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Collective Bargaining in the Public Sector:

Carroll County Education Association, Inc. v. Board of Education of Carroll County

by Luke Mickum

Maryland's state and local governments provide many services to Maryland citizens. The quantity and quality of these services depends in no small part on the salaries and working conditions state and local employers must provide to the labor force that performs these services. Although state and local government employees are unionized, they do not enjoy all of the benefits and advantages of unionization enjoyed by their private sector counterparts. In private business, negotiations between employers and unions typically take place behind closed doors; whereas, in the public sector, citizens feel that they ought to have the right to attend labor negotiations that affect the quantity and quality of public services.

Prior to the recent decision of the Court of Appeals of Maryland in *Carroll County Education Association, Inc. v. Board of Education of Carroll County*,¹ Maryland law gave no clear answer to the question whether a government employer, such as the Board of Education of Carroll County (Board), had the right, in its own discretion, to open labor negotiations with its employee unions to the public, or whether the Board had to bargain with the union on the issue of whether to hold open meetings. *Carroll County* placed the issue squarely before the court when the Carroll County Teacher's Association (Association) sought a declaratory judgment against the Board declaring that the Board's unilateral resolution to open labor negotiations to the public was void.

The lower court granted the Board's motion for summary judgment and

held that the Board had no legal duty to bargain with its union on the issue of open meetings. On appeal, the court of appeals affirmed this decision and based its holding primarily on Maryland's Open Meeting Act (OMA),² which generally requires that all meetings of public bodies be open to the public. "Collective bargaining," the term applied to labor negotiations between employers and employee unions is an exception to the OMA open meeting requirement. According to § 11(a)(8) of the OMA, collective bargaining sessions with public sector unions "may" be closed to the public.³ Nevertheless, the appellate court found that the discretion to close labor negotiations to the public lay solely with the public employer.

This article examines the distinctions between public and private sector labor relations and the impact that *Carroll County* may have on public sector labor relations.

Statutes Construed

The conflicting statutes that formed the basis of the *Carroll County* opinion were the OMA and the Public Employee's Labor Relations Act (PERLA).⁴ The Board argued that the OMA gave it the right to open meetings in their sole discretion. The Association argued that allowing the Board to hold open meetings without first discussing the matter with the union constituted a failure to bargain in "good faith," a violation of § 6-408 of PERLA, which states that upon request by the employee union, a public school employer must confer in good faith at all

reasonable times with the employee organization.⁵

In deciding the issue in favor of the Board, the court held that the Board's unilateral decision to hold open meetings did not violate the PERLA good faith requirement, which only requires that a public employer come to the bargaining table with an open mind, prepared to negotiate. The court also based its holding on § 15 of the OMA, which states that in the event of "any conflict between this subtitle and other provisions of law relating to meetings of public bodies this subtitle shall apply."⁶ The court resolved the conflict between the OMA and PERLA in favor of open meetings.

Open Meetings vs. Collective Bargaining

In *Carroll County*, the court of appeals recognized the differences between public and private sector labor negotiations. One major difference is that, in the private sector, market forces greatly influence collective bargaining. On the other hand, in the public sector, legislative and political forces influence collective bargaining and add non-economic considerations to the bargaining process.

A second fundamental distinction between public and private sector labor relations is that strikes in the public sector are generally prohibited⁷ because public services (such as police protection), unlike most private sector services and products, are indispensable. Moreover, public sector strikes threaten state sovereignty.⁸

A third distinction is the difference

in the legal status of agreements between employers and their unions in the public and private sectors. Labor agreements negotiated in the private sector are legally binding upon execution by the parties. In the public sector, however, all final decisions are left to the public employer,⁹ and agreements are always subject to renegotiation in the event the legislature fails to allocate sufficient funds to finance the agreement.¹⁰ Thus, it may be unrealistic to compare public sector collective bargaining with collective bargaining in the private sector.

The Court of Appeals of Maryland approached *Carroll County* mindful of these distinctions and recognized that its decision would impair the public sector collective bargaining mechanism. In allowing open bargaining sessions, the court understood that it was weakening the union's bargaining position: at open meetings, public opinion ordinarily favors management because union demands, such as higher salaries, usually result in reductions in public services or higher taxes. Therefore, citizens attending open meetings often pressure unions to temper their demands.

In reaching its decision, the court examined statistics suggesting that open meetings inhibit discussion and the free interplay of ideas that take place at closed meetings. The court's decision to permit open meetings, in the face of these statistics, indicates that the court gave greater weight to the benefits accruing to the public through open meetings than to the potential impairment of the public sector collective bargaining process.

Effect on Maryland Law

Despite the many differences between public and private sector labor negotiations, the Association in *Carroll County* argued that the court should apply the same standards to the public sector that it would apply in a private sector labor case, in keeping with Maryland's tradition to follow private sector precedents in public sector labor cases.¹¹ The court was not persuaded and allowed the Board the discretion to insist on open meetings as a prerequisite to further negotiations or reaching a final agreement.

In the private sector, insistence on a topic of negotiation that does not in-

volve wages, hours or working conditions is strictly prohibited.¹² Thus, by allowing the Board to insist on open meetings (a topic not dealing with wages, hours or working conditions), the *Carroll County* decision marks a clear break with the tradition of following private sector precedents in public sector cases.

This aspect of the case should be restricted to its facts, however. In *Carroll County*, a statutory basis existed for allowing the Board to insist on a subject not involving wages, hours or working conditions. In cases where statutory justification does not exist, courts should apply private sector precedents to public sector labor law cases and allow as close an adherence to true collective bargaining as is feasible in the public sector.

Impact on Collective Bargaining

The general purpose of collective bargaining is to encourage a harmonious relationship between management and employees, as it is generally recognized that "refusals to confer and negotiate had been one of the most prolific causes of industrial strife."¹³ Therefore, collective bargaining should be encouraged whenever possible.

Despite its sound basis, the rationale of *Carroll County* has been criticized by the majority of courts, commentators and labor boards that have addressed the issue. The general view is that open labor negotiations in the public sector damage the collective bargaining mechanism established by legislatures to benefit public employees. The *Carroll County* court balanced the competing considerations of open meetings and collective bargaining in favor of open meetings; whereas, most commentators, courts and labor boards favor collective bargaining, which they consider to be more conducive to industrial peace and increased industrial productivity.¹⁴

Critics of the *Carroll County* rationale point out that open meetings suppress free and open discussion, cause proceedings to become formalized rather than spontaneous, induce rigidity and posturing, create the false impression that compromise is a form of retreat and, therefore, freeze negotiators into fixed positions from which they cannot recede.¹⁵ Judge Davidson, who wrote the dissenting opinion in *Carroll County*, agrees that open meetings destroy the effectiveness of the collective bargaining process.¹⁶

Even though open meetings are con-

sidered inconsistent with collective bargaining, nearly half of the states (including Maryland) that have both open meeting laws and collective bargaining statutes limit the public's participation in public sector labor negotiations.¹⁷ Citizens may attend open meetings but may not participate in them; though the public may view the negotiations,¹⁸ its input is limited to expressing its views before and after, but not during meetings. This limited participation balances the harshness of the open meeting requirement.

The End Result

The effects of open meetings on collective bargaining in Maryland will probably be similar to those noted by a Florida survey that analyzed the first two years of Florida's open bargaining experiment.¹⁹ One negative aspect of open bargaining noted by the survey was that the participants played to the audience. In addition, the normal adversarial relationship between unions and management became even more polarized.²⁰ As bargaining positions hardened, negotiations took longer, and the cost of bargaining increased. The survey, however, also noted some positive aspects of open meetings: union representatives tempered their demands and the public had a chance to express its views and prepare itself in advance for proposed reductions in public services.²¹

Carroll County may have political consequences affecting employer/employee relations. Labor unions strongly oppose open bargaining, which they view as a management device to rally the public's support against union demands.²² There has been very little strike activity in Maryland's public sector; however, Maryland public sector unions may view *Carroll County* as a threat to their bargaining power and may feel compelled to resort to illegal strikes. Thus, *Carroll County* may represent a step backwards by fostering antagonism between unions and management which may result in more strike activity.

Carroll County represents a rational assessment of competing views. The decision fairly balances the interests of unionized public employees with the public's interest in open government. Although the impact of *Carroll County* may not be felt for some time, it represents a significant step in the refinement of a discrete body of public sector labor law. ⚖️

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already mastered the skills that they are trying to impart and are familiar with the conventions of the profession. They know that putting legal skills into action can do a lot of harm. They have seen legal arguments intensify and even initiate disagreements rather than resolve them; they have seen students who—having just learned to say “inter alia” or divide their arguments into three numbered sections (and even perhaps remember the third part of the argument)—feel that because of these skills they have somehow become superior to other citizens; they have seen first-year law students disdain the “fuzzy” thinking of other citizens and even of their spouses and friends, so that they exhibit an aggressive overconfidence that is sometimes never outgrown; they are well aware of judges who think that some special skill entitles them to a superior place in the resolution of social problems. Teachers may love their craft and the skills of their profession, but they are at least as aware of the limitations as anyone else. They spend a great deal of their academic effort questioning basic assumptions about how law is used, at attempting to locate the limitations of law. They want students to master the techniques and then to transcend them.

Sooner or later (and this misperception tends to last indefinitely) many students come to believe that their teachers know nothing, are not there at all. The most common version of this belief is that teachers are not interested in practical things. Put bluntly, students adopt this attitude because their teachers insist that they continue thinking about problems when they are tired of them. Students and alumni criticize teachers as “too abstract,” “too impractical,” “too academic,” but these are merely euphemisms for exasperation. Most law teachers have practiced law, many still do, and some will go back to the practice full time. Of course, the faculty’s academic interests may differ from the students’ interests from time to time, but there is no real doubt that the skills being taught are generally the skills needed in practice. Law students are taught to be precise, to develop the capacity to foresee potential weaknesses in their own arguments, to be orderly, to be complete, to be imaginative in the construction of legal arguments. These are the intellectual skills that the practice of law requires.

Another version of the belief that the teacher knows nothing is the distress-

singly common view that law teachers are trying to convince their students that there are always two sides to every argument. Many law students believe they have seen deeply into the purposes of legal education when they conclude that any one argument is as good as any other, that the important thing is just to be able to come up with an argument. Students might come to this conclusion because teachers tend to raise additional questions in response to most answers. The perceived message is that the student is to learn to make an argument, any argument; one must be as good as another since there are problems with all arguments. This perception is almost completely wrong. Teachers, of course, question answers so that students will learn to discover possible weaknesses in even their strongest arguments. Moreover, most teachers want students to be able to judge quality for themselves. They do not make a habit of telling students when their answers are “right” because a lawyer must learn to judge independently, by his own standards, when an argument is good enough. The point of all those questions is, in fact, to show students how to judge quality in argument, not to urge the view that quality is irrelevant.

I do not mean these observations to be self-serving. There is some truth in all the misperceptions that I have described. Every faculty member has many weaknesses, as does legal education in general. But the misperceptions distort—even oppose—what I think most law teachers know to be true. In this way they illustrate how powerful is the urge that students feel to diminish their teachers. Legal education is still fairly rigorous, and it involves many real frustrations and disappointments. Only some of these are caused by faculty members. To caricature and ultimately to try to eliminate the teacher that stands in front of them is a way for students to make the teacher responsible for all the difficulties associated with becoming educated in law. Law students in this regard only share (and perhaps enlarge) the near universal desire of students to avoid taking responsibility for their own education. Sadly, like any group subject to fairly constant misperception, teachers are under pressure to internalize the distorted image of themselves reflected in their students’ eyes. Much of the malaise in legal education today may be as much a consequence of

the resulting personal unhappiness as it is of any real ineffectiveness inherent in prevalent teaching techniques.



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NOTES

- ¹ 294 Md. 144, 448 A.2d 345 (1982).
- ² MD. ANN. CODE art. 76A, §§ 7-15 (1980).
- ³ MD. ANN. CODE art. 76A, § 11(a)(8) (1980).
- ⁴ MD. EDUC. CODE ANN. §§ 6-401, 6-411 (1978 & Supp. 1983).
- ⁵ MD. EDUC. CODE ANN. § 6-408 (1978 & Supp. 1983).
- ⁶ MD. ANN. CODE art. 76A, § 15 (1980).
- ⁷ Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 DUQ. L. REV. 357, 376-378 (1972); MD. EDUC. CODE ANN. § 6-410 (1978).
- ⁸ Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156 (1974); Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, 79 YALE L.J. 805 (1970).
- ⁹ MD. EDUC. CODE ANN. § 6-408(7) (1978).
- ¹⁰ MD. EDUC. CODE ANN. §§ 6-408(7) and 6-511 (1978).
- ¹¹ See, e.g., Montgomery County Council of Supporting Services Employees, Inc. v. Board of Education, 277 Md. 343, 354 A.2d 781 (1975); Offutt v. Montgomery County Board of Education, 285 Md. 557, 404 A.2d 281 (1979).
- ¹² NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342, 349 (1958).
- ¹³ Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 211 (1964) citing Labor Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 42-43 (1937).
- ¹⁴ Comment, *Collective Bargaining and the California School Teacher*, 21 STAN. L. REV. 340, 358-359 (1969); Board of Selectmen of Marion v. Labor Relations Commission, 7 Mass. App. Ct. 360, 362, 388 N.E.2d 302, 303 (1979); Talbot v. Concord Union School District, 114 N.H. 532, 535, 323 A.2d 912, 913-914 (1974); NLRB v. Barlett-Collins Co., 639 F.2d 652, 656 (10th Cir. 1981).
- ¹⁵ Carroll County Education Association v. Board of Education of Carroll County, 294 Md. 144, 151, 448 A.2d 345, 352 (1982) (Davidson, J., dissenting).
- ¹⁶ *Id.*
- ¹⁷ Levine, *The Status of State “Sunshine Bargaining” Laws*, 31 LAB. L.J. 709, 713 (1980).
- ¹⁸ MD. ANN. CODE art. 76A, § 7 (1980).
- ¹⁹ Levine, *supra* note 17, citing 832 Gov’t EMPL. REL. REP. (BNA) 16 (October 15, 1979).
- ²⁰ *Id.*
- ²¹ *Id.*
- ²² Levine, *supra* note 17, at 709-710.