

STATE OF MARYLAND
PUBLIC SCHOOL LABOR RELATIONS BOARD

IN THE MATTER OF: *

BOARD OF EDUCATION OF *
FREDERICK COUNTY *

Petitioner *

v. *

PSLRB Case No. N 2014-02

FREDERICK COUNTY *
TEACHERS' ASSOCIATION *

Respondent *

* * * * *

DECISION AND ORDER ON REQUEST
TO RESOLVE DISPUTE AS TO NEGOTIABILITY

I. INTRODUCTION

On April 7, 2014, the Board of Education of Frederick County (“County Board”) filed a “Request to Resolve a Dispute as to Negotiability” (“Form PSLRB-04”), with the Public School Labor Relations Board (“PSLRB”). Form PSLRB-04 reflects the authority granted to the PSLRB by Section 6-408(c)(5)(i) of the Education Article to decide disputes over the negotiability of bargaining topics:

If a public school employer and an employee organization dispute whether a proposed topic for negotiation is a mandatory, permissive, or an illegal topic of bargaining, either party may submit a request for a decision in writing to the Board for final resolution of the dispute.

Md. Code, Educ. Art. (“Educ. Art.”) § 6-408(c)(5)(i) (2014 Repl. Vol.). *See also* COMAR 14.34.02.02 (“A party requesting a resolution of a dispute as to negotiability may request relief from the Public School Labor Relations Board by completing Form PSLRB-04 and filing it with the Executive Director of the Board.”).

Section 6-408(c)(5)(v) of the Education Article states that “the [PSLRB] shall...[r]ender a decision determining whether the topic of negotiation is mandatory, permissive, or illegal,” and “[i]ssue the written decision to the parties within 14 days after receiving the written briefs.” Educ. Art. § 6-408(c)(5)(i). On April 30, 2014, the PSLRB requested the County Board and the Frederick County Teachers’ Association (“Association”) to submit written briefs in support of their respective positions. The parties submitted their briefs to the PSLRB on May 9, 2014.

II. FINDINGS OF FACT

The facts in this case are not in dispute and may be summarized as follows. Pursuant to § 6-405 of the Education Article, the Association is the exclusive representative for a bargaining unit of approximately 2,757 certificated employees who work for the County Board. The County Board is a public school employer as defined in § 6-401(f) of the Education Article.

The Association and the County Board are parties to a Collective Bargaining Agreement in effect from July 1, 2011 to June 30, 2014. The parties entered into negotiations on January 6, 2014 for a successor Agreement. During the course of negotiations, a dispute as to negotiability arose in relation to the Association’s proposal regarding involuntary transfers (“Proposal”). The Proposal reads:

When an involuntary transfer decision is necessary due to a change in curriculum or program or a reduction in student enrollment at the school the following procedures shall be followed:

Principals will request volunteers and after considering teacher performance, qualifications, length of service, and best interest of the overall needs of the school system shall make every effort to honor such request.

Factors such as teacher performance, qualifications, length of service, and best interests of the overall needs of the school system shall be considered. Such criteria is in no way intended to compromise the superintendent's authority to assign and transfer employees as the needs of the school system require, but rather to insure a fair and consistent process. Teachers are prohibited from being involuntarily transferred more than 1 time in a 5 year period unless extraordinary circumstances exist to warrant it.

If an opening, at the original worksite, for which the involuntarily transferred teacher is qualified for becomes available before July 31 said teacher has the right to return to that worksite.

Except in emergencies, the teacher shall be notified twenty (20) calendar days in advance of the intended transfer. In all cases, the teacher shall be afforded the opportunity to discuss the proposed transfer. Upon request, the superintendent shall furnish the teacher a written rationale for the involuntary transfer.

In February, 2014, the parties informed each other of their divergent positions regarding the negotiability of the Proposal. The County Board subsequently filed a request for a resolution of the parties' dispute as to negotiability.

III. POSITIONS OF THE PARTIES

The County Board divides the Proposal into seven enumerated parts and categorizes them as to negotiability as follows:

1. When an involuntary transfer decision is necessary due to a change in curriculum or program or a reduction in student enrollment at the school the following procedures shall be followed. **(Permissive)**.

2. Principals will request volunteers and after considering teacher performance, qualifications, length of service, and best interest of the overall needs of the school system shall make every effort to honor such request. **(Illegal)**.
3. Factors such as teacher performance, qualifications, length of service, and best interests of the overall needs of the school system shall be considered. **(Illegal)**.
4. Such criteria is in no way intended to compromise the superintendent's authority to assign and transfer employees as the needs of the school system require, but rather to insure a fair and consistent process. **(Illegal)**.
5. Teachers are prohibited from being involuntarily transferred more than 1 time in a 5 year period unless extraordinary circumstances exist to warrant it. **(Illegal)**.
6. If an opening, at the original worksite, for which the involuntarily transferred teacher is qualified for becomes available before July 31 said teacher has the right to return to that worksite. **(Illegal)**.
7. Except in emergencies, the teacher shall be notified twenty (20) calendar days in advance of the intended transfer. In all cases, the teacher shall be afforded the opportunity to discuss the proposed transfer. Upon request, the superintendent shall furnish the teacher a written rationale for the involuntary transfer. **(Permissive)**.

The County Board relies primarily upon two sections of the Education Article, § 6-201(b)(2)(ii), which authorizes the county superintendent to transfer teachers “as the needs of the schools require,” and § 6-408(c)(3), which prohibits a public school employer from negotiating certain matters, including “any matter that is precluded by applicable statutory law.” The County Board contends that certain parts of the Proposal impinge upon the superintendent's statutory authority to unilaterally transfer teachers. Asserting that § 6-201(b)(2)(ii) is “applicable statutory law” that precludes the parties

from negotiating about these parts, the County Board concludes that they are illegal subjects of bargaining. The County Board categorizes two parts of the Proposal as permissive subjects of bargaining because, in the opinion of the Board, these parts address only procedures related to transfers and do not impact the merits or outcome of the transfer decision.

The Association divides its Proposal consistent with the County Board's division, but with one exception (the 20-day notice and the written rationale parts of the Proposal are separated) and without enumeration. The Association contends that parts one through four and part seven of the Proposal (as enumerated by the County Board) are mandatory subjects of bargaining and that parts five and six are permissive subjects of bargaining.

The Association relies primarily on § 6-408(c)(1) of the Education Article, which mandates negotiation between the public school employer and the employee association on certain matters, "including procedures regarding employee transfers and assignments." According to the Association, the parts of the Proposal that it categorizes as mandatory subjects of bargaining pertain to procedures regarding transfers and are thus mandatory subjects of bargaining. The Association contends further that the consideration of factors is the "essence" of procedure, and that the specific factors it proposes would establish "fair, consistent, and objective standards" that would aide and not usurp the superintendent's authority to make transfer decisions.

With respect to the two parts of its Proposal that it categorizes as permissive subjects of bargaining, the Association maintains that these are not illegal subjects of bargaining because the superintendent retains final decision-making authority in each set

of circumstances. Regarding the proposed prohibition on more than one transfer in five years, the Association argues that because there is an exception for “extraordinary circumstances,” this part of the Proposal does not “limit or usurp” the superintendent’s authority. Regarding the proposed “right to return,” the Association argues that because the superintendent retains the authority “to finally determine if the teacher is qualified” for the return placement, this part of the Proposal is not an illegal subject of bargaining.

IV. ANALYSIS

Three statutory provisions of the Education Article provide the framework for resolving the instant dispute as to negotiability: § 6-201(b)(2)(ii), § 6-408(c)(1), and § 6-408(c)(3). Section 6-201(b) of the Education Article provides:

(b) Appointment of professional personnel. --

(1) Except as provided in subsection (a) of this section, the county superintendent shall nominate for appointment by the county board:

- (i) All professional assistants of the office of county superintendent; and
- (ii) All principals, teachers, and other certificated personnel.

(2) As to these personnel, the county superintendent shall:

- (i) Assign them to their positions in the schools;
- (ii) Transfer them as the needs of the schools require;
- (iii) Recommend them for promotion; and
- (iv) Suspend them for cause and recommend them for dismissal in accordance with § 6-202 of this subtitle.

Educ. Art. § 6-201(b).

Section 6-408(c) of the Education Article provides in relevant part:

(c) Representatives to negotiate. --

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

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

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

Educ. Art. § 6-408(c)(1)-(3).

Both parties categorize parts of the Proposal as “permissive,” though they disagree as to which parts fall within this category. The “permissive” category is not an analytical option in the instant dispute. If a part of the Proposal would involve the County Board in negotiating a diminishment of the superintendent’s statutory discretion to transfer teachers as the needs of the schools require, then negotiation over that part of the Proposal is precluded by applicable statutory law, namely § 6-201(b)(2)(ii), and thus is an illegal subject of bargaining. *See Montgomery County Education Assoc. v. Board of Education*, 311 Md. 303, 313 (1987) (recognizing the rule “that a governmental agency does not, without authority, abdicate or bargain away its statutory discretion”). On the other hand, if a part of the Proposal pertains to transfer procedures and does not diminish the superintendent’s statutory authority to transfer teachers, then the parties “shall”

negotiate over it, i.e., negotiation over any such part is mandatory. *See Young v. Anne Arundel County*, 146 Md. App. 526, 580 (2002) (“Ordinarily, the term ‘shall’ ‘indicates a mandatory intent, unless the context of the statute indicates otherwise.’”).

The instant dispute as to negotiability reduces, then, to a question as to which parts, if any, of the Proposal are illegal subjects of bargaining because they contemplate a diminishment of the superintendent’s discretion to transfer teachers as the needs of the schools require and which parts, if any, are mandatory subjects of bargaining because they pertain only to procedures regarding transfers and do not diminish the superintendent’s discretion. For purposes of the analysis provided herein, the Proposal is divided into five parts, as grammar and logic would seem to dictate. For the sake of clarity, the conclusions reached are correlated with the County Board’s division and enumeration of the Proposal, at the end of the analysis.

The first part of the Proposal provides:

When an involuntary transfer decision is necessary due to a change in curriculum or program or a reduction in student enrollment at the school the following procedures shall be followed:

Principals will request volunteers and after considering teacher performance, qualifications, length of service, and best interest of the overall needs of the school system shall make every effort to honor such request.

This part of the Proposal is a mandatory subject of bargaining. First, the introductory clause expressly refers to transfer procedures. Second, and critically, the remainder of this part of the Proposal requires the principal, not the superintendent, to take certain actions and make certain efforts. The superintendent’s discretion with respect to transfers

is unaffected by any requirement imposed on the principal to request volunteers for transfer, to consider certain factors in relation to the transfer need, and to attempt to honor a teacher's request for transfer. Without an additional requirement that the superintendent consider the principal's efforts under these obligations, the obligations contemplated in this part of the Proposal begin and end with the principal and do not diminish the superintendent's discretion regarding transfers.

The County Board's reliance on *Allegany County Teachers Association v. Allegany County Board of Education*, MSBE Opinion No. 05-27 (2005), is misplaced. In *Allegany County*, the State Board concluded that a provision of the collective bargaining agreement requiring the superintendent to consider certain factors, in addition to the needs of the schools, in deciding upon voluntary transfers was an illegal subject of bargaining. Here, unlike in *Allegany County*, it is the principal alone who would be required to consider certain additional factors in the transfer context.

The second part of the Proposal provides:

Factors such as teacher performance, qualifications, length of service, and best interests of the overall needs of the school system shall be considered. Such criteria is in no way intended to compromise the superintendent's authority to assign and transfer employees as the needs of the school system require, but rather to insure a fair and consistent process.

This part of the Proposal is an illegal subject of bargaining, except in one limited respect. Requiring the superintendent's transfer decision to be based upon factors in addition to the needs of the schools necessarily diminishes the superintendent's discretion under § 6-201(b)(2)(ii). The Association cites to *Brzezinski v. Howard County Board of Education*, No. 89-14, 5 Op. MSBE 336, 338 (1989), for the proposition that "the procedures used to

determine transfers and assignments is a legal topic of collective bargaining.” In *Brzezinski*, however, what the Hearing Examiner found to be a matter of procedure was a notice provision. *Id.* at 343. *Brzezinski* does not support the Association’s position that an obligation imposed on the superintendent to consider factors in addition to the needs of the schools when deciding upon transfers is a procedural matter and thus a mandatory subject of bargaining.

Finally, to the limited extent that this second part of the Proposal requires the superintendent to consider the needs of the schools in making transfer decisions, it is not an illegal subject of bargaining, as the same requirement is imposed by statute.

The third part of the Proposal provides:

Teachers are prohibited from being involuntarily transferred more than 1 time in a 5 year period unless extraordinary circumstances exist to warrant it.

This proposal is an illegal subject of bargaining. By prohibiting the transfer of a teacher more than once in a five-year period, this part of the Proposal necessarily diminishes the superintendent’s discretion to transfer teachers as the needs of the schools require. Assuming, as the Association appears to do, that the superintendent would determine when “extraordinary circumstances” exist, the “extraordinary circumstances” standard, as a measure of discretion, clearly does not coincide with the “needs of the schools” criterion in accordance with which the superintendent is authorized to make transfers. Moreover, if the successor Agreement were to include an arbitration clause, the “extraordinary circumstances” determination could be made by an arbitrator, in which

case the third part of the Proposal contemplates an even greater infringement on the superintendent's authority regarding transfers.

The fourth part of the Proposal provides:

If an opening, at the original worksite, for which the involuntarily transferred teacher is qualified for becomes available before July 31 said teacher has the right to return to that worksite.

This part of the Proposal is an illegal subject of bargaining. By requiring the superintendent to return a teacher to the worksite from which he or she was previously transferred, the proposal necessarily diminishes the superintendent's discretion to transfer teachers as the needs of the schools require. That the superintendent would determine whether the teacher was qualified to return does not, as the Association suggests, provide the superintendent with the same broad discretion to transfer personnel as the needs of the schools require. Moreover, as previously observed, if the successor Agreement were to include an arbitration clause, the determination as to teacher qualification could be made by an arbitrator, in which case the fourth part of the Proposal, like the third, contains additional grounds for concluding that it is an illegal subject of bargaining.

The fifth and final part of the Proposal provides:

Except in emergencies, the teacher shall be notified twenty (20) calendar days in advance of the intended transfer. In all cases, the teacher shall be afforded the opportunity to discuss the proposed transfer. Upon request, the superintendent shall furnish the teacher a written rationale for the involuntary transfer.

This part of the Proposal is a mandatory subject of bargaining. Notice is quintessentially procedural. *See Morales v. Morales*, 111 Md. App. 628, 632 (1996) (citation omitted). (“notice is an essential of proper procedure”); *Brzezinski*, 5 Op. MSBE at 343. Stated in

negative terms, the superintendent's statutory discretion is in no way diminished by the proposed notice requirement. Likewise, the requirement to furnish upon request a written rationale for the involuntary transfer does not diminish the superintendent's discretion because it does not prescribe the content of the written rationale.

Following the County Board's division and enumeration of the Proposal, the first, second and seventh parts of the Proposal are mandatory subjects of bargaining; the third, fourth, fifth and sixth parts of the Proposal are illegal subjects of bargaining.

V. CONCLUSIONS OF LAW

The Association's proposal regarding involuntary transfers constitutes a mandatory subject of bargaining, in part, and an illegal subject of bargaining, in part, as set forth above.

ORDER

Having considered the County Board's request to resolve a dispute as to the negotiability of the Association's proposal regarding involuntary transfers, the Association's response thereto, and the parties' briefs in support of their positions, it is hereby ORDERED that the dispute as to negotiability, in PSLRB Case No. N 2014-02, is resolved in accordance with the Decision of the PSLRB set forth above that the Association's proposal constitutes a mandatory subject of bargaining, in part, and an illegal subject of bargaining, in part.

BY ORDER OF THE PUBLIC SCHOOL LABOR RELATIONS BOARD



Seymour Strongin, Chairman



Ronald S. Boozer, Member



Robert H. Chanin, Member



Charles I. Ecker, Member

Donald W. Harmon, Ed.D., Member¹

Annapolis, MD
May 27, 2014

APPEAL RIGHTS

Any party aggrieved by this action of the PSLRB may seek judicial review in accordance with Title 10, Subtitle 2 of the State Government Article, Annotated Code of Maryland, Sec. 10-222 (Administrative Procedure Act – Contested Cases), and Maryland Rules 7-201 *et seq.* (Judicial Review of Administrative Agency Decisions).

¹ Member Donald W. Harmon, Ed.D., took no part in the consideration or decision of this case.