

IN THE COURT OF APPEALS OF TENNESSEE  
EASTERN SECTION AT KNOXVILLE

BLOUNT COUNTY EDUCATION  
ASSOCIATION,

Plaintiff/Appellant

v.

BLOUNT COUNTY BOARD OF EDUCATION  
AND WILLIAM GARY PACK, DIRECTOR OF  
BLOUNT COUNTY SCHOOLS,

Defendants/Appellees

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\* No. E2001-00729-COA-R3-CV  
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Brief of *Amicus Curiae* Tennessee School Boards Association  
in Support of Defendant/Appellee Blount County Board of Education

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ORAL ARGUMENT REQUESTED

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COMES NOW, the Tennessee School Boards Association (hereafter “TSBA”) and submits this brief in support of its *Motion For Permission to File an Amicus Curiae Brief In Support of Defendant/Appellee Blount County Board of Education.*

**STATEMENT OF THE CASE**

TSBA refers this Court to the Statement of the Case appearing at page 8 of the Brief of Defendants/Appellees Blount County Board of Education and William Gary Pack, Director of Blount County Schools.

**STATEMENT OF FACTS**

TSBA refers this Court to the Statement of Facts contained at page 9 of the *Brief of Defendants/Appellees Blount County Board of Education and William Gary Pack, Director of Blount County Schools* and incorporates those facts by reference herein.

## INTEREST OF AMICUS

TSBA is a not-for-profit organization, operated exclusively for charitable and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1954. TSBA is recognized in T.C.A. § 49-2-2001 as the organization and representative agency of Tennessee's public school board members and its membership is comprised of 137 county, city and special school district boards of education throughout the state. The purpose of TSBA, as stated in Article II of the *TSBA Constitution and Bylaws*, is to work for the general advancement and improvement of public education in Tennessee.

Of TSBA's 137 member school boards, 91 currently engage in collective bargaining with its professional employees. The case before this Court involves issues of first impression in Tennessee and this Court's decision will serve as guidance for school boards across the state as they struggle to reclaim the authority granted them by the General Assembly to control and manage the school systems under their care. All Tennessee school boards have an interest in preserving their authority and responsibility, as elected representatives of the taxpayers in their communities, for educating the students in their respective school districts and maintaining efficient and effective schools.

## ARGUMENT AND CITATION OF AUTHORITY

### **I. Teacher transfers, layoff and recall, and non-discrimination are not mandatory subjects for negotiation under the Education Professional Negotiations Act, T.C.A. 49-5-601 et seq.**

The Education Professional Negotiations Act ("EPNA"), T.C.A. § 49-5-601 *et seq.*, establishes a collective bargaining procedure for school districts and professional employee organizations. The Act sets out the rights and responsibilities of both parties and requires good faith negotiations on eight (8) specific items: 1) salaries or wages; 2) grievance procedures; 3)

insurance; 4) fringe benefits (not including pensions or retirement programs); 5) working conditions; 6) leave; 7) student discipline procedures; and 8) payroll deductions. *T.C.A. § 49-5-611(a)*.

In this case, the Blount County Education Association and the Tennessee Education Association argue that the term “working conditions” should be given the broadest possible interpretation to include any matter that touches upon the activities of teachers, even if it involves a matter of policy or managerial prerogative. *Reply Brief, p.4*. It cannot be disputed that teachers are the keystone of any school system and virtually everything that happens in a school will, in some way, affect teachers. If the extraordinarily broad interpretation offered by the BCEA and TEA were adopted, Tennessee’s boards of education could be required to negotiate on any item the union chooses, including such things as parking spaces (how far teachers must walk to their classrooms), custodial matters (how and when classrooms will be cleaned), employment decisions (assignments, transfers, abolition of position due to decreased enrollment), student assignment (how many and what kind of children will be in a given classroom) and even construction of new schools (involving assignments, classroom layout, building materials)! This is an untenable position that would irreparably damage the ability of elected boards of education and their Directors of Schools to effectively manage the public schools.

A. The express language of the statute demonstrates that the legislature did not intend an expansive definition of the term “working conditions.”

A key rule of statutory construction provides that the legislature is presumed to use each word deliberately and that the use of each word conveys some intent and has a specific meaning and purpose. *Scales v. City of Oak Ridge*, 53 S.W.3d 649, 654 (Tenn. 2001). Furthermore, statutes are to be construed so that “no part will be inoperative, superfluous, void or insignificant

... and further to give effect to every word, phrase, clause and sentence ... in order to carry out the legislative intent.” *Tidwell v. Collins*, 522 S.W.2d 674, 676-77 (Tenn. 1975). The extraordinarily broad interpretation of “working conditions” advocated by the TEA and BCEA in this case would render meaningless the seven other mandatory items included in the statute. Under their definition, each of the other subjects – which clearly touch upon the activities of teachers – would be encompassed by the term “working conditions.” If that had been the intent of the legislature, it could have adopted much simpler language requiring, for example, negotiations on salary, wages and working conditions.<sup>1</sup> This the legislature did not do.

Moreover, the Act provides that “[n]othing shall prohibit the parties from agreeing to discuss **other terms and conditions of employment** in service, but it is not bad faith... to refuse to negotiate on any other terms and conditions.” *T.C.A. § 49-5-611(b)(emphasis added)*. This language can only mean that there exist other subjects relating to employment that do not fall within the mandatory items for negotiations. If, as TEA suggests, any subject that touches on the activities of teachers is a “working condition,” there would be no “other terms and conditions of employment” for permissive negotiation and this provision would be meaningless.

**B. The legislative history of the EPNA clearly indicates that the legislature intended the final version to narrow – not broaden – the scope of negotiations.**

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<sup>1</sup> This Court previously recognized this principle in *Hamblen County Education Association v. Hamblen County Board of Education*, 892 S.W.2d 428 (1994). In that case, it was held that an early retirement incentive program did not fall within the definition of “wages and salaries” and was therefore not a mandatory subject for negotiation. In so concluding, the court cited with approval the following language from the Iowa Supreme Court:

We are convinced that the legislature did not intend to give “wages” the broad application contended for here. **If it had intended to include all “wage-related” remunerations of all species within the term “wages,” it would have been unnecessary to include in the list of mandatory subjects so many wage-related items such as insurance, vacations, overtime compensation, and supplemental pay**

*Ft. Dodge Community Schools v. Public Employee’s Relations Board*, 319 N.W.2d 181 (Iowa 1982) (emphasis added). This same reasoning applies with equal force in the instant case.

Legislative intent or purpose is to be ascertained primarily from the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language. *Natural Gas Distributors, Inc. v. State*, 545 S.W.2d 736 (Tenn. 1977). If, however, a statute is ambiguous, it is appropriate to consider the legislative history to determine the legislative intent. *Hamblen County Education Association v. Hamblen County Board of Education, et al.*, 892 S.W.2d 428, 434 (Tenn. Ct. App. 1994). In this case, the chancery court concluded that the ordinary meaning of the term “working conditions” was the physical condition of the workplace. Thus, there would ordinarily be no reason to resort to the legislative history. Even so, the insistence of the BCEA and the TEA that the term is subject to a broader interpretation raises the specter of ambiguity and therefore the trial court was justified in such an examination.

The legislative history of the EPNA reveals that the original version of the bill contained a number of provisions that were removed before passage of the act that is now the law in Tennessee. *See Appellee’s Brief*, pp. 17-19. Importantly, the sponsor of the legislation acknowledged just prior to the bill’s passage that its scope was “sharply narrowed” from the original bill. Senator White stated:

...Certainly this bill is a weaker bill from the standpoint of the educational association... It sharply narrowed the scope on which the parties could negotiate. We’ve even more sharply narrowed it with the amendments.

This discussion simply cannot be reconciled with BCEA’s contention that the inclusion of the term “working conditions” was designed to encompass all of the items removed from the original bill as well as transfer, layoff and recall, non-discrimination and the laundry list of other items put forth by the BCEA. *See Appellant’s Brief*, p.20. It is clear from the sponsor’s statement that the legislature believed the final version accorded **fewer** rights to the teacher’s union. If, in fact,

the legislature intended the term “working conditions” to encompass the items removed from the original bill, as well as any other subject that might tangentially touch upon the activities of teachers, then certainly the sponsor would not have described the bill as a “sharply narrowed” version.<sup>2</sup>

C. The 1998 Amendment to T.C.A. § 49-2-301(f)(1)(EE) and its legislative history clearly indicate that transfers have never been considered a mandatory item for negotiations.

The EIA, enacted in 1992, was a major reform in school governance. The Act provided increased accountability measures for school boards, gave boards the authority and (ultimately required them to) appoint a director of schools and redistributed the responsibility for personnel decisions.<sup>3</sup> Thus, boards of education now play a limited role in personnel decisions and matters such as transfer and assignment of personnel are the exclusive responsibility of the director. Specifically, the EIA in T.C.A. § 49-2-301(f)(1)(EE) authorized the director of schools to employ, transfer, suspend, non-renew and dismiss all personnel.

After the passage of the EIA, there was apparently some question among directors, boards and teacher representatives whether a school board could continue to negotiate these subjects

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<sup>2</sup> Other Tennessee appellate court cases interpreting the EPNA have also recognized the legislature’s intent to limit the number of mandatory subjects for negotiation. See e.g. *Marion County Board of Education v. Marion County Education Association*, 2001 WL 921859 (Tenn. Ct. App. 2001) (“the legislature has limited the scope of negotiations and the subjects which may be covered in an agreement”); *Carter County Board of Education v. Carter County Education Association*, 1996 WL 251827 (Tenn. Ct. App. 1996) (recognizing the “universal rule” that managerial prerogatives are not proper subjects for negotiation).

<sup>3</sup> Despite Appellant’s bizarre and unfounded assertion that this case arises from a “planned and orchestrated effort” by TSBA to undermine negotiations in Tennessee (*Brief of Appellant*, pp. 27-28), the true genesis of this and other recent EPNA litigation can be traced back to the enactment of the EIA and its redistribution of management authority and increased emphasis on accountability. Under the pre-EIA scheme, superintendents were elected officials, subject to the political pressures of their community. With the passage of the EIA, the superintendency became a *managerial* as opposed to *political* position and many of these new managers found it difficult, if not impossible, to meet accountability standards and effectively administer the school system in light of the restrictive bargaining agreements negotiated by their boards. Thus, in recent years, boards of education have attempted to reclaim the managerial authority (belonging both to the board and to the director of schools) that was bargained away in previous negotiations. This litigation is simply the culmination of one board’s attempt to do so.

since they now belonged to the director of schools. In 1998, TEA introduced an amendment to qualify the authority of the director to carry out these duties “[w]ithin the approved budget and consistent with existing state laws, board policies and locally negotiated agreements...” As Jerry Winters, TEA’s legislative representative, acknowledged in committee discussions about the bill, the purpose of the amendment was to clarify that **if** a board of education negotiated the issue of transfers, then the director of schools was required to comply with that contractual provision.

As Mr. Winters stated:

... But we have a few directors of schools across the state, a very limited number, that took the position that because they had powers given to them under the Education Improvement Act, that even if there was some language in a negotiated contract related to transfer, that they didn’t have to abide by that. We disagreed with that, since 1992. **And this just makes clear that if you agree to language to put in posting vacancies, a transfer provision, that in fact you can legally do that.** And that’s the problem, because they were saying it was illegal to agree to that. (emphasis added).

Representative McMillan, one of the bill’s sponsors, reiterated that idea on the floor of the House:

...we’ll make clear that this amendment does not add any mandatory items to the present negotiating act. It doesn’t say that superintendents have to do something or that ...negotiated agreements have to contain certain language. **It simply says that they may contain language regarding transfers and other matters...**

The history of this amendment makes clear that TSBA, the Tennessee Organization of School Superintendents, TEA *and the sponsoring lawmakers* believed that transfers were *not* a mandatory item for negotiations. If, in fact, transfers were a “working condition” subject to mandatory negotiation, then the 1998 amendment would have been unnecessary.

D. The legislature has set out detailed procedures that must be followed for layoff and recall of teachers – a further indication that these were not considered mandatory items for negotiation.

The subjects of layoff and recall are treated with substantial detail in the Tennessee Code. Specifically, T.C.A. § 49-5-409(d) provides that boards of education have the authority to

abolish positions for “sufficient, just and nondiscriminatory reasons” and entitles any teacher whose position is abolished to have the next position that opens during that school year, so long as the teacher is certified to hold that position. Additional and more specific rights are granted by law to tenured teachers. Section 49-5-511(b)(1) authorizes the board to abolish positions due to decreased enrollment *or for other good reasons*. Subsection (b)(3) provides:

A tenured teacher who has been dismissed because of abolition of position shall be placed on a preferred list for reemployment in the first vacancy the teacher is qualified by training and experience to fill. Nothing in this subsection shall be construed to deprive the board of the power to determine the fitness of such teacher for reemployment in such vacancy on the basis of the board’s evaluation of such teacher’s competence, compatibility and suitability to properly discharge the duties required in such vacancy considered in the light of the best interests of the students in the school where the vacancy exists.

Had the legislature intended for layoff and recall to be a mandatory subject for negotiation, it would have been unnecessary to codify the rights of both teachers and the board in the layoff and recall statutes.

Moreover, these provisions clearly grant boards the right to abolish positions and to determine the fitness of teachers for recall. Section 49-5-612(a) of the EPNA prohibits negotiation proposals that are contrary to federal or state law, the rights of professional employees and “board of education rights contained in [Title 49].” Thus, a board can no more be required to negotiate its rights in this respect than the union could be required to negotiate the statutory rights given to teachers. Considering that the legislature saw fit to specify layoff and recall rights in statute, it is only logical to conclude that it did not intend to require additional negotiations on this subject.

E. Discrimination is illegal under state and federal law and “nondiscrimination” cannot seriously be considered a mandatory subject for negotiation.

Federal and state laws make it illegal for boards of education or their employees acting in the scope of their employment to engage in discriminatory conduct and redress for impermissible discrimination is available in state and federal court. As argued above, the codification of this issue in federal and state statutes appears to preclude – or at the very least obviate the need for – negotiation of “non-discrimination.” It is illogical to suggest that the legislature would have required negotiations on a subject that is so well-defined in statute.

In light of the foregoing, it is clear, as a matter of law, that the issues of transfer, layoff and recall, and non-discrimination do not fall within the definition of working conditions and are therefore not mandatory items for negotiation. The trial court correctly concluded that the term “working conditions” is limited to the physical environment.

**II. The EPNA expressly limits the duration of collective bargaining agreements to three years and any duration or “evergreen” clause that purports to extend the contract indefinitely is void as a matter of law.**

Section 49-5-612(b) states, in relevant part, that “[t]he board of education may enter into [a collective bargaining agreement] for a period not in excess of three (3) years.” The meaning of this language cannot be disputed. Thus, any contractual provision that attempts to extend the contract beyond three years from its date of execution must be declared void as a matter of law. This is true notwithstanding the Tennessee Supreme Court’s decision in *Smith County Education Association v. Anderson*, 676 S.W.2d 328 (Tenn. 1984). In that case, the court held that it was unlawful for a board of education to unilaterally change terms of employment that are under negotiation. This rule requires boards to maintain the status quo **during negotiations**, but the prohibition does not apply once the parties have reached impasse.

In their briefs, TEA and BCEA argue that the “evergreen” clause contained in the Blount County collective bargaining agreement was merely designed to codify this rule. In fact, the

effect of the durational clause reaches much farther than they suggest. The clause not only requires maintenance of the status quo during negotiations, but also extends the contract **until a successor agreement** is reached. If this provision is allowed to stand, the BCEA could simply refuse – as it did in this case – to accept any new agreement that did not contain its preferred provisions and maintain the previous contract indefinitely. This is clearly contrary to law.

**III. BCEA acted in bad faith by bargaining to impasse on non-mandatory subjects.**

The EPNA requires both professional employee organizations and boards of education to bargain in good faith on the eight mandatory items for negotiation. *T.C.A. § 49-5-609(a)(3) and (b)(2)*. Although no Tennessee state court has ruled on this issue, the Sixth Circuit has held, in the context of private sector bargaining, that it is bad faith for a union to bargain to impasse on an impermissible subject. *NLRB v. Ozanne Construction Co.*, 112 F.3d 219, 223-24 (6<sup>th</sup> Cir. (Ohio) 1997); *Taylor Warehouse Corp. v. NLRB*, 98 F.3d 892, 901 (6<sup>th</sup> Cir. (Ohio) 1996). Courts in other states have applied this same reasoning in the public sector, holding that public employees may not insist to impasse on a permissive subject of bargaining. *See e.g. Metropolitan Council et al v. City of Center Line*, 327 N.W.2d 822, 826-27 (Mich. 1982); *International Association of Firefighters, Local 1264 v. Municipality of Anchorage*, 971 P.2d 156 (Alaska, 1999).

The application of this rule to the instant case is consistent with Tennessee’s statutory scheme and controlling case law. The EPNA specifically grants boards of education the right to refuse to negotiate on non-mandatory items. *T.C.A. § 49-5-611(b)*. Elsewhere, the Act provides that collective bargaining agreements “shall not include proposals contrary to ... board of education rights contained in this title.” *T.C.A. § 49-5-612(a)(3)*. Thus, by bargaining to impasse on non-mandatory subjects, an employees’ organization “attempts to cause a board of

education to engage in conduct violative of the provisions of this part.” T.C.A. §49-5-609(b)(1).

In other words, the union’s insistence that an agreement contain permissive items violates the board’s right **not** to negotiate those items and must be considered bad faith.

To hold otherwise would render T.C.A. §49-5-611 and the entire negotiations process meaningless. If a teachers’ organization’s insistence on negotiating non-mandatory items is not bad faith under the EPNA, the organization could effectively force the board of education to negotiate any subject or face indefinite impasse. This is an unacceptable position for boards of education and the students in their charge. The negotiations process consumes an inordinate amount of time and energy on the part of all involved - teachers, board members, and administrators. This strife and uncertainty in employee- board relations prevents both the board and its employees from focusing on their true constituents – the students. Clearly, the EPNA was not intended and should not be interpreted to give either party the power to stonewall negotiations and bog down the school system in a prolonged bargaining process.

In this case, there is ample evidence that, throughout the negotiations process, the BCEA refused to consider any agreement that did not include provisions regarding transfer, lay-off and recall. Therefore, the BCEA bargained to impasse on non-mandatory items and their intransigence must be considered bad faith.

**IV. The Blount County School Board acted properly when it unilaterally implemented its final offer after negotiating in good faith to impasse.**

Where an employees’ organization insists to impasse on an impermissible subject of bargaining, the employer is authorized to unilaterally implement its last, best offer. *Mass. Org. of State Engineers v. Labor Relations Commission*, 452 N.E.2d 1117, 1121 (Mass. 1983)(public sector); *Mountain Valley Educ. Ass’n. v. Maine School Admin. Dist.*, 655 A.2d 348, 353 (Maine 1995)(public sector). Several states with collective bargaining statutes similar to the EPNA

have also adopted this principle. For example, in Maine, as in Tennessee, the collective bargaining statute for public employees requires good faith bargaining and, if no agreement is reached, participation in mediation, fact-finding and non-binding arbitration procedures. *Compare 26 M.R.S.A. § 965(1)(E) and T.C.A. § 49-5-613.* Under this statutory scheme, the Supreme Court of Maine has adopted the rule against unilateral changes and the “impasse exception” that authorizes an employer to implement its last offer after the parties have exhausted these resolution procedures and reach bona fide impasse. *Mountain Valley*, 655 A.2d at 351-52. Once mediation, fact-finding and arbitration have taken place, unilateral alterations may be made and the parties are to resume bargaining in good faith from that point. *Id.* at 353.

Similarly, Massachusetts’ law does not expressly allow or prohibit implementation of unilateral changes by a public employer after impasse, however the Supreme Court of Massachusetts has incorporated the rule and its impasse exception into the jurisprudence of public employer collective bargaining in that state. *Massachusetts Org. of Engineers*, 452 N.E.2d at 924, 926-27.

In *Smith County*, the Tennessee Supreme Court held that the board of education acted in bad faith when it unilaterally terminated payment of monthly insurance premiums and ceased payroll deductions **while negotiations were ongoing**. 676 S.W.2d at 339. The implication of this language is that such unilateral action **is permissible** after the parties have exhausted the statutory procedures and impasse is declared.<sup>4</sup>

A finding that such action is not authorized would paralyze the public school systems in this state. The stated purpose of the EPNA is the establishment and maintenance of professional

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<sup>4</sup> In the public sector, impasse generally suspends the duty to negotiate. See *Mountain Valley*, 655 A.2d at 352; *Massachusetts Org. of Engineers*, 452 N.E.2d at 926-27; *Dearborn Fire Fighters Union v. Dearborn*, 231 N.W.2d 226 (Mich. 1975).

working conditions and “the highest possible education standards.” *T.C.A. § 49-5-601*. If there can be no unilateral action by a board that has acted diligently and in good faith, the negotiations process may freeze at impasse indefinitely and the terms of a contract may continue in perpetuity. Surely the legislature did not intend to place school boards in such an untenable position.

TSBA therefore urges this Court to follow the lead of the Tennessee Supreme Court and find that, as a matter of law, a board of education may unilaterally implement its last, best offer after good faith negotiations have been exhausted and impasse is reached.

### **CONCLUSION**

For all of the foregoing reasons, the Tennessee School Boards Association urges this Court to affirm the judgment of the trial court on all counts.

Respectfully submitted this 9<sup>th</sup> day of November.

TENNESSEE SCHOOL  
BOARDS ASSOCIATION

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