IN THE COURT OF APPEALS OF TENNESSEE

AT KNOXVILLE

UNION COUNTY EDUCATION ASSOCIATION,	) C/A NO. 03A01-9904-CV-00122
Plaintiff-Appellee,	) UNION CHANCERY
v.	) HON. BILLY JOE WHITE, CHANCELLOR
UNION COUNTY BOARD OF EDUCATION and DAVID F. COPPOCK, Superintendent of the Union County Schools,	)
Defendants-Appellants.	) AFFIRMED AND REMANDED

CHARLES HAMPTON WHITE and JAY N. CHAMNESS, CORNELIUS & COLLINS, Nashville, for Plaintiff-Appellee.

JON G. ROACH, WATSON, HOLLOW & REEVES, P.L.C., Knoxville, for Defendant-Appellant, Union County Board of Education.

O P I N I O N

Franks, J.

In this action seeking injunctive and declaratory relief to enforce an arbitrator's award, the plaintiff was granted summary judgment, and the defendants have appealed.

The following facts are not in dispute. Since approximately July 1, 1987, the Union County Education Association ("Association") and the Union County Board of Education ("Board") have negotiated, ratified and executed written memoranda of agreement under the authority of Tennessee Code Annotated §49-5-601, et. seq. These memoranda set forth the terms and conditions of professional service of the certificated employees of the Union County school system. On May 2, 1994, the Association and the Board executed a written Memorandum of Agreement ("Agreement") which was deemed effective July 1, 1993. Article XXXVIII of that Agreement provides for the duration of the Agreement[1] as follows:

ARTICLE XXXVIII: DURATION

> The provisions of this Agreement will be effective as of July 1st 1993, except as otherwise provided herein, and will continue for three (3) years and remain in full force and effect until a successor agreement has been ratified. Each professional employee shall be given a copy of this agreement.

In February of 1996, the Association notified the Board of its desire to execute a successor Memorandum of Agreement. By mutual agreement, they delayed the commencement of negotiations until after June 1, 1996. These negotiations began on July 26, 1996, and at no time did either party express any doubt or reservation concerning the viability of the Memorandum of Agreement.

On September 24, 1996, fourteen faculty members of Horace Maynard High School filed grievances pursuant to the provisions of Article VI of the Agreement, challenging practices of the Principal and the Board. On September 30, 1996, Superintendent David F. Coppock, on behalf of the Board, wrote the President of the Association and stated:

> It is the position of this office that, at present, there is no existing contract between Union County Board of Education and the Union County Education Association. Therefore, since no contract exists and, consequently, no means by which a grievance may advance, the grievance filed in my office on September 24, 1996 will not be reviewed.

Also on September 30, 1996, Fred H. Simmons, Chairman of the Board wrote the President of the Association, stating in part:

> That contract contains a duration clause which, although somewhat ambiguous and unclear, could be construed to create a contract of indeterminable length. Such a contract would be directly violative of the Education Professional Negotiations Act. Specifically, that Act at Tenn. Code Ann. § 49-5-612 bars the Board of Education from entering into a collective bargaining agreement for a period in excess of three years. Accordingly, it is our position that the contract between the Union County Board of Education and the U.C.E.A. was effective from July 1, 1993 until June 30, 1996.

As of September 30, 1996, the Board and the Association were in the process of negotiating a successor agreement.

The Association requested the Board and Coppock to process the grievances, but the Board refused. On January 17, 1997, the Association notified Coppock of its request, pursuant to the grievance procedure set forth in the Agreement, to the American Arbitration Association that the grievances be arbitrated. The American Arbitration Association notified the Board of the Association's demand to arbitrate the grievances. On February 17, 1997, Coppock, on behalf of the Board, notified the American Arbitration Association that it would not participate in arbitration because "we feel the contract is dead and do not wish to recognize it." The Board continued to decline to participate in any arbitration despite the urging of the American Arbitration Association, and the Arbitrator, Michael J. Jedell.

An arbitration hearing was held in Maynardsville on October 16, 1997, without participation by the Board. On December 30, 1997, the Arbitrator issued his opinion and award sustaining ten of the Association's grievances. The arbitrator expressly considered and found that the Agreement remained in full force and effect until a successor agreement was negotiated and ratified and that all terms and conditions of the Agreement remained in full force and effect at all times material to the actions giving rise to the grievances.

The Board refused to abide by the decision of the Arbitrator. Plaintiffs then brought this action, asking the Court to declare the Agreement valid and binding, requiring arbitration of grievances in good faith, and to declare that the Board's failure to participate in the arbitration was unlawful under the provision of T.C.A. § 49-5-606(a)(8).

In granting plaintiff's summary judgment, the Trial Court found no genuine issue of material fact. Specifically, the Court said the grievance procedure which existed under the written Agreement remained valid beyond three years from the effective date of the contract. Further, the Court found that by refusing to follow the grievance procedure set forth in the Agreement, the Board was guilty of refusing to negotiate in good faith in violation of T.C.A. § 49-5-609(a)(3). The award of the arbitrator was confirmed, enforced and made a part of the judgment of the Court.

When evaluating a motion for summary judgment, the trial court should consider "(1) whether a *factual* dispute exists; (2) whether the disputed fact is *material* to the outcome of the case; and (3) whether the disputed fact creates a *genuine* issue for a trial. " *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993). If the court determines that there is no genuine issue as to any material fact, then the movant is entitled to judgment as a matter of law. *Id.* at 215. No presumption of correctness attaches to decisions granting summary judgments where they involve only questions of law. *Hembree v. State*, 925 S.W.2d 513 (Tenn. 1996); Tenn.R.App.P. 13(d).

The Board does not dispute the wording of the Agreement, that grievances were filed, or that the Board refused to review those grievances or submit to arbitration. While the defendants contend there is an issue of fact as to the duration of the agreement, the validity of the duration provision is a question of law.

Because the National Labor Relations Act exempts from the definition of " employer" any state or any political subdivision thereof, state law governs employer-employee relations. The Education Professional Negotiations Act, T.C.A. §

49-5-601 *et. seq*., authorizes collective bargaining between local governments and " professional employees." Thus, because the present case involves the representative of " professional employees" and a local board of education, the authority to enter into a collective bargaining agreement or memorandum of agreement between the parties derives from T.C.A. §49-5-601 *et. seq.*

The provision in the relevant Code section as to the duration of agreements states in pertinent part: "The board of education may enter into such memorandum for a period not in excess of three (3) years." T.C.A. §49-5-612(b). The duration clause in the Agreement provides that it will be in effect for three years, and will "remain in full force and effect until a successor agreement had been ratified." The Board refers to this as an " evergreen" clause, purporting to extend the term of the agreement indefinitely, and argues that this is in clear contravention to the language of T.C.A. §49-5-612(b), and is therefore void. The plaintiff, on the other hand, argues that the Arbitrator's interpretation of the duration clause is binding, and the Arbitrator found the clause to be consistent with statutory language.

We conclude that the issue of whether the duration clause violated the statutory language is irrelevant. Moreover, the Chancery Court did not rule on the validity of the duration provision in the Agreement. The Court simply held that the grievance procedures that were provided for in the Agreement were applicable to the parties.

Under the Education Professional Negotiations Act, the parties are required to bargain in good faith the following conditions of employment: salaries or wages, grievance procedures, insurance, fringe benefits, working conditions, leave, student discipline procedures, and payroll deductions. T.C.A. §49-5-611. While in the process of bargaining, one side may not unilaterally change the terms and conditions of employment without first reaching an impasse in the bargaining regarding that term or condition. *Smith County Educ. Ass'n v. Anderson*, 676 S.W.2d 328 (Tenn 1984). *See also* Larry D.

Schaefer, Annotation, *What Constitutes Unfair Labor Practice Under State Public Employee Relations Act*, 9 A.L.R.4th 20 (1981).

In *Smith County*, the Supreme Court determined it to be an unlawful act for the Board of Education to make unilateral changes to terms and conditions of employment that are mandatory subjects of bargaining and which were currently under negotiations. There, the Board stopped paying insurance premiums and stopped making payroll deductions for professional dues while negotiations on a new agreement was underway. The Court found this to amount to an unlawful act under T.C.A. §48-5-609 and a refusal to bargain in good faith. The Court required the Board to maintain the "status quo" while negotiations were ongoing.

The Agreement that went into effect on July 1, 1993 set forth a grievance procedure that provided for submission of the grievance to final and binding arbitration. When the grievances at issue were filed with the Board, the Board refused to follow the grievance procedures provided for in the Agreement, on the grounds that the Agreement was no longer in effect and that there was no current contract. However, at the time, the Board and the Association were in the midst of negotiating a new agreement. There is no evidence that the parties had reached an impasse regarding the grievance procedures to be included in the new contract. Thus the employer was bound to preserve the status quo, which included maintaining the same grievance procedures that were in effect under the prior contract. *Smith County; N.L.R.B. v. Katz*, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962). C.f. *Nolde Brothers v. Local 358 Bakery & Confectionary Workers*, 430 U.S. 2d 3 (1977) (holding that the expiration of the contract would not terminate a duty to arbitrate provided in the contract.

The Board has raised the issue of whether the holding in *Smith County* acts to render the three-year provision of T.C.A. §49-5-612 meaningless. *Smith County* adopts the rule that while negotiations are ongoing, neither side may make unilateral changes to the

terms of employment. The terms of employment may change, however, with the passage of a new contract or once an impasse has been reached. The holding in *Smith County* does not perpetuate terms of the prior contract, but rather requires the parties to maintain the status quo while bargaining a new contract. Because the Board was bound by the established grievance procedures, it could not refuse to review the grievances at issue in this case, and it was proper under the procedures for the grievances to be submitted to an arbitrator for a final and binding decision.

Under the Education Professional Negotiations Act the parties were required to bargain in good faith on the matters set forth in T.C.A. §49-5-611 heretofore enumerated, and it is an unlawful act for the Board to refuse to bargain in good faith. T.C.A. §49-5-609.

In *Smith County*, the Supreme Court found that the school board's unilateral changes in the terms and conditions of employment while negotiations of a new contract were underway constituted a failure to negotiate in good faith. In reaching its decision, the Court adopted the rationale of the majority of cases in which such questions have been considered under other state public employee labor relations acts.

Under the National Labor Relations Act, an employer's unilateral change in conditions of employment which are under negotiation constitutes a refusal to bargain in good faith. *NLRB v. Katz*. Courts of other states have addressed the issue of whether the principles set forth in *Katz* apply to collective bargaining in the public sector, and a majority have held that they do. *Smith County*, 676 S.W.2d at 339.

The Court in *Galloway Township Board of Education v. Galloway Township Education Ass'n,* 78 N.J. 25, 393 A.2d 218 (1978) cited the rule from *Katz* and went on to say:

> The basis of the rule prohibiting unilateral changes by an employer during negotiations is the recognition of the importance of maintaining the then-prevailing terms and conditions of employment during this delicate period until new terms and conditions are arrived at by agreement. Unilateral changes disruptive of this status quo are unlawful because they frustrate the '

> statutory objective of establishing working conditions through bargaining.' *NLRB v. Katz*, 369 U.S. at 744, 82 S.Ct. at 1112.

393 A.2d at 230.

Accord: Appeal of Cumberland Valley School District, Etc., 483 Pa. 134, 394 A.2d 946 (1978). (During the course of negotiating a new agreement, the old agreement expired resulting in the school district's termination of payment of health insurance benefits. It was held that this constituted a refusal to bargain in good faith.)

Our Supreme Court has acknowledged that "[t]he stated purpose of our collective bargaining statutes is the establishment and maintenance of professional working conditions and 'the highest possible education standards.'" *Smith County* at 339, *citing* T.C.A. §49-5-601. Further the Court said "our statute favors the collective bargaining process as a means whereby both parties can resolve their differences through open discussion." *Id.* Because payroll deductions and insurance were mandatory subjects of bargaining, the Board's unilateral change was said to be "an incident of bad faith." *Id*. at 340.

In this case, the Trial Judge found the Defendant Board was guilty of refusing to bargain in good faith when it refused to submit grievances to arbitration. Because grievance procedures are a mandatory subject of bargaining under T.C.A. §49-5-611, the rule in *Smith County* controls. It is an act of bad faith to unilaterally change a term of employment that is a mandatory subject of bargaining while negotiations are underway.

The defendant attempts to distinguish *Smith County*, and argues:

> The Board respectfully contends that the *Smith* case is not applicable. It appears that the *Smith* holding does not address grievance procedure or arbitration but is rather limited in unilateral changes in monetary benefits. The case does not address the situation in this case where grievances were filed after the end of the term of the memorandum of agreement.

The Defendant's argument does not make a meaningful distinction between this case and *Smith County*, nor does it cite any authority to support its position. It is true that the two cases deal with different terms and conditions of employment. However, both

the conditions in *Smith* and those in this case are mandatory subjects of bargaining, T.C.A. § 49-5-611. Moreover, the Supreme Court adopted the rule of *Katz* that "an employer's unilateral change in conditions of employment which are under negotiation constitutes a refusal to bargain in good faith". *Id.* at 338-340.

For the foregoing reasons, we affirm the judgment of the Trial Court and remand with cost of the appeal assessed to the appellants.

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Herschel P. Franks, J.

CONCUR:

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Houston M. Goddard, P.J.

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Charles D. Susano, Jr., J.