

IN RE: BOARD OF
EDUCATION OF HOWARD
COUNTY V. RENEE FOOSE
AND RENEE FOOSE v.
BOARD OF EDUCATION
OF HOWARD COUNTY

BEFORE THE
MARYLAND
STATE BOARD
OF EDUCATION
Opinion No. 17-13

OPINION

INTRODUCTION

The Board of Education of Howard County (local board) filed a Petition for Declaratory Ruling to which Dr. Renee Foose, local superintendent, responded. Thereafter, Dr. Foose filed her own Petition for Declaratory Ruling and moved to consolidate the two cases. Both parties filed briefs addressing the jurisdiction of this Board to adjudicate the Petitions. In February, this Board ruled that it had primary jurisdiction over the case

FACTUAL BACKGROUND

On January 11, 2017, the local superintendent filed a complaint in Howard County Circuit Court against the local board and its members seeking declaratory and injunctive relief. Dr. Foose requested that the Circuit Court issue an Order declaring:

- (1) The contract entered into by the Board of Education and Daniel Furman [Esq.] on December 21, 2016 is void.
- (2) That the resolution passed by the Board on December 5, 2016 granting the Board authority to engage, direct, communicate with, or contract for legal services with any law firms or lawyers on behalf of HCPSS or the Board is void.
- (3) That the resolution passed by the Board on December 5, 2016 granting the Board authority to substitute its own designee for the Superintendent's designee on the Budget Review Committee is void.
- (4) That the resolution passed by the Board on December 5, 2016 requiring the Board staff, including the Board Administrator, secretarial staff, and Internal Auditor, to report to and be directed by the Board is void.
- (5) Dr. Foose has the right to be notified of and attend all meetings of the Board of Education and board committees except those considering the tenure, salary, or administration of the office of the county superintendent and that meetings held by Board or

board committees discussing Dr. Foose's performance do not fall under this exception.

On January 23, 2017, the local board filed a Petition for Declaratory Ruling with the State Board. It requested this Board to declare that:

- (1) the local board has the authority to engage legal counsel [Daniel Furman, Esq.] of its choice;
- (2) the local board's contract with its legal counsel is not subject to the approval of the local superintendent;
- (3) the local board has the authority to hire, fire, and oversee Board staff that serve and report only to the Board.

On February 6, 2017, Dr. Foose filed an amended complaint in Howard County Circuit Court adding breach of contract and anticipatory breach of contract claims. Then on February 7, 2017, Dr. Foose filed her own Petition for Declaratory Ruling with this Board seeking nine declaratory rulings:

- (1) The local superintendent has the authority to manage and administer the day-to-day administration of HCPSS.
- (2) The local board does not have the authority to require that the superintendent and her staff provide advance notice to the board of meetings with county and State officials.
- (3) Dr. Foose has the right to be notified of and to attend all meetings of the board and board committees, except the parts of meetings considering her tenure, salary, or administration.
- (4) Pursuant to *Venter v. Board of Education of Howard County*, 15 Md. App. 64, *cert. denied* 419 Md. 561 (2009), the board has no authority to terminate non-certificated employees, including those employees over whom the board has attempted to assert such authority.
- (5) The board chair and other board members do not have the authority to direct the Ethics Panel to reschedule hearings, communicate with parties to ongoing Ethics Panel proceedings about the proceedings, or otherwise interfere with ongoing Ethics Panel matters.
- (6) The board does not have the authority to order reimbursement to Barbara Krupiarz for monetary sanctions that were imposed on her by the Circuit Court for Howard County.

- (7) The provision, Section 4-205(d) of the Education Article, which provides that a contract is not valid “without the written approval of the county superintendent,” applies to HCPSS contracts, including the contract with attorney Daniel Furman.
- (8) The board does not have the authority to prevent the local superintendent from engaging, directing, communicating with, or contracting for legal services with any law firms or lawyers on behalf of HCPSS.
- (9) Daniel Furman does not have the authority to be given unfettered access to student and employee records.

The local superintendent asked that both Petitions be consolidated into one matter.

During the course of the filings in this case, the Board directed both parties to address the jurisdiction of the Board to hear and proceed with this matter given the pending proceeding in Howard County Circuit Court.¹ We issued an Opinion on February 28, 2017 concluding that the State Board had primary jurisdiction in the matter. We consolidated both cases.

STANDARD OF REVIEW

In declaring the true intent and meaning of education law, the State Board exercises its independent judgment on the record before it. COMAR 13A.01.05.05E.

LEGAL ANALYSIS

Request to Transfer Case to Office of Administrative Hearings (OAH)

The superintendent, alleging a host of factual disputes, requests that this case be transferred to OAH. That request is inappropriate in this proceeding. Specifically, in cases in which the parties petition for declaratory rulings, the State Board’s legal obligation is to issue an “interpretation of a public school law or regulations of the State Board material to an existing controversy.” COMAR 13A.01.05.02 (D). Neither that regulation nor the statute giving the State Board authority to explain the true intent and meaning of State education law, Ed. Art. §2-205(e), envision that a declaratory ruling proceeding before this Board is one in which the underlying factual controversy between the parties was intended to be resolved. Thus, we will proceed to declare the meaning of the State education laws at issue here and will confine this proceeding to that task alone.

¹ In the Circuit Court, Dr. Foose filed a request for the issuance of a show cause order. The Circuit Court issued an Order to Show Cause on January 18, 2017, requiring the local board to show cause by filing a written response on or before March 17, 2017 why the superintendent’s requested relief should not be granted and setting a hearing on March 30, 2017. That hearing has since been canceled and no new court date has been set.

A. Authority to Approve Contracts

Several of the declarations requested involve the superintendent's authority to approve contracts and the local board's authority to contract to hire legal counsel. Specifically, the local board requests a declaration that its contract for legal counsel is not subject to approval by the local superintendent. The superintendent requests a declaration that no contract of the board is valid without her approval, including the board's contract to obtain legal counsel.²

The interpretation of two statutes is at issue here. One statute gives the board of education the right "to retain counsel to represent it in legal matters that affect the board and to contract for payment of a reasonable fee to the counsel." Ed. Art. §4-104(a). The other statute states that "[a] contract made by a county board is not valid without the written approval of the county superintendent." Ed. Art. §4-205(d).

It is undisputed that the local board entered into a contract with Daniel Furman, Esq. from December 21, 2016 to June 30, 2017 for \$24,999 to represent the Board in a wide variety of legal matters. (*See Consultant Agreement*, Ex. 12 attached to Superintendent's Petition for Declaratory Ruling). It is undisputed that Dr. Foose declined to approve that contract. (*Id.* Ex. 2). The local board argues that its specific statutory authority to contract for legal services exempts its contract for legal services from approval by the superintendent. The superintendent asserts that all contracts are subject to her approval and, without her approval, the contract for legal services is not valid.

When called upon to interpret statutes, we look to ascertain the intent of the legislature. Intent can be found in the plain words of the statutes. If the plain words are clear and unambiguous, we look no further to ascertain intent. *See, e.g., Board of Educ. of Garrett County v. Lendo*, 295 Md. 55, 62 (1982). We can find no ambiguity in either statute. The words of the statutes are clear - - a board may contract to retain counsel to represent it, but no board contract is valid unless approved in writing by the Superintendent. The words of both statutes could not be plainer.

Where two statutes deal with the same subject matter (here, contract matters), they must be construed together if they are not inconsistent with one another. Thus, to the extent possible, full effect should be given to each one. This is true notwithstanding the fact that the statutes may

² The specific declarations sought are:

By the Board:

- (1) the local board has the authority to engage legal counsel [Daniel Furman, Esq.] of its choice;
- (2) the local board's contract with its legal counsel is not subject to the approval of the local superintendent;

By the Superintendent:

- (7) The provision, Section 4-205(d) of the Education Article, which provides that a contract is not valid "without the written approval of the county superintendent," applies to HCPSS contracts, including the contract with attorney Daniel Furman.

have been enacted at different times with no reference to each other. In that case, the rule is that statutes must be harmonized to the extent possible. *Id.*

The superintendent argues that the statutes can be harmonized and given full effect. She asserts that the board's right to contract for counsel and her right to approve or disapprove all contracts are "part of the checks and balances that exist throughout the entirety of the Education Article." (Superintendent's Opposition at 14). In that way, the statutes do not conflict, but rather work together to perform a salutary purpose.

The board, on the other hand, argues the statutes are in conflict and cannot be harmonized. The board asserts that the superintendent's general right to approve a contract cannot act as a veto of the board's specific right to select and contract with counsel of its choice. The board urges us to apply a rule of statutory construction which states:

when two statutes, one general and one specific, are found to conflict, the specific statute will be regarded as an exception to the general statute. In such a case, the court should give effect to the specific statute in its entirety and should retain as much of the general statute as is reasonably possible.

Maryland-Nat'l Capital Park and Planning Comm'n v. Anderson, 395 Md. 172, 194 (2006).

The board describes the conflict between the statutes as one that results in giving the superintendent the "sole authority to decide whether the board can hire counsel" eliminating the "board's ability to fulfill its legal duty." (Board's Petition at 11).

We are not convinced that a conflict between the statutes actually exists. The approval statute does not give the superintendent the sole authority to control the board's choice of counsel, nor does it eliminate the board's right to choose its counsel. It merely places some boundaries around that right - a check and balance, so to speak, subject to the superintendent's assessment of the appropriateness of the contract, but not necessarily of the board's choice of counsel. Of course, the superintendent must exercise her approval authority within the bounds of law and reason. She may not withhold her approval for arbitrary or capricious reasons.

The statute that gives the Board authority to retain its own counsel defines the matters for which board counsel may be retained. They are "matters that affect the board." Ed. Art. §4-101(a)(i). We note that the contract under which Mr. Furman was retained as counsel defines the matters under his purview. It states that he may provide services to include "representing the Board regarding legal issues typical of those encountered by a Board of Education. These include:

[M]atters related to general liability, student attendance, business enterprise, Board operations and support functions, education law, COMAR and the Maryland Annotated Code, FERPA and data privacy laws, HCPSS policies, residency and enrollment, labor law, labor relations, and union negotiations, federal and other grants, Maryland Open Meetings Act and the Maryland Public Information

Act, federal, state and local legislation affecting the Board and/or school system, and other legal services as determined by the Board.

(Superintendent's Petition, Ex. 12).

The matters listed in the contract could conceivably encompass any and every possible legal issue that occurs in the school system. As long as the Board utilizes its counsel to address only matters that affect the board, it will be acting within the bounds of the law. We caution the board not to overreach into areas that are the domain of the superintendent and her staff.

We point out that the statute establishing the Board's authority to retain counsel also defines the method through which it may do so. It may do so by "contract for payment of a reasonable fee to counsel." Ed. Art. §4-101(a)(ii). It may not, therefore, employ its own counsel as a school system employee.

Thus, we declare that each statute means what it says. The local board has the authority to engage counsel of its own choice by contract to deal with matters that affect the board. A contract made by a county board is not valid without the written approval of the county superintendent, including a board's contract for legal services. If the Superintendent's decision to disapprove the contract was neither arbitrary nor capricious, the contract for legal services at issue here is not valid. For the reasons set forth *infra*, we decline to resolve this underlying factual dispute.

B. Supervisory Authority Over Staff

It is undisputed that the board passed a resolution on December 5, 2016 that "Board staff including the Board Administrator, secretarial staff, and Internal Auditor report to, and are directed solely by and can be terminated only by the Board of Education." (Superintendent's Petition, Ex. 3, ¶50). It is undisputed that the Superintendent advised the Board that it had no authority to adopt that resolution, and that the resolution was, thus, "legally invalid." (Board's Petition, Ex. E at 4).

The local board seeks a declaration that it has the authority to hire, fire and oversee board staff who serve and report only to the board, specifically, the Board Administrator, secretarial staff, and Internal Auditor. (Board's Petition at 12). The superintendent seeks a declaration that the resolution passed by the Board on December 5, 2016 requiring the Board staff, including the Board Administrator, secretarial staff, and Internal Auditor, to report to and be directed by the Board is void.

The central question here is who has control over the supervision and termination of the staff persons who work solely for the board. Long before this dispute arose, the roles of the board and the superintendent in supervising staff were defined in Board Policy. That policy, ironically, is built on the principle that the board and superintendent "will collaborate in the effective governance and administration of the HCPSS to achieve its mission and goals with the understanding that the roles and responsibilities of the Board and Superintendent are distinct." (Board's Petition, Ex. H at 2). As to staff, the policy states:

A. The Board will direct and supervise the Superintendent, the Ombudsman, and the Administrative Specialist to the Board.

B. The Superintendent will oversee the operation, administration, and organization of the school system and will take authority over and accountability for Department of Education staff.

(*Id.* at 9).

The policy, thus, creates a clear distinction between the board's responsibility for staff reporting only to the board and the superintendent's responsibility for staff reporting to the superintendent. The Board Handbook reiterates that division of authority. "The Board employs and evaluates the Superintendent and Board Staff (Administration, Internal Auditor and Ombudsman). The Board holds the Superintendent accountable for the performance of the school system" (Board's Petition, Ex. I at 14).

The law governing supervision of school staff appears to support that division of authority. It explicitly designates to the superintendent the authority to supervise, transfer, recommend for promotion or recommend for dismissal "all professional assistants of the office of county superintendent and [a]ll principals, teachers, and other certificated personnel." Ed. Art. §6-201(b)(2). The law does not specifically address who supervises other types of school system staff, such as clerical staff, non-professional staff, or non-certificated staff. To fill that statutory void, the superintendent presents several arguments. She bases much of her argument on her authority to appoint staff. Under the various appointment statutes, there are five types of staff appointed in school systems:

- (1) Professional assistants of the office of the county superintendent, Ed. Art. §6-201(b)(1);
- (2) All principals, teachers, Ed. Art. §6-201(b)(1);
- (3) Other certificated individuals, Ed. Art. §4-103;
- (4) Non-certificated personnel, Ed. Art. §4-103; and
- (5) Clerical and other non-professional personnel, Ed. Art. §6-201(c).

The superintendent's role in the appointment of professional assistants, principals, teachers, other certificated personnel, and non-certificated personnel, by law, is limited to *recommending* such individuals for appointment *by the board*. See Ed. Art. §6-201 and §4-103. The superintendent has the authority to hire directly only "clerical and other non-professional staff," apparently without board approval. Ed. Art. §6-201(c).

We recognize that the law gives the superintendent a role in the staff appointment process, but it does not necessarily follow that the superintendent then becomes the supervisor of all staff appointed either by the board or by the superintendent directly. The superintendent's arguments do not fill the void in the statute. We return to the issue of the statute's silence on who supervises clerical, non-professional, and non-certificated staff.

Here the local board has, by its own written policy, filled the statutory void. Board policy states that the board has supervisory power over employees who report directly to it whether non-certificated, clerical, or non-professional. (Board's Petition, Ex. H at 9). When the law is silent, courts often look to the general power the legislature delegated to the agency to determine whether the agency's interpretation of its power is encompassed in the general powers. *See* Richard Pierce, Jr., *Administrative Law Treatise* §35 at 143 (4th ed. 2002). It is our view that the legislature has delegated authority to the local board sufficient to encompass the local board's policy on supervision. Specifically, in addition to its power to create and govern the school system, *see, e.g.*, Ed. Art. §§4-101, 4-109, the legislature gave each local board the power to adopt bylaws and rules "for the conduct and management of the county public schools." Ed. Art. §4-108. Certainly, the supervision of employees reporting solely to the board is within that delegated authority.

This is an interpretation of the laws that is most reasonable in the context of basic tenets of the employment relationship - - an employee reports to and is accountable to the person(s) for whom he/she works. Indeed, when we interpret our statutes we are called upon to interpret them in a way that is not inconsistent with, or ignores, common sense or logic. *Higginbottom v. PSC*, 412 Md. 112, 121 (2009); *Frost v. State*, 336 Md. 125, 137 (1994). In addition, we must avoid construing a statute in a manner that leads to an illogical or untenable outcome. *Noel S. Liverpool v. Baltimore Diamond Exchange*, 369 Md. 304, 3018 (2002). In our view, it would serve no reasonable purpose to place sole authority to supervise board-only employees in the hands of the superintendent. It would certainly unbalance the tenuous balance of power between the board and the superintendent. We do not countenance such a result.

Of course, the board must be prudent in who it decides are to be board-only employees. It cannot legally use its authority to hire its own personnel to establish a shadow management team or to become micromanagers of the superintendent. The local board must be cognizant of its role as policy maker and the superintendent's role as the administrator of the school system. If it were possible to create a bright line between each role, life in the education community in Howard County would be more peaceful. But, there is no bright line. Just the tension of proper checks and balances.

C. Superintendent's Authority to Manage the Day to Day Operations of the School System

The superintendent seeks a declaration that she has the authority to manage the day-to-day operations of the school system. The laws governing the local superintendent's powers and duties support that proposition. Specifically, a local superintendent has supervisory power over school system staff. Ed. Art. §6-201(b)(2). In addition, among other things, she evaluates the program of instruction, develops programs of professional improvement for staff, consults and advises principals and teachers, and recommends to the board curriculum, textbooks, materials and equipment. *See* Ed. Art. §4-205.

In exercising her power to manage the school system, however, the superintendent is not autonomous nor is the board to be a micromanager of the Superintendent or her staff. If the board

needs information or documents, it should direct its requests to the superintendent, not to a staff person. Each party here must understand and be cognizant and respectful of the roles they are to play collaboratively in operating a successful school system. To the detriment of all, such is not the case currently in Howard County.

D. Superintendent's Right to Attend Meetings

The superintendent seeks a declaration that she has the right to be notified of all, and to attend all, meetings of the board and board committees, except the parts of meetings considering her tenure, salary or administration. The law is crystal clear - - "Unless the tenure or salary or administration of the office of the county superintendent is under discussion, the county superintendent or the county superintendent's designee shall attend all meetings of the county board and its committees." Ed. Art. §4-102(b).

E. Other Declarations Requested by the Superintendent

Because each side in this matter does not respect the roles the other was given to exercise in operating the Howard County Public School System, we are presented with a series of requests for declaratory rulings on issues that do not directly involve the interpretation of a specific State education law. The superintendent wants this Board to declare:

- The board chair and other board members do not have the authority to direct the Ethics Panel to reschedule hearings, communicate with parties to ongoing Ethics Panel proceedings about the proceedings, or otherwise interfere with ongoing Ethics Panel matters.
- The board does not have the authority to order reimbursement to Barbara Krupiarz for monetary sanctions that were imposed on her by the Circuit Court for Howard County.
- The board does not have the authority to prevent the local superintendent from engaging, directing, communicating with or contracting for legal services with any law firms or lawyers on behalf of HCPSS.
- Daniel Furman does not have the authority to be given unfettered access to student and employee records.

We decline to issue rulings on those issues at this time but rather will stay any decision on them for 60 days. In the exercise of our visitatorial powers, we direct both parties to attempt to mediate their disputes not only to resolve the issues listed above, but also to resolve the underlying controversies between them, including the factual issues involved in the superintendent's decision to disapprove the Furman contract.

As a guiding principle in their discussions, the parties are reminded that the board policy

exhorts them to “collaborate in the effective governance and administration of the HCPSS to achieve its mission and goals with the understanding that the roles and responsibilities of the Board and Superintendent are distinct.” (Board’s Petition, Ex. H at 2).

We direct the parties to file a joint written report on or before May 30, 2017 to this Board about their progress.

CONCLUSION

For the reasons stated herein, we issue the following declarations:

- (1) The local board has the authority to engage legal counsel by contract, subject to the superintendent’s written approval of the contract, which approval shall not be unreasonably withheld.
- (2) The local board has the authority to supervise Board staff that serve and report only to the Board.
- (3) The superintendent has the authority to supervise all other school system staff and the authority to manage and administer the day-to-day operation of HCPSS.
- (4) The superintendent has the right to be notified of and to attend all meetings of the board and board committees, except the parts of the meetings considering her tenure, salary, or the administration of her office.

We decline to issue other requested declaratory rulings as described herein. We stay further rulings for 60 days. We direct the parties to attempt to mediate their disputes and to report their progress jointly, in writing, to this Board on or before May 30, 2017. In doing so, we suggest the parties consider hiring a mutually agreed-upon third-party mediator to assist in the process.

Signatures on File:

Andrew R. Smarick
President

Chester E. Finn, Jr.
Vice-President

Michele Jenkins Guyton

Laurie Halverson

Stephanie R. Iszard

Rose Maria Li

Barbara J. Shreeve

Madhu Sidhu

Guffrie M. Smith, Jr.

Laura Weeldreyer

Andrew R. Smarick, President, dissent:

I dissent only from the first declaration. I would find the statutes in conflict and read the law as generally requiring the superintendent's written approval of a contract, except for situations in which the local board retains counsel to handle matters related to the tenure, salary, or administration of the office of county superintendent. In those situations, I believe the local board should have the authority to approve a contract with counsel without requiring the superintendent's written approval.

March 28, 2017