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| ASSOCIATION OF SUPERVISORY AND ADMINISTRATIVE SCHOOL PERSONNEL, | BEFORE THE |
| Appellant | MARYLAND |
| v. | STATE BOARD |
| BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, | OF EDUCATION |
| Appellee. | Opinion No. 14-26 |

# OPINION

## INTRODUCTION

The Association of Supervisory and Administrative School Personnel has appealed the decision of the Board of Education of Prince George's County (local board) affirming a reduction-in-force decision that led to the termination of approximately 27 employees. The local board filed a Motion to Dismiss for failure to exhaust administrative remedies, or in the alternative, a Motion for Summary Affirmance maintaining that its decision was not arbitrary, unreasonable, or illegal. Appellant replied and the Local Board responded.

## FACTUAL BACKGROUND

Appellant, the Association of Supervisory and Administrative School Personnel ("ASASP"), is a labor organization that represents two bargaining units of supervisory and administrative personnel within Prince George's County Public Schools ("PGCPS"). In June 2011, PGCPS implemented a reduction in force[1] that led to the termination of 27 members of Appellant's bargaining units. Previous negotiated agreements reached in 2008 between PGCPS and Appellant governed this reduction-in-force process.

Section 3.13B of the negotiated agreements stated:

> When a [reduction in force] is necessary, the Superintendent[2] will, to the extent feasible, reassign the Unit member to a lower ranking position within the Unit. Absent the availability of another position such Unit member may be terminated from employment.
>
> In making determinations on individuals to be [subject to reduction

[1] A reduction in force is defined in the negotiated agreements as the "involuntary removal of a Unit member . . . based upon budgetary consideration, reorganization, or a decrease of the number of authorized positions within a given job classification." (Appeal, Ex. 1).

[2] On July 1, 2013, the position of chief executive officer (CEO) replaced the position of superintendent for PGCPS. References to the Superintendent should be understood to now refer to the CEO.

> in force], the Superintendent will take into consideration the total length of service since most recent date of hire in any position for which ASASP has been designated as the exclusive representative. Consideration of seniority shall not govern when a senior employee is [subject to reduction in force] because of the senior employee's lack of demonstrated qualifications or job performance as measured by evaluations, observations, or any other substantiated documentation of such Unit member's performance.

(Appeal, Ex. 1, 6). This language had been a part of the negotiated agreements with the union and PGCPS since 1993. (Appeal, Apx. at T.24).

The negotiated agreements provide employees who are terminated with recall rights and state that the local board "explicitly retains the authority to reduce the workforce as appropriate." The agreements require the Superintendent "to the extent feasible" to "meet and confer with representatives of ASASP to discuss and explore other alternatives and options which may be appropriate and which may reduce or eliminate the need for such terminations." (Appeal, Ex. 1).

Appellant argued that PGCPS failed to follow the negotiated agreements by not basing the termination decisions on seniority and not allowing more senior employees to "bump"[3] into other positions for which they were qualified. Appellant contended that during a prior reduction in force in 2010, senior employees bumped less senior ones. PGCPS disagreed with this interpretation of the negotiated agreements, maintaining that the agreements required it to consider seniority initially but did not mandate that it bump employees with less seniority. Appellant filed grievances on behalf of the employees in the two bargaining units and those grievances were consolidated into one proceeding.[4]

The local board treated the grievances as an appeal under § 4-205 of the Education Article and referred the grievances to a Hearing Examiner, who conducted a hearing on April 4, 2012. During the hearing, Appellant presented testimony from Dr. Jerome Clark, a former PGCPS Superintendent; Linda Thomas, a former local board member; and Doris Reed, the executive director of ASASP. These witnesses testified that reduction in force decisions were intended to be based solely on seniority. The first reduction in force under the negotiated agreements occurred in 2010 and allowed for the bumping of lower-ranked employees. PGCPS presented testimony from James Whattam, the former labor relations manager for PGCPS, and Synthia Shilling, Chief of Human Resources, who explained that, although PGCPS had agreed to limited bumping of two or three employees in 2010, it was not required to bump employees under the negotiated agreements. She testified that PGCPS agreed to bumping in 2010 because it would cause minimal disruption to the school system. Ms. Shilling explained that PGCPS interpreted the negotiated agreements as allowing it to terminate an employee "absent the

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[3] "Bumping" is defined as "displacement of a junior employee's position by a senior employee." Black's Law Dictionary 208 (8th ed. 2004).

[4] Two of the 27 employees apparently withdrew their grievances during the appeals process because they were reinstated to their positions. (Appeal, Ex. 1).

availability of another position"; she stated that an "available" position in section 3.13B meant a "vacant" one.[5] (Appeal, Ex. 1).

On October 12, 2012, the Hearing Examiner issued findings of fact, conclusions of law, and recommendations that agreed with PGCPS's construction of the negotiated agreements and recommended denying the grievances. The Hearing Examiner explained that 3.13B established a two-part process whereby the Superintendent (1) considers seniority in determining who will be selected as part of the reduction in force and (2) decides whether it is feasible to move any of those employees to a lower-ranking position. The Hearing Examiner concluded that employees can move into another position so long as one is vacant; in other words, there is no automatic right to bump less-senior employees. Even assuming that the contract was ambiguous, the Hearing Examiner found that the parol evidence did not alter the meaning of the agreements because one past incident of bumping was a single deviation rather than a past practice. (Appeal, Ex. 1). Appellant filed a Motion for Reconsideration, which was rejected by the Hearing Examiner when he issued supplemental conclusions of law and recommendations on December 8, 2012.

Appellant appealed to the local board, which held oral argument on March 21, 2013. The local board issued an Interim Order on May 8, 2013, deciding that the Hearing Examiner correctly interpreted the language of Section 3.13B as being clear and unambiguous. The local board concluded, however, that the Hearing Examiner incorrectly stated that the reduction in force policy was applied correctly. The local board stated that there was insufficient evidence in the record from which to conclude whether the Superintendent attempted to shift any of the terminated employees to lower-ranking positions. The local board stated that, absent additional information, the Superintendent's actions were arbitrary. The local board held open the case in order for the Appellant and the Superintendent to determine whether any of the employees could have been reassigned and, if so, to provide a proposed remedy, subject to approval by the local board. (Appeal, Ex. 4).

PGCPS submitted an affidavit on June 26, 2013 addressing the local board's request for more information about whether the Superintendent considered reassigning employees and whether such an action was feasible. Appellant submitted an affidavit from its executive director and filed a "Response and Objections to the Interim Order" challenging the local board's interpretation of the contract. The local board concluded that these filings were non-responsive because they did not address the local board's request for more information about whether employees could be reassigned. The local board issued a Second Interim Order on November 27, 2013 requesting that Appellant provide a direct response to PGCPS's submission about reassigning employees. The Appellant did not respond within the required period of time. (Appeal, Ex. 5).

On December 18, 2013, the local board issued a Final Order, concluding based on the additional information provided by PGCPS that the school system did attempt to determine if the affected employees could be reassigned to other positions before terminating them. The local

[5] In this appeal, the parties provided only selected sections of the hearing transcript rather than the full transcript. Accordingly, we rely on the representations of the parties and the findings of the Hearing Examiner as to what evidence was introduced during the hearing.

board restated its earlier conclusion that the Hearing Examiner correctly interpreted the negotiated agreements and that the language of section 3.13B was "clear and unambiguous." The local board stated that it accepted the recommendation of the Hearing Examiner and concluded the Superintendent's actions were not arbitrary, unreasonable, or illegal. (Appeal, Ex. 5).

This appeal to the State Board followed.

## STANDARD OF REVIEW

This appeal concerns a controversy or dispute regarding a local board's interpretation of a contract. Accordingly, the local board's decision must "be considered *prima facie* correct" and upheld unless the Appellant proves that the local board's decision was arbitrary, unreasonable, or illegal. *See* COMAR 13A.01.05.05; *Harford County School Bus Contractors Ass'n v. Harford County Bd. of Educ.*, MSBE Op. No. 14-17 (2014).

## LEGAL ANALYSIS

### *Motion to Dismiss*

The local board argues that Appellant's appeal should be dismissed because Appellant failed to exhaust its administrative remedies. Specifically, the local board maintains that Appellant's failure to respond to requests for more information (about whether the terminated employees could have been reassigned) in the local board's Interim Orders constituted a "failure to fully pursue an appeal before the local board." In support of its motion to dismiss, the local board cites to a number of our past cases in which we have declined to address an issue that was not decided initially by a local board. *See, e.g., Brown v. Wicomico County Bd. of Educ.*, MSBE Op. No. 12-44 (2012).

Assuming that Appellant did not properly respond to the local board's Interim Orders, we fail to see how this constituted a failure to exhaust administrative remedies. Unlike in the cases cited by the local board, the local board here *did* address the issue that is the subject of this appeal. Rather than dismissing Appellant's case for failing to comply with the local board's Interim Orders, the local board issued a Final Order on December 18, 2013 that disposed of Appellant's claims. In short, questions concerning the interpretation of the negotiated agreements were considered and decided by the local board, making those issues ripe for review by the State Board. We shall deny the Motion to Dismiss.

### *Interpretation of the Negotiated Agreements*

We are asked to determine whether the local board's interpretation of the negotiated agreements was arbitrary, unreasonable, or illegal. Specifically, Appellant challenges the local board's conclusion that (1) the language of the agreements was clear and (2) its decision not to consult any evidence extrinsic to the agreements in explaining its meaning.

Maryland applies the "law of objective contract interpretation" to a negotiated agreement,

meaning that "[t]he written language embodying the terms of an agreement will govern the rights and liabilities of the parties, irrespective of the intent of the parties at the time they entered into the contract, unless the written language is not susceptible of a clear and definite understanding." *Dumbarton Improvement Ass'n v. Druid Ridge Cemetery Co.*, 434 Md. 37, 51 (2013) (quoting *Slice v. Carozza Properties, Inc.*, 215 Md. 357, 368 (1958)). "[A] contract's unambiguous language will not give way to what the parties thought the contract meant or intended it to mean at the time of execution." *Id.* at 51-52 (quoting *Sy-Lene of Wash. v. Starwood Urban Retail*, 376 Md. 157, 167 (2003)).

In interpreting contracts, one must "determine from the language of the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated." *Id.* (quoting *General Motors Acceptance v. Daniels*, 303 Md. 254, 261 (1985)). A contract must be construed in its entirety and effect must be given to each clause so as not to disregard a meaningful part. *Id.* at 52. Parol evidence, meaning evidence outside of the contract itself, may be consulted only if there is "an ambiguity in the actual language used by the parties." *Id.* at 56. "Once an ambiguity in the language has been identified, extrinsic evidence should be used only to resolve that ambiguity." *Id.; see also Harford County School Bus Contractors,* MSBE Op. No. 14-17.

The contested provision, section 3.13B, states:

> When a [reduction in force] is necessary, the Superintendent will, to the extent feasible, reassign the Unit member to a lower ranking position within the Unit. Absent the availability of another position such Unit member may be terminated from employment.
>
> In making determinations on individuals to be [subject to reduction in force], the Superintendent will take into consideration the total length of service since most recent date of hire in any position for which ASASP has been designated as the exclusive representative. Consideration of seniority shall not govern when a senior employee is [subject to reduction in force] because of the senior employee's lack of demonstrated qualifications or job performance as measured by evaluations, observations, or any other substantiated documentation of such Unit member's performance.

Appellant maintains that the Hearing Examiner and local board erred by concluding that the language of 3.13B was plain and unambiguous. Appellant believes the local board adopted a strained reading of the provision when it concluded that 3.13B established a two-stage process for a reduction in force. Appellant argues that, because the contract is ambiguous, parol evidence should be consulted as to the agreements' meaning. Appellant cites to testimony from Dr. Clark, former PGCPS Superintendent, who testified that seniority was always the determining factor and that the purpose of section 3.13B was to address concerns about nepotism or cronyism in reduction in force decisions. Ms. Thomas, a former PGCPS board member, also testified that seniority was the top priority. Appellant further notes that, in 2010, seniority

governed the reduction in force process and less senior employees were bumped.

The local board argues that evidence from the former superintendent cannot contradict the plain meaning of the negotiated agreements. The local board adds that adopting Appellant's interpretation of the contract could result in chaos any time there is a reduction in force because allowing large numbers of employees, some of whom are in instructional roles, to bump less senior employees disrupts the educational process.

In our view, the local board's interpretation is consistent with the plain meaning of the language of the agreements and gives effect to all of its parts. The negotiated agreements, as written, create a two-step process: (1) determining who is subject to a reduction in force and (2) implementing the reduction in force.

Both parties agree that the negotiated agreements require seniority to govern when deciding who is subject to a reduction in force. This step is covered by the second paragraph of 3.13B, which states that "[i]n making determinations on individuals to be [subject to reduction in force], the Superintendent will take into consideration the total length of service."

The parties disagree on how to interpret the first paragraph of section 3.13B. That paragraph states that, when a reduction in force is necessary, "the Superintendent will, to the extent feasible, reassign the Unit member to a lower ranking position within the Unit." If there is no other available position, the employee may be terminated. Appellant, believing that section 3.13B describes a single (rather than two-step) process maintains that seniority is the only consideration governing this reassignment. In Appellant's view, bumping occurs automatically based on seniority. More senior employees may move into an "available" position, meaning a position that exists and is one that the employee is qualified to hold.

Appellant's interpretation of the agreements reads additional language into 3.13B. The first paragraph does not mention the word "seniority," nor does it describe an "automatic" bumping process. Instead, the paragraph requires the Superintendent "to the extent feasible" to reassign employees. If bumping occurred as an automatic right, there would be no need for the "to the extent feasible" language because it would be rendered meaningless. *See Dumbarton*, 434 Md. at 52. In addition, the reassignment is not described in terms of an employee's automatic right, but as a discretionary action of the Superintendent. ("The Superintendent will, to the extent feasible, reassign the Unit member . . ."). Moreover, the plain meaning of an "available" position is one that is free, open, and not already filled by another employee. *See* The American Heritage Dictionary (2d College Ed.) (defining available as "accessible for use; at hand"). This meaning of "available" is consistent with the requirement that reassignment be "to the extent feasible." If there is no vacant position, then a reassignment is not feasible. We agree with the local board that this interpretation is in harmony with the Superintendent's statutory authority to reassign and transfer personnel as the needs of the school require. *See* Educ. § 6-201(a).

If the parties intended to allow for automatic bumping based on seniority when they originally added the language of 3.13B to the negotiated agreement in 1993, they did not make that intent clear in the language of the agreement. Maryland law establishes that the clear written

language of the agreement controls its interpretation "irrespective of the intent of the parties." *Dumbarton,* 434 Md. at 51. This encourages parties to clearly state, in writing, the terms of an agreement at the time it is drafted and avoid future litigation over a document's meaning. If the parties intend for automatic bumping based on seniority, that procedure must clearly be stated in the negotiated agreement. That is not what the agreement states now.

Parol evidence is only considered if the language of the contract is ambiguous. *See Dumbarton*, 434 Md. at 56. In our view, the language of the agreements is "susceptible of a clear and definite understanding." *See id.* at 51. Because we conclude that the language of the agreements is clear, the local board need not have considered parol evidence.

CONCLUSION

For all these reasons, we deny the Motion to Dismiss and affirm the decision of the local board because it is not arbitrary, unreasonable, or illegal.

Charlene M. Dukes
President

Absent
Mary Kay Finan
Vice-President

James H. DeGraffenreidt, Jr.

Linda Eberhart

Absent
S. James Gates, Jr.

Absent
Larry Giammo

Luisa Montero-Diaz

Sayed M. Naved

Madhu Sidhu

Donna Hill Staton

Guffine M. Smith, Jr.

May 20, 2014