STATE OF MARYLAND
PUBLIC SCHOOL LABOR RELATIONS BOARD

IN THE MATTER OF:	*	
AMERICAN FEDERATION OF STATE,	*	
COUNTY AND MUNICIPAL	*	
EMPLOYEES, LOCAL 434,	*	
	*	PSLRB Case N-2017-01
Employee Organization,	*	
and	*	
	*	
BOARD OF EDUCATION OF	*	
BALTIMORE COUNTY,	*	
	*	
Public School Employer.	*	

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DECISION AND ORDER ON REQUEST TO RESOLVE DISPUTE AS TO NEGOTIABILITY

I. PROCEDURAL AND FACTUAL BACKGROUND

On September 12, 2016, the American Federation of State, County and Municipal Employees, Local 434, ("AFSCME") 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 the Education Article of the Annotated Code of Maryland ("Education Article") to "decide any controversy or dispute arising under Title 6, Subtitle 4 or 5 of this Article." Md. Code Ann., Educ. § 2-205(e)(4)(i). This authority extends to disputes over the negotiability of specific topics:

> If a public school employer and an employee organization dispute whether a proposed topic for negotiation is a mandatory, a 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 Ann., Educ. § 6-510(c)(5)(i). *See also* COMAR 14.34.02.01 ("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.").[1]

Section 6-510(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," Md. Code Ann., Educ. § 6-510(c)(5)(v)(2), and "[i]ssue the written decision to the parties within 14 days after receiving the written briefs." Md. Code Ann., Educ. § 6-408(c)(5)(v)(3). The legislature has further determined that a "decision of the Public School Labor Relations Board is final." Md. Code Ann., Educ. § 2-205(e)(4)(ii).

On September 12, 2016, the PSLRB requested that AFSCME and the Board of Education of Baltimore County ("Board of Education") submit written briefs in support of their respective positions. On September 20, 2016, AFSCME e-mailed PSLRB Executive Director Erica Snipes indicating that it "feels that it is not necessary to add to its filing. Please treat information provided in Form PSLRB-04 as our brief. We have no further filing at this time." On this same date, the Board of Education filed a response and supporting memorandum.

On October 4, 2016 (within the statutorily required 14 day period), the PSLRB issued its decision in this matter. In this decision, a copy of which is attached hereto, the PSLRB held that the topics at issue constitute mandatory subjects of negotiation, noting that an opinion setting forth its reasoning would be issued subsequently.

II. POSITIONS OF THE PARTIES

As explained in the PSLRB's October 4, 2016, decision, AFSCME's Request involved what AFSCME termed, "Attendance, Recruiting and Retention Incentive Proposals." This topic embodies two components: (1) an employee referral program, which, under certain circumstances, provides monetary compensation to *current* employees who refer candidates for employment to the Board of Education, and (2) an attendance incentive program, which provides monetary compensation to employees based on their attendance (collectively, "incentive programs").

In its Request, AFSCME contends that both the employee referral program and the attendance incentive program are mandatory subjects of negotiation, and that the Board of Education refused to negotiate with AFSCME concerning these incentive programs. As noted above, AFSCME did not submit a brief in support of its position, but instead asserts a per se argument that the incentive programs are, on their face, matters that relate to wages, and therefore, mandatory subjects of bargaining.

In its Response, the Board of Education makes three arguments. First, the Board of Education argues that the compensation offered through the incentive programs are not "wages"

[1] Pursuant to Section 6-501(d) of the Education Article, AFSCME is an "employee organization," and the exclusive negotiating representative of over 3,000 non-certificated employees of the Board of Education. The Board of Education is a "public school employer" as defined in Section 6-501(h) of this Article.

within the meaning of Md. Ed. Code Ann., §6-510, and therefore not mandatory subjects of bargaining. Second, the Board of Education contends that AFSCME's Request is untimely because AFSCME was aware of the institution of the incentive programs in July of 2014, and failed to file a timely Request to Resolve a Dispute as to Negotiability. Finally, the Board of Education claims that AFSCME's Request is moot because the Board of Education has agreed to informally discuss the incentive programs with AFSCME.

III. ANALYSIS

The Education Article establishes constraints within which the PSLRB must exercise its authority to render decisions on negotiability disputes. Section 6-510 states in relevant part:

> (c)(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. (emphasis added) [These matters are referred to as mandatory subjects of negotiation/bargaining.]

Md. Code Ann., Educ. § 6-510(c)(1). The determinative issue in this case is whether the incentive programs are "matters that relate to… wages." If they do, these incentive programs are mandatory subjects of negotiation over which the Board of Education must negotiate with AFSCME. However, before the PSLRB addresses this determinative issue, it is appropriate to first dispose of the procedural arguments concerning timeliness and mootness that the Board of Education has presented.

As noted above, the Board of Education claims that AFSCME was aware of the incentive programs when they were instituted in July of 2014, and that "[t]he alleged statutory violation therefore occurred well outside of the requisite filing period." In support of this position, the Board of Education cites "COMAR 14.34.02.01B," stating that "[t]he PSLRB rules provide that allegations of violations of Title 6 of the Education Article 'must be filed… within 60 days after the charging party knew or reasonably should have known, of the statutory violation alleged.'" The regulation cited by the Board of Education does not exist. Instead, it appears that the language quoted by the Board of Education comes from COMAR 14.34.04(A)(2), which applies to charges of statutory violations (unfair labor practices), not negotiability disputes. The regulations pertaining to negotiability disputes can be found at COMAR 14.34.02.01, *et seq.*, and do not establish a 60 day time limit – or indeed any other time limit for filing. Therefore, the Board of Education's argument with regard to timeliness is dismissed.

In addition, the Board of Education claims that AFSCME's Request is "moot" because the Board of Education has agreed to informally discuss the incentive programs with AFSCME. This argument is without merit. The PSLRB currently has before it a Request to Resolve a Dispute as to Negotiability concerning the incentive programs, and a determination by the PSLRB that the topics at issue are mandatory subjects of negotiation would require the Board of Education, in response to AFSCME's request, to engage in negotiation between the parties, not

merely informal discussion. As a result, the Board of Education's argument with regard to mootness is also dismissed.

We now move to the question of whether the incentive programs are "matters that relate to... wages" under Section 6-510(c)(1) of the Education Article. In support of its position, the Board of Education cites three decisions – two by the Maryland Court of Appeals, and one by the Maryland State Board of Education. As demonstrated below, these decisions do not support, but rather refute the Board of Education's position.

The Board of Education cites the Maryland Court of Appeals decision in *Medex v. McCabe*, 372 Md. 28 (2002), to support its position that compensation provided through the attendance incentive program "is not a form of 'wages' within the meaning of Md. Ed. Code Ann., § 6-510." In that case, an employer, Medex, adopted a plan that made payment of incentive fees for a particular fiscal year conditional upon continued employment at the time of payment. The Fiscal Year ended on January 31, 2000, and payments under the incentive plan for that Fiscal Year did not occur until March 31, 2000. McCabe, an employee of Medex, terminated his employment after January 31, 2000, but before March 31, 2000. Pointing to the condition of the plan, Medex refused to pay McCabe the incentive fee based on the fact that he was not employed at the time of payment. The employee brought suit to recover the incentive fee. The Court of Appeals held that the "incentive payments were wages earned by the employee," and that the employee "was entitled to recover as wages the incentive fees." *Id.* at 33.

Moreover, even if we assume, arguendo, that the Court of Appeals had ruled for the employer in *Medex*, that decision would not, in any event, be controlling in this case. As explained above, the PSLRB has jurisdiction over the resolution of negotiability disputes under the Education Article. Md. Code Ann., Educ. § 6-510(c)(5); Md. Code Ann., Educ. § 2-205(e)(4)(ii). Therefore, the PSLRB has the statutory authority to interpret the meaning of the term "wages" thereunder. *Medex* involved the Maryland Wage Payment and Collection Law, not the Education Article under which the current dispute is being considered. Therefore, an interpretation of the definition of "wages" under the Maryland Wage Payment and Collection Law is not binding here.[2]

The Board of Education also cites the Maryland Court of Appeals decision in *Baltimore County v. Baltimore County Fraternal Order of Police Lodge No. 4*, 439 Md. 547 (2014), to support its argument that compensation provided through the attendance incentive program does not constitute "wages." In that case, the Fraternal Order of Police ("FOP") asserted that the unilateral termination of an "Attendance Recognition Program,"[3] which Baltimore County had implemented in an effort to encourage employees to maintain regular attendance, constituted an unfair labor practice under the Employee Relations Act of the Baltimore County Code.

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[2] The Board of Education supports its position by relying on a single sentence in that decision, which states, "[i]n Maryland, not all bonuses constitute wages," wholly ignoring the Court's actual holding that incentive payments are, in fact, wages. The Court states, "[w]e have held that it is the exchange of remuneration for the employee's work that is crucial to the determination that compensation constitutes a wage. [citation omitted] Where the payments are dependent upon conditions other than the employee's efforts, they lie outside of the definition." *Id.* at 36.

[3] Under the Attendance Recognition Program, any employee completing one calendar year of employment without using any sick leave received, inter alia, funds to purchase a $100 U.S. Savings Bond.

Although, on the specific facts of the case, the Court of Appeals of Maryland denied the FOP's claims, its reasoning further undercuts the position of the Board of Education.

As noted above, the PSLRB holds final jurisdiction over the resolution of negotiability disputes under the Education Article. Md. Code Ann., Educ. § 6-510(c)(5); Md. Code Ann., Educ. § 2-205(e)(4)(ii). Therefore, the PSLRB has the statutory authority to determine what constitutes a mandatory subject of negotiation in this matter. *Baltimore County* involved the Employee Relations Act of the Baltimore County Code, not the Education Article under which the current dispute is being considered. Therefore, an interpretation under the Baltimore County Code would, in any event, not be binding on the PSLRB. That being said, while the Court of Appeals held that the Attendance Recognition Program in *Baltimore County* was not subject to negotiations, it did so solely on the basis that the program was not included in the parties' existing Memorandum of Understanding, further stating that, "[h]ad the County's refusal to negotiate in good faith involved a County policy that increased or decreased employees' wages based on their attendance or use of sick leave,[4] the dispute would fall clearly into the [Employee Relations] Act's established negotiable issues."[5]

Finally, the Board of Education cites the Maryland State Board of Education decision in *Somerset County v. Teachers Association of Somerset County*, MSBE Op. 09-13 (2009), to support its argument that compensation provided through the attendance incentive program is not "wages" within the meaning of the Education Article. In that case, the Somerset County Board of Education offered prospective teachers a signing bonus if they met certain performance standards. The Maryland State Board of Education held that "a signing bonus fits the definition of wages if the local board promised it to the teacher as compensation for the performance of a service, not as a gift or gratuity for just signing the employment contract," as is the case here.

In citing the *Somerset County* case, the Board of Education makes an effort to distinguish that case from the instant matter, arguing that the decision "was clearly limited to the specific program in Somerset County," and further, that "a signing bonus was considered wages in that case because it was provided as remuneration for employment." The Board of Education fails to distinguish the signing bonus in *Somerset* from the employee referral and attendance incentive programs in the instant case, and does not explain why an employee referral or attendance incentive program should not be considered "wages." While "[a] prior order, action, or opinion issued by the State Board [of Education] before the enactment of [the Education Article]" is not "binding" on the PSLRB, it "may be considered as precedent." Md. Code Ann., Educ. § 6-807(d). As described above, both the employee referral program and the attendance incentive program offer remuneration for services rendered. Therefore, using the standard outlined in *Somerset County* provides further support for the conclusion that payment under the incentive programs at issue are "wages," and therefore, mandatory subjects of bargaining.

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[4] The Court explained that "the relatively nominal financial incentive aspect of the program to increase employment attendance, **which was conditioned on a disclaimer [in the County's Policies and Procedures Manual] excluding the policies**... as negotiable issues, patently does not fall into the same category." *Id.* at 576. (emphasis added).

[5] The Board of Education also cites *Baltimore County* to support its assertion that recruitment and attendance incentives are "management prerogatives" not mandatorily subject to the negotiations process. However, as discussed above, the Court established that the County Board would be obligated to bargain over the Attendance Recognition Program if included in the Memorandum of Understanding for the next fiscal year.

The PSLRB has relied upon decisions of the National Labor Relations Board ("NLRB") in making determinations concerning negotiability. These decisions further support the PSLRB's conclusion that both of the incentive programs at issue are mandatory subjects of negotiation. See *C & S Indus.*, 158 NLRB 454 (1966) (holding that wage incentive program is a mandatory subject of bargaining, and finding that employer committed an unfair labor practice by instituting, without the consent of the union, such program during the term of a collective bargaining agreement).

More specifically, the NLRB has found that attendance incentive policies are mandatory subjects of bargaining. *Johnson-Bateman Co.*, 295 NLRB No. 26 (1989) (holding that wage incentive plans, such as an attendance incentive bonus program, are mandatory subjects of bargaining absent an express waiver in the parties' collective bargaining agreement); See also *Dorsey Trailers, Inc. Northumberland, PA Plant*, 327 NLRB No. 155 (1999) (finding that an employers' attendance policy has long been held to be a mandatory subject of bargaining); *Treanor Moving & Storage Co.*, 311 NLRB No. 39 (finding that changes in established practices involving enforcement of lateness and attendance policies are changes in mandatory subjects of bargaining); *Great Western Produce*, 299 NLRB No. 154 (finding that employer committed unfair labor practice by unilaterally implementing an attendance policy without first notifying and bargaining with the union); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB No. 1034 (finding that new attendance policy that provided additional guidelines and imposed a progression of warning notices and counseling sessions ultimately leading to discharge are mandatory subjects of bargaining).

The PSLRB has also relied upon decisions of various public sector state labor relations boards in other states in making negotiability determinations. These decisions also support the conclusion that attendance incentive policies are mandatory subjects of bargaining. See *In the Matter of Waterloo Community School District*, 2000 WL 35725541 (IA PERB 2000) (holding that attendance incentives are mandatory subjects of bargaining).

Similarly, the NLRB has held that employee referral programs are mandatory subjects of bargaining. See *In re Integrated Health Services, Inc.*, 336 NLRB No. 13 (2001) (finding that employer committed an unfair labor practice by unilaterally implementing a recruitment bonus for employees referring new hires without the union's consent).

In its Response, the Board of Education refers to the policies at issue as "bonuses." To the extent that the wage incentive programs at issue can be likened to bonuses, the NLRB has explained that whether a bonus is considered a "wage," and therefore a mandatory subject of bargaining, depends upon whether it is considered "compensation" for services rendered or a "gift." See *Benchmark Industries, Inc.*, 270 NLRB 22 (1984) (finding that Christmas dinners and hams that had been given to all employees regardless of their work performance, earnings, seniority, production, or other employment-related factors were gifts, and therefore, not mandatory subjects of bargaining). If the bonus is compensation, then it is a mandatory subject of bargaining; however, if it is a gift, then it is not. *Id.*

Based on the materials provided by the Board of Education, it is clear that both the attendance incentive program and the employee referral program offer compensation in

exchange for services rendered, and are not gifts. Under the attendance incentive program, employees are paid for meeting specific performance or attendance standards, and under the employee referral program, current employees are compensated for successfully referring candidates hired by the Board of Education. Because these payments are made in exchange for services rendered, they must be considered wages, and, are therefore, mandatory subjects of negotiation.

IV. Conclusions of Law

As demonstrated above, the incentive programs at issue are "matters that relate to… wages" pursuant to Section 6-510(c)(1) of the Education Article, and, therefore, mandatory subjects of negotiation.

V. Order

Having considered AFSCME's request to resolve a dispute as to the negotiability of the employee referral program and attendance incentive program, it is hereby ORDERED that the dispute as to negotiability, in PSLRB Case No. N-2017-01, is resolved in accordance with the PSLRB's decision of October 4, 2016. The incentive programs constitute mandatory subjects of negotiation.

BY ORDER OF THE PUBLIC SCHOOL LABOR RELATIONS BOARD

Elizabeth M. Morgan, Chair

Robert H. Chanin, Member

Ronald S. Boozer, Member

Donald W. Harmon, Member

John A. Hayden, III, Member

Annapolis, MD

November 3, 2016

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 CIR CT Rule 7-201 *et seq.* (Judicial Review of Administrative Agency Decisions).