

NICOLAS MOON

Appellant

v.

SOMERSET COUNTY BOARD
OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 12-20

OPINION

INTRODUCTION

In this appeal, Appellant, Nicolas Moon, contests the Somerset County Board of Education's decision not to award him the contract for Bus Route #3. The local board has filed a Motion for Summary Affirmance maintaining its decision is not arbitrary, unreasonable or illegal. The Appellant has filed a Response opposing the local board's motion and the local board filed a Reply to Appellant's Response.

FACTUAL BACKGROUND

The Somerset County Board of Education advertised for potential contractors to be awarded the contract for Bus Rt. #3. Three contractors and three substitutes¹ applied. Appellant was one of the three substitutes who applied.

Section 4B of the Pupil Transportation Policy 200-18 states that, "The award of bus contracts shall be by the Board of Education upon recommendation of the county Superintendent. The Superintendent or his/her designee shall advertise for bus contractors, prepare application forms, receive and review applications and train the applicant. Contracts shall be awarded on the basis of best qualifications as judged by the Board of Education and upon economy and efficiency of operation. Substitutes serving Somerset County Public Schools will be given priority over contractors already having a route."

Section 8 of the Policy sets out the criteria for selection of a contractor as follows:

8. CONTRACTOR SELECTION

¹ A substitute is a qualified driver who is approved by the local board and authorized to drive a bus route in the absence of the regular bus contractor.

- A. The Superintendent or their duly authorized agent shall accept an application and file it in the order of receipt. A file of approved applicants will be maintained for each contract advertised.
- B. Contracts shall be awarded on the basis of qualifications and location of residence or bus lot in relation to the bus route.
- C. Applicants shall meet the following minimum standards:
 - (1) Age: 21 or older and have been driving 5 years
 - (2) Financially solvent – letter of credit from a commercial lending institution; bank, savings and loan, etc.
 - (3) Must meet all requirements of the Maryland State Department of Education and COMAR 12A.06.07.06.
 - (4) Must provide three references acceptable to the Board of Education.
 - (5) Somerset County Resident
- D. Transportation Department Recommendations for Selection of Contractor Based on Points Earned:

(1) Locations of residence of the applicant in relation to the route	0-10 Points
(2) Driving Record	10 Points
(3) Substitute for Somerset County Board of Education (2 points for each year up to five years)	2-4-6-8-10 Points
(4) Substitute driver for contractor relinquishing route	25 Points
(5) Employment Record	10 Points
(6) Interview and information supplied on application	0-20 Points
(7) Driving (school bus) experience of applicant	15 Points

MAXIMUM ACCUMULATIVE POINTS 100 Points

On June 14, 2011², the local board convened in an open work session at 5:10 pm. During the open work session, the board discussed the bus contract for Rt. #3. The Superintendent’s staff informed the board that three contractors and three substitutes had applied for the contract. Mr. Daugherty, of the Superintendent’s staff recommended that the contract be awarded to Appellant, a substitute, because he scored the highest in the interview process. The local board thereafter discussed their concerns about the selection process. One member questioned whether substitutes should be given extra points. Another member questioned the use of the point system. The board then discussed its intention to revise policy 200-18 to get rid of the point system and re-advertise the route #3 bus contract. The board also discussed and agreed that all stakeholders should be involved in the process of determining what criteria should be used to select bus contractors.

During the regular board session that began at 7:15 pm, a quorum was present. When the item agenda regarding the route #3 bus contract came up, a motion was called for and passed to table the award of route #3 bus contract. The vote was unanimous.

² This was the Board’s last meeting with its then Superintendent Dr. Brofee. Dr. Brofee retired on June 30, 2011. The new Superintendent, Dr. Marjorie Miles, took office July 1, 2011.

Based on its concerns, the local board asked the new Superintendent, Dr. Majorie Miles to review bus Policy 200-18 as to the award of the bus contract for Rt. #3, as well as the handling of Appellant's application. Dr. Miles did so and reported to the Board that Policy 200-18 had not been followed for the Rt. #3 bus contract and that the panel recommending the selection based its rankings solely on the interview and not on the other factors called for in the policy. As such, the process for selection had been flawed. Accordingly the board did not remove the award of the contract from the table, but instead voted to re-advertised the route #3 bus contract.

In a letter dated August 23, 2011, Dr. Miles advised Appellant that, among other things, the route #3 bus contract had been re-advertised because the point system used in the interview process did not adhere to the criteria for contractor selection set out in Policy 200-18. She went on to explain that the selection criteria states that driving records, driving experience, location of residence, the interview and the information supplied on the application were to be considered in the selection process. The only criterion used in the selection of the recommended awardee in the route #3 bus contract was the interview questions. Dr. Miles further indicated that as a result, the process was flawed, the contract would be re-advertised and interviews would be conducted again. She encouraged Appellant to re-apply.

On September 23, 2011, Mr. Moon submitted a letter to the Somerset County Board of Education appealing the award procedure and re-advertisement of the route #3 bus contract. In an Opinion dated October 18, 2011 the Somerset County Board of Education denied Appellant's appeal. The Board reviewed the work session and regular meeting minutes of the June 14, 2011 meeting as to the Route #3 bus contract and found that because there was concern regarding the point system used in the policy to award bus contracts the board was within its authority to unanimously vote to table awarding the route #3 contract. The local board also explained that they had complete discretionary authority to conduct their business in a way it reasonably believed to be in its best interest; and the local believed in this instance that it was in its best interest to defer any decision regarding the award of the Rt #3 bus contract.

Furthermore, when the new superintendent reviewed how the selection process was conducted for the route #3 bus contract, she found that the panel conducting the interviews had only considered the interview and not the other criteria called for in the policy. The superintendent determined that the process set out in the policy had not been followed and recommended to the local board that the contract be re-advertised.

On November 16, 2011, Appellant appealed the local board decision to the Maryland State Board of Education requesting that the Board enter an Order that the route #3 bus contract #3 be awarded to him. Appellant also requested that the Board award to him all income that he would have earned had the route #3 bus contract been timely awarded to him and all attorney's fees and cost associated with his appeal.

STANDARD OF REVIEW

This case involves a challenge to the local board's decision not to award a bus contract to Appellant, Nick Moon. The procurement of services by a local board has traditionally been

viewed as a local matter subject to review by the State Board. *See Chesapeake Charter Inc. v. Anne Arundel County Bd. of Educ.*, 358 Md. 129 (2000). The State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal. COMAR 13A.01.05.05A. *Chesapeake Charter v. Anne Arundel County Bd. of Educ.*, MSBE Op. No. 03-09 (Feb. 26, 2003). A decision is arbitrary if it is (1) contrary to sound educational policy; or (2) a reasoning mind could not have reasonably reached the conclusion the local board reached. A decision is illegal if it is:

- (1) Unconstitutional;
- (2) Exceeds the statutory authority or jurisdiction of the local board;
- (3) Misconstrues the law;
- (4) Results from an unlawful procedure;
- (5) Is an abuse of discretionary powers; or
- (6) Is affected by any other error of law.

COMAR 13A.01.05.05B & C.

The Appellant has the burden of proof by a preponderance of the evidence. COMAR 13A.01.05.05(D).

LEGAL ANALYSIS

Appellant asserts that the Selection Committee did follow the criteria mandated by Policy 200-18 and because he received the highest number of points in the interview, the local board should have awarded him the contract. Appellant also asserts that his due process rights were violated.

In his appeal, Appellant seeks the following relief:

1. That the route #3 bus contract be awarded to him.
2. That he be awarded attorney's fees and costs associated with his appeal of the route #3 bus contract; and
3. That he be awarded all income that he would have earned had the route #3 bus contract been awarded to him.

Were Appellant's Due Process Rights Violated?

Appellant alleges that his due process rights were violated because he could not interview or subpoena witnesses, nor obtain documents that were in the possession and control of the local board. He also contends that the time limit to file his appeal with the local board did not afford him sufficient time to obtain documents through a Freedom of Information Act Request.³ In

³ We determine this to also mean a Maryland Public Information Act Request.

Mathews v. Eldridge, 424 U.S. 319 (1976), the Supreme Court made clear that in a due process challenge, the adequacy of the hearing provided depends on the gravity of the property interest deprived. "The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty'" *Am. Mfrs. Mut. Ins. Co. v. Sullivan* 526 U.S. 40, 59 (1999)(citing U.S. CONST. amend. XIV; *Mathews v. Eldridge*, 424 U.S. 319 (1976)). "Only after finding the deprivation of a protected interest do we look to see if the State's procedures comport with due process." *Sullivan*, 526 U.S. at 59 (citation omitted). Property interests "are defined by existing laws or rules that secure certain benefits that support claims of entitlement to those benefits. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

There is nothing in Maryland law or regulation that confers upon a potential contractor a protected property interest in a contract that has not been awarded to him. Appellant possess only a unilateral expectation of a benefit based on the recommendation of the Superintendent's staff; that expectation does not rise to the level of a "protected property interest" called for in *Mathews*. Nonetheless, the record here reveals that the local board afforded Appellant appropriate due process.

Appellant filed an appeal with the local board on August 23, 2011. On August 25th, the local board's attorney wrote to Appellant requesting that he submit to the board any supporting documentation for his appeal by Monday, September 26, 2011. The letter further stated, "[i]f you have any further questions, please feel free to contact the undersigned." On September 23, 2011, the board received and considered Appellant's documentation. Appellant was given the opportunity to present any materials or ask any questions he wished. A hearing on the written record satisfies any due process rights that the Appellant may have had in this case.

Was the Decision Not to Award Bus Contract #3 to Mr. Moon Arbitrary, Unreasonable or an Abuse of Discretion by the Local Board?

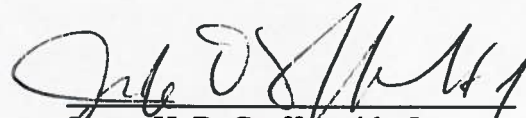
With regard to the Appellant's request that Bus Contract #3 be awarded to him, the local board noted that, "[it] has some concern regarding the policy for awarding bus contracts and wanted to give the matter further consideration." (Local Board's October 18, 2011 Opinion at 2). The local board further stated that, "[it has] complete discretionary authority to conduct its business in a way it reasonably believes to be in its best interest." *Id.* "If there was doubt as to whether the [selection] process had been followed, it was appropriate and within the Board's discretion to decide not to award the contract and re-advertise it to avoid any question or confusion as to whether proper procedure had been followed." (Local Board's Reply to Appellant's Response to the Local Board's Summary Affirmance). We agree.

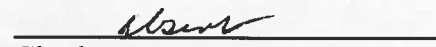
The local board policy clearly states that bus contracts shall be awarded on the basis of best qualifications as judged by the Board of Education and upon economy and efficiency of operation. We see nothing arbitrary, unreasonable, or illegal about the local board's unanimous vote in an open session to table the award of its bus contract based on concerns about whether the selection process was properly performed based on their policy. Nor do we think there was anything arbitrary, unreasonable, or an abuse of the local board's discretionary power when it

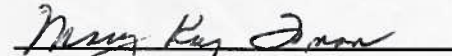
ultimately decided to re-advertise the bus contract because their investigation indicated that the policy was not followed.

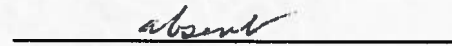
CONCLUSION

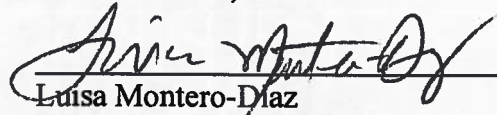
For these reasons, we affirm the local board's decision.

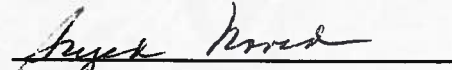

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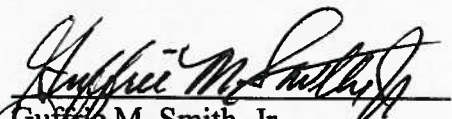

Mary Kay Finan

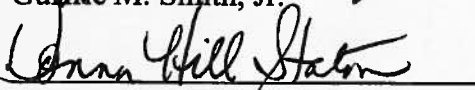

S. James Gates, Jr.


Luisa Montero-Diaz

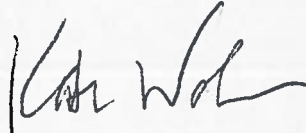

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June 26, 2012

