

Part 6—Education Professional Negotiations Act

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49-5-601. Short title — Statement of purpose. —

(a) This part shall be known and may be cited as the “Education Professional Negotiations Act.”

(b) (1) It is the purpose of this part to prescribe the legitimate rights and obligations of boards of education and their professional employees and to establish procedures governing relationships between them that are designed to meet the special requirements and needs of public education.

(2) Boards of education and their professional employees have an obligation to the public to exert their full and continuing efforts to achieve the highest possible education standards in the institutions that they serve. This requires establishment and maintenance of an educational climate and working environment that will attract and retain a highly qualified professional staff and stimulate optimum performance by the staff.

(3) Experience has shown that boards of education and their professional employees can best reach these objectives if each utilizes the ability, experience and judgment of the other in formulating policies and making decisions that involve terms and conditions of professional service and other matters of mutual concern. It is the purpose and policy of this part, in order to protect the rights of individual employees in their relations with boards of education, and to protect the rights of the boards of education and the public in connection with employer-employee disputes affecting education, to recognize the rights of professional employees of boards of education to form, join and assist professional employee organizations to

meet, confer, consult and negotiate with boards of education over matters relating to terms and conditions of professional service and other matters of mutual concern through representatives of their own choosing, to engage in other activities for the purpose of establishing, maintaining, protecting and improving educational standards and to establish procedures that will facilitate and encourage amicable settlements of disputes.

(4) 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" is 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.

(5) Notwithstanding other provisions of this title to the contrary, directors of schools shall have the ultimate right to transfer all professional employees subject only to §§ 49-2-303 and 49-5-510. Nothing in this section shall be construed to make transfers or assignments mandatory subjects of negotiations.

(6) Notwithstanding any other provision to the contrary, nothing in subdivisions (b)(4)-(6) shall be construed to prevent a board of education or professional employee organization from engaging the services of qualified individuals for purposes of advice and consultation during the negotiations process. No such individual may directly serve as a negotiator as defined in § 49-5-602.

[Acts 1978, ch. 570, §§ 1, 2; T.C.A., § 49-5501; Acts 2002, ch. 683, § 1.]

Section to Section References. This part is referred to in §§ 5-23-107, 49-1-201, 49-2-301, 49-5-5012, 49-13-118.

Law Reviews.

Alternative Dispute Resolution in the Personal Injury Forum (William P. Zdancewicz), 26 U. Mem. L. Rev. 1169 (1996).

UAW-GM Saturn Contract: "Sweetheart Deal" or Novel Labor-Management Agreement? (Jeffrey L. Hall), 17 Mem. St. U.L. Rev. 69 (1986).

Attorney General Opinions. Participation of principals in collective bargaining under Education Improvement Act, OAG 97-106 (7/28/97).

Union rights of county department of education's custodial employees, OAG 98-0168 (8/27/98).

The federal No Child Left Behind Act of 2001 does not affect rights of teachers under state law or collective bargaining agreements, OAG 04-004 (1/12/04).

Cited: Fulenwider v. Firefighters Asso. Local Union 1784, 649 S.W.2d 268, 1982 Tenn. LEXIS 375 (Tenn. 1982); Knox County v. Knoxville, 786 S.W.2d 936, 1990 Tenn. LEXIS 126 (Tenn. 1990); Hamblen County Educ. Ass'n v. Hamblen County Bd. of Educ., 892 S.W.2d 428, 1994 Tenn. App. LEXIS 566 (Tenn. Ct. App. 1994); Muhlheim v. Knox County Bd. of Educ., 2 S.W.3d 927, 1999 Tenn. LEXIS 431 (Tenn. 1999).

NOTES TO DECISIONS

1. Construction.
2. Jury Trial.
3. Applicability.

1. Construction.

In recognition that determining legislative intent is, at best, a hazardous undertaking, the court chose to err, if there be error, in favor of freedom of choice by the employees. Sullivan County Education Asso. v. May, 605 S.W.2d 823, 1980 Tenn. App. LEXIS 340 (Tenn. Ct. App. 1980).

Where a teacher asserted that the provisions of the Education Professional Negotiations Act (EPNA), T.C.A. § 49-5-601 — T.C.A. § 49-5-613, providing for the recognition of a single professional employee organization as the representative of all of the professional employees in the school system for the purposes of collective bargaining constituted an unlawful monopoly in violation of Tenn. Const. art. I, § 22, there was no monopoly created allowing the collective bargaining as provided in the statute because the purpose and policy of the EPNA was clearly for the promotion of the welfare and benefit of the students, teachers, and the public as a whole. Esquinance v. Polk County Educ. Ass'n, 195 S.W.3d 35, 2005 Tenn. App. LEXIS 446 (Tenn. Ct. App. 2005), appeal denied, —S.W.3d—, 2006 Tenn. LEXIS 31 (Tenn. 2006) .

Where a teacher alleged that the teacher's union's violations were “under color of state law,” the trial court erred when it dismissed the teacher's suit against the teacher's union for failure to state a claim; although the complaint that part of his union dues were being used in violation of, inter alia, his rights to free speech, free assembly and petition, and freedom of religion, was premised on state constitutional violations, when viewed under the Education Professional Negotiations Act (EPNA), T.C.A. § 49-5-601 et seq., the complaint could also have been construed to have alleged other wrongs upon which relief could have been granted. The EPNA could have been interpreted to mean that a voluntary donation of a portion of the dues collected from the teachers exceeded the authority granted to the collective bargaining agent. Esquinance v. Polk County Educ. Ass'n, 195 S.W.3d 35, 2005 Tenn. App. LEXIS 446 (Tenn. Ct. App. 2005), appeal denied, —S.W.3d—, 2006 Tenn. LEXIS 31 (Tenn. 2006) .

T.C.A. § 49-5-601, T.C.A. § 49-5-612, T.C.A. § 49-5-101, T.C.A. § 49-5-108, and T.C.A. § 49-5-403 preclude an education association as the bargaining unit for the licensed professional employee from

representing teachers in their capacity as coaches; any contractual protections emanating from the Education Professional Negotiations Act are relevant to persons only in their status as professional employees and not in their status in non-licensed positions. *Lawrence County Educ. Ass'n v. Lawrence County Bd. of Educ.*, 244 S.W.3d 302, 2007 Tenn. LEXIS 1084 (Tenn. Dec. 20, 2007), rehearing denied, — S.W.3d —, 2008 Tenn. LEXIS 30 (Tenn. Jan. 30, 2008).

Where a probationary teacher entered into an employment contract with the school board pursuant to the Education Professional Negotiation Act, and worked for three years and then his contract was not renewed, the teacher was not entitled to binding arbitration of a grievance with the local school board; decision of whether to renew a probationary teacher's contract rested with the local school officials. *Cannon County Bd. of Educ. v. Wade*, — S.W.3d —, 2008 Tenn. App. LEXIS 446 (Tenn. Ct. App. July 31, 2008).

2. Jury Trial.

A party to an action brought under the Education Professional Negotiations Act (title 49, ch. 5, part 6) or the Open Meetings Act (title 8, ch. 44) is entitled to a jury trial. *Smith County Education Asso. v. Anderson*, 676 S.W.2d 328, 1984 Tenn. LEXIS 936 (Tenn. 1984).

3. Applicability.

After the trial court determined that a guidance counselor's grievance following the decision of the director of schools to transfer her to a teaching position was not subject to binding arbitration under the Education Professional Negotiations Act, T.C.A. § 49-5-601 et seq., she retired; thus, court of appeals determined that her appeal was moot. *Robertson County Bd. of Educ. v. Redmond*, — S.W.3d —, 2008 Tenn. App. LEXIS 260 (Tenn. Ct. App. Apr. 30, 2008), rehearing denied, — S.W.3d —, 2008 Tenn. App. LEXIS 450 (Tenn. Ct. App. May 27, 2008).

49-5-602. Part definitions. —

As used in this part, unless the context otherwise requires:

(1) “Arbitration” means the process of determination of disputed matters by submission to private unofficial persons selected for a purpose and in a manner consistent with this part. Arbitration under this part is not governed by title 29, chapter 5;

(2) “Board of education” or “local board of education” means the local school district board of education, as defined in § 49-1-103;

(3) “Fact-finding” means investigation of an existing dispute by an individual panel or board with the fact-finder submitting a report to the parties describing the issues involved. The report may contain recommendations for settlement and may be made public after the parties to the dispute have had an opportunity to study it;

(4) “Management personnel” means those professional employees certified by the board of education to represent it in the negotiating process;

(5) “Mediation” means that process by which an impartial third party assists in reconciling a dispute regarding compensation, benefits, duties and other terms and conditions of employment and service between representatives of the board of education and the recognized professional employees' organization through interpretation, suggestion and advice;

(6) “Memorandum of agreement” means a written memorandum of understanding arrived at by the representatives of the board of education and a recognized professional employees' organization, which shall be presented to the board of education and to the membership of such organization for ratification or rejection;

(7) “Negotiating unit” means those professional employees in the respective school districts, as defined in subdivision (11), exclusive of those persons specifically named as management personnel;

(8) “Negotiations” means that process whereby the chief executive of a board of education, or such representatives as it may designate, and representatives of a recognized professional employees' organization meet at reasonable times and confer, consult, discuss, exchange information, opinions and proposals in a good faith endeavor to reach agreement on matters within the scope of discussions, and incorporate such agreements into a written agreement;

(9) “Negotiator” means the person or persons selected by the board of education and the professional employees' organization to do the negotiating. The board may select the director of schools, any member of the board or full-time system-wide employees as prescribed in § 49-5-608. The professional employees' organization may select from among those who are members of the organization;

(10) “Person” includes one (1) or more individuals, organizations, associations or their representatives;

(11) “Professional employee” includes any person employed by any local board of education in a position that requires a license issued by the department of education for service in public elementary and secondary schools of this state, supported, in whole or in part, by local, state or federal funds, but shall not include a retired teacher who is employed as a teacher in accordance with title 8, chapter 36, part 8;

(12) “Professional employees' organization” means any organization with membership open to professional employees, as defined in subdivision (11), in which the employees participate and that exists for the purpose, in whole or in part, of dealing with boards of education concerning, but not limited to, grievances, wages, hours of employment or conditions of work. The organizations may establish reasonable rules and regulations for conducting business, including provisions for the dismissal of individuals from membership;

(13) “Representative” includes any person, or group of persons, organization or association that is designated and authorized by the respective negotiating unit or local board of education to negotiate and act for it under this part; and

(14) “Strike” means the failure with others to report for duty, the willful absence from one's position, the stoppage of work or the abstinence in whole or in part from the full, faithful and proper performance of the duties of employment, and without the lawful approval of one's superior; or in any manner interfering with the operation of the public school system, for the purpose of inducing or coercing the recognition of any employee organization or a change in the conditions or compensation or the rights, privileges or obligations of employment.

[Acts 1978, ch. 570, § 3; T.C.A., § 49-5502; Acts 1987, ch. 308, § 28; 2000, ch. 903, § 4.]

Cross-References. Professional employee, within local education agency only, § 49-5-5205.

Section to Section References. This section is referred to in § 49-5-601.

Law Reviews.

Alternative Dispute Resolution in the Personal Injury Forum (William P. Zdancewicz), 26 U. Mem. L. Rev. 1169 (1996).

Cited: *Esquinance v. Polk County Educ. Ass'n*, 195 S.W.3d 35, 2005 Tenn. App. LEXIS 446 (Tenn. Ct. App. 2005); *Metro. Nashville Educ. Ass'n v. Metro. Bd. of Pub. Educ.*, — S.W.3d —, 2006 Tenn. App. LEXIS 604 (Tenn. Ct. App. Sept. 12, 2006); *Lawrence County Educ. Ass'n v. Lawrence County Bd. of Educ.*, 244 S.W.3d 302, 2007 Tenn. LEXIS 1084 (Tenn. Dec. 20, 2007).

NOTES TO DECISIONS

1. “Arbitration.”

1. “Arbitration.”

Where a probationary teacher's employment contract was not renewed, he was not entitled to binding arbitration of a grievance with the local school board, as Tennessee's Arbitration Act, T.C.A. § 29-5-301 et. seq., was inapplicable to arbitrations authorized under T.C.A. § 49-5-602(1); decision of whether to renew a probationary teacher's contract rested with the local school district. *Cannon County Bd. of Educ. v. Wade*, — S.W.3d —, 2008 Tenn. App. LEXIS 446 (Tenn. Ct. App. July 31, 2008).

Collateral References.

Who are supervisors for purposes of bargaining-unit determinations in state public employment labor relations. 96 A.L.R.3d 723.

49-5-603. Rights of professional employees. —

Professional employees have the right to self-organization, to form, join or be assisted by organizations, to negotiate through representatives of their own choosing and to engage in other concerted activities for the purpose of professional negotiations or other mutual aid or protection; provided, that professional employees also have the right to refrain from any or all such activities.

[Acts 1978, ch. 570, § 7; T.C.A., § 49-5506.]

Section to Section References. This section is referred to in § 49-5-609.

Law Reviews.

Government — Smith County Education Association v. Anderson: An Exception Under the Tennessee Open Meetings Act, 15 Mem. St. U.L. Rev. 116 (1984).

Cited: Esquinance v. Polk County Educ. Ass'n, 195 S.W.3d 35, 2005 Tenn. App. LEXIS 446 (Tenn. Ct. App. 2005).

NOTES TO DECISIONS

1. Professional Employee.

1. Professional Employee.

Even though the coaching assignment was not protected by the terms of the collective bargaining agreement, but was instead governed by a series of one-year terms as no license was required for the position under T.C.A. § 49-2-301(b)(1)(FF) and therefore was not a professional employee under T.C.A. § 49-5-603, the coach also had the right to sue under contract over his transfer, because the board of education unanimously approved the arbitrator's recommendations at a meeting. Lawrence County Educ. Ass'n v. Lawrence County Bd. of Educ., 244 S.W.3d 302, 2007 Tenn. LEXIS 1084 (Tenn. Dec. 20, 2007), rehearing denied, — S.W.3d —, 2008 Tenn. LEXIS 30 (Tenn. Jan. 30, 2008).

49-5-604. Rights preserved. —

(a) Those rights and responsibilities of boards of education, directors of schools and professional employees as contained in this title are not statutorily modified or repealed by this part.

(b) This part shall not operate so as to annul, modify or preclude the renewal or continuation of any recognition heretofore entered into between a board of education and a professional employees' organization. Upon the termination of an existing agreement, subsequent professional employee organization recognition shall be governed under this part; provided, that the time schedule established in § 49-5-605 shall not be applicable and recognition with all

accompanying rights shall become available immediately upon the completion of the other required recognition procedures.

[Acts 1978, ch. 570, §§ 8, 17; T.C.A., §§ 49-5507, 49-5516.]

Textbooks. Tennessee Jurisprudence, 22 Tenn. Juris., Schools, § 16.

Attorney General Opinions. Authority of school superintendent (now director of schools) to transfer teachers and school personnel within district, OAG 97-107 (7/28/97).

Cited: Smith County Education Asso. v. Anderson, 676 S.W.2d 328, 1984 Tenn. LEXIS 936 (Tenn. 1984); Lawrence County Educ. Ass'n v. Lawrence County Bd. of Educ., 244 S.W.3d 302, 2007 Tenn. LEXIS 1084 (Tenn. Dec. 20, 2007).

NOTES TO DECISIONS

1. Applicability.
2. Rights Protected.
3. Increase in Salaries.

1. Applicability.

Title 49, ch. 5, part 6 applies to school systems that were operating under voluntary bargaining agreements when it was enacted under the provisions of the second sentence of T.C.A. § 49-5-604(b) in spite of the apparent inconsistent wording of the first sentence. Memphis Education Asso. v. Board of Education, 706 S.W.2d 88, 1985 Tenn. App. LEXIS 2660 (Tenn. Ct. App. 1985).

Any provisions, or any interpretations of those provisions, of a collective bargaining agreement which have the effect of limiting the superintendent's (now director of schools') discretion with regard to selection, length of contract, renewal or non-renewal of contracts, performance, or accountability of principals are beyond the permissible scope of the agreement. Marion County Bd. of Educ. v. Marion County Educ. Ass'n, 86 S.W.3d 202, 2001 Tenn. App. LEXIS 600 (Tenn. Ct. App. 2001).

2. Rights Protected.

This provision of the code only protects the rights of recognized employees' representatives at the time title 49, ch. 6, part 6 was passed. Carter County Board of Education Comm'rs v. American Federation of Teachers, 609 S.W.2d 512, 1980 Tenn. App. LEXIS 346 (Tenn. Ct. App. 1980).

Where a probationary teacher entered into an employment contract with the school board pursuant to the Education Professional Negotiation Act and worked for three years and then his contract was not renewed, the teacher was not entitled to binding arbitration of a grievance with the local school board; decision of whether to renew a probationary teacher's contract rested with the local school officials and could not be modified by Tennessee's Arbitration Act or other law in accordance with T.C.A. § 49-5-604. Cannon County Bd. of Educ. v. Wade, — S.W.3d —, 2008 Tenn. App. LEXIS 446 (Tenn. Ct. App. July 31, 2008).

3. Increase in Salaries.

Under T.C.A. § 49-5-604, teachers' union had right to continue to be teachers' recognized representative for duration of its contract but T.C.A. § 49-5-604 did not validate increase in salaries, negotiated between board of education and union, which had not been funded by county commissioners. Carter County Board of Education Comm'rs v. American Federation of Teachers, 609 S.W.2d 512, 1980 Tenn. App. LEXIS 346 (Tenn. Ct. App. 1980).

49-5-605. Organization recognition. —

(a) Upon the submission, by one (1) or more professional employees' organizations to the appropriate local board of education between October 1 and November 1 of any year, of a request for recognition together with signed petition cards that constitute thirty percent (30%) or more of the professional employees, the board of education and the requesting employees' organization shall appoint persons to serve on a special election committee for the purpose of conducting an election as provided in subsection (b).

(b) (1) In the event one (1) or more professional employees' organizations submit a request for recognition as provided in subsection (a), a special secret ballot election will be conducted among the eligible professional employees to determine which requesting organization, if any, shall represent the employees.

(2) A special election committee shall be formulated to set the date, establish the times and places, establish the procedure and supervise the election process, supervise the counting of ballots and file the results with the board of education and the requesting professional employees' organizations.

(A) The election committee shall be composed of one (1) person selected by each professional employees' organization that has filed with the board of education a request for recognition as provided in subsection (a), plus an equal number of persons selected by the board of education.

(B) The requesting professional employees' organizations and the board of education shall select the persons to serve on this election committee and shall notify the other parties of the selection no later than November 15.

(C) These persons so selected shall select an additional person to serve as chair.

(D) In the event any party has not named the election committee persons or a majority agreement cannot be reached upon the person to serve as chair by November 20, upon request of any of the selected persons to serve on this committee, the commissioner of education shall within five (5) calendar days name those persons who otherwise should have been named.

(E) The election committee may, upon majority approval, appoint other persons

to assist in conducting the election. Motions before the election committee shall require a majority vote of the membership of the full committee.

(F) The election committee persons or persons appointed to assist in conducting elections pursuant to this section shall not be compensated for this service.

(3) Voting places and times selected by the election committee shall be convenient and accessible for all eligible professional employees.

(4) A majority vote of those voting shall be required to secure representation by a professional employees' organization. The secret ballot shall provide for a person to vote for no representation by any professional employee organization.

(5) If a majority vote is not secured, a second election shall be held between those organizations or nonorganizations receiving the first and second largest number of votes.

(6) The secret ballot election shall be held and the results transmitted to the board and the respective professional employee organizations prior to January 1 next.

(7) Those persons or organizations initiating the election shall be assessed the costs necessitated in conducting the election by the chair of the election committee.

(8) The professional employees' organization receiving a majority vote shall be designated as exclusive representative effective January 1 next for a period of twenty-four (24) months.

(c) The initial recognition will be for twenty-four (24) months and will be automatically extended for additional twenty-four (24) month periods unless between October 1 and October 15 of the second twelve (12) months of any recognition period:

(1) The board of education challenges and substantiates that the recognized organization does not, in fact, possess a majority of the professional employees as paid members; or

(2) Another professional employees' organization files application for recognition with the board of education, together with signed petition cards that constitute a majority of the professional employees. In such event, an election between the competing organizations will be held according to subsection (b).

(d) When a professional employees' organization has met the requirements of recognition in this section as the exclusively recognized organization, the board of education and the organization shall, in good faith, enter into negotiations, and if agreement is reached, enter into a memorandum of agreement based upon the negotiations and comply with the agreement according to this part.

[Acts 1978, ch. 570, § 4; T.C.A., § 49-5503.]

Section to Section References. This section is referred to in §§ 49-5-604, 49-5-606, 49-5-607.

Textbooks. Tennessee Jurisprudence, 22 Tenn. Juris., Schools, § 16.

Cited: Smith County Education Asso. v. Anderson, 676 S.W.2d 328, 1984 Tenn. LEXIS 936 (Tenn. 1984); Esquinance v. Polk County Educ. Ass'n, 195 S.W.3d 35, 2005 Tenn. App. LEXIS 446 (Tenn. Ct. App. 2005); Lawrence County Educ. Ass'n v. Lawrence County Bd. of Educ., — S.W.3d —, 2005 Tenn. App. LEXIS 738 (Tenn. Ct. App. Nov. 28, 2005).

NOTES TO DECISIONS

1. Decertification Election.

1. Decertification Election.

Pursuant to § 49-5-607, a decertification election may be held at any time, and continued negotiations are not required during the pendency of decertification proceedings. Sullivan County Education Asso. v. May, 605 S.W.2d 823, 1980 Tenn. App. LEXIS 340 (Tenn. Ct. App. 1980).

49-5-606. Status of recognized organizations. —

A professional employees' organization recognized pursuant to this part shall be the exclusive representative of all the professional employees employed by that board of education for the purpose of negotiating. A challenge to recognition may be made only by the board of education or another professional employees' organization as provided in § 49-5-605.

[Acts 1978, ch. 570, § 5; T.C.A., § 49-5504.]

Cited: Sullivan County Education Asso. v. May, 605 S.W.2d 823, 1980 Tenn. App. LEXIS 340 (Tenn. Ct. App. 1980); Smith County Education Asso. v. Anderson, 676 S.W.2d 328, 1984 Tenn. LEXIS 936 (Tenn. 1984); Hamblen County Educ. Ass'n v. Hamblen County Bd. of Educ., 892 S.W.2d 428, 1994 Tenn. App. LEXIS 566 (Tenn. Ct. App. 1994); Esquinance v. Polk County Educ. Ass'n, 195 S.W.3d 35, 2005 Tenn. App. LEXIS 446 (Tenn. Ct. App. 2005); Lawrence County Educ. Ass'n v. Lawrence County Bd. of Educ., — S.W.3d —, 2005 Tenn. App. LEXIS 738 (Tenn. Ct. App. Nov. 28, 2005).

49-5-607. Organization decertification. —

(a) When the board of education and the recognized professional employees' organization are presented with petitions bearing the signatures of a majority of the professional employees in the negotiating unit indicating they no longer desire to be represented by the recognized

organization, an election committee shall be established according to § 49-5-605, and the election committee shall conduct a decertification election by secret ballot in which all professional employees in the negotiating unit will have the choice of voting either for the continuation of recognition or for decertification of the recognized professional employees' organization.

(b) If a majority in the negotiating unit vote for decertification, the committee will thereupon notify the board of education and the recognized professional employees' organization that the organization is no longer the recognized representative.

(c) Those persons requesting a decertification election shall be assessed by the chair of the election committee an amount adequate to pay for conducting the election.

(d) The terms and conditions of any existing memorandum of agreement shall continue in existence for the terms of the memorandum, except that any reference to the recognized professional employees' organization shall mean the individual employee.

(e) The board of education shall not be required to negotiate with any subsequently recognized professional employees' organization for the remaining period of the existing memorandum of agreement, but shall negotiate at the appropriate time as set forth in this part with a subsequently recognized professional employees' organization for a future period.

[Acts 1978, ch. 570, § 16; T.C.A., § 49-5515.]

NOTES TO DECISIONS

1. Decertification Election.
2. —Negotiations During Pendency.

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2. —Negotiations During Pendency.

Pursuant to this section, a decertification election may be held at any time, and continued negotiations are not required during the pendency of decertification proceedings. *Sullivan County Education Asso. v. May*, 605 S.W.2d 823, 1980 Tenn. App. LEXIS 340 (Tenn. Ct. App. 1980).

49-5-608. Management personnel. —

(a) (1) During the first month following the initial recognition of a professional employees' organization, and thereafter during the first two (2) months of each fiscal year, the board of education may designate and certify specific individuals as management personnel.

(2) The individuals shall be allowed to retain membership in the recognized professional employees' organization, but shall not be considered to be a part of the negotiating unit.

(3) Upon request, the designated management personnel shall represent the board of education in all negotiation activities.

(4) Management personnel shall not be eligible to represent the recognized professional employees' organization, to vote on whether to accept or reject items to be negotiated or items that have been negotiated or to derive benefits from the negotiation efforts, except those benefits that go to all professional employees of the school system.

(5) Management personnel must be designated by majority vote of the board of education from those employees who devote a majority of their time to the systemwide area or areas of professional personnel management, fiscal affairs or general management.

(b) All management personnel must be certified to the recognized organization within the first two (2) months of the school system's fiscal year. Those certified as management personnel shall be so classified through the current fiscal year only, but are subject to being recertified by the board of education for subsequent years. In the event a certified management person terminates employment or is transferred to a position that disqualifies the person, the board of education shall have thirty (30) days following the filling of the vacated position to name and certify a replacement. The board of education may name and certify management personnel not to exceed the schedule below according to the average daily attendance (ADA) of schools for the previous school year as used by the department of education in allocating state funds.

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[Acts 1978, ch. 570, § 6; T.C.A., § 49-5505.]

Section to Section References. This section is referred to in § 49-5-602.

49-5-609. Unlawful acts. —

(a) It is unlawful for a board of education or its designated representative to:

(1) Impose or threaten to impose reprisals on professional employees or discriminate against professional employees by reason of their exercise of rights guaranteed by this part;

(2) Interfere with, restrain or coerce employees in the exercise of the rights guaranteed in § 49-5-603;

(3) Refuse or fail to negotiate in good faith or execute a written memorandum incorporating any agreements reached with representatives of a recognized professional employees' organization as provided in this part;

(4) Refuse to permit a professional employees' organization to have access at reasonable times to areas in which professional employees work, use institutional bulletin boards, mail boxes or other communication media or use institutional facilities at reasonable times for the purpose of holding a meeting concerned with the exercise of the rights guaranteed by this part; provided, that, if a representative has been selected or designated pursuant to this part, a board of education may deny such access or usage to any professional employees' organization other than the representative until such time as a lawful challenge to the majority status of the representative is sustained pursuant to this part;

(5) Encourage or discourage membership in any organization by discrimination in hiring, granting of tenure or other terms or conditions of employment; provided, that the board of education or its designated representative may express any views, arguments or opinions on the subject of employer-employee relations; provided, that such expression contains no threat of reprimand, discharge or promise of benefits;

(6) Discharge or discriminate against an employee because the employee has filed an affidavit, petition or complaint or given any information or testimony under this part;

(7) Dominate, interfere or assist in the administration of any professional employee organization; or

(8) Refuse to in good faith mediate, arbitrate or participate in fact-finding efforts pursuant to this part.

(b) It is unlawful for a recognized professional employees' organization or its representatives to:

(1) Cause or attempt to cause a board of education to engage in conduct violative of this part; provided, that this subdivision (b)(1) shall not be construed to impair the right of a professional employees' organization to prescribe its own rules with respect to operation involving the acquisition or retention of membership;

(2) Refuse or fail to negotiate in good faith with a board of education or to execute a written contract incorporating any agreements reached;

(3) Interfere with, restrain or coerce professional employees or a board of education in the exercise of rights granted in this part;

(4) Refuse to good faith mediate, arbitrate or participate in fact-finding efforts pursuant

to this part;

(5) Engage in a strike;

(6) Urge, coerce or encourage others to engage in unlawful acts as defined in this part; or

(7) Enter onto the school grounds for the purpose of contacting professional employees in such a manner and at such times as will interfere with the normal operations of the school, except that agreement may be reached in any memorandum of agreement for grievance investigations and process by the recognized professional employees' organization.

(c) (1) A complaint of an unlawful act must be filed in the chancery court of the county where the professional employees' organization is seeking or has attained recognition.

(2) No complaint shall issue based upon any unlawful act occurring more than six (6) months prior to the filing of the complaint.

(3) The court is empowered to prevent any board of education or its agents, or organizations, associations, or their agents, from engaging in any unlawful act.

(4) If, upon the preponderance of the evidence taken, the court is of the opinion that a party named in the complaint has engaged in or is engaging in any such unlawful act, then the court shall state its findings of fact, issue an order requiring the party to cease and desist from the unlawful act, and take such affirmative action, including resumption of negotiations, reinstatement of employees with or without back pay or execution of a contract the terms of which have been agreed upon, as well as to effectuate the policies of this part. The order may further require the party to make reports from time to time showing the extent to which it has complied with the order.

(5) If, upon the preponderance of the testimony taken, the court is not of the opinion that a party named in the complaint has engaged in or is engaging in any such unlawful act, then the court shall state its findings of fact and shall issue an order dismissing the complaint.

[Acts 1978, ch. 570, § 9; 1983, ch. 183, § 1; T.C.A., § 49-5508.]

Law Reviews.

Government — Smith County Education Association v. Anderson: An Exception Under the Tennessee Open Meetings Act, 15 Mem. St. U.L. Rev. 116 (1984).

Retaliatory Discharge and Public Policy (Charles H. Anderson), 26 No. 6 Tenn. B.J. 30 (1990).

Attorney General Opinions. Teachers' organizations — limitations on access to school communication media, OAG 00-057 (3/31/00).

T.C.A. § 49-5-609(a)(5) has no bearing on a teacher's right to select a legal representative (a personal lawyer) of his or her choice, OAG 06-051 (3/20/06).

Cited: Esquinance v. Polk County Educ. Ass'n, 195 S.W.3d 35, 2005 Tenn. App. LEXIS 446 (Tenn. Ct. App. 2005); Metro. Nashville Educ. Ass'n v. Metro. Bd. of Pub. Educ., — S.W.3d —, 2006 Tenn. App. LEXIS 604 (Tenn. Ct. App. Sept. 12, 2006).

NOTES TO DECISIONS

1. Question for Trial Judge.
2. No Good Faith Negotiation.
3. Adoption and Implementation.

1. Question for Trial Judge.

Whether the board committed acts that amount to a failure to negotiate in good faith was a question for the trial judge and not the jury. Smith County Education Asso. v. Anderson, 676 S.W.2d 328, 1984 Tenn. LEXIS 936 (Tenn. 1984).

2. No Good Faith Negotiation.

The unilateral termination of insurance premiums by the board during negotiations was an unlawful act and not negotiated in good faith. Smith County Education Asso. v. Anderson, 676 S.W.2d 328, 1984 Tenn. LEXIS 936 (Tenn. 1984).

The unilateral action by the board in refusing to continue deduction of professional dues from teachers' salaries during negotiations was an unlawful act and not a negotiation in good faith. Smith County Education Asso. v. Anderson, 676 S.W.2d 328, 1984 Tenn. LEXIS 936 (Tenn. 1984).

Where an association asserted that a city either improperly used a 1% increase in the state minimum salary to partially satisfy its agreement to pay a 3% increase in teachers' salaries, the agreement between the association, the city, and an education board contemplated a total overall increase of 3% that included the 1% increase mandated by the state, because there was nothing in the record to indicate that the state-mandated increase was discussed specifically by the negotiating teams. City of Covington Educ. Ass'n v. City of Covington, — S.W.3d —, 2007 Tenn. App. LEXIS 193 (Tenn. Ct. App. Apr. 5, 2007).

3. Adoption and Implementation.

The adoption and implementation by the county board of education of the early retirement incentive program is an unlawful act in violation of T.C.A. § 49-5-609. Hamblen County Educ. Ass'n v. Hamblen County Bd. of Educ., 892 S.W.2d 428, 1994 Tenn. App. LEXIS 566 (Tenn. Ct. App. 1994), appeal denied, 1995 Tenn. LEXIS 33 (Tenn. Jan. 30, 1995).

49-5-610. Strikes — Remedies. —

(a) (1) If a strike occurs, the board of education may apply to the chancery court in the

county to enjoin the strike. The application shall set forth the facts constituting the strike.

(2) If the court finds, after a hearing, that a strike has occurred, the court may enjoin the employees from participating in the strike.

(b) When local boards of education have determined which employees have engaged in or participated in a strike, the employees may be subject to dismissal or forfeit of their claim to tenure status if they presently have attained tenure, and the employees may revert to probationary teacher status for the next three-year period. Any employee who engaged in or participated in a strike who is not a tenured teacher may also be subject to dismissal.

(c) No penalty, forfeiture of rights or privileges or other sanction or fine imposed on a professional employees' organization, its officers or members, as the result of a strike, shall be negotiable by the organization and a board at any time.

[Acts 1978, ch. 570, § 10; T.C.A., § 49-5509.]

49-5-611. Scope of negotiations. —

(a) The board of education and the recognized professional employees' organization shall negotiate in good faith the following conditions of employment:

(1) Salaries or wages;

(2) Grievance procedures;

(3) Insurance;

(4) Fringe benefits, but not to include pensions or retirement programs of the Tennessee consolidated retirement system;

(5) Working conditions;

(6) Leave;

(7) Student discipline procedures; and

(8) Payroll deductions.

(b) Nothing shall prohibit the parties from agreeing to discuss other terms and conditions of employment in service, but it is not bad faith, as set forth in this part, to refuse to negotiate on any other terms and conditions. Either party may file a complaint in a court of record of any demands to meet on other terms and conditions and have an order of the court requiring the other party to continue to meet in good faith on the required items of this section only. Any

negotiations under this part shall be meetings within title 8, chapter 44.

[Acts 1978, ch. 570, § 11; T.C.A., § 49-5510.]

Section to Section References. This section is referred to in § 49-3-306.

Attorney General Opinions. Authority to grant additional leave, OAG 99-079 (4/5/99).

Cited: Putnam County Educ. Ass'n v. Putnam County Comm'n, — S.W.3d —, 2005 Tenn. App. LEXIS 450 (Tenn. Ct. App. Aug. 1, 2005); Lawrence County Educ. Ass'n v. Lawrence County Bd. of Educ., — S.W.3d —, 2005 Tenn. App. LEXIS 738 (Tenn. Ct. App. Nov. 28, 2005); Lawrence County Educ. Ass'n v. Lawrence County Bd. of Educ., 244 S.W.3d 302, 2007 Tenn. LEXIS 1084 (Tenn. Dec. 20, 2007).

NOTES TO DECISIONS

1. No Good Faith Negotiation.
2. Early Retirement Program.
3. Salary Supplement.
4. Scope.

1. No Good Faith Negotiation.

The unilateral termination of insurance premiums by the board during negotiations was an unlawful act and not negotiated in good faith. *Smith County Education Asso. v. Anderson*, 676 S.W.2d 328, 1984 Tenn. LEXIS 936 (Tenn. 1984).

The unilateral action by the board in refusing to continue deduction of professional dues from teachers' salaries during negotiations was an unlawful act and not a negotiation in good faith. *Smith County Education Asso. v. Anderson*, 676 S.W.2d 328, 1984 Tenn. LEXIS 936 (Tenn. 1984).

When a party improperly insists on negotiating a non-mandatory provision of the parties' contract, the other party's remedy is to file a complaint seeking an order requiring the offending party to meet and bargain in good faith on the mandatory subjects; and T.C.A. § 49-5-611(b) in no way authorizes the non-offending party simply to declare an impasse and unilaterally implement policies on the mandatory subjects, and at no time can a party declare an impasse on any of the mandatory subjects unless and until there has been good faith bargaining on the particular subject upon which impasse was declared and the parties are deadlocked on that subject despite good faith efforts to reach an agreement. *Blount County Educ. Ass'n v. Blount County Bd. of Educ.*, 78 S.W.3d 307, 2002 Tenn. App. LEXIS 68 (Tenn. Ct. App. 2002).

2. Early Retirement Program.

The county board of education's early retirement incentive program is a fringe benefit under T.C.A. § 49-5-611, and hence a mandatory subject of negotiations. *Hamblen County Educ. Ass'n v. Hamblen County Bd. of Educ.*, 892 S.W.2d 428, 1994 Tenn. App. LEXIS 566 (Tenn. Ct. App. 1994), appeal denied, 1995 Tenn. LEXIS 33 (Tenn. Jan. 30, 1995).

3. Salary Supplement.

County board of education could lawfully limit the credit for prior teaching experience of newly-employed teachers for the purpose of assessing a local salary supplement. *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 953 S.W.2d 686, 1997 Tenn. App. LEXIS 199 (Tenn. Ct. App. 1997), appeal denied, 1997 Tenn. LEXIS 457 (Tenn. Sept. 15, 1997).

4. Scope.

Non-discrimination and contract duration are mandatory subjects of negotiation of a contract between a board of education and its professional employees. *Blount County Educ. Ass'n v. Blount County Bd. of Educ.*, 78 S.W.3d 307, 2002 Tenn. App. LEXIS 68 (Tenn. Ct. App. 2002).

The Tennessee legislature intended to provide a narrow list of specific subjects over which bargaining between boards of education and their professional employees is mandatory. *Blount County Educ. Ass'n v. Blount County Bd. of Educ.*, 78 S.W.3d 307, 2002 Tenn. App. LEXIS 68 (Tenn. Ct. App. 2002).

Where a probationary teacher's employment contract was not renewed, he was not entitled to binding arbitration of a grievance with the local school board; non-renewal of probationary teachers is not a permissive subject of negotiation under T.C.A. § 49-5-611. *Cannon County Bd. of Educ. v. Wade*, — S.W.3d —, 2008 Tenn. App. LEXIS 446 (Tenn. Ct. App. July 31, 2008).

Collateral References.

Bargainable or negotiable issues in state public employment labor relations. 84 A.L.R.3d 242.

49-5-612. Agreements. —

(a) The scope of a memorandum of agreement shall extend to all matters negotiated between the board of education and the professional employees' organization; provided, that the scope of the agreement shall not include proposals contrary to:

- (1) Federal or state law or applicable municipal charter;
- (2) Professional employee rights defined in this part; and
- (3) Board of education rights contained in this title.

(b) When agreement is reached by the representatives of the board of education and the recognized professional employees' organization, they shall jointly prepare a memorandum of understanding, and, within fourteen (14) calendar days, present it to their appropriate governing authorities for ratification or rejection. These governing authorities, as soon as practical, shall consider the memorandum and take appropriate action. If either governing authority rejects or modifies any part of a proposed memorandum, the matter shall be returned to the parties for further negotiation. The board of education may enter into the memorandum for a period not in

excess of three (3) years. Any items negotiated by a board of education and a professional employees' organization that require funding shall not be considered binding until such time as the body empowered to appropriate the funds has approved the appropriation. In the event the amount of funds appropriated is less than the amount negotiated, the board or its representatives and the professional employees' organization or its representatives shall renegotiate an agreement within the amount of funds appropriated.

(c) A board of education and a recognized professional employees' organization who enter into an agreement covering terms and conditions of professional service or other matters of mutual concern may include in the agreement procedures for final and binding arbitration of such disputes as may arise involving the interpretation, application or violation of the agreement. [Acts 1978, ch. 570, §§ 12, 13, 15; T.C.A., §§ 49-5511, 49-5512, 49-5514.]

Textbooks. Tennessee Jurisprudence, 22 Tenn. Juris., Schools, § 16.

Cited: *Esquinance v. Polk County Educ. Ass'n*, 195 S.W.3d 35, 2005 Tenn. App. LEXIS 446 (Tenn. Ct. App. 2005); *Robertson County Bd. of Educ. v. Redmond*, — S.W.3d —, 2008 Tenn. App. LEXIS 260 (Tenn. Ct. App. Apr. 30, 2008).

NOTES TO DECISIONS

1. Increase in Salaries.
2. Discretion.
3. Duration.
4. Professional Employee.

1. Increase in Salaries.

Since the increase in salaries for the year 1978-79 which had been negotiated between the board of education and the union required funding by the county commissioners, under this section it could not be considered binding until the commissioners approved the funding. *Carter County Board of Education Comm'rs v. American Federation of Teachers*, 609 S.W.2d 512, 1980 Tenn. App. LEXIS 346 (Tenn. Ct. App. 1980).

Where the amount of funds approved by the county commissioners was less than the amount negotiated by the board and the union, the only remedy available under this section was for the board of education and the union to renegotiate an agreement within the funds available. *Carter County Board of Education Comm'rs v. American Federation of Teachers*, 609 S.W.2d 512, 1980 Tenn. App. LEXIS 346 (Tenn. Ct. App. 1980).

Agreement between an association, a city, and an education board regarding teachers' salaries contemplated a total overall increase of 3% that included a 1% increase mandated by the state, because: (1) There was nothing in the record to indicate that the state-mandated increase was discussed specifically by the negotiating teams; (2) The agreement could not be considered binding until the budget was approved; and (3) The association's actions subsequent to execution of the agreement indicated that

the association accepted that the agreed 3% increase was a total increase. *City of Covington Educ. Ass'n v. City of Covington*, — S.W.3d —, 2007 Tenn. App. LEXIS 193 (Tenn. Ct. App. Apr. 5, 2007).

2. Discretion.

Any provisions, or any interpretations of those provisions, of a collective bargaining agreement which have the effect of limiting the superintendent's (now director of schools') discretion with regard to selection, length of contract, renewal or non-renewal of contracts, performance, or accountability of principals are beyond the permissible scope of the agreement. *Marion County Bd. of Educ. v. Marion County Educ. Ass'n*, 86 S.W.3d 202, 2001 Tenn. App. LEXIS 600 (Tenn. Ct. App. 2001).

Pursuant to T.C.A. § 49-5-612, judicial review of the permissible scope of arbitration agreement between teacher and the metropolitan board of education (board) was allowed; under the collective bargaining agreement, the teacher's entire dispute with the board was subject to arbitration; the interpretation of the agreement in respect to the coaching position was proper. *Metro. Nashville Educ. Ass'n v. Metro. Bd. of Pub. Educ.*, — S.W.3d —, 2006 Tenn. App. LEXIS 604 (Tenn. Ct. App. Sept. 12, 2006), rev'd, — S.W.3d —, 2008 Tenn. LEXIS 113 (Tenn. Feb. 25, 2008).

Where a probationary teacher entered into an employment contract with the school board pursuant to the Education Professional Negotiation Act and worked for three years and then his contract was not renewed, the teacher was not entitled to binding arbitration of a grievance with the local school board under T.C.A. § 49-5-612(c); decision of whether to renew a probationary teacher's contract rested with local school officials. *Cannon County Bd. of Educ. v. Wade*, — S.W.3d —, 2008 Tenn. App. LEXIS 446 (Tenn. Ct. App. July 31, 2008).

3. Duration.

T.C.A. § 49-5-612(b) prohibits the term of a memorandum of agreement between a board of education and its professional employees from exceeding three years, and, because of this explicit directive, these parties cannot negotiate an agreement in excess of three years even if they so desire. *Blount County Educ. Ass'n v. Blount County Bd. of Educ.*, 78 S.W.3d 307, 2002 Tenn. App. LEXIS 68 (Tenn. Ct. App. 2002).

4. Professional Employee.

T.C.A. § 49-5-601, T.C.A. § 49-5-612, T.C.A. § 49-5-101, T.C.A. § 49-5-108, and T.C.A. § 49-5-403 preclude an education association as the bargaining unit for the licensed professional employee from representing teachers in their capacity as coaches; any contractual protections emanating from the Education Professional Negotiations Act are relevant to persons only in their status as professional employees and not in their status in non-licensed positions. *Lawrence County Educ. Ass'n v. Lawrence County Bd. of Educ.*, 244 S.W.3d 302, 2007 Tenn. LEXIS 1084 (Tenn. Dec. 20, 2007), rehearing denied, — S.W.3d —, 2008 Tenn. LEXIS 30 (Tenn. Jan. 30, 2008).

49-5-613. Mediation and arbitration. —

(a) Following reasonable efforts to reach agreement, either the board of education or the recognized professional employees' organization may, upon written notification to the other, request the services of the federal mediation and conciliation service. If such service is not

available at a time agreeable to the requesting party, a mediator shall be selected by a three-member panel consisting of one (1) person selected by the board of education, one (1) person selected by the recognized professional employees' organization and one (1) person to serve as chair selected by these two (2) persons. The mediator shall meet with the parties or their representatives, or both, forthwith, either jointly or separately, and shall take such other steps as the mediator deems appropriate in order to persuade the parties to resolve their differences and effect a mutually acceptable agreement. The mediator shall not, without the consent of both parties, make findings of fact or recommend terms of settlement. The costs of the services of the mediator appointed by the panel shall be borne by the party requesting the mediator.

(b) If the mediator is unable to bring the parties to agreement, either party may, by written notification to the other, request that their differences be submitted to fact-finding advisory arbitration. Either party may request the American Arbitration Association to designate an arbitrator. The arbitrator so designated shall not, without the consent of both parties, be the same person who was appointed mediator pursuant to subsection (a).

(c) The arbitrator shall meet with the parties or their representatives, or both, either jointly or separately, make inquiries and investigations, hold hearings and shall take such other steps as the arbitrator deems appropriate. For the purpose of the hearings, investigations and inquiries, the arbitrator shall have the power to issue subpoenas requiring the attendance and testimony of witnesses or the production of evidence. The several departments, commissions, divisions, authorities, boards, bureaus, agencies and officers of the state or any political subdivisions or agencies thereof, including the board of education, shall furnish the arbitrator, upon the arbitrator's request, all records, papers and information in their possession relating to any matter under investigation by or in issue before the arbitrator. If the dispute is not settled prior thereto, the arbitrator shall make findings of fact and recommend terms of settlement, which recommendations shall be advisory only, and shall be made within thirty (30) calendar days after the arbitrator's appointment. Any findings of fact or recommended terms of settlement shall be submitted in writing to the parties. The arbitrator has the discretion to make such findings and recommendations public, and either the board of education or the professional employees' representative may make such findings and recommendations public if no agreement is reached within ten (10) calendar days after their receipt from the arbitrator. Upon completion of the processes of mediation, fact-finding and advisory arbitration, this part stipulates no additional recourses or actions. The costs for the services of the arbitrator shall be borne by the party requesting the arbitrator.

[Acts 1978, ch. 570, § 14; T.C.A., § 49-5513.]

Cited: Memphis Education Asso. v. Board of Education, 706 S.W.2d 88, 1985 Tenn. App. LEXIS 2660 (Tenn. Ct. App. 1985); Hamblen County Educ. Ass'n v. Hamblen County Bd. of Educ., 892 S.W.2d

428, 1994 Tenn. App. LEXIS 566 (Tenn. Ct. App. 1994); *Esquinance v. Polk County Educ. Ass'n*, 195 S.W.3d 35, 2005 Tenn. App. LEXIS 446 (Tenn. Ct. App. 2005).

NOTES TO DECISIONS

1. Arbitrator's Authority.

1. Arbitrator's Authority.

Where a probationary teacher entered into an employment contract with the school board pursuant to the Education Professional Negotiation Act and worked for three years and then his contract was not renewed, the teacher was not entitled to binding arbitration of a grievance with the local school board under T.C.A. § 49-5-612(c); decision of whether to renew a probationary teacher's contract rested with the local school district and did not rest with an arbitrator under T.C.A. § 49-5-613(c). *Cannon County Bd. of Educ. v. Wade*, — S.W.3d —, 2008 Tenn. App. LEXIS 446 (Tenn. Ct. App. July 31, 2008).