C.A.S.E.,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
BALTIMORE COUNTY BOARD OF EDUCATION,	OF EDUCATION
Appellee.	Opinion No. 10-50

REVISED OPINION

INTRODUCTION

The Council of Administrative and Supervisory Employees (CASE) filed a request for declaratory ruling on a matter related to Superintendent's Rule 4117 which addresses reassignment of personnel and subsequent salary adjustments. The Baltimore County Board of Education (local board) filed a Memorandum in Response. CASE filed a Rebuttal Brief.

FACTUAL BACKGROUND

In December 2008, the Superintendent of Schools of Baltimore County rescinded Rule 4117. (*See* Memorandum, Ex. 1).[1] That Rule provided that administrative and supervisory personnel assignments and transfers were to be made by the Superintendent "as the needs of the schools require" and that any administrative employee could be reassigned by action of the Superintendent. It also addressed salary reductions and provided that when an employee's reassignment could result in a salary reduction:

- The employee would be advised of such recommendation before the effective date and if the reassignment is to be effective for the following school year, notice should be given no later than June 15.
- The employee would continue to be paid in the following school year at 100% of the employee's salary prior to the reassignment.
- For the second school year following the reassignment, the employee would be paid at 95% of the pre-assignment salary.
- If, during the second year following the reassignment, the employee retired, the employee would be paid at 100% of the employee's pre-reassignment salary.

Rule 4117 was never a part of the Master Collective Bargaining Agreement. Pursuant to local board policies and practices, a Rule, such as Rule 4117, is issued by the Superintendent of

[1]Superintendent's Rule 4117 (previously 4117.1) was initially approved by the Superintendent in 1981. It was subsequently revised in 1993, 1995 and 2007. The initial Rule predates the existence of a separate unit representing administrative and supervisory personnel.

Schools to implement the policies of the Board of Education and to establish the manner in which Board policies are to be executed. Rules of the Superintendent are presented to the local board for information purposes and do not require Board approval for their enactment or rescission. The Superintendent rescinded Rule 4117 and presented that information to the local board at its meeting of December 16, 2008. (*See* Memorandum, Minutes, Ex. 2).

On January 16, 2009, CASE sent a letter to the Administrative Assistant of the local board, attempting to file a "grievance . . . in response to the deletion of Superintendent's Rule 4117." (Memorandum, Ex. 3). The letter alleged that the deletion of Rule 4117 violated the following provisions of the Master Agreement.

- Article I - CASE is recognized as the exclusive bargaining representative for unit members regarding salary, wages, hours, and other working conditions.
- Article 2.12 - Any recommendations from any committees established by the Superintendent to study and/or recommend changes in salary, benefits, hours and working conditions of CASE members will be brought to the negotiation process.
- Article 15.1 - Board functions and responsibilities not expressly modified or restricted by the Agreement are retained and vested exclusively in the Board. The Board retains the right to make or change rules or policies not in conflict with Agreement of negotiations laws.

On January 26, 2009, the Superintendent met with the CASE President to discuss the rescission of Rule 4117. Apparently, that meeting did not resolve the matter. On March 2, 2009, CASE sent a letter to the local board President, the local board Hearing Scheduler and the Superintendent, which stated "in accordance with Section 10.1(5) of the Master Agreement, CASE hereby appeals its Grievance to Level II under Section 10.2 . . . ." (Memorandum, Ex. 5). The March 2 letter requested a hearing before the local board which, if it was not scheduled or held, CASE noted that it would "appeal this matter to final, binding arbitration, as is mandated under Section 10.2 Level III of the Master Agreement."

On March 12, 2009, the local board's general counsel responded to the grievance and denied CASE's request for a hearing. (Memorandum, Ex. 7).

Because CASE had stated that it would press for arbitration and would unilaterally seek the appointment of an arbitrator if the local board declined to mutually agree to an arbitrator, the local board filed a Complaint to Stay and Enjoin Arbitration in the Circuit Court for Baltimore County. The parties subsequently filed a Joint Motion to Stay Proceedings. An Order to Stay Proceedings was signed on September 19, 2009 "to allow the parties to seek a determination from the Maryland State Board of Education on the substantive issues raised in this matter." (Memorandum, Ex. 8).

CASE identifies three issues for resolution here:

(1) Whether the terms of Superintendent's Rule 4117 are negotiable?

(2) Whether the Superintendent and Baltimore County Board of Education acted in bad faith by deleting Superintendent's Rule 4117 without first negotiating with CASE?

(3) Whether the grievance filed by CASE in this matter is arbitrable?

STANDARD OF REVIEW

The State Board exercises its independent judgment on the record before it when it explains and interprets public school law and State Board regulations. COMAR 13A.01.05.05.

LEGAL ANALYSIS

Jurisdiction

In a Memorandum dated June 23, 2010, this Board asked the parties whether this case should be retained by the State Board for final decision or transferred to the newly created Public School Labor Relations Board for handling.

The Labor Relations Board was established by the Fairness in Negotiations Act, House Bill 243/Senate Bill 590, Acts of 2010. The Act provides in Section 3:

> AND BE IT FURTHER ENACTED, that this Act shall be construed to apply only prospectively and may not be applied or interpreted to have any effect on or application to any negotiations requested or entered before the effective date of this Act.

A review of the record shows that the request for negotiations arose prior to July 1, 2010, which is the effective date of the Act. Because negotiations over the rescission of Rule 4117 were requested prior to the effective date of the Act, the State Board retains jurisdiction of this case for a final decision.

Negotiability of Rule 4117

The central issue in this case is whether the rescission of Rule 4117 was a mandatory subject of bargaining. Mandatory topics are salary, wages, hours, and other working conditions. Md. Educ. Code Ann. §6-408(b)(1). CASE argues that the topic of rescission of the Rule was a mandatory topic because that Rule afforded salary protection to CASE eligible employees who were involuntarily transferred.

This Board has ruled on this type of issue several times in the past *See Montgomery County Educ. Assoc. v. Board of Educ. of Montgomery County*, 1 Op. MSBE 35 (1970); *Montgomery County Educ. Assoc. v. Board of Educ. of Montgomery County*, 3 Op. MSBE 602 (1984); *aff'd.*, 311 Md. 303 (1987); *Einem v. Howard County Bd. of Educ.*, 5 Op. MSBE 327 (1989); *Public Sch. Adm'rs and Supervisors Ass'n of Baltimore City v. New Bd. of Sch. Comm'rs*, MSBE Op. No. 00-3(2000); *aff'd.*, 142 Md. App. 61 (2002).

Over 30 years ago, in the first Montgomery County case cited above, the State Board established the rule that the statutory authority to appoint included the authority to reclassify employees and that authority "rests in complete control of the County boards of education." It was not a negotiable topic. *MCEA v. Board of Educ. of Montgomery County*, 1 Op. MSBE at 36.

In 1984, the State Board decided the issue of salary adjustments related to the reclassification. In that case, the school system was undergoing a general reclassification of positions, some resulting in salary increases, some resulting in salary decreases. The union argued that the local board was require to engage in negotiations over the salary impact of each of the reclassifications. *MCEA v. Board of Educ. of Montgomery County*, 3 Op. MSBE at 614. The State Board referred the case to a Hearing Examiner who ruled, "While I do not believe that the union has the right to negotiate each salary impact as the reclassification process proceeds. . ., I do believe there is a mandatory duty on the part of the County Board to negotiate an across-the-board clause" addressing salary protections for employees whose salaries are reduced. *Id.* at 616-17.

Interestingly, when the State Board reviewed the Hearing Officer's decision, it refused to adopt "her conclusion that there is a mandatory duty on the part of the County Board to negotiate an across-the-board clause. . . ." with respect to a reclassification that results in a salary decrease. *Id.* at 602. The State Board concluded that the topic was not a mandatory topic for negotiation, but rather was permissive. *Id.* at 603.

On appeal, the Court of Appeals quoted the Hearing Examiner's finding "that the task of reevaluating duties and reevaluating salaries were inextricably intertwined." The Court focused on the individual salary determinations that would be the subject of negotiations and concluded that "submitting such [salary] decisions to collective bargaining would have an adverse impact on the County's Board ability to operate its school system." 311 Md. at 322-323. It affirmed the State Board's decision.

Several years later, in *Einem v. Howard County Bd. of Educ.*, the State Board again ruled that the transfer of a teacher to a lower ranking job at a lower rate of pay was not a negotiable, arbitrable topic. 5 Op. MSBE at 327-329.

The Court of Special Appeals reiterated the non-negotiability of salary reductions related to transfers in an arbitration case appealed directly to the court. It ruled that the "step placement of unit employees was an integral part of the reclassification process." *Washington County Educ.*

Classified Employees v. Board of Educ., 97 Md. App. 397, 404 (1992). In short, the salary reductions were not negotiable.

In 2000, eight principals in the Baltimore City Schools were reassigned to positions of Assistant Principal and their salaries were adjusted downward to reflect their new assignments. The union requested arbitration of the salary reductions. In the case before the State Board, the union recognized that the CEO had the statutory authority to assign and transfer principals as the needs of the schools required. It argued, however, that under the Collective Bargaining Agreement the CEO could not change the job titles or reduce the salaries of the reassigned principals. The State Board of Education again found that a transfer of a principal to a lateral position or to a position of a lower rank is within the statutory discretion of local Superintendents and "that a salary adjustment is a necessary part of the CEO's statutory authority to transfer professional personnel as the needs of the school require." *PSASA v. New Board of Sch. Comm'rs*, MSBE Op. No. 00-3 at 3.

The Court of Special Appeals affirmed the State Board's decision and found that the salary reductions that accompany the reassignments of principals were not negotiable and therefore, not arbitratable. *See* 142 Md. App. at 78.

CASE urges us, on the facts of this case, to separate the Superintendent's unilateral authority to transfer an administrator and decouple it from the salary adjustment that accompanies the transfer. In the *PSASA v. New Board of Sch. Comm'rs*, the State Board addressed that very issue. We stated:

> Despite PSASA's attempt to separate matters of salary from that or reassignment to a new position, we believe that these issues are indistinguishable when an employee is transferred pursuant to the CEO's authority under section 6-201(b) of the Education Article. This theory is supported by State Board regulation 13A.07.02.01B which sets out the terms of the regular contract for certificated employees. It provides in relevant part that if a transfer is made during the school year, the salary of the employee may not be reduced for the remainder of that school year. Given this provision, it is axiomatic that by law the employee's salary may be adjusted in following years in accordance with the employee's assignment.

MSBE Op. No. 00-3 at 3.

CASE further argues that decoupling is appropriate because the State Board has drawn a distinction between procedural and substantive aspects of employee transfer matters. For example, in *Williamson v. Board of Educ. of Prince George's County*, MSBE Op. No. 89-11 (1989), the State Board concluded that the right to transfer teachers involuntarily is non-negotiable, but the order in which such transfers are made is procedural and thus negotiable.

Similarly, in *Howard County Educ. Support Personnel Ass' v. Board of Educ. of Howard County*, MSBE Op. No. 89-32 (1989), the State Board found that matters of educational policy including promotion, transfer, and evaluation of non-certified employees is not negotiable, but procedures for promoting, transferring and evaluation of non-certified employees are negotiable. CASE asserts that Rule 4117 is purely procedural, a formula easily applied to transfers and salary reductions, and thus its continued existence should be subject to mandatory negotiations.

In our view, salary adjustments when an administrator is transferred are not like the procedural matters we addressed in other cases such as notice provisions or seniority provisions. Indeed, the procedural nature of salary adjustments related to reclassification was presented to the Court of Special Appeals in *Washington County Educ. Classified Employees v. Board of Educ.* The court said, "While we agree that the issue of when and how step increases are granted would normally be regarded as procedural, when a change in step status is occasioned by a reclassification plan, the matter is no longer procedural. Instead, it becomes part of the substance of the reclassification plan." 97 Md. App. at 404.

Based on long-standing precedent, we adhere to the State Board's decisions that salary adjustments flowing from transfer decisions are inextricably intertwined with the Superintendent's unilateral transfer authority. Thus, even simple formulas to govern the salary adjustments are not the subject of mandatory negotiations.

Arbitrability

A post-transfer salary formula was never the subject of negotiation between the local board and CASE and was not included as a provision of the Master Agreement. Section 10.4 of the Master Agreement provides:

> The jurisdiction and authority of the arbitrator and his/her opinion an award shall be confined to the *express provision or provisions of this Agreement at issue between the Council and the Board.* He/she shall have no authority to add to, alter, detract from, amend or modify any provision of this Agreement, or to make any award which will in any way deprive the Board of any of the powers delegated to it by law.

(Emphasis added).

There is no express provision in the Agreement about the issue at hand. Therefore, an attempt to arbitrate in this case would expand the jurisdiction and authority of an arbitrator far beyond the provisions of the Agreement.

To bring the issue within the four corners of the Agreement, CASE alleged violations of three (3) provisions of the Master Agreement. First, CASE alleged that there was a violation of Article I. Article I is a recognition provision, in which the Board recognizes CASE "as the

exclusive collective bargaining representative for all bargaining unit members with regard to all matters relating to salary, wages, hours and other working conditions." In rescinding the Rule, the Superintendent has not negotiated with any other entity or organization. The rescission of Rule 4117 is not a violation of the recognition provision contained in Article I establishing CASE as the exclusive collective bargaining representative.

CASE's second alleged violation is Article 2.12., which provides that: " any recommendations from any committee established by the Superintendent to study and/or recommend changes in salary, benefits, hours, and working conditions of CASE members will be brought to the negotiation process." In the instant matter, Rule 4117 was not rescinded as a result of a recommendation from a "committee established by the Superintendent to study and/or recommend changes in salary, benefits, hours and working conditions." Therefore, there is no violation of Section 2.12.

The final alleged violation is founded in Article 15.1. That Section reads:

> All Board functions and responsibilities not expressly modified or restricted by this Agreement are retained invested exclusively in the Board. The Board retains the right to make or change rules or policies not in conflict with this Agreement or the negotiations laws.

In our view, what occurred here is consistent with Article 15.1. Pursuant to that provision, the local board retained the right to make or change rules or policies not in conflict with the Agreement or the laws regarding negotiations. The local board, through its Superintendent, rescinded or deleted a Rule that had previously been in existence regarding the salary protections for reassigned administrative and supervisory personnel. Since there are no provisions in the Master Agreement concerning salary protections for such individuals subsequent to a transfer, the local board, through its Superintendent, had the right to make or change such rules or policies. The rescission of Rule 4117 did not violate the Agreement. It is not an issue for arbitration.

CONCLUSION

It is the Declaration of this Board that, for the reasons set forth herein:

(1) The terms of Rule 4117 are not negotiable;

(2) The Superintendent and the local board did not act in bad faith by rescinding Rule 4117 without first negotiating with CASE; and

(3) The grievance filed by CASE in this matter is not arbitratable.

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