IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

POLK COUNTY BOARD OF EDUCATION	*	
	*	
	*	
Appellant,	*	
	*	NO. E2003-01110-COA-R3-CV
v.	*	
	*	POLK COUNTY CHANCERY
	*	COURT NO. 6884
POLK COUNTY EDUCATION ASSOCIATION,	*	
	*	
	*	
Appellee.	*	
	*	

MEMORANDUM OF *AMICUS CURIAE* TENNESSEE SCHOOL BOARDS ASSOCIATION IN SUPPORT OF APPELLANT POLK COUNTY BOARD OF EDUCATION

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ORAL ARGUMENT REQUESTED

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MEMORANDUM OF *AMICUS CURIAE*
TENNESSEE SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF APPELLANT
POLK COUNTY BOARD OF EDUCATION.

The Tennessee School Boards Association (TSBA) submits this brief in support of its *Motion For Leave to File an Amicus Curiae Brief in Support of Appellant, Polk County Board of Education.* TSBA respectfully asks this Court to reverse the January, 2004 ruling by the Tennessee Court of Appeals and reinstate the judgment of the Polk County Chancery Court.

STATEMENT OF THE CASE

TSBA refers this Court to the Statement of the Case appearing at page 1 of the *Brief of Appellant Polk County Board Of Education.*

STATEMENT OF FACTS

TSBA refers this Court to the Statement of Facts contained at page 3 of the *Brief of Appellant Polk County Board of Education* and incorporates those facts by reference herein.

INTEREST OF AMICUS

As explained in the Tennessee School Boards Association's *Motion For Leave to File an Amicus Curiae Brief in Support of Appellant Polk County Board of Education*, TSBA is a not-for-profit organization, created exclusively for charitable and educational purposes within the meaning of section 501(c)(3) of the Internal Revenue Code. TSBA is recognized in Tenn. Code Ann. § 49-2-2001 as the organization and representative agency of Tennessee's school board members and its membership is comprised of 135 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.

The purpose and intent of TSBA's filing of this brief is to argue that the Court of Appeals erred in its decision to reverse the Chancery Court's grant of summary judgment which held that a dress code policy was a mandatory item of negotiations under the Education Professional Negotiations Act, Tenn. Code Ann. § 49-5-601 *et seq*.

Of TSBA's 135 member school boards, 91 currently engage in collective bargaining with its professional employees. The case before this Court involves an issue 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

Chapter 683, Public Acts of Tennessee 2002 amended the Education Professional Negotiations Act (EPNA) to define working conditions as follows: "those fundamental matters that affect a professional employee financially or the employee's employment relationship with the board of education." Tenn. Code Ann. § 49-5-601(b)(4). The amendment further states, "(b)asic education policy shall not be a mandatory subject of negotiations. 'Basic education policy' shall be defined to include such things as the content of the curriculum, teaching strategies,

class offerings, student placement and other things related to the policy's effect on the school system's overall ability to meet and maintain the state's student performance standards." *Id*. In the *Brief of Appellant, Polk County Board Of Education,* filed with this Court, counsel effectively argues the Appellant's case and TSBA adopts and supports those arguments and the underlying authority. TSBA does not intend to take this Court's valuable time by repeating those same arguments, but instead wishes to present a broader view of how the Court of Appeals decisions will affect the 91 school systems who currently collectively bargain, and potentially the remaining 45 should unionization efforts be successful in those school systems.

I. THIS CASE IS ONE OF STATUTORY CONSTRUCTION NOT ARBITRATION

Appellee argues in its *Answer of the Defendant/Appellee Polk County Education Association To Application For Permission To Appeal*, that the grievance in question is arbitrable. TSBA submits this position is in error and further submits that should this position be adopted by this Court there is great risk of broad grievance clauses swallowing the whole of negotiated contracts

A. Arbitration Under the EPNA is Statutorily Limited in Scope to the Terms of an Actually Negotiated Agreement

The EPNA does not require boards of education to engage in binding arbitration but does set forth a process for mediation and arbitration. Initially in an unresolved dispute "either the board of education or the recognized professional employees' organization **may** (emphasis added), upon written notification to the

other, request the services of the federal mediation and conciliation service." Tenn. Code Ann. § 49-5-613(a). Should this process fail to "effect a mutually acceptable agreement" then either party may "request their differences be submitted to fact-finding/advisory arbitration." Tenn. Code Ann. § 49-5-613(b). When the parties do participate in this statutory arbitration process, "the arbitrator shall make findings of fact and recommend terms of settlement, which recommendations shall be advisory only." Tenn. Code Ann. § 49-5-613(c).

When a board of education and teacher's union are involved in binding arbitration, arbitration is a result of a mutually negotiated agreement and the terms of that agreement can be found within the language of the contract. "A board of education and a recognized professional employees' organization who enter into an agreement covering terms and conditions of professional service and/or other matters of mutual concern may include in such agreement procedures for final and binding arbitration of such disputes as may arise involving the interpretation, application or violation of such agreement." Tenn. Code Ann § 49-5-612(c). Clearly, this portion of Tennessee law contemplates final and binding arbitration only for disputes regarding the interpretation of the contract, however TSBA submits that arbitration is not a remedy for a disagreement over management prerogatives.

In *Marion County Bd. of Ed. v. Marion County Ed. Assoc.*, 86 S.W.3d 202 (Tenn.Ct.App.2001), the Middle Section of the Tennessee Court of Appeals upheld the Marion County Board of Education's authority to exercise its

statutory rights free from the interference of an arbitrator. In that case, the director of schools terminated a teacher's employment as principal and transferred him to a classroom position. *Marion County* at *205.

The teacher grieved the transfer and sought binding arbitration of the dispute. Although the Board attempted to enjoin arbitration, the Marion County Chancery Court ordered arbitration to proceed since the Board had agreed to arbitration as the means for resolving disputes arising under the terms of its agreement with the teachers' union. Subsequently, the arbitrator found that the director's decision had violated a number of the provisions of the negotiated agreement, including a specific provision dealing with transfers. *Id.*

On appeal, the Marion County Board of Education argued that state law gives its director of schools the authority to appoint principals in the Marion County school system *Marion County* at *206-207. The teacher's union argued that, although the director may indeed have the power to appoint principals, transfers are a proper subject for collective bargaining and, therefore, subject to grievance and arbitration. *Marion County* at *210-211.

The Court of Appeals refused to interpret the language of the collective bargaining agreement in a fashion to compel arbitration over an issue that state law vests in the hands of the director of schools. *Marion County* at *213-214. Although the teacher's removal from the principalship did impact various provisions of the negotiated agreement with the union, including the provision on transfers, the Court of Appeals ruled that the transfer from the principalship was

not subject to arbitration "because that decision was solely in the province of the director of schools and could not be delegated to an arbitrator." *Marion County* at *214.

The Court recognized that the union's argument would swallow the entirety of the EPNA. Any decision that a board of education makes has an impact at some level upon the mandatory items of collective bargaining. Nevertheless, the Court reasoned that the EPNA protects a board from the duty to negotiate or arbitrate matters that are ultimately "the prerogative of management." *Marion County* at *211.

B. The Court of Appeals Has Already Ruled on the Arbitration Issue

Appellee asserts in its *Answer of the Defendant/Appellee Polk County Education Association to Application for Permission to Appeal*, pp. 4-6, that the grievance in question is arbitrable. The record does not support this assertion. The Court of Appeals dealt with this issue decisively in its opinion in *Polk County Board of Education v. Polk County Education Association*, 2004 WL 73275 Tenn.Ct.App.) at *1-2.

> *In this appeal, the PCEA asserts that both the Memorandum of Agreement ("Agreement") executed by the parties and state law require arbitration.*
>
> *The Board maintains that the issue regarding construction of the parties' Agreement was actually determined in the first appeal, since the issue was raised, and this Court remanded to the Trial Court with instructions to (only) consider the newly enacted legislation defining "working conditions" under Tenn.Code Ann. § 49-5-601 et seq., thereby ruling by implication that the parties' Agreement would not require arbitration, and that now has become the law of the case.*

> *The Board is correct in its assertion that this issue with regard to the parties' Agreement was raised before the Court in the first appeal, and dealt with the same parties and the same facts. The Board is correct that this Court rejected that argument by implication when it remanded the issue to the Trial Court solely for consideration of the newly enacted definition of "working conditions" under EPNA.*

There can be no doubt as to the intent of the Court of Appeals when it clearly stated that arbitration is not the issue in this case and that statutory construction was the only issue to be considered on remand. TSBA urges the Court to consider this broader issue and rule on the construction of Tenn. Code Ann. § 49-5-601(a)(4) thereby giving guidance to all Tennessee school systems that collectively bargain.

II. THE COURT OF APPEALS ERRED IN ITS CONSTRUCTION OF PUBLIC CHAPTER 683

A. Tennessee Law of Statutory Construction is Well Established

Recent decisions in the area of statutory construction have reaffirmed long-standing guiding principles that require a Court, when construing a statute, to take great care to avoid changing the law's original intent. This Court held in *Perrin v. Gaylord Entertainment Co.,* 123 S.W.3d 823, 826 (Tenn.2003), that, "(w)hen interpreting statutes, a reviewing court must ascertain and give effect to the legislative intent without restricting or **expanding** (emphasis added) the statute's intended meaning or application. *Parks v. Tenn. Mun. League Risk Mgmt. Pool,* 974 S.W.2d 677, 679 (Tenn.1998). The court must examine the language of the statute and, if unambiguous, apply its ordinary and plain meaning. *Id.; see also Niziol v. Lockheed Martin Energy Sys., Inc.,* 8 S.W.3d 622, 624 (Tenn.1999). **If**

the language of the statute is ambiguous, the court must examine the entire statutory scheme and the relevant legislative history to ascertain and give effect to the legislative intent. (emphasis added) *Parks,* 974 S.W.2d at 679."

The original intent of the General Assembly must not be overlooked in construing a statute. In *Crew One Productions, Inc. v. State,* 2004 WL 354321 at *9 (Tenn.Ct.App.), the Court of Appeals, quoting this Court, stated the following: "This Court's primary objective when construing a statute is to effectuate the purpose of the legislature. *Lipscomb v. Doe,* 32 S.W.3d 840, 488 (Tenn.2000). Insofar as possible, the intent of the legislature should be determined by the natural and ordinary meaning of the words used in the statute, and not by a construction that is forced or which limits or extends the meaning. *Id.* Likewise, the Court must seek to ascertain the intended scope of the statute, neither extending nor restricting the scope intended by the legislature. *State v. Morrow,* 75 S.W.3d 919, 921 (Tenn.2002). The Court's interpretation must not render any part of the statute "inoperative, superfluous, void or insignificant." *Id.* (quoting *Tidwell v. Collins,* 522 S.W.2d 674, 676-77 (Tenn.1975). Rather, the Court construes statutory provisions within the context of the entire statute, giving effect to the statute's over-arching purpose. *Merrimack Mut. Fire Ins. Co. v. Batts,* 59 S.W.3d 152, 151 (Tenn.Ct.App.2001). Courts must construe a statute reasonably, bearing in mind its objective, the harm it seeks to avoid, and the purposes it seeks to promote. *Voss v. Shelter Mut. Ins. Co.,* 958 S.W.2d 352, 345 (Tenn.Ct.App.1997)."

Caldwell v. Wood, 2004 WL 370299 at *2 (Tenn.Ct.App.) holds that if the language of a statute is clear and unambiguous the "legislative intent" must be followed. "The interpretation of a statute requires courts to " 'ascertain and give effect to the legislative intent' " behind the statute. *Sharp v. Richardson,* 937 S.W.2d 846, 849 (Tenn.1996) (quoting *Cronin v. Howe,* 906 S.W.2d 910, 912 (Tenn.1995)). When the language of the statute is unambiguous, the legislative intent must be determined from the face of the statute, adopting the "natural and ordinary" meaning of the language therein. *Davis v. Reagan,* 951 S.W.2d 766, 768 (Tenn.1997); *Westland W. Cmty. Ass'n v. Knox County,* 948 S.W.2d 281, 283 (Tenn.1997)." See also *Kyle v. Williams,* 98 S.W.3d 661, 664 (Tenn.2003). "In interpreting a statute, the court is to give effect to the legislative intent. "Legislative intent is to be ascertained primarily from the natural and ordinary meaning of the language used." *Id.* Where the language of the statute is clear, the statute must be applied as written, with the presumption that the legislature "says in a statute what it means and means in a statute what it says." *Id.* (citing *Gleaves v. Checker Cab Transit Corp.,* 15 S.W.3d 799, 803 (Tenn.2000)); *see also Schering-Plough Healthcare Prods., Inc., v. State Bd. of Equalization,* 999S.W.2d 773, 775-76 (Tenn.1999). *Smith v. Smith,* 2004 WL 220089 at *8 (Tenn.Ct.App.)."

B. The Decision of the Court of Appeals Improperly Imposes "Impact Bargaining" on Tennessee Schools

In its decision in *Polk County*, the Court of Appeals held "(w)e conclude this particular dress code is not so restrictive or egregious as to require teachers to purchase new wardrobes but it is unclear from the record what would happen to the teacher who did not or would not comply with it, and this could very well fundamentally **impact** (emphasis added) on the teacher's employment relationship." *Polk County Board Of Education v. Polk County Education Association*, 2004 WL 73275 (Tenn.Ct.App) at *3. This holding rewrites the EPNA to include the concept of "impact bargaining." The Court seems to hold that if the Board's action has an impact on an employee's employment relationship with the board then it must be negotiated. TSBA submits that this approach is error and should be reversed.

C. The Legislative History of Public Chapter 683 Does Not Support "Impact Bargaining"

On January 31, 2001 modifications of the EPNA were introduced in the 102nd General Assembly first in the Senate through SB0457 and then on February 15, 2001 in the House.[1] This bill was introduced to amend Tenn. Code Ann. § 49-5-601 by adding a new subdivision (b)(4) which reads as follows:

> The "terms and conditions of professional service" or "working conditions" of professional employees are those fundamental, basic or essential matters that affect a professional employee financially or the employee's employment relationship with the board of education. In order to reduce employer-employee disputes, the term "working conditions" shall be liberally construed, unless the proposed area of bargaining impinges so

[1] Http://www.legislature.state.tn.us/info/Leg_Archives/102GA/bills/BillStatus/SB0467.htm

> indirectly upon matters of employment as to require the exclusion of the subject from the area of mandatory bargaining."[2]

The broad language of the initial bill was amended, however, in the Senate Education Committee and the scope of that bill was narrowed through SA0777 (Senate Amendment) that read as follows:

> The "terms and conditions of professional service" or "working conditions" of professional employees are those fundamental matters that affect a professional employee financially or the employee's employment relationship with the board of education. While a board of education is not required to agree or concede to any proposal, good faith negotiations of terms and conditions of employment or working conditions of employees shall be undertaken, provided that no proposal may directly prevent the director of schools from transferring faculty and staff to address performance and accountability deficiencies as identified by state accountability standards. Basic education policy shall not be a mandatory subject of negotiations. "Basic education policy" shall be defined to include such things as the content of the curriculum, teaching strategies, class offerings, student placement and other things related to the policy's effect on the school system's overall ability to meet and maintain the state's student performance standards. **The impact of basic education policy and the well-being of teachers shall be negotiable.** (emphasis added)

Clearly from the change in the broader language of the initial bill, the Senate chose to limit the items that would be considered mandatory items of negotiation. There still remained, however, a provision in the amendment's final sentence requiring collective bargaining on the impact of basic education policy on the well-being of teachers.[3]

On April 3, 2002, the Senate adopted an additional amendment[4], which modified the language of the proposed statute by deleting the last sentence in its

[2] SB0467 102nd General Assembly.
[3] SA0777 102nd General Assembly
[4] SA0806 102nd General Assembly.

entirety thus eliminating the concept of "impact bargaining" from the final version of the bill. [5] The Senate passed this final version on May 10, 2002.

Tennessee has always limited the scope of negotiations between boards of education and teacher organizations. The EPNA requires the board of education and the recognized professional union to negotiate in good faith only eight items: 1) salaries or wages, 2) grievance procedures, 3) Insurance, 4) fringe benefits, 5) working conditions, 6) leave, 7) student discipline procedures, and 8) payroll deductions. Tenn. Code Ann. § 49-5-611(a). The General Assembly broadened and defined the meaning of working conditions by adding the new statutory language contained in Public Chapter 683. TSBA submits that there is no evidence to show that the legislature intended to broaden the scope of negotiations to include all items that generally should be considered management prerogatives but might possibly, in some insignificant way, impact an employees relationship with the employer. The legislature could have taken such action had it chosen, but did not.

CONCLUSION

For all of the foregoing reasons, the Tennessee School Boards Association respectfully urges this Court to reverse the decision of the Court of Appeals and reinstate the judgment of the Chancery Court of Polk County.

[5] The language of section (b)(4) with the deletion of the final sentence was ultimately adopted in Public Chapter 683.

Respectfully submitted this 8th day of April 2004.

TENNESSEE SCHOOL
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_____

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing motion has been served upon counsel for parties in interest herein:

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by mailing to said counsel to their offices VIA United States Mail, postage prepaid.

On this, _____ day of April 2004.

_____
Randall G. Bennett