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Massachusetts Association of School Committees

MASC/MASS JOINT CONFERENCE

Enhanced programming; revised scheduling, and an expanded Saturday session are among the "not to miss" new offerings in Hyannis this November.

What's the key issue in your district these days? Is it the PARCC or MCAS debate? Implications of the new student discipline law? Educator evaluation and collective bargaining? Budget woes (cutbacks)? The almighty shrinking dollar and how to make the most of fewer of them? Is there a superintendent search on the horizon? A(n unwanted) charter school moving into town? Other?

No matter your issue, school committee members and superintendents are likely to find it addressed at this year's joint conference in **HYANNIS, NOVEMBER 5-8**. More than 70 sessions on topics ranging from virtual and innovation schools; strategic use of financial data; succession planning and strategic leadership; the implications of social media (including a special session on how—and how not to—blog and tweet) will help you and your colleagues understand the key issues and learn about strategies and programs to help your district raise achievement without breaking the bank.

This November will also bring several changes to Massachusetts that may have far-ranging impact for school leaders. A new governor and attorney general will be voted on. The long-winded casino debate will be settled by ballot question. Other state elections may (or may not) help to resolve the ongoing Congressional stalemate. There is new leadership, and a new hard-line, in the teacher unions at both the state and national levels.

GUEST SPEAKERS

Helping to put these developments in perspective for conference participants will be political commentator/TV/radio host **JIM BRAUDE** who will lead a discussion on the prior day's election results at the Wednesday keynote dinner. Thursday General Session will feature Harvard Law School professor **DOUGLAS STONE** who has lectured extensively on having difficult conversations (with employees, colleagues, family members etc.) and how to learn from the feedback. Also joining the Thursday General Session will be National School Boards Association President **ANN BYRNE** who will share insights from a national perspective and report on progress on several national education fronts.

After spending a full day in breakout and general sessions on Thursday, what better way to wind down and put what you've learned in perspective than to join guest speaker and Somerville native **JIMMY TINGLE** at the Thursday night dinner. Tingle, a comedian and political satirist who has appeared on The Tonight Show and many other nationally acclaimed venues, will no doubt bring his particular slant to local and national events.

Friday General Session will feature keynote speaker **HERMAN BOONE**. The real-life coach from *Remember the Titans*, Boone has been inspiring national audiences with the story of how he united a racially divided team, and how school districts can successfully encourage teamwork toward a common goal. Following the General

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Charter School Bill Rejected by the State Senate

As members are likely aware, the House of Representatives passed its version of charter school legislation in May. The State Senate considered S.2262, concerning charter schools, and the approximately 40 amendments thereto on July 16. The Senate soundly rejected the charter legislation by rejecting the Senate Ways and Means version of the bill 26 to 13, and rejected the engrossment of the bill 30 to 9.

MASC worked closely with the Co-Chairs of the Education Committee—Senator Chang-Diaz of Boston and Representative Peisch of Wellesley—to secure funding for local public schools whose students chose to attend charter schools, and this account has been fully funded for FY2014 by the legislative addition of $27.6 million. Senator Chang-Diaz sought the support of MASC for an amendment to ensure that if the charter school tuition account was not fully funded in future years that the money to expand the cap on charter schools would also be subject to reduction. MASC supported the Chang-Diaz amendment along with the MMA, and it was included in the Senate Ways and Means version of the bill.

Also, both MASC and MMA opposed a provision, con-

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ALERT: LEGAL UPDATE | SJC RULES IN FAVOR OF LEXINGTON

MASC and MASS join in filing amicus brief in support of Lexington School Committee

by Stephen J. Finnegan Esq. MASC General Counsel

No longer will an arbitrator who finds a charge under the Teacher Dismissal Law, pursuant to Lexington to be substantiated, be allowed to substitute his judgment as to the proper punishment for that of the school district. This is a very significant case and Geoffrey Bok, Counsel for Lexington, did an excellent job in preparing and arguing the case. Mike Long and I, on behalf of MASC and MASS, joined in the submission of an Amicus Brief and contributed to certain of the legal arguments, which found their way into Justice Spina's decision. Mike and I have argued in both Atwater and successfully in Lexington that the authority of an arbitrator is circumscribed in statutory arbitrations. I especially commend my colleague Mike Long for raising this line of reasoning in the 2001 *Geller* case that resulted in a plurality of that Court adopting the limits imposed upon arbitrators in teacher dismissal cases.

Justice Spina writing for the majority (only Justice Lenk dissented) concluded that the arbitrator in Lexington exceeded the scope of his authority by awarding the reinstatement of Mark Zagaeski on the basis of the "best interest of the pupils" in the district, despite having found that the school district carried its burden to show facts amounting to conduct unbecoming a teacher. The decision of the Superior Court judge was reversed and the arbitration award was vacated. Since the *Geller* decision in 2001, school districts have been waiting for the right case to build the *Geller* plurality, which held that once a school district, as determined by the arbitrator, met its burden of a proof the arbitrator did not have the authority to modify the district's determination of the appropriate punishment.

Zagaeski earned his doctorate in cellular biophysics in 1981 and in 2000 he began his public school teaching career in Lexington, and his employment was terminated in June, 2011. He was a physics teacher, whose evaluations were uniformly positive, and had no history of discipline. Zagaeski taught an integrated math and physics class for students who tend to be at risk academically many of whom were special needs students. The arbitrator found that "Zagaeski was more flexible with boundaries than another teacher might have been."

In April, 2011, a seventeen year old female student in Zagaeski's class was disappointed with her grades and asked Zagaeski in front of her classmates, whether there was any way she could "pay…for a better grade." Another student in the class asked, "You mean short of sexual favors?" Zagaeski responded that "Yes, that is the only thing that would be accepted." He continued by saying "Don't be ridiculous" and told the student that the only way to raise her grade was to work harder. He then encouraged her to come after school for extra help.

Two days later she sought extra help. Zagaeski was in his classroom assisting another female student. The student again asked Zagaeski, "Can't I just pay you for a better grade?" Zagaeski responded "Well no… you know that the only thing I would accept is a sexual favor." The other female student exclaimed, "Dr. Z!" and laughed. The seventeen year old student made a complaint to the guidance counselor about Zagaeski's comments.

Eventually, after a hearing, Zagaeski was dismissed from his employment based on six separate instances of conduct unbecoming a teacher. The arbitrator concluded that the school district only carried its burden to establish the charge described above. The arbitrator further found that Zagaeski's comments were inappropriate for a teacher to make to a student, and that these comments created a hostile or offensive educational environment for the student. The arbitrator concluded that Zagaeski's conduct constituted "a relatively minor and isolated" violation of the harassment policy, which only nominally constituted conduct unbecoming a teacher. The arbitrator further found that in light of Zagaeski's high performance ratings throughout his employment, it would be in the best interests of the pupils in the district that he be retained as a teacher. The arbitrator reinstated the teacher with only two days of unpaid suspension.

Lexington appealed the decision of the arbitrator. The Superior Court judge stated that although he was inclined to follow the reasoning of Justice Cordy's plurality opinion in *Geller* in support of a conclusion that the arbitrator had exceeded the scope of his authority, the judge was given pause by a footnote in the opinion, which states in relevant part, "This is not the case of an arbitrator finding a teacher to have engaged in minor misconduct that, however, nominally fits within a category on which dismissal could be based. In such circumstances, an arbitrator's finding that the conduct did not rise to the level of misconduct contemplated by the statute as a ground for dismissal is one that would likely lie within the scope of his authority." *Geller*, 435 Mass. At 231 n.7 (Cordy, J., concurring).

Where arbitration is mandated by the terms of a collective bargaining agreement, the scope and limits of the authority of the arbitrator are ascertained by the terms of the agreement. However, in a case such as this, where arbitration is mandated by statute, the exclusive source of the arbitrator's authority is the statute itself. Therefore, judicial review of the arbitrator's interpretation of the authorizing statute, (G. L. c. 71, § 42) particularly regarding the scope of the arbitrator's authority under the statute, is "broader and less deferential" than in cases of judicial review of an arbitrator's decision arising from the interpretation of a private agreement.

The purpose of the Education Reform Act was not to enhance the employment rights of public school teachers. (See G. L. c. 69, § 1, as appearing in St. 1993, c. 71, § 27.) Rather, the stated purposes of the Reform Act express a concern for the increased accountability of educators and the improvement of the quality of education provided in public schools. The cases prior to the Reform Act expressed concern over teacher dismissal decisions by school committees that were based on "personal hostility, ill will or political animosity" such that the school's stated grounds for dismissal were nothing more than pretext. Justice Cordy's footnote applies, if an arbitrator finds that the school district has labeled a

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Conference 2014

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Session, the Leadership Luncheon audience will hear from **TOM WEBER**, MA Commissioner of Early Education and Care, who will share thoughts on how his department and districts can collaborate in order to ensure that all children arrive at school ready to learn.

NEW IN 2014

In response to member requests, several important new features have been added to the 2014 program, key among them an enhanced Friday-Saturday program. MASC has heard from members that work and family commitments often make it difficult to attend the full Wednesday through Saturday conference. In order to accommodate those who may only have one or two days to participate, the 2014 Conference Planning Committee rescheduled the Delegate Assembly to Wednesday afternoon, thereby making it possible to offer a full afternoon of meaningful programming on Friday. And on Saturday, in addition to the new member training sessions, other programming will focus on "the student voice," with sessions targeted to student concerns (overload and student stress; technology that engages students and raises achievement, among others). We will even hear from a panel of students at the concluding Saturday box lunch at which current student leaders and some who have recently graduated will discuss their high school experience and how well they believe, and/or found, they were prepared for the world of college and work.

For those attending only the Friday-Saturday program, a special low registration rate is being offered and the hotel will extend the conference room rate to include Saturday night for those who might want to have their families join them for a get-away weekend at the Cape.

Of course, many of the conference standards will continue to be on the program: division meetings; MASS business meeting; the Exhibit Hall with many new exhibitors and special exhibitor/partner sessions; live musical entertainment on Wednesday and Friday nights in the Bogey's lounge; and of course, the Life Member dinner on Friday night.

As this Bulletin goes to press, more than 400 of your colleagues have already signed up to attend the conference. Make sure you aren't left behind. Register online at www.masc.org or call the MASC office (800-392-6023) for more information. If you have registered, congratulations, and we look forward to seeing you in Hyannis.

Legal Update Lexington

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teacher's conduct "conduct unbecoming a teacher" when the conduct does not, in substance, truly rise to that level, or that the school district has used that label merely as a pretext to dismiss the teacher based on personal, political, or other unauthorized bases, the arbitrator is empowered to vacate the punishment imposed by the school district. In this case, however, there is no indication in the record before the Court that the grounds on which Zagaeski was dismissed were mere pretext or that his misconduct was so minor that it did not in substance constitute one of the enumerated bases on which the statute permits dismissal. Therefore, the SJC determined that Justice Cordy's observation in footnote 7 in Geller regarding "minor" misconduct, and the concerns expressed in early case law regarding political dismissals based on "subterfuge" are not implicated here.

Justice Spina cited cases which determined that public school teachers hold a position of special public trust. As the SJC recently acknowledged in Atwater, "students must be able to trust that they will be safe in the presence of their teachers and coaches. They must be able to rely on their teachers and coaches to exercise sound judgment and maintain appropriate boundaries, even when they themselves may be unable to do so." The creation of a hostile learning environment through sexual harassment, whether verbal or physical, can be detrimental to the well-being of students who experience such harassment in part because it may unreasonably interfere with their education. The Court held that Zagaeski's conduct undermined various laws and policies, as well as one of the central purposes of the Reform Act: to ensure an educational setting that safeguards, rather than warps, a child's self-esteem. (See G. L. c. 69, S. 1.)

Justice Spina referenced an additional concern: that teachers are in part responsible for instilling core constitutional values in student in preparation for their participation as citizens in a democracy. A teacher, the Court opined, who models sexually harassing behavior in front of public school students as if it is all in good fun undercuts our constitutional value of freedom from gender discrimination. Indeed, students who witness teachers engaging in such conduct may come to believe that such conduct is acceptable in an academic or professional setting. The Court concluded that inculcation of those sorts of values by teachers is not acceptable in our public schools.

The Court agreed that the teacher dismissal statute does authorize the arbitrator to engage in a substantive review of dismissal decisions insofar as it requires arbitrators to consider the "best interests of the pupils in the district and the need for elevation of performance standards." However, Justice Spina disagreed that this statutory language authorizes an arbitrator to draw on a teacher's past performance to override a dismissal decision based on a teacher's conduct having threatened the safety and welfare of his or her students. If a teacher's past performance could be used as a basis on which an arbitrator could award reinstatement – because, as here, the arbitrator concluded it was in the students' best interests to have high performing teachers – then the "need for elevation of performance standards" and the "best interests of the pupils" would come to mean the same thing. Where the teacher conduct at issue is performance-based, the arbitrator should consider the school district's decision primarily in light of the need to raise performance standards. However, when the conduct at issue has jeopardized the safety or self-esteem of students in the classroom setting, the arbitrator should consider the best interest of the pupils primarily in light of the pupil's interest in a safe learning environment. The Legislature cannot have intended a teacher's past academic performance to be used to justify reinstatement of a teacher found to have engaged in conduct that created a hostile learning environment for certain students.

For the foregoing reasons, the SJC vacated the order of the Superior Court confirming the arbitrator's award, and the case was remanded to the Superior Court for entry of an order vacating the arbitration award.

COMING SOON: MGL 2014

Highlights Contained in 2014 Version **By Stephen J. Finnegan Esq.**

This Bulletin will be followed in the coming weeks with the receipt of your 2014 School Law book, and gives me the opportunity to underscore a few of the more salient legislative changes. The anti-bullying legislation was first enacted in 2010 and has been materially amended in 2012 and 2014. The 2012 revision added to the definitions of "Bullying" and "Perpetrator" as found in General Laws chapter 71 S. 37 O the following: in addition to a student "a member of a school staff including, but not limited to, an educator, administrator, school nurse, cafeteria worker, custodian, bus driver, athletic coach, and advisor to an extracurricular activity or paraprofessional who engages in bullying or retaliation." This provision, which also applies to the application of the school plan in subsection (d), became effective on July 1, 2013. The 2014 amendment effective July 23, 2014, requires that each plan recognize that certain students may be more vulnerable to becoming a target of bullying or harassment based on actual or perceived differentiating characteristics, and enumerates certain categories. This amendment significantly expands the scope of bullying incident data to be reported to DESE. A survey of students is required at least once every 4 years. Also, DESE may investigate certain school based incidents of bullying.

Substantial revisions to the student discipline law (G.L. c. 71 SS. 37H, 37H1/2, 37H3/4, G.L.c.76, SS. 1,1B, 18 and 21) passed in 2012 and become effective July 1, 2014. These amendments include requirements for school districts: to provide continuing alternative education to students who are expelled or suspended from school for more than 10 consecutive school days, whether in or out of school; to establish a pupil absence notification program in each of its schools; to allow for expulsion only for SS. 37H, H1/2 offences; to add significantly greater procedural requirements for violations of SS. 37H3/4, and to require greater reporting of student discipline to DESE. Also, the Legislature, due to MASC advocacy and support from the Joint Chairs of the Committee on Education, and action by the State Auditor, which found that the alternative education requirement constituted an unfunded mandate, resulted in an appropriation for F.Y. 2015 of $ 246,000 that begins in a limited way the funding of this program. This list is not intended to be complete, but rather to draw your attention to the statutes above enumerated, and the accompanying regulations contained in your 2014 General Laws.

ADDITIONAL COPIES MAY BE ORDERED ON THE MASC WEBSITE (www.masc.org) OR CALL (800-392-6023).

Charter School

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tained in the House bill, granting commonwealth charter schools the right of first refusal of the sale or lease of a public school determined by MSBA to have excess capacity. Current law contains permissive language, which would have been changed to a mandate. The House language was deleted from the Senate Ways and Means version of the charter bill. Special thanks should go to Senator Joan Lovely of Salem for her assistance and support concerning the deletion of the school facility provision.

MASC offered further amendments to S.2262 regarding legislation filed in this session of the Legislature. The first was an amendment offered by Senator Michael Moore (Millbury) to require local approval of new charter schools, and also, amendments filed by Senator Karen Spilka (Ashland) concerning the restoration of school committee authority to approve school improvement plans and an addition to the charter school application requiring charter schools to prepare an analysis of the social and economic impact of a charter on the communities from which they will draw students. These further amendments had significant support; however, they were withdrawn after it became clear that the bill lacked the support to pass.

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