined by the arbitrator.

The Court explained that “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.” *Id.* at 550, citing *Cheek v. United Healthcare of the Mid-Atl., Inc.*, 378 Md. 139, 155, 159-60, 835 A.2d 656, 666-68 (2003); *Holmes [v. Coverall N. Am.]*, 336

Md. 534, 546, 649 A.2d 365, 370-71 (1994)] (“The scope of the court’s involvement extends only to a determination of the existence of an arbitration agreement.”).

In ruling that the AAUP’s grievance was not arbitrable, the Court of Special Appeals usurped the role this Court has assigned to arbitrators: interpreting the underlying agreement. The Court of Special Appeals’ decision prohibits the AAUP from ever challenging the College’s refusal to pay a contractually required salary increase. The decision guts collective bargaining over wages and benefits despite the statutory requirement of bargaining over wages and other terms and conditions of employment. Maryland Education Code §16-412(a)(4) trumps the previously enacted provision in Maryland Education Code §16-103(d) authorizing the College’s Trustees to “fix” salaries.

Where a grievance alleges a breach of contract but is deemed not arbitrable, the union normally retains the right to sue for breach of contract. *Smith v. Evening News Ass’n*, 371 U.S. 195, 196 n. 1 (1977); *Groves v. Ring Screw Works*, 498 U.S. 168 (1990). By holding that the College had unreviewable discretion to dishonor its salary commitments, the Court of Special Appeals decided the merits of the grievance and precluded a suit for breach of contract.

A. The Decision Prohibits the AAUP from Grieving If the College Refuses to Pay a Salary Increase Arguably Not Fully Funded by the Council

As permitted by Maryland Education Code §16-412(g)(1), the parties’ Agreement provided that effective September 2017 “there shall be a” six-and-one-quarter percent (6.25%) wage increase for most faculty. As required by Maryland Education Code §16-

412(g)(6), the Agreement provided that

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. ...

Although it is undisputed that the Council provided more than was “necessary to implement this Agreement,” the Council provided less than the College requested for wages and benefits for all College employees.¹

In determining that the AAUP’s grievance was not arbitrable, the Court of Special Appeals had to determine whether an arbitrator could determine whether the Council had provided “necessary” funds or whether the College had unreviewable discretion to determine how to spend the money actually provided by the Council. Despite contractual language limiting the College’s discretion because the Agreement was fully funded, the Court of Special Appeals erred in holding that

whether the funds “necessary to implement this Agreement” were received and whether wage modifications were “made necessary by the shortfall” are not facts requiring third-party determination under the terms of the Agreement. They were determinations to be made “in the judgment of Management.”

[Appendix 2 at 18]. Here, the College requested \$7.4 million and received \$5.2 million.

¹The AAUP represents only full-time faculty. The SEIU and AFSCME represent adjunct faculty and maintenance employees; these unions had not yet negotiated collective bargaining agreements with the College that would be financed by the College’s request to the Council. Other employees and all administrators are not represented by any union.

This was more than the amount the College admitted was “necessary to implement the Agreement,” but insufficient to fund promises to employees not represented by the AAUP.² Furthermore, the Agreement expressly restricts the College’s asserted right to ignore the Agreement’s salary requirements.³

Although the Court of Special Appeals gave lip service to *Balt. County FOP Lodge No. 4*, its decision ignored this Court’s directive by basing its decision entirely on its interpretation of Section 8.5 of the Agreement. Furthermore, the Court of Special Appeals mistakenly relied upon *FOP Lodge 35 v. Montgomery County*, 437 Md. 618, 89 A.3d 1093 (2014). This Court held that under the Police Labor Relations Act, the County Council, as both the funding authority and the employer, 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.

The Court of Special Appeals’ decision means that if the College requests \$7.4

²The duty of fair representation requires the AAUP to serve the interests of all full-time 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 AAUP has no duty to ensure that other College employees receive promised benefits, especially where those promises are used to justify reduced salary and benefits contractually required for employees represented by the AAUP.

³Section 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.” Simply stated, the College has no right to “allocate and expend funds” to violate Section 8.2.

million, but receives \$7.399 million, the College can reject its collective bargaining agreement and force the AAUP into mediation and fact-finding, neither of which can enforce the Agreement. Maryland Education Code §16-412(a)(9) and (12).

B. The Decision Prohibits the AAUP from Grieving If the College Refuses to Pay a Salary Increase Fully Funded by the Council

If the Council provided the College's full monetary request, but the College refused to pay contractually required salary increases, the Court of Special Appeals decision would still prohibit the AAUP from arbitrating. The Court of Special Appeals held that an arbitrator lacks authority to require the College to honor its contractual salary commitments.

The Court of Special Appeals relied upon Section 3.2(C) of the Agreement, which defines the arbitrator's jurisdiction:

The jurisdiction and authority of the arbitrator of the grievance and the opinion and award of the arbitrator shall be confined exclusively to the interpretation and/or application of the express provision or provisions of this Agreement at issue between the Union and Management. The arbitrator shall have no authority to add to, detract from, alter, amend, or modify any provisions of this Agreement ...or ... to establish or alter any wage rate or wage structure;

The Court of Special Appeals ruled that this provision "makes clear that the implementation of faculty-wide wage rates and structures are not arbitrable disputes" because "The arbitrator shall have no authority to ... establish or alter any wage rate or wage structure[.]" [Appendix 2 at 18]. The Court of Special Appeals did not understand that it was the College, not the AAUP, that wants to "alter" the contractual salary increase required by Section 8.2.

Where, as here, the AAUP's grievance seeks neither a penny more nor a penny less

than required by the express language in Section 8.2 of the Agreement, the conclusion that the AAUP was asking an arbitrator to “establish or alter any wage rate or wage structure” is ludicrous. The AAUP clearly sought the “application of the express provision or provisions of this Agreement,” not deviation from the Agreement. The clause relied upon by the Court of Special Appeals was intended to apply where there was no agreement concerning the negotiation of the proper wage rate. It was not intended to apply where the College refuses to honor its contractual commitment.

II. THE COURT SHOULD DETERMINE WHETHER ATTORNEY GENERAL FROSH CORRECTLY STATED MARYLAND PUBLIC POLICY CONCERNING CLASS GRIEVANCES AND, IF SO, WHETHER MARYLAND PUBLIC POLICY REQUIRES REVERSAL OF THE COURT OF SPECIAL APPEALS DECISION

Where, as here, the Maryland Uniform Arbitration Act does not apply, 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, 96-98, 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). No Maryland court has determined whether the common law permits the filing of class grievances where the collective bargaining agreement is silent.

The Court of Special Appeals offered two contradictory explanations. First, it declined to address this issue:

Were this dispute arbitrable under the grievance provisions, a class arbitration

rather than separate arbitration hearings for each of the over 500 affected faculty members might have merit. But, because we conclude that a wage dispute arising from a revenue shortfall is not an arbitrable grievance, we do not reach the policy argument advanced by AAUP favoring class grievances. [Appendix 2 at 18, n. 18]

Second, it stated that the class grievance “was not permitted under the Agreement without the Board's consent” [Appendix 2 at 19]. If this Court grants the Petition, it must address the public policy question.

The State of Maryland filed an *Amicus Curiae* brief to the Supreme Court in *Epic Systems Corp. v. Lewis*, 584 U.S. —, 200 L. Ed. 2d 889 (2018) [Appendix 3]. In its Brief, the State argued that “The states and the federal government have long recognized that employees need the right to join together in concerted activities and should not be forced to sign away that right just to earn a living.” It followed that “Any contract term that requires an individual employee to waive his right to engage in concerted activities” was unlawful. The State forcefully argued that employees should not be forced to bring contract claims individually. [Appendix 3].

In *Epic Systems*, the Court rejected the State’s arguments, holding that the Federal Arbitration Act⁴ prohibited class arbitration by a group of employees with identical individual employment agreements. However, 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.

⁴9 U.S.C. §1 *et seq.*

Because neither the Federal Arbitration Act nor the Maryland Uniform Arbitration Act⁵ apply, the Court must fashion a common law solution. This Court has modified common law principles to reflect contemporary conditions or views. *Anne Arundel*; *Kelley v. R.G. Industries, Inc.*, 304 Md. 124, 497 A.2d 1143 (1985); *Jones v. State*, 302 Md. 153, 161, 486 A.2d 184 (1985); *Boblitz v. Boblitz*, 296 Md. 242, 462 A.2d 506 (1983); *Adler v. American Standard Corp.*, 291 Md. 31, 42-43, 432 A.2d 464 (1981); *Kline v. Ansell*, 287 Md. 585, 414 A.2d 929 (1980). See also *Seaborne-Worsley v. Mintiens*, 458 Md. 555, 567, 183 A.3d 141 (2018).

We urge the Court to conclude that Maryland public policy does not prohibit class grievances and that if the contract is silent, whether a contract permits class grievances is an issue of procedural arbitrability, *i.e.*, whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, which are for the arbitrators to decide. *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 84-85 (2002); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557-58 (1964).

⁵Maryland Code, Courts and Judicial Proceedings, Sec. 3-202 *et seq.*

CONCLUSION

For the above reasons, this case is deserving of review by this Court.

Respectfully submitted,

/s/ H. David Kelly

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MARYLAND RULE 8-112 CERTIFICATION

1. This Petition contains 3,029 words, excluding the parts of the Petition exempted from the word count by Rule 8-503.
2. This Petition complies with the font, spacing, and size requirements of Rule 8-112. This brief has been prepared with proportionally spaced type Times New Roman, 13 point.

/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 3rd day of December 2019, two copies of the Petition and Appendix were served on Appellee by first class mail, postage prepaid, to its counsel of record at the following address:

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