

I

Facts and Travel

The Warwick Teachers' Union, Local 915, AFT (the Union) and WSC have been collective bargaining partners since at least 1970. The instant dispute arises out of a disagreement concerning a directive, issued by WSC through the Superintendent of the Warwick Public Schools (WPS), which required WPS teachers to record and maintain grades by way of electronic entries in a computer. This directive led to the Union filing an unfair labor practice charge against WSC on August 16, 2013. The following facts are derived from testimony presented at two hearings before the Board, on April 8, 2014 and May 13, 2014, and are undisputed on appeal.

At all relevant times prior to the events leading to this appeal, it has been the consistent practice of WPS teachers to maintain a running account of grades by way of written entries in a paper gradebook. This practice appeared to be of no great controversy prior to 2010. In the Matter of R.I. State Labor Relations Board and Warwick Sch. Comm., at 2, Case No. ULP-6115 (Decision and Order, Nov. 12, 2014) (hereinafter Decision). In 2010, however, WSC purchased a computer program called the "Aspen Student Information System (hereinafter Aspen program)." Id. This program allows the electronic recording of student grades, both interim and final, demographic information, and other data. Id. The Aspen program also allows students and their parents to view grades and other relevant student information through a "parent portal," which can be accessed via a login and password. Id.

The Union and WSC negotiated collective bargaining agreements in both 2011 and 2012; in both years, WSC sought to require Union teachers to use the grade-

recording features of the Aspen program. Id. at 3. The Board noted that WSC sought to replace existing contract language regarding the recording of grades by paper entries with language requiring recording grades electronically. The previous language read: “[g]rade reporting sheets in the secondary schools shall be made available to teachers two (2) school days prior to the close of each marking period and shall be due in the main office of each school on the third (3rd) school day after marks close.” Id. at 2. WSC desired to have this section revised to read:

“[g]rades shall be due in the main office of each school [on] the third (3rd) school day after marks close in accordance with district schedules and requirements. All teachers will enter Student Information System (SIS) related information (as required by the district and in accordance with the calendars established by the district).” Id. at 3.

In both contract negotiations, the suggested language was rejected by the Union. Id. For that reason, the previous language relative to the paper recording of grades was retained in the collective bargaining agreement (CBA) in force at the time of this dispute, which was in effect from September 1, 2012 to August 31, 2014.

In the spring of 2013, WSC determined that implementation of a change in the recording of grades was not a mandatory subject of bargaining. Id. On the final day of the 2012-2013 school year, it communicated the decision to the Union via a memorandum submitted as evidence to the Board. Id. The memorandum makes reference to expected financial shortfalls and WSC’s efforts to find savings where possible; the memorandum also makes clear that paper gradebooks will no longer be permitted, and that teachers will be required to use the Aspen program to record grades. Id. at 3-4.

Following this communication, the President of the Union, James Ginolfi, contacted WSC through Rosemary Healey, its Director of Human Resources and Department Attorney, and met with Ms. Healey on July 24, 2013. Id. at 4. At this meeting, the Union raised its objection, stating that implementation of an electronic-only gradebook constituted a mandatory subject of collective bargaining. Id. Further communications did not result in an agreement between the parties. Id. The Union then objected to this change in writing on August 8, 2013. Id. WSC responded to the objection on August 30, 2013, and reiterated its position that the implementation of the change was not subject to mandatory bargaining and was a non-delegable statutory duty of the WSC. Id.

The Union then filed the unfair labor practice charge leading to this appeal. WSC argued three points below: first, that the Union waived its rights to bargain the issue; second, that it has a non-delegable statutory right to implement an electronic grading system as a matter of educational policy¹; and third, that the implementation of an electronic grading system is a management right under the existing CBA not subject to mandatory bargaining. Id. at 5. The Union responded that it did not waive its rights to bargain and that because no statutory duty can excuse WSC from being subject to mandatory bargaining on a matter affecting the terms and conditions of Union members' employment, WSC committed an unfair labor practice both by refusing to bargain and unilaterally implementing the change. Id. at 4-5.

The Board resolved the unfair labor practice claim in favor of the Union and determined that WSC, by not considering the issue of mandatory electronic recording of

¹ See G.L. 1956 § 16-2-9 (committing control of local educational policy to school committees).

grades to be a mandatory issue for bargaining, and by unilaterally imposing this requirement on the teachers of the WPS, committed an unfair labor practice. In deciding in favor of the Union, the Board found that the decision to require electronic grade recording resulted in a “material and substantial change” to the terms and conditions of the teachers’ professional employment. Id. at 10. Characterizing the question of mandatory bargaining as the “threshold” issue, the Board noted that Rhode Island public school teachers represented by a Union are entitled to collective bargaining on all terms and conditions of professional employment. Id. at 5; see § 28-9.3-2. Examining the evidence and testimony presented, the Board noted that the Union had concerns regarding the time in which teachers would be required to record grades and further desired to bargain issues relating to a “uniform grading system,” the frequency of grade entry, the duration of grade entry, and access to computers for the purpose of grade entry. Decision at 7.

Citing testimony from Michael Costello (Costello), a teacher at WPS, the Board considered what it referred to as the “physical” aspects of grade recording—the physical manner in which a teacher would be constrained from walking up and down student aisles and recording marks if a paper gradebook was not allowed. Id. The Board further noted Costello’s testimony regarding the effects of electronic grade recording in terms of limitations on both his access to the software and his grade entries: Costello testified that he was no longer able to record grades “off-duty” during his downtime without a laptop and internet access, as well as becoming incapable, to some degree, of “round[ing]-up” a grade. Id. at 8. Costello noted, however, that a teacher can adjust grades, but opined that it took “more effort and time to do so.” Id.

The Board further cited two “robo-calls” sent out by WSC to teachers. See id. at 9. These calls contained information relating to training on the Aspen program. Id. The Board concluded, based on these phone calls, that teachers were being directed to engage in work-related training and preparation activities during their summer break. Id. Combined with the memorandum issued earlier, the Board determined that WSC had essentially required Union members to engage in more than “limited” training tasks pursuant to its unilateral implementation of the Aspen program.

The Board went on to reject several arguments put forward by WSC. First, it held that the statutory duty argument advanced by WSC was belied by the references to cost savings highlighted in the June 24, 2013 memorandum. Id. at 10-11. The Board determined that the motivation for the policy change was fiscal in nature, rather than being grounded in educational policy, and as such was germane to mandatory bargaining rather than being related to educational policy within the exclusive province of the school committee. Id. at 11. The Board then disposed of an argument that the change was within the management rights of WSC. The Board held that section 12-15 of the CBA covered the use of paper gradebooks and intimated that WSC’s prior negotiations on the use of the Aspen program rendered the issue one subject to mandatory bargaining. Id. at 12. Furthermore, the Board determined that the Union did not waive its rights to bargain the issue, having promptly objected in writing to the requirement of the Aspen program gradebook use. Id. at 13. Finally, the Board held that, having determined the matter subject to mandatory bargaining, WSC’s offers to engage in effects bargaining failed to satisfy its duty to bargain the issue. Id. Based on these conclusions, the Board found that WSC had committed an unfair labor practice in violation of §§ 28-37-13(6) and (10).

WSC then brought the instant appeal to the Superior Court under the APA.

II

Standard of Review

Under the terms of the Administrative Procedures Act, § 42-35-15, the Court's standard of review is limited.

"The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

"(1) In violation of constitutional or statutory provisions;

"(2) In excess of the statutory authority of the agency;

"(3) Made upon unlawful procedure;

"(4) Affected by other error or law;

"(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

"(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

Sec. 42-35-15(g).

The Court is "limited to an examination of the certified record to determine if there is any legally competent evidence therein to support the agency's decision." Barrington Sch. Comm. v. R.I. State Labor Relations Bd., 608 A.2d 1126, 1138 (R.I. 1992) (citing Blue Cross & Blue Shield v. Caldarone, 520 A.2d 969, 972 (R.I. 1987); Narragansett Wire Co. v. Norberg, 118 R.I. 596, 607, 376 A.2d 1, 6 (1977)). The Court may not substitute its judgment for that of the board on questions of fact. Id. (citing Lemoine v. Dep't of Mental Health, Retardation and Hosps., 113 R.I. 285, 291, 320 A.2d 611, 614-15 (1974)). Legally competent evidence, also known as substantial evidence, has been defined as "relevant evidence that a reasonable mind might accept as adequate to support a

conclusion[; it] means an amount more than a scintilla but less than a preponderance.”
Town of Burrillville v. R.I. State Labor Relations Bd., 921 A.2d 113, 118 (R.I. 2007)
(quoting Ctr. for Behav. Health, Rhode Island, Inc. v. Barros, 710 A.2d 680, 684 (R.I.
1998)).

III

Analysis

1

Waiver

First, the Court must address the question of whether the Union waived its rights to bargain the change in grade-keeping. If the Union did not preserve its right to bargain the issue, the ensuing dispute giving rise to this litigation is largely moot. Both Rhode Island and federal labor law consistently emphasize that “it is incumbent upon [a] union to act with due diligence’ with respect to requesting bargaining once the union has received adequate notice of a proposed modification in the terms or conditions of employment.” Town of Burrillville, 921 A.2d at 120 (quoting Kansas Educ. Ass’n v. Kansas Staff Org., 275 N.L.R.B. 638, 639 (1985)). In order to appropriately preserve the right to bargain an issue, “[a] union must do more than merely protest the proposed change or file an unfair labor practice action”; the rights to bargain will be waived unless the employer is “affirmatively advise[d]” of the union’s desire to engage in bargaining. Id. (citing Citizens Nat’l Bank of Willmar v. Willmar Bank Emps. Ass’n, 245 N.L.R.B. 389, 390 (1979)). Generally, a union must request bargaining prior to implementation of a change, but the Court will not find a waiver where “a proposed change has been made irrevocable prior to the notification of the union” or where the change “has otherwise

been announced as a matter on which the employer will not bargain.” Id. (quoting W-I Forest Prods. Co., 304 N.L.R.B. 957, 960 (1991)).

WSC contends that, because it first purchased the Aspen program in 2010 and began to implement it in that school year, the Union’s failure to object to the system from that point on constituted a waiver of its bargaining rights. The Court is in agreement with the Board that this argument is without merit. WSC points out that it began operating the Aspen program and invited, but did not require, WPS teachers to use the software from 2010 on. WSC also directs the Court to a requirement that secondary school teachers enter fourth quarter grades in the Aspen program in the 2012-2013 school year. It is plain, however, that neither of these changes is the same or substantially similar to the one ultimately imposed upon the teachers and leading to this dispute.

A union is not required to object to every change tangentially related to one they take issue with. Voluntary utilization of electronic grading software need not be objected to in order to preserve the right to object to mandatory utilization of electronic grading software. Similarly, a union need not object to a one-time requirement that only some employees perform a task in a certain way in order to preserve the right to object to a directive that all bargaining unit employees perform an entire class of job duties in a particular way. The parties agree that the first time the Union received notice of the proposed change was on the last school day of the 2012-2013 school year. Before the implementation of the change, on the first day of the 2013-2014 school year, the Union wrote to WSC expressing an objection to the change and clearly requested bargaining over the issue. Decision at 4. WSC does not appear to take issue with the Board’s factual determination that this request for bargaining occurred, but instead argues that the

Union was required to object to each and every instance in which the Aspen software was used in order to preserve its rights.

The Union is not required to so act. It is required to affirmatively advise the employer of a desire to engage in bargaining over an issue before the implementation of a proposed change. Town of Burrillville, 921 A.2d at 120. It unquestionably did so in this case on August 8, 2013. The Board's conclusion that the Union did not waive its rights to bargain the change is therefore free of error.

2

CBA Coverage and Mandatory Bargaining

The next issue before the Court presents two closely interrelated questions: first, does the CBA in force allow the use of only paper gradebooks—prohibiting the use of electronic systems such as the Aspen program—and, second, if it does not, does the change nonetheless materially impact the terms and conditions of employment such that it is a mandatory subject of bargaining and not a management right? The Board held both that section 12-15 of the CBA covered the use of paper grading and that the change was a mandatory subject of bargaining as it materially altered the teachers' terms and conditions of employment. WSC challenges both holdings on appeal.

A

The CBA

The Board held, in its Decision, that the right to change the manner of grade recording in WPS was not a management right reserved to WSC. The Board based this conclusion upon language in section 12-15 of the CBA, "Pupils' Report Card Marks." See Decision at 12; Agreement between The Warwick School Committee and The

Warwick Teachers' Union, Sept. 1, 2012 to Aug. 31, 2014, Joint Ex. 1 (hereinafter CBA), at 28. The Board noted that there are references in this section to "paper record cards," and concluded, based on the past efforts of WSC to revise language in this section, that the CBA covered the use of paper gradebooks. Decision at 12. WSC disputes the meaning of this section, and contends that the CBA does not cover the use of paper gradebooks. The Union in turn contends on appeal that the Board's decision on the meaning of section 12-15 must be affirmed as it is a factual finding, which the Court may not disturb under its standard of review.

The meaning of a contractual provision is a question of law to be resolved by the Court; "it is only when contract terms are ambiguous that construction of terms becomes a question of fact." Clark-Fitzpatrick, Inc./Franki Found. Co v. Gill, 652 A.2d 440, 443 (R.I. 1994) (citing Judd Realty, Inc. v. Tedesco, 400 A.2d 952, 955 (R.I. 1979)). Likewise, the existence of ambiguity vel non is also a question of law for the Court. Young v. Warwick Rollermagic Skating Ctr., Inc., 973 A.2d 553, 558 (R.I. 2009) (citing Gorman v. Gorman, 883 A.2d 732, 738 n.8 (R.I. 2005)). Here, the Board made no finding of ambiguity; the Board only remarked that the section in question did not possess "a great amount of detail." Decision at 12. This passing reference is not a conclusion that the CBA contained ambiguous language, the interpretation of which by the Board becomes a question of fact to be deferred to. See Gill, 652 A.2d at 443. The Board's conclusion that the CBA covers paper gradebooks is therefore one of law, reviewable by the Court de novo.

Two subsections of section 12-15 of the CBA make reference to the recording of grades. Section 12-15.2 reads thus:

“[g]rade reporting sheets in the secondary schools shall be made available to teachers two (2) school days prior to the close of each marking period and shall be due in the main office of each school on the third (3rd) school day after marks close. The present practice on final marks for seniors and for grades seven through eleven shall remain in effect.” CBA § 12-15.2, at 28.

Section 12-15.3 states that “[a] report card of the carbon type shall be used in the elementary schools. The original shall be sent home and other copies retained for office use. Such forms shall be made available to the teachers five (5) days before they are due.” CBA § 12-15.3, at 28. Neither of these sections has more than one reasonable construction, and so neither is ambiguous. Section 12-15.2 requires sheets for final grade reporting to be made available two days prior to the end of the grading period; those grades are due to the administration three days after grades close. There is no language in this provision that allows a reasonable person to conclude that it governs the manner of day-to-day grade recording. Likewise, section 12-15.3 defines the type of report card to be issued to students; there is no reasonable basis for the conclusion that a student receives a report card for each assignment. Instead, this provision, as with section 12-15.2, governs only the process by which final grades are reported to students and their families.

For much the same reasons that these provisions are unambiguous, nothing in section 12-15 governs the use of paper gradebooks to record daily grades. Each section refers to the manner in which grades will be recorded for final report cards; neither makes any reference to the day-to-day recording of grades on individual assignments, quizzes, and tests that is the subject of this dispute. The references to paper grade reporting sheets and carbon report cards do not indicate an agreement between the parties to use paper

gradebooks rather than an electronic system for grade recording prior to the issuance of final report cards. Accordingly, the Board's holding that the CBA covers the use of paper gradebooks is affected by error of law. There are no other provisions of the CBA cited by either the Board or the Union in support of the argument that it covers the use of paper gradebooks. This conclusion alone, however, does not end the Court's inquiry.

B

Management Right/Mandatory Subject of Bargaining

The manner of grade recording must be more than outside the reach of the CBA to be a true management right, subject to no requirement of bargaining on the part of WSC. Any matter affecting the "terms and conditions of professional employment," even if not included in a preexisting collective bargaining agreement, is subject to mandatory collective bargaining under Rhode Island's labor law. See § 28-9.3-2. Rhode Island courts generally look to the expansive body of federal precedent on labor law, as Rhode Island's statutes parallel federal labor statutes. MacQuattie v. Malafronte, 779 A.2d 633, 637 n.3 (R.I. 2001) (citing Belanger v. Matteson, 115 R.I. 332, 338, 346 A.2d 124, 129 (1975)).

The normal scope of the phrase "terms and conditions of . . . employment" extends to "issues that settle an aspect of the relationship between the employer and employees." Ford Motor Co. v. N.L.R.B., 441 U.S. 488, 501 (1979) (quoting Chem. & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178 (1971)). It is also well settled that even apparently trivial matters within the scope of employment can amount to a material change in the terms and conditions of employment when they lead to substantial costs. Id. It must be noted, however, that "an employer is not obligated to

bargain over changes so minimal that they lack [] an impact.” W-I Forest Prods. Co., 304 N.L.R.B. at 959.

Reviewing the findings of facts, the Court cannot affirm the Board’s Decision that the proposed changes amount to a material and substantial change in WPS teachers’ terms and conditions of employment. Although “terms and conditions of employment” is an expansive term, there still remains a boundary line on the level of impact necessary to qualify a change as material. Id. at 959. In Ford Motor Co., the Supreme Court affirmed the N.L.R.B.’s conclusion that an increase in cafeteria food prices amounted to a material change in the terms and conditions of employment, citing the “substantial sum of money over time” even minor cost increases can cause. 441 U.S. at 501. It can be said that management decisions are those “which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security.” Fibreboard Paper Prods. Corp. v. N.L.R.B., 379 U.S. 203, 223 (1964).

Here, the Board’s findings of facts focus on the impact of additional training incident to the implementation of an electronic grade posting system. See Decision at 15. Of note, any additional training is a one-time requirement. There is no evidence in the record that indicates that WPS teachers will face ongoing demands on their time in the form of continuous training. Likewise, the testimony of Costello and Mr. Ginolfi reflect concerns about the impact of the change on teachers’ day-to-day activities; they do not evidence any increase, other than the one-time training requirement, in the required job duties of teachers. The ongoing effects of the change on the terms and conditions of employment of WPS teachers is minimal and the decision is one of the type that involves the exercise of sound management that lies “at the core of entrepreneurial control.” Ford

Motor Co., 441 U.S. at 498. Furthermore, there is no evidence that the change will even indirectly impinge upon Union members' employment security. See Fibreboard Paper Prods. Corp., 379 U.S. at 223. There is no evidence in the record to support the Board's conclusion that the shift to the use of electronic gradebooks results in material change to the terms and conditions of the teachers' employment; therefore, WSC is not obligated to bargain the decision to implement electronic grading. The Court takes no issue with the Board's factual findings of impact to teachers, but it cannot agree that the facts found support a legal conclusion of material and substantial change to the terms and conditions of employment because of the de minimis training requirement.

The conclusion that the actions taken by WSC do not amount to a material change in the terms and conditions of employment does not leave the Union totally without recourse. WSC still retains an obligation to bargain the effects of its decision to change the grade recording from paper to electronic means. See Providence Hosp. v. N.L.R.B., 93 F.3d 1012, 1018 (1st Cir. 1996) (citing First Nat'l Maint. Corp. v. N.L.R.B., 452 U.S. 666, 681 (1981) (noting that "unions generally enjoy the right to bargain over the effects of decisions which are not themselves mandatory subjects of collective bargaining.")). The decision to change from paper to electronic means—being one that does not materially affect the terms and conditions of the WPS teachers' professional employment—is a management right that WSC may exercise in its discretion, subject only to a requirement of effects bargaining.

The Court further notes that the Board appears to have reasoned that WSC's previous attempts to negotiate the issue transformed this change from a non-negotiable management right into a mandatory subject of bargaining. See Decision at 12. This

conclusion does not appear to be supported by law. Broadly speaking, there are three categories of bargaining subjects: mandatory subjects, permissive subjects, and illegal subjects. Hill-Rom Co. v. N.L.R.B., 957 F.2d 454, 457 (7th Cir. 1992) (citing N.L.R.B. v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958)). Permissive bargaining, as its name implies, covers subjects of bargaining which neither fall within the scope of mandatory bargaining nor are prohibited by law. Id. Accordingly, WSC may engage in voluntary, permissive bargaining on a subject it is not obligated to bargain without transforming the issue into a mandatory subject of bargaining. See Providence Hosp., 93 F.3d at 1018 (citing First Nat’l Maint. Corp., 452 U.S. at 681).

3

Statutory Duty

Because the Court resolves this dispute in favor of WSC on the above grounds, it need not reach the question of whether the issue of grade recording is a matter of educational policy within the non-delegable statutory duty of WSC to control the educational policy of its school system. The Court pauses to note, however, that our Supreme Court has spoken in no uncertain terms about the force of the language committing educational policy concerns to school committees:

“[i]n enacting Title 16, the General Assembly delegated to the school committees of the several cities and towns expansive powers over education; it spoke in extraordinarily broad terms when it vested authority over the public schools in the state’s several school committees. It is true that the sweeping language of Title 16 must be read in harmony with the provisions of the Michaelson Act; it is nonetheless a basic rule of law that school committees are not at liberty to bargain away their powers and responsibilities with respect to the essence of the educational mission.” N. Providence Sch. Comm. v. N. Providence Fed’n of Teachers, Local 920, Am. Fed’n of

Teachers, 945 A.2d 339, 347 (R.I. 2008) (hereinafter North Providence Teachers).

This matter presents a scenario similar to that in North Providence Teachers, as the Board has made a factual determination regarding the motivating factor behind WSC's implementation of the Aspen program, and found that fiscal, rather than educational, concerns underlay the action taken. See 945 A.2d at 342-43. As school committees are vested with "the entire care, control, and management" of educational policy, the discharge of that responsibility requires at least some consideration of fiscal concerns. See § 16-2-9. A bankrupt school committee cannot fulfill its educational mission. The line between purely fiscal motivations and valid educational policy concerns will be hazy; the Board must be cautious in its delineation of the boundaries between the two when making findings such as it did in this matter. It may well be the case, given the nature of this dispute and the broad shift to electronic means of data recording in society, that the issue will be a recurrent one.

IV

Conclusion

For the reasons articulated above, the Decision of the Board is affected by error of law, substantially prejudicing the rights of the WSC. The Decision of the Board is vacated, and the parties may proceed with bargaining the effects of the implementation of electronic grade keeping in the WPS.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: Warwick School Committee v. Rhode Island State Labor Relations Board, et al.

CASE NO: KC-2014-1520

COURT: Kent County Superior Court

DATE DECISION FILED: March 9, 2016

JUSTICE/MAGISTRATE: Rubine, J.

ATTORNEYS:

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