CAROLINE COUNTY BUS CONTRACTORS ASSOCIATION, LLP,	BEFORE THE
	MARYLAND
Appellant	
v.	STATE BOARD
CAROLINE COUNTY BOARD OF EDUCATION,	OF EDUCATION
Appellee	Opinion No. 06-24

OPINION

In this appeal, the Caroline County Bus Contractors Association ("the Bus Contractors") challenge the local board's affirmance of the local superintendent's decision to not readjust retroactively, for three years, the amount paid to the Appellants under the terms of the contract with the local board and his decision to compensate Appellants $81,637.92 for increased fuel costs for the 2005-2006 school year. The local board has submitted a Motion for Summary Affirmance maintaining that its decision was not arbitrary, unreasonable or illegal. Appellants have filed an opposition to the local board's motion, and the local board has filed a response.

FACTUAL BACKGROUND

In 1997, the local board entered into the first of two transportation contracts with Appellants. The 1997 contract included an Exhibit B which described how payments to Appellants would be calculated and established a base payment for the 1997-1998 school year. Each subsequent year's base payment was the prior year's base payment plus four additional adjustments for: (1) average fuel costs for the Maryland area as set by AAA, plus the annual change in the CPI-T[1] (¶ 1.b); (2) route mileage (¶1.c); (3) a per vehicle assessment (¶ 1.e); and (4) an adjustment of 80% of the base payment, *"including adjustments during the contract year required by 1.b and 1.c above*, increased or decreased" by the CPI-T. (Supt. Exh. 2, emphasis added.)

For each year from 1997 to 2002, a monthly fuel cost adjustment was made. (Tr. 68). In addition, for each year from 1997 to 2002, Charles Kinnamon, Appellants' financial manager, chief negotiator and accountant, submitted spreadsheets to the local board reflecting what he believed the local board was obligated to pay under the contract. (Tr. 13-18). However, he never added to the base rate a separate annual adjustment for fuel costs. (Tr. 48).

Milton Nagel, the local board's chief financial officer, used the spread sheets as they were prepared by Charles Kinnamon, to draft the local board's transportation budget request for each ensuing year. (Tr. 13).

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[1]CPI-T is the consumer product index for Transportation and is set by the U.S. Departments of Transportation and Labor.

In 2002, the contract was renegotiated resulting in a new base payment for the 2002-2003 school year. (Supt. Exh. 1). The contract and Exhibit B remained unchanged, except that the fuel adjustment would be made using AAA Salisbury rates (rather than overall Maryland rates) and the adjustment of the base payment would be based upon the percentage increase given Caroline County Public School support employees rather than the CPI-T. The provision concerning the base payment (¶1.d) no longer included the phrase that the base would be adjusted *"including adjustments during the contract year required by 1.b and 1.c above."* (Supt. Exh. 3, emphasis added).

Just as under the first contract, Mr. Kinnamon developed spreadsheets stating what the Appellants were due under the contract. Just as under the first contract, although there were monthly fuel cost adjustments, the base rate for the years 2003-2004, 2004-2005 and 2005-2006 was not separately adjusted annually for fuel costs.[2] (Supt. Exhs. 6-8). Mr. Nagel reviewed these calculations and used them in developing his transportation budget.

In December 2004, Appellants' representatives expressed a concern to Mr. Nagel about rising fuel prices and the "gap" between the cost of fuel and Appellants' revenue under the contract. (Tr. 81). Mr. Nagel agreed there was a problem with rising prices but that he could not help them as the county budget had already been approved and the local board did not otherwise have available appropriated funds. At that meeting, no one claimed that there was a deficiency under the contract or that the local board had failed to include fuel adjustments in the base payments. (Tr. 20).

Over the next eight months, Mr. Kinnamon continued to send Mr. Nagel spreadsheets that excluded any separate fuel adjustment in the base rate, and Mr. Nagel continued to rely on them in formulating his budget and making payments to Appellants.

On August 30, 2005, Appellants sent a letter to the local board contending, for the first time, that the base payment calculations that Mr. Kinnamon had presented on their behalf for the previous eight years did not "conform" to the contract language. Attached to the letter were newly revised spreadsheets which incorporated a fuel adjustment into the base rate and a schedule of "revised contract payments" which totaled $230,210.40. (Supt. Exhs. 9 and 10).

At a meeting on September 1, 2005, Mr. Nagel told Mr. Kinnamon in person that Mr. Kinnamon's revised schedules were contrary to his (Mr. Nagel's) own interpretation of the contract and that the local board would not be able to pay such an amount.

In September 2005, Appellants appealed to the local superintendent to recover the $230,210.40. The contract provided that the local superintendent would interpret the true intent

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[2]An adjustment would not be necessary for the 2002-2003 school year as that was the base year for the new contract.

and meaning of the contract and his decision could be appealed to the local board in accordance with Md. Code Ann., Educ. Art. §4-205(c).

The local superintendent met with the Appellants on November 1, 2005 at which time Appellants made a demand for $81,637.92 to resolve the matter, but the parties did not reach an agreement. Shortly thereafter, Mr. Nagel offered to pay Appellants $49,664, an amount equal to the federal fuel tax credit, (even though it was not required in the contract), and which would permit Appellants to "turn them a profit as it relates to fuel." (Tr. 25). Appellants rejected this offer, which they later deemed "offensive", "fraudulent" and "deceptive". (Letter of appeal to the local board, p. 2).

A hearing was scheduled before the local board for December 12, 2005. On the day of the hearing, the local superintendent offered to pay Appellants the $81,637.92 they had earlier demanded. Appellants went ahead with the hearing.

On January 17, 2006 the local board issued its decision. It focused its decision on the reasonableness of the local superintendent to offer to pay the Bus Contractors an additional $81,210.92 for 2004-2005 school year. It found that the interpretation of the contract at issue was not simple and straightforward; that it had been interpreted consistently in the past not to include a separate annual fuel cost adjustment to the base rate despite the Appellants' current arguments that that interpretation was wrong. (Local Board Decision at 3). The local board concluded:

> Considered in the context of the school system's budgetary concerns, the unexpected and unbudgeted increase in the cost of fuel, and the historic practice of the parties in interpreting and applying the base payment formula of Exhibit B, the Superintendent's compromise decision to offer $81,637.92 seems reasonable and appropriate.

This appeal followed.

STANDARD OF REVIEW

The procurement of transportation services by a local board has traditionally been viewed as a local matter. *Chesapeake Charter, Inc. v. Anne Arundel County Bd. of Educ.,* 3 Op. MSBE 9 (2003) (citing *Chesapeake Charter, Inc. v. Anne Arundel County Bd. of Educ.*, 358 Md. 129 (2002). Thus, the standard of review is that the decision of the local board shall be considered *prima facie* correct, and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal. COMAR 13A.01.05.05A, *Bellote v. Anne Arundel County Board of Education*, 3 Op. MSBE 8 (2003).

ANALYSIS

There are several questions posed in this case. First, did the local superintendent and the local board actually interpret the "true intent and meaning" of the contract? Second, if so, is that interpretation legal and reasonable? Third, are the Bus Contractors legally entitled to any additional payments under the contract? We address each question below.

Interpretation of the Contract

The contract itself states that "[i]nterpretation as to the true intent and meaning of any part of the agreement shall be the responsibility of the Superintendent of Schools or his designee. All such decisions are subject to the appeal processes provided by law." (Supt. Exh. 1; Contract, Section Two, ¶ 1.) The Appellants assert that neither the local superintendent nor the local board actually interpreted the contract. We have, therefore, reviewed the record to determine whether the local superintendent or his designee did indeed interpret the true intent and meaning of the contract and whether the local board affirmed that interpretation as legal and reasonable.

It appears from the record at the time this dispute arose that the local superintendent designated Mr. Nagel as the person to interpret the contract. Mr. Nagel testified at the hearing before the local board that he and the school system had consistently interpreted the contract in one specific way. He said:

> The way in which we have been interpreting the contract was that we would provide month to month increases, month to month changes in fuel throughout the school year. But that the CPIT and then the now COLA plus one percent would take account for an annual increase from one school year to the next. What this [the revised calculations] does is not only give them an adjustment for the change in fuel to be added to the base, but it also compounds going forward.
>
> Q: So the base rate would go up each year?
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> And that's why you know this year 2005-2006 on page 1 of 8 of Superintendents Exhibit 10[3] is such a large dollar amount, 'cause of the compounding effect going back and quite honestly had this intent of the interpretation of the contract been proffered on day one, I don't know if we'd agreed to it because of the compounding effect that has now been created. It's in essence costing a lot more in this year for, its more than compensating for the cost of fuel, which is not the intent of this contract.

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[3]Superintendent's Exhibit 10 is the Revised Contract Payment calculations from 2003 to 2005.

(Tr. 24-25).

Mr. Nagel's interpretation of the contract rested on seven years of calculations submitted to him by the Bus Contractors on which he relied when he crafted the local board's transportation budget. (Tr. 13-19). The local board, by referring specifically to the "historic practice of the parties in interpreting and applying the base payment formula of Exhibit B . . .", appears to have accepted and affirmed that interpretation of the contract.

Reasonableness and Legality of the Interpretation of the Contract

The reasonableness of the local superintendent's interpretation of the contract, in our view, is almost unassailable. First, for the seven years spanning the duration of both the 1997 and the 2002 contracts, Mr. Kinnamon, the Bus Contractors' accountant, consistently sent Mr. Nagle spreadsheets that did not include annual fuel cost adjustments to the base rate. (Tr. 48). Appellants assert that, when the 1997 contract was renegotiated in 2002, it was understood that specific changes were being made so that the Bus Contractors would be compensated for the yearly increases in fuel costs and that the intent of the parties was to "tighten-down loose, non-definitive language." (Appeal at p. 1). If that were the case, and the negotiated contract had, in fact, contained significant changes including yearly fuel cost adjustments to the base rate, in our view Mr. Kinnamon would have reviewed his old spreadsheets and adjusted the formulas accordingly or drafted new spreadsheets. Instead, he continued to send to the local board spreadsheets that excluded an annual fuel cost adjustment to the base rate. For seven years the local board relied upon the Appellants' calculations which were, in turn, incorporated into the final submitted transportation budget, which the County Commissioners relied on in approving the local board's annual budget.

That past practice supports the local board's affirmance of the local superintendent's interpretation of the contract as a reasonable interpretation. In our view, when both parties to a long-term contract pay and accept payment based on a common understanding of the meaning of the contract, an interpretation of the contract based on that understanding is reasonable.

The Appellants argue, however, that the local board could not go outside the four corners of the contract and consider evidence of past practice to ascertain the contract's meaning. Appellants claim that the fuel adjustment is a "simple, straightforward formula" and that there is no ambiguity in the contract. Accordingly, they argue that when there is no ambiguity in a contract, as a matter of law, any evidence extrinsic to the contract cannot be considered in determining its meaning. Under the plain language of the contract, they contend, Appellants are owed $230,210.40. Any mistake made by Mr. Kinnamon in providing spreadsheets to the local board, they contend, does not alter the terms of the contract.

The local board argues that the contract is far from clear and unambiguous. They note that for the past seven years, Appellants' own accountant had not followed the formula that Appellants claim is so clear. Mr. Kinnamon testified that he did not note any payment deficiencies until 2005. (Tr. 49). If the formula were so clear, the local board asserts, Mr.

Kinnamon would have adjusted his spreadsheets during the first year of the 2002 contract. Thus, it contends that its finding that the contract was not clear on its face is legally correct and that looking to the history and practice of the parties was legally appropriate.

We agree with the local board. Under Maryland law, parol evidence, or evidence that is extrinsic to the contract, is admissible to clarify the meaning of a contract where the contract is found to be ambiguous. *Phoenix Services Ltd. Partnership v. Johns Hopkins Hospital*, 167 Md. App. 327, 393 (2006). Contractual language is considered "ambiguous" when the words of the contract are susceptible of more than one meaning to a reasonably prudent person, taking into account the character of the contract, its purpose, and the circumstances of the parties at the time of its execution. *Id.* at 392.

The testimony at the hearing makes clear that the words of this contract were susceptible to more than one meaning. Mr. Kinnamon testified that upon hearing the local superintendent's statement to "just follow the contract" in the summer of 2005, he and Dale Lord, Bus Contractors President, went back to Mr. Kinnamon's office, where he was "scratching [his] head, and Dale and I looked at this contract and tried to figure out why isn't the contract working out the way it's suppose to." (Tr. 54). Mr. Kinnamon also stated that he did not detect any payment deficiencies under the contract until 2005, since previous purported deficiencies did not raise a "red flag." (Tr. 48).

It is our view that the Bus Contractors historically did not have the clear understanding of the terms of the contract that they assert today are "simple and straightforward." Certainly, Mr. Nagle and the local board did not understand the terms of the contract to mean that annual fuel adjustments would occur to the yearly base payment. Mr. Nagle testified that the local board would not have signed such a contract. (Tr. 25).

We have determined that consideration of the evidence of the historical payment and budgetary practices of the parties was legally appropriate under the circumstances of this case. Therefore, we conclude that the local board's interpretation of the contract was both reasonable and legal.

Entitlement to Additional Payments Under the Contract

Given the analysis set forth above that the local board interpreted the contract legally and reasonably, it follows, as a matter of law, that the Bus Contractors are not entitled to additional payments under the terms of the contract.

Even if that analysis were incorrect, however, the local board argues that Appellants have waived their right to the monies for past years. It asserts that a contractual requirement may be waived by a party's conduct. It asserts that the Appellants consistently sent the local board spreadsheets representing the obligations of the local board, and the local board consistently relied on those spreadsheets in formulating its transportation budget. It also consistently paid out those amounts to Appellants without protest from them. Even after Appellants discussed the gap

in funding with Mr. Nagel, Mr. Kinnamon continued to submit spreadsheets that excluded the fuel adjustments Appellants are now seeking. By accepting the payments based upon their own calculations and continuing to submit spreadsheets without the fuel adjustment in the base rate, the local board asserts that the Appellants waived any right to demand performance of the contract retroactively according to the terms they now assert.

We agree with the local board. Under Maryland law, a contractual requirement in a written contract may be waived by a party's conduct. *Batista v. Savings Bank of Baltimore,* 67 Md. App. 257, 270 (1986) (contractual right to prompt payment and repossession waived by conduct, even if contract contained non-waiver provision); *Bargale Industries, Inc. v. Robert Realty Company, Inc.*, 275 Md. 638, 645 (1975), *citing Glen Alden Corp. v. Duvall*, 240 Md. 405 (1965) (acceptance of conduct in breach of contract constituted a waiver of compliance with the terms of the contract).

In this case, Charles Kinnamon, the Bus Contractors' financial advisor, consistently sent the local board spreadsheets during the life of both contracts representing the obligations of the local board, and the local board continuously relied on those spreadsheets in formulating its transportation budgets. As the financial advisor to the Appellants, Mr. Kinnamon was in the best position to identify mistakes in payment calculations. Yet, he continued to send to the local board spreadsheets that excluded the fuel adjustments that the Appellants are now seeking. According to the testimony of the Bus Contractors' president, Dale Lord, her constituents were aware of a funding gap as early as 2004. (Tr. 80-81). Despite their alleged awareness of this "gap," Appellant did not immediately re-examine either the contract language or Mr. Kinnamon's seven years of spreadsheets for any possible mistakes or miscalculations. Even after notifying the local board of a gap in funding, the Bus Contractors continued to submit spreadsheets that excluded the annual fuel adjustments, and the Bus Contractors' continuously accepted payments that were in breach of the contract. In our view, by accepting these payments and continuing to send the local board spreadsheets that yielded "incorrect" payments, the Bus Contractors have waived any right to demand performance of the contract according to the terms they now assert.

In addition to the waiver argument, the local board argues persuasively that if the local board's contract interpretation is legally wrong, both parties had entered into the contract under the guise of a mutual mistake.

Maryland has long recognized that an executed contract may be rescinded as a result of a material mutual mistake by the parties. *Smith v. Bounds Package Corp.*, 206 Md. 74, 79 (1954). Here, the parties entered into the 2002 contract laboring under a misunderstanding as to the method of calculating the base payment. Mr. Nagel testified that had he known that the Bus Contractors intended to calculate the base payment adjustment in the manner sought in the instant appeal, he would never have recommended that the local board enter into what has now become a far more costly agreement. (Tr. 25-26). This indicates to us that there was a mutual mistake at the time the parties entered into the 2002 contract and that mistake was material to the contract.

Rescission and/or reformation of the contract under Maryland law is appropriate when the parties labor under a material mistake as to basic facts of the contract where, if the true facts had been known, the contract would not have been executed. *Smith,* 206 Md. at 79. Under this doctrine, the contract could be rescinded in its entirety and the Appellants would likely forfeit any entitlement to additional dollars under the contract.

With these arguments in mind, we conclude that the local board's affirmation of the local superintendent's decision to provide the Appellant with a fuel cost adjustment for fiscal year 2005-2006 in the amount of $81,637.92 was inherently reasonable, but was not legally required under the terms of the contract.

CONCLUSION

For the reasons stated above, we affirm the decision of the local board.

Edward L. Root
Edward L. Root
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Dunbar Brooks
Vice President

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July 19, 2006