

DEBORAH PULLEY,
KIMBERLY ROOF, AND
ROBIN WELSH,

Appellant

v.

CALVERT COUNTY BOARD
OF EDUCATION

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 16-16

OPINION

INTRODUCTION

On February 12, 2014, Deborah Pulley, Kimberly Roof, and Robin Welsh (Appellants) appealed the decision of the Calvert County Board of Education (local board) concerning their employment contracts.¹ The State Board reversed the decision of the local board in *Pulley, et al. v. Calvert County Bd. of Educ.*, MSBE Op. No. 14-37 (2014).

The local board filed a Petition for Judicial Review with the Circuit Court for Calvert County challenging the State Board's decision. On April 8, 2015, the court reversed the State Board and remanded the case because there were genuine disputes of material fact between the parties that necessitated a hearing. The State Board sent the case to the Office of Administrative Hearings (OAH) on May 27, 2015, and OAH conducted a hearing on September 18, 2015. The administrative law judge (ALJ) issued a proposed decision on January 21, 2016. Both parties filed exceptions to the decision and the State Board heard oral argument on April 26, 2016.

FACTUAL BACKGROUND²

In 2006, the superintendent of Calvert County Public Schools (CCPS) nominated Deborah Pulley as Executive Director for Operations and Robin Welsh as Deputy Superintendent. In 2010, he nominated Kimberly Roof as the Executive Director for Administration. The local board approved all three nominations and the three served in their positions until 2013. They were considered a part of the "executive team," and "senior staff" because of their close interactions with the local superintendent. This appeal concerns the validity of the employment contracts for Pulley, Roof, and Welsh.

The superintendent signed hundreds of written contracts on behalf of CCPS, including building renovation contracts, IT equipment and service agreements, facilities contracts, employees' contracts, and labor agreements. Among those contracts was a \$40 million construction contract between the contractor and CCPS. The local board and the superintendent jointly signed a few contracts, but the majority of contracts were signed solely by the superintendent.

¹ These three cases have been consolidated into one opinion because they all concern the interpretation of the same contract language.

² We adopt the findings of fact in full as proposed by the ALJ. This summary is drawn from those facts.

The previous superintendent each spring attended a retreat with the local board in which he discussed salary and benefits, including sick leave and annual leave, for executive team members. Executive team members were informed ahead of time about their proposed salary and benefits and were allowed to offer feedback. After the spring retreat, the previous superintendent informed the executive team members of their salaries and wrote a memorandum to the CCPS Finance Office stating the salaries for the upcoming year.

The superintendent continued this practice. He would meet in closed session with the local board to discuss salaries and fringe benefits for the executive team and inform the executive team members of the local board's decision. The salaries for the executive team were voted on by the local board during public meetings. After the local board set the salaries, the superintendent would communicate that information to the CCPS Finance Officer.

In response to an audit in 2008, the superintendent informed the local board that written employment contracts were needed for the executive team members. For the 2008-09 school year, he prepared written employment contracts for Pulley and Welsh and signed them on behalf of the county board. He incorporated the salaries that were voted on by the local board during open session and the fringe benefits that were discussed and approved by the local board during their closed session. When Roof joined the executive team in 2010, a similar process occurred regarding her contract.

For the 2012-13 school year, the superintendent prepared employment contracts for Pulley, Roof and Welsh. The contracts included the salaries approved and voted on by the local board in open session, as well as the fringe benefits discussed and agreed to by the board during closed session. The 2012-13 contracts are the agreements at issue in this appeal.

Regarding sick leave, the contracts included the following language: "At [the] time of leaving the Executive Team position, the compensation for any remaining unused sick leave will be a matter of negotiation between Employer and Employee."

As for annual leave, the contracts stated the following:

Employee shall be entitled to annual leave in accordance with Employer's agreement with CASA [Calvert Association of Supervisors and Administrators] based on years of eligible service as determined by the Superintendent, plus ten (10) additional leave days per year. Annual leave shall accumulate without limitation. Employee shall be allowed to cash out unused annual leave upon leaving an executive team position, deposit the value [of] any remaining annual leave days into a personal [Tax Sheltered Annuity] TSA, or have the value treated as an Employer contribution to Employee's TSA, up to the maximum allowed under the I.R.S. regulations. Such actions may be taken within one year of leaving the executive team position.

The superintendent resigned in 2013 and Nancy Highsmith became the Interim Superintendent for the 2013-14 school year. In July 2013, Ms. Highsmith informed the Appellants that no changes were being made to the executive team at that time, but that the local board had instructed her not to enter into any contracts with them. She explained that the Appellants would be receiving the same benefits as those in the CASA bargaining unit, but they would not receive

any of the extra benefits that had been in their contracts.

The Appellants stayed in their executive team roles until September 9, 2013, when Highsmith and board president Eugene Karol transferred them to new positions. Pulley became the principal of Middle Creek Middle School, Roof became the Director of Student Services, and Welsh became the principal of Calvert Country School. Pulley subsequently retired. Highsmith and Karol told Appellants they would keep their same executive team salaries for the 2013-14 school year but that their salaries would thereafter revert to the CASA bargaining group salary scale. Highsmith and Karol declined to discuss allowing Appellants to cash out sick or annual leave.

On October 4, 2013, Appellants submitted an appeal to the local board of the interim superintendent's decision. They argued that they should be able to negotiate the sale of unused sick leave and cash out unused annual leave, as stated in their contracts. They also sought to apply the protections listed in Section 7.4 of the CASA agreement, which allows an employee transferred to a lower-paying position to maintain the same salary level for three years. The Appellants maintained they were a part of the CASA unit at the time of their transfer.

The local board issued its opinion on January 17, 2014. On the question of benefits, the local board concluded that Appellants were not entitled to negotiate sick leave payments or to receive annual leave payments. It concluded that the contracts Appellants signed were with the superintendent, not with the board, and that the board had not approved or ratified the contracts. The local board explained that Maryland law gives the local board the authority to employ individuals and set their salaries and compensation and that the local board did not approve or ratify the contract provisions dealing with sick and annual leave. The local board further noted that the contracts expired on June 30, 2013, and concluded that the provisions Appellants wished to apply did not extend beyond that date. Additionally, the local board concluded that the sick leave benefits provision was "vague" and that the provision only permitted Appellants to negotiate with their "employer" as to unused sick leave. The local board decided that the "employer" in this case was the superintendent, not the board.

On the question of salaries, the local board ruled that Appellants were not entitled to the three-year salary protection mentioned in section 7.4 of the CASA negotiated agreement because Appellants were not members of the CASA unit at the time they were transferred to the other positions. In addition, the local board noted that Appellants were "entitled to benefits consistent with those provided" to CASA unit members under the negotiated agreement, but that "benefits" did not include salaries. One of the five board members dissented from the decision, concluding that the board's decision was arbitrary and unreasonable.

An appeal to the State Board followed. In *Pulley v. Calvert County Bd. of Educ.*, MSBE Op. No. 14-37 (2014), this Board concluded that valid contracts existed between the parties, that the sick leave and annual leave provisions continued to apply after the contracts expired, and that Appellants should have been considered members of CASA at the time of their transfer because there were no evidence to the contrary in the record.

On April 8, 2015, the Circuit Court for Calvert County reversed and remanded the State Board's decision on procedural grounds without reaching the substance of the parties' arguments. The court concluded that a disputes of material fact existed regarding the validity of

the contracts.

After the remand, the State Board referred the case to OAH. An ALJ held a hearing on September 18, 2015 and issued a proposed decision on January 21, 2016. The ALJ concluded that (1) valid employment contracts existed between the parties; (2) the provision of the contract that provided that the parties could negotiate the sale of unused sick leave was vague and unenforceable; (3) the provision that allowed for the Appellants to have one year after leaving their position to decide whether to cash out or transfer their annual leave continued to exist after the contracts expired; and (4) the Appellants were not subject to the salary protections of the CASA bargaining unit because they were not members of that group during the relevant time period.

Both parties filed exceptions to the decision and the State Board heard oral argument on April 26, 2016.

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). We exercise our independent judgment in interpreting the education law of Maryland. COMAR 13A.01.05.05E.

LEGAL ANALYSIS

Both parties filed exceptions to the ALJ's proposed decision. We shall take each in turn.

Local Board's Exceptions

The local board argues that the Appellants' employment contracts were invalid and not binding on the local board. The local board's argument is that (1) the local board only approved the salaries not the additional benefits contained in the contracts or the contracts themselves; (2) without the local board's approval, the contracts could not be binding as a matter of law; and (3) the contracts were impermissible because they did not conform to the regular (teacher) contracts required of certificated employees by COMAR 13.07.02.01B(1). As a result, the local board maintains that the Appellants should be denied all of the relief they seek.

Maryland law requires that the local board determine the compensation of each appointee in a school system. Md. Code, Educ. §6-201(4). The local board argues that it never approved or ratified the contracts; instead, it merely approved the salaries, which were voted on during open session. The local board argues that it cannot be bound to "have an obligation imposed upon it to expend public funds except in the formal manner expressly provided by law." The local board maintains that it was the superintendent, not the local board, who entered into the

contracts with Appellants and that the evidence demonstrated that local board members were not familiar with the details of the Appellants' benefits.

The ALJ found that Calvert County had a longstanding practice of having the superintendent discuss the benefits of the executive team members with the local board, which then approved those benefits by consensus during closed session. (ALJ's Proposed Decision, at 14). The ALJ reviewed the testimony of the former superintendent and four local board members who all stated that "the terms of the benefits were discussed with them and that they either approved or came to a consensus about what the benefits for the executive team should be." (*Id.* at 17). The ALJ concluded, and we agree, that it is not surprising that the local board members did not recall details of the agreements several years after the fact. (*Id.*) As the ALJ reasoned, the "approval" or "coming to a consensus" that was done by the local board met the requirements under the law that the local board "determine" the salaries of employees. (*Id.*)

The ALJ distinguished the line of cases cited by the local board in support of its position, most notably *Alternatives Unlimited v. New Baltimore City Bd. of Sch. Comm'rs*, 155 Md. App. 415 (2004). In *Alternatives*, a company that sought to enter into a \$250,000 contract with the local board argued that an incoming CEO had orally agreed to the contract, even though the company was aware that all service contracts for more than \$15,000 had to be in writing and approved by the local board. The Court held that a government entity cannot be bound, even if one of its agents has apparent authority to enter into agreements, unless the agreement is made as part of the formal process required by law. Unlike in *Alternatives*, where the local board had no knowledge of the agreement, the superintendent here had actual authority to enter into agreements with Appellants and presented those benefits to the local board for approval. (ALJ's Proposed Decision, at 18-19). We see no error in the ALJ's reasoning that valid contracts existed.

The final argument raised by the local board is that the contracts were invalid because they did not conform to the regular contract at COMAR 13A.07.02.01B. The ALJ concluded that the Appellants' contracts need not follow the contract template and observed that some of the provisions, such as requiring membership in a teacher's union, would not apply to Appellants. More importantly, COMAR 13A.07.02.01B states that other contracts "may not be recognized." This is in contrast to COMAR 13A.07.02.01C (governing provisional contracts), which states that no other contracts "shall" be recognized. The use of the word "may" indicates that, although certificated employees' contracts are required to follow COMAR 13A.07.02.01B, the regulation does not override an otherwise valid contract, such as the one entered into with Appellants. Because we agree with the ALJ that the contracts were valid, the provision allowing Appellants to cash out or transfer their unused annual leave after leaving their positions applies.

Appellants' Exceptions

The Appellants filed exceptions to the second and fourth recommendations of the ALJ: (2) the provision of the contract that provided that the parties could negotiate the sale of unused sick leave was vague and unenforceable; and (4) the Appellants were not subject to the salary protections of the CASA bargaining unit because they were not members of that group during the relevant time period.

Sick leave provision

Appellants argue that it was the superintendent's intent in negotiating the employment agreement that the Appellants be able to negotiate the sale of their sick leave. Appellants maintain that the language of the employment contract is clear and unambiguous, but that even if it were not, parol evidence should be consulted to determine the intent of the parties. They contend that the local superintendent intended for the Appellants to be able to negotiate the sale of their sick leave.

The ALJ concluded that the sick leave negotiation language was unenforceable because it is vague. In the words of the ALJ, "parties can always negotiate so this provision does not specifically provide the Appellants with any benefit that can be enforced." (ALJ's Proposed Decision, at 20). The ALJ's conclusion is consistent with Maryland contract law, which requires "that the terms of a contract must be sufficiently definite for enforcement." *See Horsey v. Horsey*, 329 Md. 392, 420 (1993). An agreement to negotiate in the future, by contrast, constitutes only an "agreement to agree" because it imposes no specific obligations on the parties. *Id.* Although the local superintendent may have intended to allow the Appellants to negotiate the sale of sick leave, we agree with the ALJ that contract law renders such a vague promise unenforceable.

Salary provision

The Appellants also challenge the ALJ's conclusion that the Appellants did not become members of the CASA bargaining unit until September 9, 2013. Appellants argue that they were placed in the CASA unit in July 2013 prior to their transfer to their new positions. At issue is whether Section 7.4 of the CASA agreement, which ensures that employees transferred to new positions shall receive the same salary for at least three years, applied to Appellants.

Appellants raise several exceptions related to the ALJ's conclusion: (1) one of the witnesses presented by the local board, former interim superintendent Highsmith, was not previously identified as a witness in a prehearing statement; (2) Highsmith testified by phone, which did not allow the ALJ to properly assess her credibility; and (3) the ALJ improperly accepted Highsmith's testimony without giving proper consideration to Appellants' evidence.

As to the first two points, it was within the ALJ's discretion to allow Highsmith to testify as a rebuttal witness and to offer her testimony by phone. Highsmith should not have been an entirely unexpected witness and Appellants have not offered any prejudice they suffered as a result. Although the ALJ was not able to assess Highsmith's testimony in person, we see no issue with the ALJ's determination that Highsmith was credible. The ALJ based that conclusion in part on Highsmith's experience regarding CASA, particularly Highsmith's background as a prior vice president and long-time member of the association. (ALJ's Proposed Decision, at 22). The ALJ's decision observes that Highsmith's testimony was "emphatic" in contrast to Appellant Roof's "uncertain" testimony about their discussions. (*Id.*) This conclusion did not require that the ALJ observe both witnesses face-to-face. Rather, the ALJ drew her conclusions based on the strength of the information presented by the parties and exercised her discretion appropriately.

On the third point, the ALJ recognized that there was a conflict in the testimony regarding when the Appellants became members of CASA. Appellant Roof testified that

Highsmith informed the Appellants that they had been placed in the CASA unit in July 2013 while Highsmith testified that she never told the Appellants that they would be covered by CASA before their transfer on September 9, 2013. (*Id.*) Highsmith testified that “confidential employees,” such as Appellants, could never be a part of the CASA bargaining unit. (*Id.*)

The ALJ found it “more likely than not” that Highsmith “told the Appellants that they would have the same benefits *as* someone in the CASA bargaining unit but she never told the Appellants they would be placed *in* the CASA bargaining unit prior to being transferred to their new positions outside of the executive team.” (*Id.* at 23) (emphasis in original). The ALJ observed that it was “understandable how the Appellants, who were on the executive team and not as familiar with the CASA bargaining unit as Ms. Highsmith (who had been its vice president at one point), may have misunderstood Ms. Highsmith’s statements.” (*Id.*). In our view, the ALJ properly considered the evidence presented by all sides and the record supports her conclusions.

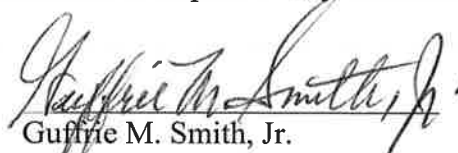
Summary

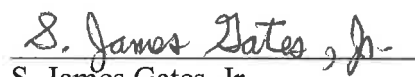
The circuit court remanded the case to OAH for fact finding on the following issues. We adopt the ALJ’s recommended decision and answer the questions as follows:

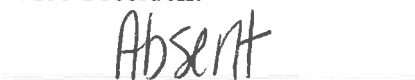
- (1) Did valid employment contracts exist between the Appellants and the County Board?
Yes.
- (2) If there were valid contracts, did the sick leave and annual leave provisions continue to apply after the contracts expired? The annual leave provisions continued to apply for up to a year after the contracts expired. The sick leave negotiation provision is unenforceable and does not apply.
- (3) Were the Appellants subject to the salary protections of the CASA bargaining unit (Article 7.4)? No.

CONCLUSION

For all these reasons, we adopt the Proposed Decision of the ALJ as a Final Decision, with the additional reasoning included in this opinion. Accordingly, the Appellants should be granted one year from the date of this decision to elect how to dispose of any annual leave they accrued while in their executive team positions.


Guffie M. Smith, Jr.
President


S. James Gates, Jr.
Vice-President

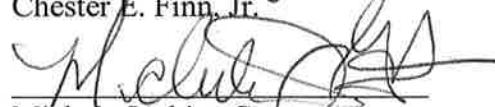

James H. DeGraffenreidt, Jr.



Linda Eberhart



Chester E. Finn, Jr.



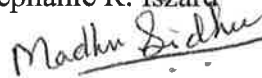
Michele Jenkins Guyton



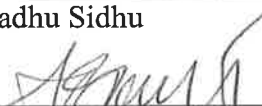
Laurie Halverson



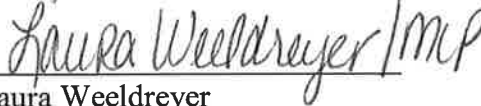
Stephanie R. Iszard



Madhu Sidhu



Andrew R. Smarick



Laura Weeldreyer

May 24, 2016

DEBORAH PULLEY, et al.,

v.

**CALVERT COUNTY BOARD OF
EDUCATION**

* **BEFORE ANN C. KEHINDE,**
* **AN ADMINISTRATIVE LAW JUDGE**
* **OF THE MARYLAND OFFICE**
* **OF ADMINISTRATIVE HEARINGS**
* **OAH No.: MSDE-BE-20-15-18309**

* * * * *

CORRECTED PROPOSED DECISION¹

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDING OF FACTS
DISCUSSION
CONCLUSIONS OF LAW
PROPOSED ORDER

STATEMENT OF THE CASE

Dr. Jack Smith became the Superintendent for Calvert County Public Schools (CCPS) in 2006, and served as the Superintendent until he resigned in 2013. When Dr. Smith was appointed Superintendent, he nominated Robin Welsh to the position of Deputy Superintendent and Deborah Pulley to the position of Executive Director for Operations. The Board of Education of Calvert County (County Board)² appointed Ms. Welsh and Ms. Pulley to those positions but did not provide them with written contracts.

Starting with the 2008-09 school year, Ms. Welsh and Ms. Pulley entered into individual written employment contracts with the County Board which were signed by Dr. Smith. In 2010, Kimberly Roof was appointed by the County Board to the position of Executive Director for

¹ This decision was originally issued with an incorrect mailing date of January 20, 2016.

² Every Maryland county has a board of education responsible for the public school system within the county. Md. Code Ann., Educ. § 3-103 (2014). By law, a county board of education is a body politic and corporate. Md. Code Ann., Educ. § 3-104 (2014). *See* subtitle 4 of the Education Article regarding the County Board.

Administration. She entered into a written employment contract with the County Board which was signed by Dr. Smith.

The last written employment contracts for Ms. Welsh, Ms. Pulley and Ms. Roof (Appellants) was for the term beginning on July 1, 2012 and ending on June 30, 2013. The employment contracts contained identical provisions regarding the sale of unused sick leave, the ability to cash out unused annual leave, and whether the Appellants were entitled to benefits consistent with those provided to the Calvert Association of Supervisors and Administrators (CASA).

When the Appellants were advised that they would not be permitted to enforce the provisions of the employment contracts, they filed appeals with the County Board. On January 17, 2014, the County Board decided that the Appellants were not entitled to sick leave or annual leave payments, nor were they entitled to the three-year salary protection provided by the CASA agreement.

On February 12, 2014, the Appellants filed an appeal with the Maryland State Board of Education (State Board). The County Board filed a Motion for Summary Affirmance (Motion). On July 22, 2014, the State Board reversed the decision of the County Board and found in favor of the Appellants. The County Board filed a Petition for Judicial Review with the Circuit Court for Calvert County, Maryland (Court). On April 8, 2015, the Court reversed the State Board and remanded the case to the Office of Administrative Hearings (OAH). In doing so, the Court found that the State Board ignored the County Board's Motion and should have transferred the case to the OAH because there were genuine issues of material fact in dispute between the parties. Accordingly, the Court held that, pursuant to the Code of Maryland Regulations (COMAR) 13A.01.05.07A(3), the case must be remanded to the OAH for further fact finding. The matter was forwarded to the OAH on May 27, 2015.

On July 29, 2015, a telephone pre-hearing conference was held and on August 7, 2015, I issued a Prehearing Conference Report. During the prehearing conference, the parties agreed to hold the hearing on Friday, September 18, 2015, and Monday, September 21, 2015.

Accordingly, the hearing began and concluded on September 18, 2015, at the OAH. The Calvert County Board of Education (County Board) was represented by Andrew Nussbaum, Esquire.

The Appellants were represented by Robin Welsh, Esquire.

At the conclusion of the hearing, the parties requested that they be allowed to receive the transcript first and then submit closing arguments in writing. I agreed to that request and was told that the transcript would be ready by September 28, 2015; the parties requested that they be allowed to simultaneously submit their closing arguments by October 19, 2015. Unfortunately, the transcript was not available to the parties until October 7, 2015, and they requested they receive an extension until October 28, 2015 to submit their closing arguments. I granted the parties' request and they timely submitted their closing arguments; the record closed on October 28, 2015.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the procedural regulations for appeals to the State Board of Education, and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014); COMAR 13A.01.05; COMAR 28.02.01.

ISSUES

The Court remanded the case for fact finding on the following issues:

1. Did valid employment contracts exist between the Appellants and the County Board?
2. If there were valid contracts, did the sick leave and annual leave provisions continue to apply after the contracts expired?
3. Were the Appellants subject to the salary protections of the CASA bargaining unit (Article 7.4)?

SUMMARY OF THE EVIDENCE

Exhibits

As part of the record forwarded to the OAH, there were three sets of the records (one for each of the three Appellants) as of the February 12, 2014 appeal to the State Board. These documents were considered as part of the record along with the Opinion and Order of the Court, *In the Matter of Board of Education of Calvert County*, Case no.: C-14-1051, issued on April 8, 2015, by the Honorable Judge Mark S. Chandlee.

- Appellant's Appeal to the State Board, dated February 12, 2014
- 1. Letter to Dr. Karol and Ms. Highsmith, dated September 4, 2013
- 2. Employment Contract, dated July 23, 2012
- 3. Letter to Dr. Karol and Ms. Highsmith, dated September 23, 2013
- 4. Policy Statement #1600 (Administration) of the Board of Education Regarding Appeals
- 5. Appeal Information Form
- 6. Affidavit of Robin C. Welsh
- 7. Affidavit of Deborah G. Pulley
- 8. Affidavit of Kimberly H. Roof
- 9. Envelope with postage date stamped October 24, 2013
- 10. In the Matter of Appeal 13-19, dated November 3, 2013
- 11. Appeal letter to State Board, dated December 3, 2013
- 12. Letter from County Board, dated January 17, 2014, with attached Decision
- 13. Affidavit of Jack Smith
- 14. Dissent of Tracy H. McGuire from County Board Decision
- 15. Memorandum from Jackie LaFiandra, dated February 25, 2014, acknowledging the appeal

16. County Board's Response and Motion for Summary Affirmance, dated March 19, 2014, with supporting Memorandum
17. Memorandum from Jackie LaFiandra, dated March 20, 2014, requesting response to County Board's Motion for Summary Affirmance
18. Appellants' Response to County Board's Motion for Summary a Affirmance, dated March 31, 2014
19. Memorandum from Jackie LaFiandra, dated April 4, 2014, requesting a reply from the County Board to the Appellants' Response
20. County Board's Reply, dated April 8, 2014
21. Memorandum from State Board dated July 23, 2014, with Opinion No. 14-37.

During the hearing, the parties offered Joint exhibits 1 through 35, which were admitted into evidence as:

- Joint 1: Employment contract for Debbie Pulley, dated July 23, 2012
- Joint 2: Employment contract for Kim Roof, dated July 23, 2012³
- Joint 3: Employment contract for Robin Welsh, July 23, 2012
- Joint 4: Memorandum to Gordon Smith, dated June 22, 2006
- Joint 5: PIA Request, dated October 12, 2010
- Joint 6: Letter to Joseph Sella, dated November 12, 2010
- Joint 7: Response to ethics complaint, dated April 21, 2015
- Joint 8: Agreement between County Board and the CASA, fiscal years 2013 and 2014.
- Joint 9: Letter to County Board, dated May 15, 2013
- Joint 10: Email from Tracy McGuire, dated May 16, 2013
- Joint 11: Email from Dawn Balinski, dated May 23, 2013
- Joint 12: Letter to County Board, dated July 25, 2013
- Joint 13: Ms. Pulley's letter to Dr. Karol and Ms. Highsmith, dated September 4, 2013

³ The Employment Contract is dated November 10, 2011 on the first page but I conclude that is a clerical error because on the last page it was signed by Dr. Smith on July 23, 2012 and Ms. Roof on July 26, 2012.

- Joint 14: Ms. Roof's letter to Dr. Karol and Ms. Highsmith, undated
- Joint 15: Ms. Welsh's letter to Dr. Karol and Ms. Highsmith, dated September 4, 2013
- Joint 16: Ms. Pulley's letter to Dr. Karol and Ms. Highsmith, dated September 23, 2013
- Joint 17: Ms. Roof's letter to Dr. Karol and Ms. Highsmith, dated September 23, 2013
- Joint 18: Ms. Welsh's letter to Dr. Karol and Ms. Highsmith, dated September 23, 2013
- Joint 19: Agreement between County Board and the CASA, 2015-2018
- Joint 20: Decision of County Board – Deborah Pulley, dated January 17, 2014
- Joint 21: Decision of County Board – Kimberly Roof, dated January 17, 2014
- Joint 22: Decision of County Board – Robin Welsh, dated January 17, 2014
- Joint 23: Memorandum to County Board, dated July 9, 2009
- Joint 24: Memorandum to County Board, dated July 8, 2010
- Joint 25: Memorandum to County Board, dated October 13, 2011
- Joint 26: Memorandum to County Board, dated July 12, 2012
- Joint 27: Deborah Pulley Employment Contracts 2009, 2010, 2011, 2012
- Joint 28: Kim Roof Employment Contracts 2010, 2011, 2012
- Joint 29: Robin Welsh Employment Contracts 2009, 2010, 2011, 2012
- Joint 30: Appeal Information Form (Pulley)
- Joint 31: Appeal Information Form (Roof)
- Joint 32: Appeal Information Form (Welsh)
- Joint 33: Response to appeal (Pulley), dated October 24, 2013
- Joint 34: Response to appeal (Roof), dated October 24, 2013
- Joint 35: Response to appeal (Welsh), dated October 24, 2013
- Joint 36: County Board Minutes, dated July 12, 2012

Witnesses

The Appellants elicited testimony from Dr. Jack Smith, Interim State Superintendent, Maryland State Department of Education (MSDE); Robert Gray, Esq., former County Board member; Rose Crunkleton, Esq., former County Board member; William J. Phalen, Jr., County Board member; Tracy Herr McGuire, County Board member and current president; and, Kimberly H. Roof, Appellant.

The County Board elicited telephone testimony from Nancy Highsmith, past Interim Superintendent CCPS.

FINDING OF FACTS

I find the following facts by a preponderance of the evidence:

1. From 2003 to 2006, Dr. Horsmon was the Superintendent and Dr. Jack Smith was the Deputy Superintendent of CCPS.
2. The “executive team” refers to employees of the CCPS that work closely with the Superintendent. They are also referred to as “senior staff” or “confidential employees.”
3. CASA is the exclusive bargaining representative of the certificated administrators and supervisors employed by the CCPS. Executive team employees have never been part of the CASA unit for purposes of negotiating contracts during the relevant time period involved in this case.⁴
4. From 2003 to 2006, Dr. Horsmon attended a closed meeting (“retreat”) each spring with the County Board. The topic of salary and benefits, including sick leave and annual leave, for the executive team employees (and others who were not in the CASA unit) was on the agenda each spring. Prior to the retreat, Dr. Horsmon told the

⁴ It was unclear from the evidence whether that has since changed, but in the 2012-13 school year the positions of Deputy Superintendent, Executive Director for Operations, and Executive Director for Administration were not in the CASA unit.

executive team members his recommendations for their salaries and benefits. The executive team members provided any input they wanted Dr. Horsmon to consider. After the retreat, Dr. Horsmon orally relayed the decision of the County Board to the executive team and he wrote a memorandum to the CCPS Finance Officer stating the executive team's salaries for the upcoming school year.

5. In 2006, Dr. Smith was employed by the County Board as the Superintendent for CCPS from 2006 until he resigned in 2013.
6. When he became the Superintendent, Dr. Smith nominated Ms. Welsh to be the Deputy Superintendent for CCPS and she was appointed to that position by the County Board. Ms. Welsh served as the Deputy Superintendent from 2006 to 2013.
7. Dr. Smith also nominated Ms. Pulley to be the Executive Director for Operations for CCPS and she was appointed to that position by the County Board. Ms. Pulley served as the Executive Director from 2006 to 2013.
8. During his tenure, Dr. Smith signed hundreds of written contracts on behalf of CCPS. He signed building renovation contracts, IT equipment and service agreements, facilities contracts, employees' contracts and labor agreements on behalf of CCPS.
9. Dr. Smith signed a \$40 million construction contract on behalf of CCPS which defined the parties as the CCPS, Jack R. Smith and the contractor, not as the County Board and the contractor.
10. A few of the contracts were signed by both the County Board and Dr. Smith but the majority of the contracts were signed solely by Dr. Smith.
11. When Dr. Smith became Superintendent, he continued the practice of meeting annually with the County Board in a closed session and recommending the salaries and fringe benefits for the executive team. The County Board discussed the

recommendation and asked Dr. Smith any questions. Every year the County Board members decided the executive team members' salaries and benefits for the upcoming school year and communicated their decision to Dr. Smith. Dr. Smith verbally communicated the County Board's decision to the executive team.

12. The salaries for the executive team were voted on by the County Board in a public meeting. After the County Board approved the salaries, Dr. Smith communicated the salary information in a brief memorandum to the CCPS Finance Officer stating that the various salaries had been established for the executive team for the next school year and listing the new salaries. The memorandum did not include information about benefits.
13. In Spring 2008, Tammie McCourt was hired as the Chief Budget and Finance officer for CCPS. That fall, when CCPS had its annual audit, Ms. McCourt informed Dr. Smith that more documentation was needed regarding the salary and benefits paid to the executive team. Dr. Smith told the County Board that the auditors needed more written documentation which would include written employment contracts for the executive team. In the fall of 2008, the County Board consisted of the following members: Bob Gray, Bill Phalen, Mary Garvey, Frank Parish and Gene Karol.
14. Dr. Smith discussed the salaries and fringe benefits for Ms. Welsh and Ms. Pulley (as well as other executive team members) with the County Board. The County Board came to an agreement as to the salary and fringe benefits for the executive team members. In an open session, the County Board voted to approve the salaries for the executive team.
15. For the 2008-09 school year, Dr. Smith prepared written employment contracts for the executive team members, including Ms. Welsh and Ms. Pulley, and signed them

on behalf of the County Board. He incorporated the salaries that were voted on by the County Board and the fringe benefits that were discussed and approved by the County Board as terms in the contracts.

16. In January 2009, after Bill Phalen, Mary Garvey and Frank Parish decided not to run for re-election, there were three new members on the County Board: Rose Crunkleton, Terry McGuire and William Chambers.
17. Dr. Smith explained to the County Board in the fall of 2008, and then again when the three new members joined the County Board in January 2009, that CCPS would not be able to honor the three-year labor agreement it negotiated with the teachers, administrators and staff. Dr. Smith explained to the County Board that during the 2008-09 school year, all of the local school districts in Maryland received significantly less funding from the State than they had anticipated. Dr. Smith also told the County Board that if they paid out the third year of the contract, they would have had to lay off approximately one hundred and thirty-five CCPS employees.
18. In 2010, Ms. Roof joined the executive team as the Executive Director for Administration for CCPS. She served in that position until 2013. For the 2010-11, and 2011-12 school years, Ms. Roof and Dr. Smith signed an employment agreement that incorporated the salary and fringe benefits approved by the County Board.
19. The tight fiscal environment continued throughout most of Dr. Smith's tenure as Superintendent. All CCPS employee salaries and benefits became a major focus of attention for the County Board, and the topics were discussed during many meetings.
20. The Calvert Education Association (CEA) and the Calvert Association of Educational Support Staff (CAESS), collectively Unions, are the certified bargaining unit representatives for CCPS teachers and educational support staff.

21. The Unions requested information, through the filing of Public Information Act (PIA) requests, concerning the salaries and benefits of the Superintendent and the executive team members for each of the years during which Dr. Smith was superintendent. The PIA requests also included a request for copies of the executive team's contracts. Every time CCPS received a PIA request, the County Board was informed. The CCPS provided the information, including copies of contracts, to the Unions per the PIA requests.
22. The Unions referred to the salaries and benefits of executive team members during their negotiations with the County Board. The negotiations became so contentious they were held during open sessions with some Calvert County Commissioners and members of the press frequently in attendance.
23. As in previous years, Dr. Smith had employment contracts prepared for the Appellants for the 2012-13 school years. The employment contracts stated the salaries approved and voted on by the County Board in open session. The employment contracts included fringe benefits as discussed and agreed to by the County Board.
24. Each of the Appellants' written employment contracts provided the following language regarding compensation for unused sick leave which included: "At [the] time of leaving the Executive Team position, the compensation for any remaining unused sick leave will be a matter of negotiation between Employer and Employee." (Joint 1, 2, 3).
25. Each of the Appellants' written employment contracts provided the following language regarding annual leave:
 - e. Employee shall be entitled to annual leave in accordance with Employer's agreement with CASA based on years of eligible

service as determined by the Superintendent, plus ten (10) additional leave days per year. Annual leave shall accumulate without limitation. Employee shall be allowed to cash out unused annual leave upon leaving an executive team position, deposit the value [of] any remaining annual leave days into a personal [Tax Sheltered Annuity] TSA, or have the value treated as an Employer contribution to Employee's TSA, up to the maximum allowed under the I.R.S. regulations. Such actions may be taken within one year of leaving the executive team position. (Joint 1, 2, 3).

26. Dr. Smith resigned as Superintendent by giving notice at the end of the 2012-13 school year.
27. Nancy Highsmith was the Interim Superintendent for the 2013-14 school year.
28. In July 2013, Ms. Highsmith spoke with the Appellants and told them that the County Board instructed her not to enter into any contracts with them. She told the Appellants that no changes were being made at that time to the composition of the executive team. Ms. Highsmith also told the Appellants that they would receive the same benefits as those in the CASA bargaining unit but they would not get any of the extra benefits that had been in their contracts.
29. The Appellants continued in their executive team positions from July 1, 2013 until they were placed in new positions, effective September 9, 2013. On or about August 30, 2013, Ms. Highsmith and County Board member Dr. Karol reassigned Ms. Welsh to the position of Principal at the Calvert Country School, Ms. Pulley was reassigned to the position of Principal of Middle Creek Middle School,⁵ and Ms. Roof was reassigned to the position of Director of Student Services. Dr. Karol and Ms. Highsmith also told the Appellants that they would keep the same executive team position salaries they had in the 2012-13 school year for the 2013-14 year but that they would not receive the executive team position salaries beyond the 2013-14

⁵ Ms. Pulley subsequently retired and is no longer employed by the CCPS.

school year. Instead, they would be placed on the relevant salary scale for the CASA bargaining group. Ms. Highsmith and Dr. Karol refused to discuss the selling of annual and/or sick leave with the Appellants.

DISCUSSION

Did valid employment contracts exist between the Appellants and the County Board?

The Superintendent of CCPS is the “is the executive officer, secretary, and treasurer of the county board.” Md. Code Ann., Educ. § 4-102(a)(1) (2014). For Calvert County (but not every jurisdiction in Maryland), state law provides that “the county board shall employ individuals in the positions that the county board considers necessary for the operation of the public schools in the county.” Md. Code Ann., Educ. § 6-201(a) (2014). Section 6-201(f) of the Education Article of the Annotated Code of Maryland provides that “the qualifications, tenure, and compensation of each appointee shall be determined by the county board.” Md. Code Ann., Educ. § 6-201(f) (2014).

The County Board argued that although the County Board determined the executive team members’ salaries, by voting on Dr. Smith’s recommendations in open session, there was no similar determination of the executive teams’ fringe benefits. The County Board did not call any witnesses on the issue of fringe benefits but relied instead on the testimony of the witnesses called by the Appellants. The County Board argued that the testimony was clear that the County Board did not discuss or vote on fringe benefits in open session. The County Board argued that because the employment contracts were signed by Dr. Smith, the provisions regarding fringe benefits were unenforceable against the County Board after Dr. Smith resigned.

The Appellants agreed that fringe benefits are part of the compensation that must be determined by the County Board. They argued that the County Board determined the Appellants’ compensation through a process in which the County Board discussed with the

Superintendent the provisions of the employment contracts each year prior to the implementation of the contracts. The Appellants argued that the County Board approved the employment contracts through a consensus process. (Appellant's Post-Hearing Memorandum of Law, p. 11).

The evidence was clear that Calvert County had a longstanding practice of the Superintendent recommending the executive team's salaries to the County Board, which then voted on the salaries in open session. I also conclude that the preponderance of the evidence demonstrated that it was a longstanding practice for the Superintendent to discuss the executive team's benefits with the County Board. Although the County Board did not vote on or ratify the contracts in open or closed session, they *determined* what the benefits would be through consensus.⁶

Dr. Smith and four board members were called to testify about the executive team's salaries and benefits. Dr. Smith testified that he used his own contract, and what the executive team was receiving in terms of salaries and benefits, as the starting point for recommending any changes to the County Board. For example, Dr. Smith testified that in approximately 2009 or 2010, the County Board was strongly in favor of granting CCPS employees a sick leave transfer program. If a CCPS employee experienced a catastrophic event, other employees could donate sick leave to that employee as long as they kept a balance of fifteen days of sick leave. (T. 64). Dr. Smith further testified that he was uncomfortable with this system because of the unequal relationship between employees. A supervisor might be reluctant to discipline poor performance from an employee who had previously donated leave to the supervisor, or a subordinate employee might feel pressured to donate leave in order to receive a good evaluation from his or

⁶Section 3-304(b) of the Education Article requires that all actions of the County Board be taken at a public meeting and recorded, except as provided for in section 3-304(c), which provides that closed sessions may be held in accordance with section 3-305 of the General Provisions Article. Md. Code Ann., Educ. § 3-304(b), (c) (2014). Section 3-305(b) of the General Provisions Article provides, "a public body may meet in closed session or adjourn an open session to a closed session only to: (1) discuss: (i) the appointment, employment, assignment, promotion, discipline, demotion, **compensation**, removal, resignation, or performance evaluation of an **appointee, employee,** or official over whom it has jurisdiction[.]" Md. Code Ann., Gen. Provs. § 3-305(b) (2014) (emphasis added).

her supervisor. Dr. Smith testified that he voiced his concerns to the County Board but it, and Dr. Karol in particular, strongly wanted this benefit so it was granted. Dr. Smith testified that he continued to voice his concerns to the County Board about the sick leave transfer program.

In 2012, Dr. Smith testified that his wife, a CCPS teacher, developed colon cancer. He testified that he specifically used the example of his wife during one of the meetings with the County Board to make his point that it would be inappropriate for him or a member of the executive team to receive a sick leave transfer from a subordinate employee. (T. 93-95). Dr. Smith testified he was able to use this example to convince the County Board to modify his own contract to exclude him from the leave transfer program. Dr. Smith testified that the County Board agreed that year that the executive teams' contracts should also be modified to exclude them from the leave transfer program and to instead grant the executive team employees an additional one day per month of sick leave in lieu of participating in the leave transfer program. (T. 65-66; 95).

Robert Gray testified that he is a retired attorney and was a County Board member for twelve years. Mr. Gray testified that executive team member benefits were discussed during several meetings annually and that the benefits were approved by a consensus and "then [the County Board] directed the superintendent to go ahead and proceed with that, whatever decisions we had made at that point." (T. 121). Mr. Gray also testified that he assumed that the County Board's conclusions were documented in some way but could not recall whether it was a formal contract, a memorandum of understanding (MOU), or a directive memorandum. Although the County Board used Mr. Gray's lack of recollection as to whether the documentation was in the form of a contract or a MOU, to argue that the County Board did not know that there was written documentation, I disagree. Mr. Gray testified that he considered the type of documentation to be

an “administrative detail” that someone else would take care of as opposed to a policy setting issue which was the County Board’s job. (T. 122).

Rose Crunkleton is also an attorney and served on the County Board from 2008 until December 2012; she was the President of the County Board in 2012. Ms. Crunkleton testified that she was aware there were contracts with the executive team but she never saw them and the County Board did not vote on the contracts. (T. 141). Instead, the Superintendent discussed the general terms of the contracts and she remembered conversations about compensation for unused leave. (T. 136). Ms. Crunkleton also testified that procurement contracts over \$25,000.00 were available for review online and the County Board voted on the contracts in open session but did not sign the contracts, the Superintendent signed them. (T. 139-142).

William Phalen, Jr. is a retired statistician and served on the County Board for seventeen years. He left the County Board in December of 2010, but began serving on January 1, 2015, after he ran again and was elected. Mr. Phalen testified that the County Board “approved” the benefits of the executive team staff. (T. 171).

Tracy McGuire works for a small law firm in Dunkirk, Maryland and has been on the County Board for seven years. Starting in January 2015, Ms. McGuire has been the President of the County Board. Ms. McGuire testified that when she joined the County Board in 2009, Dr. Smith came to the County Board in the late Spring and stated he would like to make changes to the agreements or contracts with his executive team. Ms. McGuire recalled that there was no money for pay raises and therefore Dr. Smith asked to offer the executive team more compensatory time or selling more annual leave. (T. 180-181). Ms. McGuire’s testimony was similar to Ms. Crunkleton in that she testified that she never saw written contracts for the executive team and that the County Board did not vote on the contracts in open session. Ms. McGuire’s testimony differed from Ms. Crunkleton’s in that she testified the County Board does

not see the full contracts for procurement contracts in amounts over \$25,000.00. Instead, she testified, the County Board receives a recommendation from the Superintendent that summarizes the amount of the contract and the reason why the particular contractor should be awarded the contract. (T. 197).

I found Dr. Smith and all four board member witnesses to be credible in that each one testified in a forthright manner and was clear to explain the limits of his or her recollection. Dr. Smith testified unequivocally that each year he would recommend salaries for each of his executive staff and he would outline any changes he was proposing to their benefits. In this manner, he testified, he covered changes regarding additional annual leave and the sale of that annual leave beyond the life of the contract (T. 96) as well as sick leave, health benefits, retirement, and bereavement leave. (T. 99).

It is not surprising that the four board members did not recall all of the details about each of these topics. The County Board members did not have daily contact or supervision of the executive team. I would not expect the subject of executive team salaries and benefits to be as high a priority for them as it was for Dr. Smith and therefore I would not expect their recollection of those discussions to be as detailed as it was for Dr. Smith. Furthermore, the Appellants never contended that the County Board members saw the written employment contracts. Therefore, their memory of the discussion of the contents of the contracts would reasonably be less complete than that of Dr. Smith who read the contracts every year. Moreover, the County Board witnesses were being questioned about contracts from the 2012-13 school year. Nevertheless, each board member testified that the terms of the benefits were discussed with them and that they either approved or came to a consensus about what the benefits for the executive team should be. "Approval" or "coming to a consensus" about the benefits is a determination of the benefits as required by the statute.

The County Board cited *Alternatives Unlimited v. New Baltimore City Board of School Commissioners*, 155 Md. App. 415, 425 (2004) for the proposition that a governmental entity is not obligated to expend public funds except in the formal manner expressly provided by law. (Board of Education of Calvert County's Post-Hearing Memorandum, p. 8). After carefully reading *Alternatives Unlimited*, and considering the parties' arguments, I conclude that *Alternatives Unlimited* is distinguishable from this case.

In *Alternatives Unlimited*, the Baltimore City Board had promulgated procurement policies and procedures which required all professional service contracts over the amount of \$15,000.00 to be approved, in writing, by the school board. Alternatives Unlimited, a company providing drop-out prevention services to urban school districts, knew that there was a requirement that all professional service contracts over \$15,000.00 had to be approved in writing. In fact, for the 1999-2000 school year, Alternatives Unlimited entered the competitive bidding process and was awarded a contract by the Baltimore City Board in the amount of \$76,207.00 to provide drop-out prevention services. There was no dispute between the parties regarding the drop-out prevention program. The dispute arose over Alternatives Unlimited's contention that in June of 2000 it had entered into an oral contract with the Baltimore City Board to provide services to students who had already dropped out of school to "drop-back-in" at a cost of \$250,000.00. Alternatives Unlimited argued that Carmen V. Russo, the new CEO, approved the implementation of the program. The Court noted that Ms. Russo had, at the most, two very brief meetings with Alternatives Unlimited. The first meeting was approximately fifteen minutes in length and took place prior to the time Ms. Russo actually became the CEO. In that meeting, which Ms. Russo characterized as a brief "getting to know you" meeting, she diplomatically told Alternatives Unlimited that she was always interested in programs that would provide resources to drop-outs. Alternatives Unlimited argued that at a second meeting with school officials, Ms.

Russo briefly walked into the meeting, and gave approval for the program to go ahead. Ms. Russo could not recall if she entered that meeting or not but she was adamant that she had not given approval for a contract with Alternatives Unlimited.

In this case, there was no promulgated policy of the County Board that the executive team's contracts had to be reviewed by the County Board or that County Board had to vote on those contracts in open session. Further, unlike the brief meetings between Ms. Russo and Alternatives Unlimited, Dr. Smith testified that he discussed the salary and benefits with the County Board in several meetings annually. It is clear from his testimony, and that of the County Board members, that these discussions were not one or two extremely brief conversations as occurred in *Alternatives Unlimited*. Finally, unlike Ms. Russo, each of the County Board witnesses testified that they "approved" or "came to a consensus" about the executive staff's benefits.

In addition, Dr. Smith testified that as part of the negotiations over teacher contracts, the Unions filed PIA requests every year requesting his contract and the contracts for each executive team member. (T. 53-56). Dr. Smith testified that every time the Unions filed PIA requests, the County Board was informed and the County Board was also informed that the contracts were provided. Finally, Dr. Smith's uncontroverted testimony was that the Unions' negotiators referred to the contracts during negotiations between the bargaining units and the County Board and that these discussions were held in open session and with the press present. (T. 54).

The County Board also argued that the employment contracts are unenforceable because COMAR 13A.07.02.01B(1) provides that a form entitled "Regular Contract" shall be used and others may not be recognized. However, COMAR 13A.07.02.01B notes that it is a "Regular (Teacher's) Contract." The form contract instructs the parties to elect whether the employee will participate in the "Teachers' Retirement System" or "Teachers' Pension Plan System." The

Appellants in this case were members of the executive team and were not teachers; therefore, COMAR 13A.07.02.01B does not render the employment contracts unenforceable.⁷

If there were valid contracts, did the sick leave and annual leave provisions continue to apply after the contracts expired?

Section 5(d) of the Appellants' employment contracts provides in pertinent part the following information regarding compensation for unused sick leave: "At [the] time of leaving the Executive Team position, the compensation for any remaining unused sick leave will be a matter of negotiation between Employer and Employee."

The County Board argued that because the express terms of the contracts provided that the contracts expired on June 30, 2013, and there was nothing in the contracts that extended the sick and annual leave benefits beyond the date of their termination, the sick and annual leave provisions did not survive the expiration of the contracts. Further, the County Board argued that the language used in the provision regarding sick leave was unenforceable due to vagueness. I agree with the County Board that the language is unenforceable because it is vague; parties can always negotiate so this provision does not specifically provide the Appellants with any benefit that can be enforced. *Robinson v. Gardiner*, 196 Md. 213, 217 (1950) ("No action will lie upon a contract, whether written or verbal, where such a contract is vague or uncertain in its essential terms.")

Section 5(e) of the Appellants' employment contracts also provided the following language regarding annual leave:

e. Employee shall be entitled to annual leave in accordance with Employer's agreement with CASA based on years of eligible service as determined by the Superintendent, plus ten (10) additional leave days per year. Annual leave shall accumulate without limitation. Employee shall be allowed to cash out unused annual leave upon leaving an executive team position, deposit the value [of] any remaining annual leave days into a personal [Tax Sheltered Annuity] TSA, or

⁷ It is interesting that the County Board would argue that the Appellants could only use the regulatory form contract that is clearly for teachers when it is also arguing that the Appellants, as executive team members, could not be members of CASA.

have the value treated as an Employer contribution to Employee's TSA, up to the maximum allowed under the I.R.S. regulations. **Such actions may be taken within one year of leaving the executive team position.** (emphasis added).

(Joint 1, 2, 3).

The County Board argued that because the express terms of the contracts provided that the contacts expired on June 30, 2013, and, as there was nothing in the contracts that extended the annual leave benefits beyond the date of their termination, the annual leave provisions did not survive the expiration of the contracts. I agree that the amount of annual leave noted in the first part of paragraph e did not continue past the expiration of the contract, but I conclude that the express language of the second part of the paragraph does survive the ending date of the contract. The language expressly states that the executive team employee has up to one year after leaving the position to elect which option she wished to pursue with her unused annual leave.

This interpretation is also consistent with Dr. Smith's testimony regarding the rationale for including the one year language. Dr. Smith testified that employees typically retire on June 30th before the next fiscal year starts on July 1st so they need some time to decide what they want to do with their annual leave. Dr. Smith explained that the year the provision regarding annual leave was added to the contract, he spoke with the County Board about the rationale for giving a former executive team employee one year to decide and that the County Board understood his rationale and agreed with the provision. (T. 71). No one was called by the County Board to refute Dr. Smith's testimony about his rationale for recommending this language or that it was discussed with the County Board the year it was included.

Were the Appellants subject to the salary protections of the CASA bargaining unit (Article 7.4)?

The Appellant Roof testified that in at least two meetings prior to being transferred to their new positions, effective September 9, 2013, the Appellants were told by the Interim Superintendent, Nancy Highsmith, that the County Board had placed them in the CASA unit and

that they would have the protections of the CASA bargaining unit. Therefore, the Appellants argued, they should have received their executive team salaries for three years pursuant to Article 7.4 of the CASA Agreement. (Joint Ex. 8, p. 8) Ms. Highsmith testified that she never told the Appellants, nor would she have told the Appellants, that they were covered by the CASA Agreement prior to being transferred to their new positions effective September 9, 2013.

I found Ms. Highsmith's testimony credible. She testified that they had numerous discussions about the Appellants' salaries and benefits after she became Interim Superintendent and that she told the Appellants the County Board instructed her not to enter into any contracts with the executive team and that their benefits would be the same as what the CASA bargaining unit had without any of the extras that they had in their contracts. (T. 237). Further, Ms. Highsmith testified that she had been a member of CASA for many years, was their vice president at one point, and would never allow a "confidential" member to be a member of the CASA bargaining unit. (T. 258).

On cross examination, Ms. Highsmith was asked to define a "confidential employee" which she explained was "someone that works directly with the superintendent and ... actually negotiate[s] against the other bargaining unit." (T. 262). The Appellants sought to discredit this testimony by showing that other employees have negotiated on behalf of the County Board were actually members of the CASA unit. The Appellants recalled Ms. Roof who named the employees who were on the negotiating team. All, with the exception of one, were actually not part of the CASA unit but were in the "meet and confer" unit. (T. 282). Ms. Roof was not certain if the one employee on the negotiating team, a human resources supervisor, was part of CASA.

The Appellants failed to prove that CASA members have served as negotiators on behalf of the County Board. Moreover, it is unimportant to determine whether Ms. Highsmith was

correct. What is important is whether Ms. Highsmith believed that a confidential employee could not be in the CASA bargaining unit which would lend credibility to her statement that she would never have told the Appellants they were part of the CASA unit prior to being transferred. Having carefully considered all of the evidence, I have no doubt from Ms. Highsmith's testimony that she did not believe a confidential employee could be placed in CASA, and as a result, I find it more likely than not that she told the Appellants that they would have the same benefits *as* someone in the CASA bargaining unit but she never told the Appellants they would be placed *in* the CASA bargaining unit prior to being transferred to their new positions outside of the executive team.⁸

In contrast to Ms. Highsmith's emphatic testimony that she never told the Appellants that they would be placed in the CASA bargaining unit prior to being transferred to their new positions, Appellant Roof was uncertain about the wording Ms. Highsmith used in their discussions. She first testified that Ms. Highsmith told them they were going to "be placed in CASA" and then "you're under a CASA agreement and that's where we've already placed you." (T. 212-213). Later, Appellant Roof agreed with counsel for the County Board that they would be unit members of CASA beginning with the 2013-14 school year. (T. 234).

There is no dispute that the Appellants were not transferred to their new positions until September 9, 2013, and that these new positions were within the CASA bargaining unit. As the Appellants were not members of the CASA bargaining unit until they were transferred, Article 7.4 did not apply to them at the time they were transferred.

The Appellants also argued that if the County Board contended that their employment contracts were invalid, but at the same time it also contended that they were not members of the

⁸ It is understandable how the Appellants, who were on the executive team and not as familiar with the CASA bargaining unit as Ms. Highsmith (who had been its vice president at one point), may have misunderstood Ms. Highsmith's statements.

CASA bargaining unit, then during the time period of July 1, 2013 through September 8, 2013, they were the only CCPS employees without protection. I am not persuaded by this argument. Ms. Highsmith pointed out that the Appellants never received any protection outside of their contracts (and prior to the written contracts no protection). (T.266). I agree. The employment contracts stated what the Appellants' salaries were for the 2012-13 school year only and that "thereafter [it would] be determined on a year-to-year basis." (Joint 1, paragraph 4). The contract never provided any protection after the 2012-13 school year and if they were not transferred to positions within the CASA bargaining unit, the CASA agreement clearly did not provide them with any protection either. I have found that the contracts did survive past the 2012-13 school year in terms of the annual leave because that provision plainly provided that the Appellants had up to one year after leaving their executive team position to decide what they wanted to do with their annual leave. The contracts could have provided protection in terms of sick leave but the wording of that provision is so vague that it is unenforceable.

CONCLUSIONS OF LAW

Based on the above Findings of Fact and Discussion, I conclude as a matter of law that:

1. Valid employment contracts existed between the Appellants and the County Board (Md. Code Ann., Ed. Art. § 6-201(f)); and, further that
2. The provision of the contract that provided that compensation for any unused sick leave would be a matter of negotiation between the Appellants and the County Board is vague and unenforceable (*Robinson v. Gardiner*, 196 Md. 213, 217 (1950)); and, further that:
3. The provision of the contract that provided for the Appellants to have one year after leaving an executive team position to elect what they wanted to do with their unused

annual leave continued to exist after the contracts expired because of the express language used in the contract provision; and, further that,

4. The Appellants were not subject to the salary protections of the CASA bargaining unit (Article 7.4) from July 1, 2013 until September 8, 2013, because they were not members of the CASA bargaining unit during that time period.

PROPOSED ORDER

I Propose that:

1. The Appellants be granted one year to elect one of the following options for the annual leave they accrued while they were in executive team positions:
 - a. Cash out unused annual leave; or,
 - b. Deposit the value of any remaining annual leave days into a personal Tax Sheltered Annuity; or,
 - c. Have the value of any remaining annual leave days treated as an CCPS contribution to the Appellants' Tax Sheltered Annuity, up to the maximum allowed under the IRS regulations in accordance with paragraph five (e) of their employment contracts;
2. That the Appellants be denied any relief regarding unused sick leave; and,
3. That the Appellants be denied any salary relief as provided for in the CASA Agreement.

January 21, 2016
Date Decision Mailed

Ann C. Kehinde
Administrative Law Judge

ACK/cj
#160385

RIGHT TO FILE EXCEPTIONS

A party objecting to this Proposed Decision may file exceptions with the State Board within 15 days of receipt of this Proposed Decision. COMAR 13A.01.05.07F(1).

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DEBORAH PULLEY, et al.,

v.

CALVERT COUNTY BOARD OF

EDUCATION

*** BEFORE ANN C. KEHINDE,**

*** AN ADMINISTRATIVE LAW JUDGE**

*** OF THE MARYLAND OFFICE**

*** OF ADMINISTRATIVE HEARINGS**

*** OAH No.: MSDE-BE-20-15-18309**

* * * * *

FILE EXHIBIT LIST

As part of the record forwarded to the OAH, there were three sets of the records (one for each of the three Appellants) as of the February 12, 2014 appeal to the State Board. These documents were considered as part of the record along with the Opinion and Order of the Court, *In the Matter of Board of Education of Calvert County*, Case no.: C-14-1051, issued on April 8, 2015, by the Honorable Judge Mark S. Chandlee.

- Appellant's Appeal to the State Board, dated February 12, 2014
- 1. Letter to Dr. Karol and Ms. Highsmith, dated September 4, 2013
- 2. Employment Contract, dated July 23, 2012
- 3. Letter to Dr. Karol and Ms. Highsmith, dated September 23, 2013
- 4. Policy Statement #1600 (Administration) of the Board of Education Regarding Appeals
- 5. Appeal Information Form
- 6. Affidavit of Robin C. Welsh
- 7. Affidavit of Deborah G. Pulley
- 8. Affidavit of Kimberly H. Roof
- 9. Envelope with postage date stamped October 24, 2013
- 10. In the Matter of Appeal 13-19, dated November 3, 2013

11. Appeal letter to State Board, dated December 3, 2013
12. Letter from County Board, dated January 17, 2014, with attached Decision
13. Affidavit of Jack Smith
14. Dissent of Tracy H. McGuire from County Board Decision
15. Memorandum from Jackie LaFiandra, dated February 25, 2014, acknowledging the appeal
16. County Board's Response and Motion for Summary Affirmance, dated March 19, 2014, with supporting Memorandum
17. Memorandum from Jackie LaFiandra, dated March 20, 2014, requesting response to County Board's Motion for Summary Affirmance
18. Appellants' Response to County Board's Motion for Summary a Affirmance, dated March 31, 2014
19. Memorandum from Jackie LaFiandra, dated April 4, 2014, requesting a reply from the County Board to the Appellants' Response
20. County Board's Reply, dated April 8, 2014
21. Memorandum from State Board dated July 23, 2014, with Opinion No. 14-37.

During the hearing, the parties offered Joint exhibits 1 through 35, which were admitted into evidence as:

Joint 1: Employment contract for Debbie Pulley, dated July 23, 2012

Joint 2: Employment contract for Kim Roof, dated July 23, 2012¹

Joint 3: Employment contract for Robin Welsh, July 23, 2012

Joint 4: Memorandum to Gordon Smith, dated June 22, 2006

Joint 5: PIA Request, dated October 12, 2010

Joint 6: Letter to Joseph Sella, dated November 12, 2010

Joint 7: Response to ethics complaint, dated April 21, 2015

Joint 8: Agreement between County Board and the CASA, fiscal years 2013 and 2014.

¹ The Employment Contract is dated November 10, 2011 on the first page but I conclude that is a clerical error because on the last page it was signed by Dr. Smith on July 23, 2012 and Ms. Roof on July 26, 2012.

- Joint 9: Letter to County Board, dated May 15, 2013
- Joint 10: Email from Tracy McGuire, dated May 16, 2013
- Joint 11: Email from Dawn Balinski, dated May 23, 2013
- Joint 12: Letter to County Board, dated July 25, 2013
- Joint 13: Ms. Pulley's letter to Dr. Karol and Ms. Highsmith, dated September 4, 2013
- Joint 14: Ms. Roof's letter to Dr. Karol and Ms. Highsmith, undated
- Joint 15: Ms. Welsh's letter to Dr. Karol and Ms. Highsmith, dated September 4, 2013
- Joint 16: Ms. Pulley's letter to Dr. Karol and Ms. Highsmith, dated September 23, 2013
- Joint 17: Ms. Roof's letter to Dr. Karol and Ms. Highsmith, dated September 23, 2013
- Joint 18: Ms. Welsh's letter to Dr. Karol and Ms. Highsmith, dated September 23, 2013
- Joint 19: Agreement between County Board and the CASA, 2015-2018
- Joint 20: Decision of County Board – Deborah Pulley, dated January 17, 2014
- Joint 21: Decision of County Board – Kimberly Roof, dated January 17, 2014
- Joint 22: Decision of County Board – Robin Welsh, dated January 17, 2014
- Joint 23: Memorandum to County Board, dated July 9, 2009
- Joint 24: Memorandum to County Board, dated July 8, 2010
- Joint 25: Memorandum to County Board, dated October 13, 2011
- Joint 26: Memorandum to County Board, dated July 12, 2012
- Joint 27: Deborah Pulley Employment Contracts 2009, 2010, 2011, 2012
- Joint 28: Kim Roof Employment Contracts 2010, 2011, 2012
- Joint 29: Robin Welsh Employment Contracts 2009, 2010, 2011, 2012
- Joint 30: Appeal Information Form (Pulley)
- Joint 31: Appeal Information Form (Roof)
- Joint 32: Appeal Information Form (Welsh)

Joint 33: Response to appeal (Pulley), dated October 24, 2013

Joint 34: Response to appeal (Roof), dated October 24, 2013

Joint 35: Response to appeal (Welsh), dated October 24, 2013

Joint 36: County Board Minutes, dated July 12, 2012