

ALLEGANY COUNTY TEACHERS
ASSOCIATION,

Appellants

v.

ALLEGANY COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 05-27

OPINION

Allegany County Teachers Association (“ACTA”) requests that the State Board determine whether language in the collective bargaining agreement (“the Agreement”) between ACTA and the local board regarding assignment or transfer is a lawful subject of bargaining (regardless of whether mandatory or permissive). Specifically, ACTA argues that the provision at issue establishes a procedure for addressing voluntary transfers and that this procedure is negotiable and arbitrable.¹ The local board contends that the provision at issue does not permit arbitration regarding the merits of an assignment and transfer decision made by the local superintendent, and to the extent that ACTA contends that it does, negotiation and arbitration on such issues are precluded by statute and are therefore illegal topics of collective bargaining.

FACTUAL BACKGROUND

The local board and the Allegany County Teachers Association have a collective bargaining agreement for the period July 1, 2003 through June 30, 2006.² With regard to the assignment and transfer of individuals in Appellant’s collective bargaining unit by the local superintendent, Article V, Section B(4) of the Agreement provides the following:

In considering transfer requests, there shall be taken into account the availability of appropriate openings, the certification for the position requested and the professional competence of the applicant in terms of the needs of the school system and the particular school or schools involved. Provided all these factors

¹ACTA’s request for a State Board ruling stems from grievances filed by two school system employees who allege violations of the Agreement with regard to their transfer requests and seek arbitration of their grievances.

²ACTA is the exclusive bargaining representative for all of the Allegany County Board of Education’s certificated professional employees who spend 50% or more of their time working directly with pupils, such as teachers, counselors, librarians/media specialists, and resource teachers.

are equal, qualified teachers employed within the Allegany County School System shall be given priority over new applicants for a position. In choosing between applicants already employed within the Allegany County School System, consideration shall be given to the factor of length of service in Allegany County, but this factor shall not be binding.

Debra Buskirk and Sheila Kinnie are certificated professional employees of the local board and members of the bargaining unit represented by ACTA. On or about June 22, 2004, Buskirk and Kinnie filed grievances alleging that the local board had violated Article V, Section B(4) of the Agreement when their requests for voluntary transfers were denied. Buskirk requested a transfer to a vacancy in a guidance counseling position that was split between two schools, Beall Elementary School and Westernport Elementary School. Kinnie requested a transfer to a vacancy in a physical education position that was split between two schools, George's Creek Elementary School and Bel Air Elementary School. Each employee had seniority over the other applicants. *See* grievance forms. The grievances were processed through all of the lower levels of the grievance procedure and appealed to the stage of final and binding arbitration. On March 11, 2005, the Circuit Court for Allegany County entered an Order staying the arbitration until the matter of negotiability and arbitrability is decided by the State Board.

LEGAL BACKGROUND

Prior to October 1, 2002, all topics proposed for negotiation in local school systems fell into one of two categories: mandatory topics of negotiation and illegal topics of negotiation. The State Board used a two-step test to determine whether a subject was a mandatory or an illegal topic of negotiation:

- First, the Board looked to see whether a statute precluded negotiation on the subject by delegating that authority to the local board; if yes, the subject was an illegal topic of bargaining and fell within the scope of unilateral decision-making by the local board and local superintendent.

- If there was no statute that precluded negotiation, the State Board applied a balancing test weighing the interests of the employee in the matter against the interests of the school system as a whole. If the employees' interests outweighed the interests of the school system as a whole, the matter was a mandatory subject of bargaining. If the school system's interests predominated, the issue was a non-negotiable matter of educational policy within the full control of the local board.

The two-step test was affirmed by the Maryland Court of Appeals in 1987 in the case entitled *Montgomery County Educators' Association v. Montgomery County Board of Education*, 311 Md. 303 (1987).

In its 2002 session, the General Assembly amended Title 6, Subtitles 4 & 5 of the Education Article (collective bargaining statutes for the public school systems in Maryland) by recognizing, with certain specified exceptions, permissive topics as legitimate subjects of collective bargaining, provided that both sides voluntarily agree to engage in such negotiation. The entirety of § 6-408(b), the statute applicable to the issue in this appeal, is as follows:

(b) *Representatives to negotiate.* – (1) On request, a public school employer or at least two of its designated representatives shall meet and negotiate with at least two representatives of the employee organization that is designated as the exclusive negotiating agent for the public school employees in a unit of the county on all matters that relate to salaries, wages, hours, and other working conditions.

(2) Except as provided in paragraph (3) of this subsection, a public school employer or at least two of its designated representatives *may* negotiate with at least two representatives of the employee organization that is designated as the exclusive negotiating agent for the public school employees in a unit of the county on other matters that are mutually agreed to by the employer and the employee organization.

(3) A public school employer may not negotiate the school calendar, the maximum number of students assigned to a class, or any matter that is precluded by applicable statutory law.

(4) A matter that is not subject to negotiation under paragraph (2) of this subsection because it has not been mutually agreed to by the employer and the employee organization may not be raised in any action taken to resolve an impasse under subsection (d) of this section. (Emphasis added).

ISSUE

The issue in this case is whether the language of Article V, Section B(4) of the Agreement between the parties constitutes a lawful or unlawful subject of bargaining. ACTA asserts that the provision at issue creates a process pursuant to which all qualified current employees of the system have preference over new hires if certain enumerated factors are considered to be equal. ACTA maintains that because the provision is procedural in nature, it covers topics that are appropriate subjects of negotiation and arbitration.

The local board asserts, however, that ACTA has attempted to challenge the substance of employee transfer decisions through arbitration. The board maintains that the provision at issue does not permit ACTA to challenge the merits of a transfer decision through arbitration because transfer and assignment decisions are statutorily assigned to the local superintendent.³ The board contends therefore that assignment and transfer decisions are illegal subjects of collective bargaining precluded by applicable statutory law.

ANALYSIS

It is well established in Maryland that a local superintendent has broad statutory authority to assign and transfer teachers “as the needs of the schools require.” Md. Code Ann., Educ. §6-201(b). Numerous State Board opinions and the Court of Special Appeals in *Hurl v. Board of Education of Baltimore County*, 6 Op. MSBE 602, 605 (1993), *aff’d*, 107 Md. App. 286 (1995), affirm that a transfer of a teacher is within the discretion of the local superintendent. *See, e.g., Heaney v. New Bd. of School Comm’rs. for Baltimore City*, MSBE Opinion No. 99-2 (January 26, 1999)(lateral transfer of principal); *Hart v. Board of Educ. of St. Mary’s County*, 7 Op. MSBE 740 (1997)(transfer from assistant principal to classroom teacher); *Chenowith v. Board of Educ. of Baltimore County*, 7 Op. MSBE 192 (1995)(transfer from assistant principal to director of recruitment); *Cameron v. Board of Educ. of Baltimore County*, 6 Op. MSBE 814, 815 (1995)(transfer from assistant principal to classroom teacher).

Section 6-408(b)((3) states that a “public school employer may not negotiate the school calendar, the maximum number of students assigned to a class, **or any matter that is precluded by applicable statutory law.**” (Emphasis added). We find that § 6-201(b) is a statute that precludes negotiation on the merits of an assignment or transfer because as explained above, it vests the local superintendent with the sole discretion to assign personnel and transfer them as the needs of the schools require. *See also New Bd. of Sch. Comm’rs. of Baltimore City v. Public Sch. Adm’rs and Supervisors Ass’n of Baltimore City*, 142 Md. App. 61 (2002)(reviewing the transfer of several principals to teaching positions at a lower salary and upholding the State Board’s determination that the matter was not arbitrable); *Kent County Bd. of Educ. v. Kent County Teachers’ Ass’n*, MSBE Opinion No. 05-12 (April 20, 2005)(State Board held that reassignment of special education teachers to case manager positions is not negotiable as it is an exercise of the superintendent’s statutory authority to assign and transfer as the needs of the schools require).

The issue for consideration is therefore whether Article V, Section B(4) of the Agreement can affect the merits of a transfer decision or whether it sets forth only procedures for transfer. If the provision can affect the outcome of the transfer decision, the provision is illegal as transfer and assignment are precluded from negotiation by statute, § 6-201(b) of the Education Article. If

³Counsel for both parties concurred that if the provision at issue is deemed a lawful subject of bargaining, the outside arbitrator, not the local superintendent, will decide whether all factors specified in the provision are equal with respect to the qualifications of the applicants.

the provision sets forth procedure only, the topics covered by the provision may be permissive topics of negotiation provided that the parties mutually agree to negotiate the topic.

Based on our review of the language in Article V, Section B(4) of the Agreement, we find that the provision does impact the assignment and transfer decisions made by the superintendent. The provision enumerates various factors that the superintendent must consider – availability of appropriate openings, certification for the position requested, and the professional competence of the applicant. The superintendent must then determine whether the enumerated factors are equal as to the applicants. If the superintendent finds the factors to be equal, the superintendent must then give priority to qualified teachers within the school system over new applicants for the position. If the factors are not equal, no priority applies.

In contrast, a provision dealing with the procedural aspects of assignment and transfer might contain items such as establishing a mechanism for advertising vacancies or a reasonable notice provision. *See Brzezinski, et al. v. Howard County Bd. of Educ.*, 5 Opinions MSBE 336, 343 (1989)(in dicta the ALJ found no inconsistency between a reasonable notice provision and the sole right of the superintendent to make assignments).⁴

CONCLUSION

For these reasons, we find that Article V, Section B(4) of the agreement between ACTA and the Allegany County Board is an illegal subject of bargaining precluded by § 6-201(b)(2)(i) & (ii) of the Education Article. The disputes at issue are therefore not subject to arbitration.

Edward L. Root
President

Dunbar Brooks
Vice President

Lelia T. Allen

J. Henry Butta

⁴Procedural aspects of assignment and transfer that do not impact the ultimate assignment and transfer decision would fall into the permissive category provided the parties mutually agree to negotiate the topic. *See* Md. Code Ann., Educ. § 6-510(b)(2).

Beverly A. Cooper

Calvin D. Disney

Richard L. Goodall

Maria C. Torres-Queral

David F. Tufaro

CONCURRING & DISSENTING

I concur that decision-making on assignments and transfers resides with the local superintendent. However, I believe that non-person specific procedures, which relate to the handling of assignments and transfers and do not direct the decision of the superintendent, are lawful subjects of bargaining.

Karabelle Pizzigati

DISSENTING

The provisions of the negotiated contract should be enforced by this Board. The evidence suggests that the school system and the Union mutually, and in good faith, agreed to the terms contained in the agreement, and I see nothing in the evidence to convince me that those same provisions in this contract that were negotiated in good faith, and mutually agreed upon by both parties, should be nullified and declared unenforceable by the appeal to this Board.

I do not believe this Board should sanction a school system's efforts to disavow a contract provision which was negotiated in good faith and ratified by both parties (that includes the Superintendent). Therefore, I respectfully dissent from the Opinion issued in this case.

JoAnn T. Bell

*Richard L. Goodall, a new member of the State Board of Education, did not participate in the deliberations leading to the issuance of this opinion.

August 31, 2005