

SOMERSET COUNTY BOARD OF
EDUCATION,

Appellant

v.

TEACHERS ASSOCIATION OF
SOMERSET COUNTY,

Appellee

BEFORE THE
MARYLAND
STATE BOARD

Opinion No. 09-13

OPINION

INTRODUCTION

The Somerset County Board of Education (local board) filed a Petition for Declaratory Ruling requesting that this Board rule that signing bonuses are not a matter subject to arbitration under the collective bargaining agreement. The Teachers Association of Somerset County (TASCO) filed an Answer and Request for Hearing. The local board responded by letter to TASCO's Answer.

FACTUAL BACKGROUND

In 2007, to attract highly qualified teachers, the local board offered prospective teachers a signing bonus if they met the criteria for highly qualified status, were fully certified in their area of instruction, and agreed to teach in the school system for three years. (Affidavit of Leo Lawson, ¶ 4, and Ex. 1 attached to Request for Declaratory Ruling). Forty teachers accepted the job offer and a signing bonus of either \$1,000 or \$3,000 depending on the area of certification. Of those 40 teachers, 23 received their signing bonus check before the first day of school (August 20, 2007). It was, therefore, not a part of their first regular paycheck which was issued on September 15. Seventeen teachers received their bonus checks after the date school started. As to those payments, 10 of the 17 teachers received their bonus checks on August 31, 2007. Those checks, therefore, were not part of the first regular paycheck. Apparently, seven of the teachers received their signing bonus in their regular paycheck.

On January 7, 2008, TASCO filed a grievance stating that "it was the position of TASCO during negotiations that any bonus paid during the work year must be negotiated."¹ (Request for Declaratory Ruling, Ex. 2). TASCO explained that the contract governs "how new hires will be placed on the scale and paid. If new hires are paid a 'bonus' after they report to work, they are in effect being paid an amount different than [the contract] permits." This outcome, TASCO

¹ In its Answer to the Petition for Declaratory Ruling TASCO expands its argument to cover all signing bonuses, no matter when they were paid.

asserted, violated Article IV of the contract - - "No employee will be disciplined or reduced in rank or reduced compensation without just cause." TASC0 explained:

The effect of the signing bonus is to establish a salary system that is not equal for all employees as is required by the contract. This in effect causes some employees to be paid less than others on the same step of the salary schedule. This is especially true for teachers hired several years ago and who are on the same step as someone hired this year who received a bonus and teachers who are the same step of the scale as a new hire but not in a "hard to staff" area (for example, a teacher on step 5 will be paid less than new hire in a hard to staff area on step 1.)

Id.

The local superintendent denied the grievance explaining that during negotiations in 2007 the local board had refused to negotiate pre-employment bonuses, asserting that it was an illegal subject of bargaining. TASC0, she noted, did not seek impasse or a declaratory ruling from the State Board on that issue. The local superintendent adhered to the view that the topic of pre-employment signing bonuses was an illegal subject for collective bargaining and, therefore, could not be the subject of a grievance. (Petition for Declaratory Ruling, Ex. 3).

On March 3, 2008, the local board upheld the superintendent's decision finding that there were no viable grounds for a grievance because the individuals who received the "monies [were] not employees at the time of the award of the incentive" and because the collective bargaining agreement did not "address pre-employment travel expenses, signing incentives, moving expenses or other incentives." (Petition for Declaratory Ruling, Ex. 4). Thereafter, TASC0 filed a demand for arbitration. (*Id.*, Ex. 5). The local board filed a Petition for Declaratory Ruling with this Board and filed a complaint in the Circuit Court for Somerset County to enjoin TASC0 from pursuing arbitration until this Board rules on the Petition for Declaratory Relief. TASC0 has responded to the petition and requested a hearing before this Board.

STANDARD OF REVIEW

In a case in which the State Board is asked to declare the intent and meaning of an education law, the State Board exercises its independent judgment on the record before it in the explanation and interpretation of the public school laws and State Board regulations. COMAR 13A.01.05.05D.

LEGAL ANALYSIS

This case presents one question:² Is a signing bonus offered to a teacher to sign a contract to teach in Somerset County Public School System considered wages? If it is considered wages, the signing bonus is a mandatory topic of bargaining and subject to arbitration. *See* Md. Educ. Code Ann. §6-408(b) (mandatory topics are wages, salary, working conditions). To answer the question presented here requires first that we define the term “wages.” There is no definition of wages in the Education Article, however. Therefore, we must look elsewhere for guidance.

TASCO directs us to the Labor and Employment Article. TASCO bases its argument that a signing bonus is wages on the definition of wages contained in the Maryland Labor and Employment law -- Wage and Payment Collection statute, Md. Labor & Emp. Code Ann., § 3-501, *et seq.* The purpose of the Wage and Payment Collection statute is to provide employees with a means to collect all the wages to which they are entitled for the work they have performed. *Whiting Turner Contracting Co. v. Fitzpatrick*, 366 Md. 295, 303 (2001). To effectuate that purpose, the statute defines wages.

The local board initially argued that, because that definition is part of Labor and Employment law, it could not be used in this case. In its Post-Argument filing, the local board appears to have changed that position. (*See* Memorandum on Behalf of the Board of Somerset County at 2).

We begin our analysis, therefore, with the statutory definition: wages are “all compensation due to an employee for employment [including] a bonus, a commission, a fringe benefit, or any other remuneration promised for service.” Md. Labor & Emp. Code Ann. § 3-501(c).

Although that definition of wages specifically includes bonuses, the Court of Appeals has recognized that, “not all bonuses constitute wages.” *Medex v. McCabe*, 372 Md. 28, 36 (2002) citing *Whiting Turner Contracting Co. v. Fitzpatrick*, 366 Md. 295, (2001). “[I]t is the exchange of remuneration for the employee’s work that is crucial to the determination that compensation constitutes a wage. Where payments are dependent on conditions other than the employee’s efforts, they lie outside of the definition.” *Id.* To understand what “remuneration for work” means, the facts of the *Medex* case and the *Whiting Turner* case are instructive.

In *Whiting Turner*, the employee at the time of hiring was promised a weekly salary and, after 2 years, a profit sharing bonus, depending on the profitability of the company. After one

²We do not find merit in the local board’s argument that the signing bonus occurred “pre-employment,” and therefore, it is not within the bounds of TASCO’s representation which, the local board asserts, is for employees only. It is our view that, although the parties agreed on the signing bonus prior to employment, that agreement had no force or effect until the moment the teacher became an employee, not before.

year of employment, during a discussion with his employer in which the employee said he was considering resigning, the employer said "I have a profit sharing check for you in my pocket. All you have to do is tell me you are staying." *Whiting Turner Contracting Co. v. Fitzpatrick*, 366 Md. at 299-300. After considering the matter over the weekend, the employee resigned. He did not get the bonus check. He sued his employer.

To determine if the employee was entitled to the profit sharing, the Court of Appeals looked closely at the statutory definition of wages. It focused on the words "promised for remuneration for service" and used those words to declare a bright line rule - "Once a bonus, commission or fringe benefit has been promised as part of the compensation for service, the employee would be entitled to its enforcement as wages." *Id.* at 305.

Applying that rule, the Court reviewed the parties' agreement at the time of hiring which included the promise of salary and a profit sharing bonus after two years of employment. The Court noted that, if the employee had stayed two years, the profit sharing bonus would have become "wages" because it was promised for two years of service.

The employer offered the employee the bonus after one year, however. The fact that the employer offered the employee the bonus check after only one year did not transform that check into a wage. That check, the Court concluded, was "not part of the compensation package promised, it is merely a gift, a gratuity revocable at any time before delivery." *Id.* at 306.

In *Medex*, the employee was a sales representative who earned a salary of \$49,000, plus incentive fees. Payment of the incentive fees was conditioned on meeting targets and on being an employee at the end of the fiscal year in which incentive payment was earned, as well as being an employee at the time of the "actual payment" of the incentive. The employee resigned four days after the relevant fiscal year ended (January 31, 2000). Payment of the incentive fees did not occur until March 31, 2000. *Medex*, 376 Md. at 32.

The Court of Appeals agreed with the employee's contention that incentives fees that are part of the employee's promised compensation for service performed, even though they are not due for payment at the time the employee resigns, are wages. They must be paid despite an express term in the employment contract to the contrary. *Id.* at 35. The Court came to that conclusion because:

- the incentive fees were related directly to the sales the employee made during the fiscal year; and
- the employee had performed all the work necessary to earn the incentive fees.

Therefore, the Court held that because the fees were promised compensation for service performed, they were "wages under the Act." *Id.* at 37.

Based on the Maryland case law discussed above, we believe that a signing bonus fits the definition of wage if the local board promised it to the teacher as compensation for the performance of a service, not as a gift or gratuity for just signing the employment contract.

We look, therefore, to the agreement between the local board and the teacher at the time of hiring. It states in full:

Somerset County Public Schools provides a pre-employment signing bonus to teachers who meet the criteria of "Highly Qualified" as defined by "No Child Left Behind" (NCLB) as well as being fully certified in the area of instruction they will be teaching. By accepting the pre-employment signing bonus, the undersigned agrees to the following terms and conditions:

- Meet the criteria for highly qualified status under MSDE certification requirements;
- Meet the criteria for full certification; and
- Agree to teach in Somerset County Public Schools for a minimum of three (3) years.

Failure to fulfill the three year term will result in the obligation to repay a pro-rata dollar amount of the signing bonus. Termination of employment or non-renewal of contract prior to completing the three year term will make this agreement null and void with no obligation on the part of the teacher to return any portion of the signing bonus.

Ex. 1, attached to Petition for Declaratory Ruling.

In considering whether the signing bonus was promised as compensation for the performance of some service, it seems to us that the teacher receiving the signing bonus has already done the work necessary to meet the criteria for a highly qualified teacher and for full certification. Those are prerequisites for being offered the bonus. The one other thing the teacher needs to do is "to teach in Somerset County Public Schools for a minimum of three years." When the parties' arguments are stripped to the bone, therefore, the question with which we are left is: "Is showing up for work for three years, without resigning, the performance of work or service?"

We conclude that it is "performance for work or service" because the school system promised the signing bonus if the teachers agreed to teach for three years and teachers here promised three years of service in order to keep the signing bonus. They essentially "earn" the signing bonus year by year by providing that service. Other cases support that conclusion.

For example, the Internal Revenue Service (IRS) in Rev. Rul. 2004-109 considered several scenarios involving bonuses. In the scenario relevant to this case, a Baseball Club negotiated an employment contract with a player. Under the contract, the player received a

signing bonus if he reported to work for spring training. The signing bonus was not contingent on the player's future performance of service. The question presented was "Is this signing bonus 'wages' for the purpose of imposing FICA taxes?" Under the Internal Revenue Code, wages is defined as all remuneration for employment. IRC §§ 312(a). Employment is defined as any service, of whatever nature, performed by an employee for the person employing him. IRC § 3121(b). For the IRS, "[e]mployment encompasses the establishment, maintenance, furtherance, alteration or cancellation of the employer-employee relationship." Rev. Rul. 2004-109 at 4.

Applying those definitions, the IRS ruled that because "the individual receives the signing bonus in connection with establishing the employer-employee relationship, . . . the signing bonus is part of the compensation the Baseball Club pays as remuneration for employment, making it wages regardless of the fact that the contract provides that the bonus is not contingent on the performance of future services." *Id.*

In our case, the signing bonus not only establishes, in part, the employer-employee relationship, it is contingent on the performance of three years of service, (except if the teacher's contract is terminated before three years at which time the contingency is excused.) As in the IRS Ruling, the signing bonus here is wages.

TASCO provided in its Post-Argument filing several cases from other jurisdictions finding that teacher signing bonuses and other monetary incentives are wages. See *Sherwood National Education Association v. Sherwood-Cass-R-VIII School District*, 168 S.W.3d 456 (2005); *Hamilton County Education Association v. Hamilton County School District*, 30 FPER 180 (2004) (Florida Public Employee Relations Commission).

The local board argues, however that we should be guided by cases that hold that additional pay is not wages if additional teaching services are not required to be performed to receive it. (Petition for Declaratory Ruling at 9-10). We have reviewed those cases to determine whether they provide appropriate guidance here.

In *United Teachers of Dade v. Dade County School Board*, 500 So.2d 508 (Fla. 1986), the union challenged a statute establishing a \$3,000 Master Teacher award "to recognize superior ability among Florida's instructional personnel and to provide an economic incentive to such personnel to continue in public school instruction." *Id.* at 508. The union argued that the statute violated Florida's Constitution which grants public employees the same rights to bargain collectively as private employees. *Id.* at 510.

The court reasoned that private employees have the right to bargain for salary and wages. Thus, the question was whether the award came within the definition of wages. The court did not look for guidance to state or federal statutory definitions of wages. *Id.* at 512-13. Instead, the court found persuasive the decision from the Iowa Supreme Court, *Fort Dodge Community School District v. Public Employment Relations Board*, 319 N.W.2d 181 (Iowa 1982). To support its position, the local board here cites *Fort Dodge* also. Therefore, we review the facts and conclusions in that case.

The *Fort Dodge* school system adopted a plan to provide cash incentives for early retirement. The union sued asserting that the early retirement payment was a mandatory topic for bargaining under the Iowa Code which required bargaining of:

- wages
- hours
- vacations
- shift differentials
- supplemental pay
- transfer procedures
- health and safety matters
- in-service training
- insurance
- holidays
- leaves of absence
- overtime compensation
- seniority
- job classifications
- evaluation procedures
- staff reduction

Id. at 181-183.

The union argued that the cash incentive to retire early was wages. The court explained that it looked very narrowly at the topics for bargaining. Although it defined wages quite similarly to the IRS definition and to Maryland's definition - - "a specific sum or price paid by an employer in return for services rendered by an employee," it concluded:

We are convinced the legislature did not intend to give "wages" the broad application contended for here. If it had intended to include all "wage-related" remunerations of all species within the term "wages," it would have been unnecessary to include in the list of mandatory subjects so many wage-related items such as insurance, vacations, overtime compensation, and supplemental pay. In its commonly understood meaning, wages would not include payment for services not rendered or labor not performed.

Id. at 183084.

The *Fort Dodge* case is not persuasive here because the Iowa collective bargaining statute sets out a detailed laundry list of bargainable topics. The courts in Iowa determine whether the topic is on the list or not. Only if it is, is the topic a mandatory one for bargaining. See *Waterloo Education Association v. Iowa Public Employment Relations*, 740 N.W.2d 418, 425 (2007).

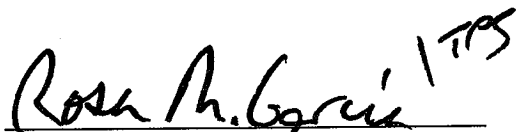
In Maryland, however, the collective bargaining statute contains no such detailed laundry list. We have defined the term wages guided by Maryland case law. Thus, for all the reasons given, we are compelled to conclude that, for purposes of collective bargaining, in Maryland the term wages includes "signing bonuses," like the one here.

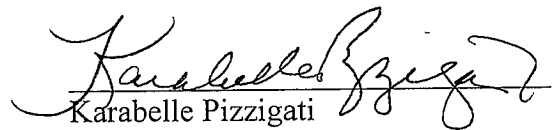
CONCLUSION

For the reasons stated herein, we declare that the term wages as used in § 6-408 of the Education Article includes signing bonuses like the one here and, therefore, such signing bonuses are a mandatory topic of bargaining and an arbitrable matter under the collective bargaining agreement in effect in Somerset County Public Schools.



James H. DeGraffenreidt, Jr.
President


Dunbar Brooks


Rosa M. Garcia


Karabelle Pizzigati

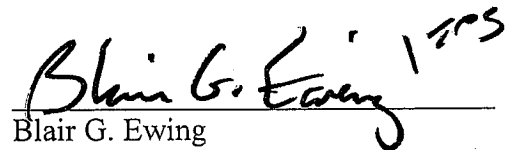

Ivan C.A. Walks


Kate Walsh

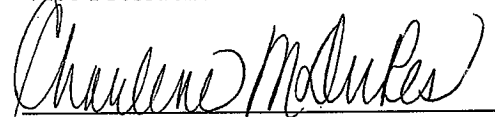
Dissent:

We, the undersigned, respectfully dissent. As a matter of good public policy, given the teachers shortage in so many content areas, and given the difficulty in recruiting teachers in some areas of the State, we believe that local boards should have the unilateral authority to offer signing bonuses. In our view, signing bonuses are an inducement, not a payment, for a particular service and thus, would not be wages.

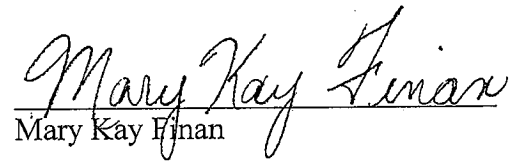
We are particularly concerned here because MSTA appears to have adopted a policy position against signing bonuses. If MSTA maintains that position, it would eliminate the concept of signing bonuses in public education in Maryland. We believe that that position represents an anachronistic view of the teacher market and we urge MSTA to reconsider its position and, at the very least, bargain in good faith for signing bonuses especially for teachers in areas of shortage.



Blair G. Ewing
Vice President



Charlene M. Dukes



Mary Kay Finan



Richard L. Goodall

March 24, 2009