STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

DELAWARE STATE UNIVERSITY, Charging Party, v. AMERICAN FEDERATION OF STATE, COUNTY, & MUNICIPAL EMPLOYEES, AFL-CIO, COUNCIL 81 AND ITS LOCAL UNION NOS. 1007 and 1267, Respondents.	)	**ULP No. 05-06-487** *Decision of the Executive Director*

Appearances

Gary L. Lieber, Esq., Schmeltzer, Aptaker & Shepard, for Delaware State University
Perry F. Goldlust, Esq., Aber, Goldlust, Baker & Over, for AFSCME Locals 1007 & 1267

BACKGROUND

Delaware State University ("DSU" or "University") is a public employer within the meaning of the Public Employment Relations Act, 19 Del.C. Chapter 13 ("PERA" or "Act"), § 1302(p).

The American Federation of State, County & Municipal Employees, AFL-CIO, Council 81, through its affiliated Locals Nos. 1007 and 1267 ("AFSCME" or "Union"), is an employee organization within the meaning of §1302(i), of the Act and the exclusive bargaining representative of a bargaining unit of Clerical/Technical employees as defined in DOL Case 167 and Plant Maintenance employees as defined in DOL Case 44, respectively, within the meaning of §1302(j), of the Act.

On June 29, 2005, DSU filed this unfair labor practice charge alleging that by refusing to bargain over DSU's proposals for a successor agreement to a collective bargaining agreement which expired effective June 30, 2005, AFSCME violated §1307(b)(2) and (b)(3), of the Act.[1]

In its Answer filed on July 20, 2005, AFSCME denied the material allegations set forth in the Charge and under New Matter filed a Counter Charge alleging conduct by DSU which violated §1307(a)(2) and (a)(5), of the Act.[2] The Counter Charge focuses on the submission by DSU during mid-term negotiations of proposals allegedly in violation of the negotiating Ground Rules; direct written communication by DSU to bargaining unit employees; DSU's unilateral implementation of its opening proposal for a successor agreement, as amended; and, DSU's refusal to participate in binding grievance arbitration.

On August 9, 2005, DSU filed its Response to New Matter denying the material allegations set forth therein, and under Affirmative Defenses to New Matter, requested that the Counter Charge be dismissed for reasons of waiver and unclean hands.

On August 17, 2005, AFSCME filed an Answer denying DSU's Affirmative Defenses.

On November 18, 2005, a Probable Cause Determination was issued by the Delaware Public Employment Relations Board ("PERB") finding that, "the pleadings establish

[1] 19 Del.C. § 1307, Unfair Labor Practices, provides, in relevant part: (b) It is an unfair labor practice for a public employee or for an employee organization or its designated representative to do any of the following: (2) Refuse to bargain collectively in good faith with the public employer or its designated representative if the employee organization is an exclusive representative. (3) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

[2] 19 Del.C. § 1307, Unfair Labor Practices, provides, in relevant part: (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following: (2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization. . . (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.

probable cause to believe that AFSCME and/or DSU may have violated its duty to bargain in good faith, and that DSU may have dominated, interfered with or assisted in the formation, existence or administration of the labor organization."

The hearing was delayed by agreement of the parties on December 1, 2005, until after an expedited attempt to mediate a settlement. When mediation failed, a hearing was held on February 13 and February 16, 2006. Simultaneous written post-hearing briefs were filed on March 28, 2006, and simultaneous reply briefs were filed by DSU on April 10, 2006 and by AFSCME on April 11, 2006. The following discussion and decision result from the record thus compiled.

MATERIAL FACTS

The following statement of material facts results primarily from the testimony of Mark Farley, Vice President of Human Resources, Legal and Legislative Affairs ("Mr. Farley") for DSU and Karen Valentine ("Ms. Valentine"), Staff Representative for AFSCME, and the numerous exhibits submitted by the parties.

Local Unions No. 1007 and 1267 were parties to a collective bargaining agreement with DSU for the period July 1, 1998, through June 30, 2001.[3] Article XXXI of that Agreement provided:

> This agreement should go into effect as of July 1, 1998 and continue in effect through June 30, 2001, and from year-to-year thereafter unless at least ninety (90) days prior to the expiration date of this Agreement, or any anniversary date thereafter, notice in writing, shall be given to either party by the other party of the desire to amend, alter, abrogate, or negotiate a new Agreement."

[3] AFSCME Local Union No. 2888 was also a party to this agreement but is not a party to this dispute.

The contractually required notice to commence negotiations was given by AFSCME to DSU on March 28, 2002, (Union Ex. 1) and bargaining commenced on September 22, 2002. Ms. Valentine testified that it was agreed at the September 22, 2002, meeting that all proposals for modification of the prior agreement must be submitted during the first three bargaining sessions which were held in October, November and December, 2002. Thereafter, bargaining continued without resolution through April, 2003.

On April 29, 2003, Cliff Coleman ("Mr. Coleman"), then Chief Spokesperson for DSU, informed AFSCME that DSU was financially unable to meet AFSCME's salary demands. On May 9, 2003, AFSCME requested financial information from DSU documenting its claimed inability to pay. (Union Ex. 2) Much of the requested information was eventually provided and bargaining started again in October, 2003. About this time, Sheila Davis ("Ms. Davis") from the DSU personnel office replaced Mr. Coleman as the Chief Spokesperson for DSU. According to Ms. Valentine, negotiations stalled and little progress occurred between October, 2003 and March, 2004.

Mark Farley was hired by DSU in February, 2004, as the Vice President for Labor Relations and Legislative Affairs. Thereafter, he functioned as the lead negotiator for DSU. Upon his arrival, Mr. Farley was informed by Ms. Davis that longstanding ground rules dating back to 1994 were in effect for the contract negotiations.

Ground Rule 7 of the 1994 Ground Rules provided:

> Each party will provide a list of issues to be discussed at the first bargaining session. Each party may present a revised list of issues during the second bargaining session. Thereafter, all bargaining will be limited to the items previously provided by both parties. The April 21, 1994 meeting is not a bargaining session. (Employer Ex. 1)

The first negotiation meeting in which Farley participated occurred early in March, 2004. At that meeting Mr. Farley introduced numerous new bargaining proposals to which Ms. Valentine objected. Upon being informed by Ms. Valentine that new proposals were not permitted after the third bargaining session (which occurred in December, 2002), Mr. Farley sent Ms. Valentine a letter dated March 15, 2004, informing her of DSU's, intent to "abrogate" the current collective bargaining agreement effective June 30, 2004." (Employer Ex. 2)

As documented by a letter from Mr. Farley to Ms. Valentine dated March 19, 2004, the parties reached a compromise permitting the negotiations to continue. Mr. Farley's letter summarizing the parties' agreement provides, in relevant part:

> The University is willing to compromise from our initial proposal, and our recently stated intent to abrogate the agreement, in an effort to continue toward resolution of all matters related to the agreement. To this end, we would be willing to give favorable consideration to a one year extension of our current agreement if the Union changes its stance on negotiation of those issues you deemed "new" and we begin negotiating the new agreements (separately for each unit and effective 7/1/05) by January 15, 2005.
>
> Our compromise is to limit our proposals to the following areas with the assumption that clerical revisions from our most recent proposal are acceptable:
>
> - Work and overtime scheduling
> - Exclusion of FLSA exempt and confidential (Title 19, sect. 1302) positions from the union (in a separate discussion outside of negotiations)
> - Grievance procedure
> - Essential Personnel
> - Creation of a new "Employee Rewards Program"
>
> (Employer Ex. 3, emphasis in original)

The parties subsequently agreed to the following Ground Rules dated June 1, 2004:

1. DSU and AFSCME agree as follows:

   - The current collective bargaining agreement will end on June 30, 2005. These negotiations will be for proposed changes through June 30, 2005.
   - Beginning not later than January 15, 2005, the individual AFSCME units (1007, 1267, and 2888) will begin to negotiate new agreements (for each unit) to be effective July 1, 2005.
   - A schedule of meetings will be prepared at the first meeting (meetings may be cancelled by either side with 24 hour notice and explanation of the reason)
   - Meetings will not be cancelled due to low attendance by either side (except that the Chief Negotiator for both sides must be present)
   - No audio or video recording will be allowed.
   - The Chief Negotiator for both sides shall be vested with the authority to make binding proposals and counter proposals in the course of negotiations
   - No public statements will be made except with 48-hour notice. This will not prevent either side from communicating with membership or the University administration regarding the status of negotiations.
   - All tentative agreements will be reduced to writing, dated and signed by the two chief negotiators.
   - The Chief Negotiator for each team shall control the conduct of negotiating team members to minimize disruption and facilitate dialogu (*sic).*
   - Proposals will be limited to those provided in the 3/19/04 memo and those provided by AFSCME prior to 3/19/04.

2. The final agreement shall not become binding until ratified by the membership and the University. (Employer Ex. 5)

The 2004 Ground Rules were initially signed by Mr. Farley and Ms. Valentine in June, 2004.

They were again signed in February 2005, after DSU misplaced its original copy.

Thereafter, the negotiations continued with some minimal progress but without a final resolution of all outstanding issues. On March 14, 2005, Farley sent the following letter to Valentine:

> This letter is to clarify the status of our negotiations with each of the three AFSCME Locals (1007, 1267, 2888). In March 2004, we resumed negotiations with the intention of reaching an agreement that would expire on June 30, 2005. We had agreed in our Negotiating Ground Rules dated June 1, 2004 (attached) that the current collective bargaining agreement would terminate by mutual agreement and by operation of law on June 30, 2005 regardless of whether we reached an agreement on revisions to the current agreement or not. In view of the fact that an agreement has not been reached to date, we believe it would be more productive to commence negotiations for the new contract rather than try to negotiate changes to an existing agreement that will expire in less than 90 days from today.
>
> We have agreed to meet with each of the Units in April 2005 to negotiate an agreement that would become effective July 1, 2005 (if ratified by both parties prior to that date). Accordingly, the University plans to provide you with its opening proposal sufficiently in advance of those meetings to enable you to review them and be prepared to negotiate. We also encourage the Unions to provide us with their opening proposals in anticipation of the first meeting to negotiate the contract to be effective July 1, 2005.
>
> We further propose that all negotiations, beyond those already scheduled, be held during non-compensable time. (Employer Ex. 6)

Mr. Farley testified that he sent the letter because Ms. Davis, who was still a member of DSU's negotiating team, informed him the Union was only willing to negotiate over the existing proposals but not over DSU's new proposals for a successor agreement to be effective July 1, 2005.

According to Mr. Farley, on April 11, 2005, DSU's proposals for successor contracts to be effective July 1, 2005, were e-mailed to Ms. Valentine. Ms. Valentine, however,

testified she received the proposals for Locals 1007 and 1267 for the first time on April 12 and April 14, 2005, respectively. (Employer Ex. 7) On both occasions Ms. Valentine informed Mr. Farley the Union would continue to participate in the current negotiations but would not participate in negotiations over DSU's new proposals for successor agreements until after the current negotiations were concluded.

By memo dated July 5, 2005, Farley communicated directly with the members of Local Unions 1007, 1267:

> As you know, the collective bargaining agreement with AFSCME has expired. Unfortunately, the University and AFSCME did not reach a new agreement.
>
> We are advising you that since the contract expired, there is no legal obligation that you must belong to the Union or pay dues or a service fee. You have the right to be a member of the Union or not be a member – it is your decision. If you wish, you can revoke your membership by advising the Union that you no longer wish to be a member. The University has no position on that issue; we just want you to know what your rights and options are. Since those options have changed due to the contract's expiration, I am advising you of the change.
>
> Similarly, you now have the right to revoke your dues deduction from your paycheck. You can simply send me a note (signed and dated) indicating that you no longer want any deduction taken from your paycheck for either dues or service fees.
>
> Again, this choice is totally up to you. (Employer Ex. 8)

On or about July 19, 2005, DSU submitted a revision of its April proposals for successor agreements for Locals 1007 and 1267 to be effective July 1, 2005. (Employer Ex. 9) Sometime in July, 2005, DSU posted a revised proposal on its website as being immediately effective until a new agreement was in place. On July 19th, Mr. Farley sent the following memo to Ms. Valentine:

> I am enclosing the University's revised proposal. Upon review, we realized that there were certain provisions inadvertently omitted and still others that should be improved upon and/or clarified.
>
> I am again urging you [AFSCME] to return to the bargaining table. Your position is frankly untenable and is the sole reason why the University decided to implement its proposal. (Employer Ex. 9 & 10)

On August 11, 2005, Ms. Valentine sent the following memo to Mr. Farley: "In response to your letter of July 19, 2005, the union has always been ready, willing and able to negotiate." (Employer Ex. 11) At no time, was AFSCME willing to, nor did it, bargain over the proposals submitted by Delaware State in April, 2005, as modified on July 19, 2005, for successor agreements to be effective July 1, 2005.

In a memo dated August 18, 2005, Mr. Farley again communicated directly with the bargaining unit employees and their supervisors:

> On March 14, 2005, I sent a letter to Ms. Karen Valentine (exclusive bargaining agent for locals 1007 and 1267). This letter stated in part "we had agreed in our Negotiating Ground Rules dated June 1, 2004 (attached) that the current collective bargaining agreement would terminate by mutual agreement and by operation of law on June 30, 2005 regardless of whether we reached an agreement on revisions to the current agreement or not."
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> In July, 2005, another letter was sent to Ms. Valentine. The letter makes it clear that the University intends to implement its last proposal until an agreement can be negotiated to replace the one that ended on June 30, 2005. It read as follows:
>
> > This letter is to advise you that the University will make changes to wages, hour and working conditions consistent with its last proposal made to the Union. These changes will go into effect on July 1 or soon thereafter depending upon the speed by which we can implement these changes. This action is necessitated because Council 81 and Local Unions 1007 and 1267 have refused to negotiate in good faith with respect to

> the University's proposals for a new agreement. The University asserts that such conduct constitutes bad faith bargaining and it has filed an unfair labor practice charge with the Delaware Public Employment Relations Board. The Unions' outright refusal to bargain in good faith has created an impasse, privileging the University to implement its proposals. Additionally, consistent with the fact that there is no agreement between the parties, the University will not arbitrate grievances concerning matters that arise on or after July 1, 2005.
>
> **Out of concern for the employees, the University is certainly willing to consider modifying its proposal regarding personal leave. This is consistent with the University's flexible approach taken throughout the negotiations.** A copy of the proposal (the current replacement for the old agreement) can be found at http://www.desu/hr/policies/index.php or we will provide you with a copy next week.
>
> With regard to the winter break, the University's proposal does not remove the break. Rather, it gives the University the discretion of determining the dates for the break.
>
> Please note that the University's proposals were only implemented because the old contract was ended and the Union ceased negotiations in April 2005. The University has filed an Unfair Labor Practice against the Unions and is optimistic that they will return to the negotiating table soon to resume negotiations. In the meantime, please follow the proposal as if it were the agreement. We remain committed to the negotiation process and the law and we trust that our classified employees are as well. (Employer Ex. 12, emphasis in original)

By letter dated September 28, 2005, Hector Figueroa, Assistant Provost, solicited AFSCME's return to the bargaining. His letter to Ms. Valentine provides:

> In April and July, 2005, the University submitted its proposal for negotiations with local 1007 and local 1267. To date, you have refused to negotiate over, or counter propose in response to, these proposals. This refusal resulted in our filing an Unfair Labor Practice with the Delaware Public Employee Relations Board-that action is still pending. However, we are both free to negotiate and make forward progress. It is my hope that we will do so. The first step in this progress will be to resume

> negotiations by responding to our proposal with a counter offer. (Employer Ex. 14)

When the positions of the parties remained unchanged AFSCME requested that the impasse proceed to mediation. The attempted mediation, however, of the bargaining was unproductive.

On November 8, 2005, the Executive Board of Local 1267, requested through the American Arbitration Association ("AAA") to arbitrate a grievance protesting the termination of a bargaining unit employee. On December 21, 2005, counsel for DSU, sent the following letter to the AAA Case Manager.

> The University declines to arbitrate this matter. At the time of Mr. Parker's termination there was no collective bargaining agreement between the parties. Arbitration is a matter of contract and a party cannot be required to submit a labor or employee dispute to arbitration. *See, e.g., United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 582 (1960), cited in Del. Public Employees v. New Castle County, Civil Action No. 13314, 1994 Del Ch. LEXIS 168 at [*6] (Court of Chancery of Delaware, Sussex 1994).* (Employer Ex. 15(d)).

On February 15, 2006, DSU counsel sent the following letter to Ms. Valentine:

> The University was willing to try to resolve this matter as part of the mediation process involving a new collective bargaining agreement. However, now that the Union has terminated that process, I am advising you that the University refuses to arbitrate for the reasons set forth in my letter to Ricardo V. Biggs of the American Arbitration Association dated December 21, 2006. Furthermore, this is a matter of substantive arbitrability and, therefore, the University declines the option of allowing the arbitrator to decide the arbitrability issue. (Employer Ex. 15(a)).

ISSUES

1. Whether the conduct of AFSCME, Council 81, and Local Unions 1007 and 1267 violated 19 Del. C. § 1307 (b)(2) and (b)(3), as alleged?
2. Whether the conduct of Delaware State University violated 19 Del.C. § 1307(a)(2) and (a)(5), as alleged?

PRINCIPAL POSITIONS OF THE PARTIES

Delaware State University: The Union engaged in a *per se* violation of the duty to bargain in good faith when it unequivocally refused to negotiate the University's proposals. The University argues that the Ground Rules dated June 1, 2004, are clear and unambiguous. The 2004 Ground Rules expressly provide that the rolled-over collective bargaining agreement was to end on June 30, 2005 and negotiations for a successor collective bargaining agreement to be effective July 1, 2005, were to commence not later than January 15, 2005. Had the parties intended that negotiations over a successor agreement not take place until the mid-term negotiations concluded, as the Union contends, they could have simply so stated. To accept the Union's position would render the first two bullet points of the 2004 Ground Rules meaningless.

As a result of the Union's conduct, the University was entitled to implement its proposals of July 2005 whether or not impasse formally existed. The Union offered no reason for its refusal to engage in bargaining over the University's proposals for a successor agreement to be effective July 1, 2005. The University unilaterally implemented its July, 2005 proposal as leverage to force the Union to the bargaining table.

Citing private sector case law, DSU contends that even when bargaining impasse has not yet occurred, there are circumstances which permit an employer to unilaterally implement its last proposal.

> When a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining, an employer may be justified in implementing unilateral changes in terms and conditions of employment. *See, e.g., Motor Lines, Inc., 215 NLRB 793 (1974).* However, before imposing any changes, an employer, as part of demonstrating its diligence and good faith, must present the union with its detailed contract proposals and permit the union a reasonable time to evaluate the proposals. *M&M Bldg. & Elec. Contractors, Inc.*, 262 NLRB 1472 (1982). See also *Bridon Cordage,* 329 NLRB 258 (1999)*; Carpenters Local 206 v. NLRB,* 707 F.2d 516 (9th Cir.) 1983.

Before unilaterally implementing its proposal, DSU not only complied with the conditions established by the National Labor Relations Board but also filed the instant unfair labor practice charge with the Delaware Public Employment Relations Board .

Alternatively, the parties were at impasse and the University is permitted to implement all or part of its last proposal. Citing the private sector case of *NLRB v. Katz,* 369 U.S. 736 (1962), DSU argues that an employer may unilaterally implement its last proposal once impasse has been reached, which is clearly the case here. The University requests the PERB to reconsider its decision to the contrary in *City of Wilmington v. Wilmington FOP Lodge No. 1*, 2004 Del.Ch. LEXIS 86 at *17-18, 175 LRRM 2367 (Del.Ch. 2004). In *Wilmington* the basis for the PERB's rejection of the private sector rule set forth in *Katz* (Supra.) permitting unilateral change was that, "[u]nlike private sector employees, public sector employees in Delaware are prohibited from striking or participating in other concerted conduct inconsistent with the full and faithful performance of their employment

responsibilities." DSU maintains the rationale for PERB's rejecting Katz has been rejected by the Delaware Court of Chancery.

Delaware State University's Memo of July 5, 2005 to bargaining unit employees was neither false nor misleading and does not constitute an unfair labor practice. AFSCME presented no evidence in support of its allegation that the July 5, 2005, memo to the bargaining unit employees from Mr. Farley violated § 1307(a)(2) or (a)(5), of the Act. The University's purpose in sending the memo was to respond to questions from bargaining unit employees who were confused and sought clarification of the status of the negotiations and to pressure the Union to return to the bargaining table.

The University argues the memo is completely consistent with § 1304 of the Act which grants to employees the right to have union dues deducted from his/her paycheck and to revoke the deduction at the employee's written request. Further, § 1319 of the Act makes union membership voluntary. DSU argues that the content of the letter was factual and DSU was simply exercising its right to free speech to which the Union was free to respond.

Consistent with well established law, the University announced to the Union that since there was no collective bargaining agreement, it would not arbitrate grievances concerning matters that arose on or after July 1, 2005. AFSCME has presented no evidence that DSU suspended the grievance procedure, which DSU argues it has not. However, DSU's duty to arbitrate is a matter of contract and after the collective bargaining agreement expired DSU cannot be required to arbitrate. *Litton Financial Printing Div. v. NLRB,* 501 U.S. 190 (1991)*; City of Wilmington,* (Supra); *Board of Educ. of Appoquinimink Sch. Dist. V. Appoquinimink Educ. Ass'n,*1999 Del.Ch. LEXUS 188, at *15-16, 163 LRRM 2754, 2758 (Del.Ch. 1999).

AFSCME: **The terms and conditions of employment that are in effect at the end of the term of a collective bargaining agreement may not be unilaterally altered.** AFSCME contends that the prior collective bargaining agreement expired on June 30, 2002. Thus, there was no valid collective bargaining agreement in effect in April, 2005, when DSU announced its intent to abrogate the Agreement on June 30, 2005, just prior to unilaterally implementing its proposals as the successor agreement.

Citing *Appoquinimink Ed. Assn. v. Bd. of Ed.,* Del. PERB, ULP No. 1-2-84A, I PERB 23 (1984) at 27, the Union argues that unilateral changes in the status quo after the expiration of the CBA creates a disruptive atmosphere, and these changes are held to be unlawful because they frustrate the goal of arriving at a CBA without disrupting the delivery of public services. In Delaware, the *quid pro quo* for not allowing employees to strike is the statute passed by the legislature requiring binding interest arbitration as the final step in the impasse resolution procedure. The longstanding law in Delaware is that unilateral changes in mandatory subjects of bargaining are prohibited. Therefore, although the collective bargaining agreement expired on June 30, 2002, the status quo of the terms and conditions of employment set forth therein continued by operation of law until such time as there is a voluntary settlement by the parties or a final and binding decision by an interest arbitrator.

DSU admitted that it made many unilateral changes in terms and conditions of employment. AFSCME maintains that it was never presented with a final offer by DSU. In July, 2005, DSU unilaterally implemented changes in mandatory subjects of bargaining including personal leave time, holiday time off, overtime subcontracting, denial of paid time for Union business and the grievance and arbitration procedure, all to the detriment of the Union and the bargaining unit employees.

The combined net effect on the collective bargaining agreement of Mr. Farley's letters of March 15 and 19, 2004, and the new Ground Rules did not alter the rights and obligations of either party. The Ground Rules agreed upon in September, 2002, prohibited the introduction of new proposals after the third negotiating session, which occurred in December, 2002. The introduction of new proposals by DSU in March, 2004, violated this provision of the Ground Rules.

Further, the annual roll-over of the Agreement relied upon by DSU occurred only if neither party gave notice of its intent to renegotiate a revised Agreement which AFSCME did in 2002. Consequently DSU's notice in March, 2004, of its intent to "abrogate" the current Agreement is meaningless since the collective bargaining agreement had long since expired on June 30, 2002.

It was the prohibition on unilateral changes in mandatory subjects of bargaining not an in-force contract that kept the status quo of those terms and conditions of employment in effect. At no time prior to the unilateral implementation of changes in the status quo of mandatory subjects of bargaining in July, 2005, did either party seek to invoke the impasse resolution procedure of mediation and binding interest arbitration.

AFSCME argues that DSU breached the June, 2004, Ground Rules by failing to initiate negotiations prior to January 15, 2005, over a successor collective bargaining agreement to be effective July 1, 2005.

From the time DSU resumed negotiations in March, 2004, it engaged in surface bargaining, never intending to arrive at a collective bargaining agreement but waiting for a time when it could impose its unilateral changes to the terms and conditions of bargaining. Prior to the designation of Vice-President Farley in March, 2004, DSU never

designated a person as its bargaining representative with the authority and the intention to resolve issues and reach agreement with the Union. Clifford Coleman initially claimed inability to meet AFSCME's economic demands but then reversed his position. Coleman's replacement, Sheila Davis, simply maintained the status quo until the arrival of Mr. Farley who promptly introduced new proposals in violation of the 2002 Ground Rules and then attempted to abrogate a non-existent collective bargaining agreement. This was followed in July, 2005, with DSU's implementation of DSU's proposal resulting in the unilateral change of mandatory subjects of bargaining.

The Union's response to DSU's April proposal was appropriate and not an unfair labor practice.

AFSCME argues that its refusal to bargain over DSU's July, 2005, proposals for successor Agreements cannot be considered an unfair labor practice since DSU had no right to introduce the proposals in the first place.

DSU conducted and implemented a well planned attack on the very existence of the Union in violation of 19 Del.C. 1307(a)(2) and (a)(5).

> DSU's April proposal withdrew all Union Security. It dropped language for dues check-off or service fees even though 19 Del. C. §1305 required that deductions be made for Union dues and service fees. It took away the right of paid leave Union officers needed to attend Union business including grievances and negotiations. In its July 5, 2005 memorandum to bargaining unit members, DSU provided false and misleading information regarding Union dues and service fees. (Union Exhibit 2) The memo informed the Union membership that DSU encouraged and supported members leaving the Union. It promised the freedom from all Union dues and fees.
>
> When DSU finally made a proposal for Union security, it offered language that was both illegal and undermining of Union security. It wanted the Union to bargain over when a person becomes a member of the Union. It wanted to require

> employees to become a member of the Union when the law prohibits persons from being required to become members. DSU proposed to control how long an employee could be required to be a member (which was only for the life of the agreement). It continued to refuse to withhold dues or service fees despite the requirements of 19 Del.C.§1305. DSU was making proposals regarding the internal matters of the Union. Not only is this improper, it is hardly an indication of a good faith intent to arrive at a CBA. (Union's opening brief @ pgs. 24 and 25)

Although DSU informed both the Union and the bargaining unit membership that the arbitration of grievances was no longer available, the proposal implemented by DSU in July, 2005, provided for binding grievance arbitration.

AFSCME further alleges that DSU's failure to pass along the wage increases authorized by the legislature in July 2005 until several months later constituted a *per se* unfair labor practice.

DISCUSSION

19 Del.C. §1302(e) defines "collective bargaining" as "the performance of the mutual obligation of a public employer through its designated representatives and the exclusive bargaining representative to confer and negotiate in good faith with respect to terms and conditions of employment, and to execute a written contract incorporating any agreements reached. However, this obligation does not compel either party to agree to a proposal or require the making of a concession."

The pleadings in this matter raise questions concerning whether the conduct engaged in by the parties after negotiations commenced on September, 2002, constitute a violation of 19 Del.C. § 1307(a)(5) and/or (b)(2) and whether conduct by DSU interfered with the administration of the Union in violation of §1307(a)(2), of the Act.

A breach of the statutory duty to bargain in good faith can result from either a single incident (a *per* se violation) or a course of conduct extending over a period of time. *Seaford Education Assn. v. Bd. of Ed,* Del.PERB, ULP 2-2-84S, I PERB 1 (1984).

Article XXXI, of the 1998 - 2002 collective bargaining agreement provided:

> 31.1 This agreement should go into effect as of July 1, 1998 and continue in effect through June 30, 2001, and from year to year thereafter unless at least ninety (90) days prior to the expiration date of this Agreement, or any anniversary date thereafter, notice in writing shall be given to either party by the other party of the desire to amend, alter, abrogate or negotiate a new Agreement.

The record establishes that in March, 2002, AFSCME notified DSU by certified mail that it desired to commence negotiations over a successor agreement. (Union Ex. 1). Negotiations began in September, 2002, but little, if any, meaningful progress occurred between then and March, 2004. The fact that during this period DSU had two (2) chief negotiators (Coleman and Davis) is not significant. At some point Ms. Davis informed AFSCME Representative Valentine that a new administrator was being hired by DSU who would be available in early 2004 to serve as DSU's chief negotiator. Nor do I find it significant that DSU initially claimed an inability to meet AFSCME's economic demands in 2003, but later retracted that position as negotiations continued. Neither of these incidents is independently indicative of bad faith; rather, they are a consequence of negotiations that had already extended over a period of two years. Thus, whether DSU and/or AFSCME violated its statutory duty to bargain in good faith will ultimately be determined by their conduct after March, 2004, when Mr. Farley arrived.

Mr. Farley testified that shortly after his arrival in early 2004, he was told by Ms. Davis that the Ground Rules agreed to in 1994 (which covered the negotiation of the 1998-

2002 agreement) remained in effect. Ms. Valentine, however, testified that new Ground Rules were agreed to on September 22, 2002, one of which was that no new proposals could be introduced after the third bargaining session in December, 2002. Although uncorroborated by documentary evidence, Ms. Valentine's testimony is unrebutted by any credible evidence. Although present throughout the hearing, Ms. Davis did not testify to rebut Ms. Valentine's testimony that new Ground Rules applicable to the on-going negotiations were mutually agreed upon in September, 2002.

At the first negotiating session after Mr. Farley assumed the position of Chief Negotiator in March, 2004, DSU introduced a series of new proposals. AFSCME objected claiming that the 2002 Ground Rules prohibited the introduction of new proposals after December, 2002. For this reason, AFSCME initially refused to bargain over DSU's new proposals.

The introduction of the new proposals by DSU in March, 2004, is of no particular consequence. Considering the lack of progress in the negotiations since 2002, Mr. Farley's stated intention to ignite the stalled negotiations was not unreasonable. Further, there was no evidence Mr. Farley was aware of the 2002 Ground Rules at that time or that by introducing new proposals he intended to disrupt the negotiations.

AFSCME's refusal to consider the new proposals from DSU led to Mr. Farley's letter of March 15, 2004, informing AFSCME of DSU's intent to "abrogate" the collective bargaining agreement effective June 30, 2004. However, as a consequence of the Union's certified letter in March, 2002, expressing its desire to open negotiations over a successor agreement, the prior collective bargaining agreement had already expired effective June 30, 2002. This is a situation of which Mr. Farley should have been aware; clearly, there would be

no need for the parties to be involved in on-going negotiations if one of the parties had not exercised its option under Article XXXI of the prior agreement.

Regardless, as evidenced by Mr. Farley's letter of March 19, 2004, to Ms. Valentine, a compromise was reached in which AFSCME agreed to bargain over six (6) of the additional subjects introduced by DSU. The June 1, 2004, Ground Rules agreed to by the parties provide that the interim negotiations over current issues were to continue with proposals by DSU being limited to the bargaining subjects in Mr. Farley's March 19, 2004, letter and proposals submitted by the Union prior to March 19, 2005. (Employer Ex. 10)

The mere fact that the June 1, 2004, Ground Rules reference a "current collective bargaining agreement," does not automatically create a valid and enforceable contract between DSU and AFSCME. DSU argues the contract which it believed existed was to expire effective June 30, 2005. AFSCME maintains there was no existing agreement and the current negotiations were to continue until agreement was reached or a binding interest arbitration decision was issue on the terms of the July 1, 2002 – June 30, 2005 contract. AFSCME further argued that it only made sense to complete negotiations of the terms of that agreement which was to expire on June 30, 2005, before entering into negotiations for a successor to be effective July 1, 2005.

Although the Ground Rules provided "beginning not later than January 15, 2005, the individual AFSCME units (1007, 1267, and 2888) will begin to negotiate new agreements (for each unit) to be effective July 1, 2005" (Employer Ex. 5), it is clear that there was no shared understanding between these parties as to what the status of the negotiations for the 2002- 2005 agreement would be as of June 30, 2005, in the event that no agreement had been reached. Given the parties' history of post-expiration negotiations, it was not unreasonable

for AFSCME to believe that those negotiations would continue until they were concluded either by mutual agreement or invocation of the statutory impasse resolution procedures.

As previously discussed, no collective bargaining agreement existed on June 1, 2004 or any time thereafter, and no signed, written document, as required by §1307(a)(7) and (b)(4), of the Act, was offered into evidence by DSU to support its contention that there was a "current collective bargaining agreement" covering the period of July 1, 2002 - June 30, 2005.[4] Nor is there evidence as to the terms of an existing collective bargaining agreement or that such a contract was approved by DSU or ratified by bargaining unit members, as required by the June, 2004, Ground Rules. Neither had the mediation or binding interest arbitration process been invoked by either party to resolve the impasse at any time prior to March, 2005.

By letter dated March 14, 2005, Mr. Farley expressed DSU's desire to shift the focus of the negotiations from the interim negotiations to full blown negotiations for the collective bargaining agreement DSU claims the parties agreed would be effective July 1, 2005. To this end, in mid-April DSU presented AFSCME with its proposal for a new agreement for each bargaining unit.

Although Mr. Farley testified a copy of the initial proposal for each bargaining unit was e-mailed to the Union and faxed to Ms. Valentine by Ms. Davis on April 11, 2005, Ms. Valentine testified she first saw the University's initial proposal at the negotiating sessions held on April 12 and April 13, 2005, respectively. As a result, AFSCME did not have an

[4] 19 Del.C. §1307, Unfair Labor Practices, provides, in relevant part: (a)(7) and (b)(4), "Refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract." The definition of "collective bargaining" requires parties execute a written agreement incorporating any agreements reached during negotiations. 19 Del.C. §1302(e).

adequate opportunity to thoroughly evaluate the document or prepare an informed response before the parties met to negotiate.

The timing of the initial proposals is significant since they were presented to the Union as a complete contract which did not identify new provisions, modified provisions or the deletion of provisions from the prior agreement. DSU left it to the Union to compare the proposal with the prior collective bargaining agreement in order to identify the changes, which would require a significant expenditure of time given that DSU's proposal included the text of two complete contracts of twenty or more single spaced pages of text. The sections of DSU's proposal were not numbered (as was the previous agreement) nor did the order of those sections comport to the order of the prior agreement. There was no Table of Contents or index provided with DSU's proposal for either Local 1007 or Local 1267. Nor was there any effort by DSU to identify whether any of the tentative agreements reached during the three (3) prior years of bargaining were included in DSU's proposal.

DSU's subsequent revision of its April proposal was also presented to the Union in July, 2005, as a complete contract which again did not identify the modification or addition of new contract language, the deletion of old contract language appearing in either the prior collective bargaining agreement or DSU's initial proposal. Mr. Farley's cover letter dated July 19, 2005, states, in part, that DSU's initial proposal was revised when, "we realized that there were certain provisions inadvertently omitted and still others that should be improved upon and/or clarified." (Employer Ex. 9). It was again left to the Union to compare the revised contract with the prior agreement and DSU's prior proposal in order to identify additions and affected provisions.

The lack of time allowed for adequate review and the absence of clarifying or explanatory comment evidences a disregard by DSU for the give and take inherent in the collective bargaining process and is inconsistent with DSU's stated objective to bring the Union to the table for meaningful negotiation. Considered together, these are valid considerations when evaluating the totality of the conduct engaged in by DSU throughout the negotiations.

Further, by memorandum dated July 6, 2005, Mr. Farley notified the "Supervisors of locals 1007 and 1267 employees",

> The collective bargaining agreement between the University and the AFSCME locals has expired and should no longer be used to manage the terms and conditions of their employment. Instead, the University is implementing the attached proposal as the rules that will govern their employment while no contract is in effective and we will not arbitrate any grievance that arises after July 1, 2005. This proposal does apply to local 2888. [*Union Ex. 6*]

This communication to the supervisors of Locals 1007 and 1267 employees predates by thirteen (13) days the transmission of the revised proposals to AFSCME representatives.

The unilateral implementation by DSU of its July 19, 2005, revision is also indicative of DSU's continuing disregard of its bargaining obligation under established Delaware law. Citing the private sector case of *NLRB v. Katz*, 369 U.S. 736 (1962), DSU argues that a state of impasse existed between DSU and AFSCME thus permitting DSU to unilaterally implement its proposal. Alternatively, DSU argues that even if impasse did not formally exist it was still entitled to unilaterally implement the July, 2005, revision of its initial proposal.

Neither of DSU's arguments is persuasive. The applicable law controlling issues before the Delaware Public Employment Relations Board is that of the State of Delaware, not

private sector case law developed before the National Labor Relations Board and in the federal courts when interpreting the National Labor Relations Act.

The Delaware Chancery Court has observed:

> The general rule is that certain provisions of a collective bargaining agreement known as "mandatory bargaining subjects" may not be unilaterally changed upon the expiration of a collective bargaining agreement.[5] In Delaware, these mandatory bargaining subjects include all "terms and conditions of employment" or those "matters concerning or related to wages, salaries, hours, grievance procedures, and working conditions." [6] The importance of maintaining the status quo for mandatory bargaining subjects has been explained by the Delaware Public Employment Relations Board as follows:
>
> Maintaining stability during the negotiation process is a crucial factor in continuing the orderly and uninterrupted operations of [public agencies] and to maintaining an environment where parties are free to negotiate in good faith on an equal basis. To permit one of the parties to impose a unilateral change in a mandatory subject of bargaining, without prior negotiation at least to the point of impasse, jeopardizes the desired stability and permits one party to effectively circumvent the collective bargaining process, thereby creating the potential for unfair advantage.[7] *City of Wilmington v. Wilmington FOP Lodge No. 1*, 2004 LEXIS 86, (Del.Ch. June 22, 2004), 175 LRRM. 2367, 2370 (Del.Ch. 2004). (emphasis added)

The General Assembly recognized the benefit of not permitting unilateral changes in terms and conditions of employment when it amended the Public Employment Relations Act and the Police Officers' and Firefighters' Employment Relations Act in 1999 to require binding interest arbitration as the exclusive means by which impasse arising during collective

[5] *Laborers Health & Welfare Trust Fund for N. Cal. V. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988); NLRB v. Katz, 369 U.S. 736, 743 (1962).
[6] 19 Del C. § 1602(n).
[7] *Brandywine Affiliate/NCCEA/DSEA/NEA v. Brandywine School. Dist. Bd. of Ed..*, U.L.P. No. 1-9-84-6B, slip. Op. at 87 (Del. P.E.R.B. Nov. 20, 1984).

bargaining may be resolved. *AFSCME Council 81, Local 1102 v. City of Wilmington*, Del. PERB, ULP 05-04-477, V PERB 3419, 3131 (2005).

The full Delaware Public Employment Relations Board clearly stated this standard in a recent decision:

> This Board has a twenty-two year history of requiring that parties abide by their arguments relating to mandatory subjects of bargaining, unless and until they negotiate and agree to change those terms and conditions of employment, or a contrary result is imposed through the binding interest arbitration process.
>
> …[T]his Board has consistently held that the continuation of the status quo of mandatory subjects of bargaining during the period following expiration of a collective bargaining agreement is fundamental to preserving the balance created by the statute. We believe this mandate is clear in the statutory purpose with which we are charged. *AFSCME Council 81, LU 1102 v. Wilmington*, Del. PERB, ULP 05-04-477, V PERB 3515, 3518 (2006).

There is no reason or justification for either party under the existing statutory framework to take matters into its own hands by unilaterally implementing its proposal. To permit this flies in the face of the law which requires that unresolved bargaining impasses be resolved through a neutral and public process based on statutory criteria set forth in 19 Del.C.§1315. Where parties are unable to voluntarily arrive at agreement on the terms and conditions of a collective bargaining agreement, binding interest arbitration is a mandatory process under the PERA resulting in the implementation of a binding contract through the binding interest arbitrator. There is no opportunity under the law for either party to unilaterally implement its last best final offer until the interest arbitrator has so directed.

By unilaterally imposing its position, DSU ignored well-established and long-standing Delaware case law and the express and specific requirements of the Public Employment Relations Act.

DSU next argues that it was entitled to unilaterally implement its July, 2005, proposal because AFSCME engaged in conduct which prevented the parties from achieving a negotiated settlement. Again, DSU mistakenly relies upon a private sector decision by the National Labor Relations Board interpreting the National Labor Relations Act rather than established Delaware public sector collective bargaining and Delaware case law.

Rather than taking matters into its own hands and acting in a manner inconsistent with the law, DSU should have moved the impasse to mediation and perhaps requested expedited processing of this unfair labor practice charge which it filed on June 29, 2005. If it had done so, the issue of whether AFSCME violated §1307(b)(2), of the Act would be long since resolved and meaningful negotiations would have commenced. If this had occurred, it is probable that through either a voluntary settlement or binding interest arbitration a successor agreement would now be in place.

Not only did DSU fail to do either, it failed to consider AFSCME's initiation of the statutory impasse resolution procedure with AFSCME's request for mediation in early July, 2005. Notably, it was at this point in time that DSU unilaterally implemented its revised proposal.

It is undisputed that the unilateral implementation of DSU's proposal resulted in a change to terms and conditions of employment. Mr. Farley's letter dated August 18, 2005, to all bargaining unit employees and supervisors provides, in relevant part:

> This letter is to advise you that the University will make changes to wages, hour and working conditions consistent with

> its last proposal made to the Union. These changes will go into effect on July 1 or soon thereafter depending upon the speed by which we can implement these changes. (Employer Ex. 12)

DSU's unilateral imposition of its proposal as the new collective bargaining agreement and unilateral alteration of the status quo of mandatory subjects of bargaining constitutes not only a *per se* violation of the statutory duty to bargain in good faith (19 Del.C. §1307(a)(5)), but is also a consideration in evaluating the totality of the conduct engaged in by DSU throughout the negotiations.

The letters of July 5, 2005, and August 18, 2005, addressed directly to the bargaining unit employees are also problematic for DSU. The July 5 letter addressed union membership, union dues and fair share fees. The letter provides, in relevant part:

> . . . there is no legal obligation that you must belong to the Union or pay dues or a fair share fee . . . If you wish, you can revoke your membership by advising the Union that you no longer wish to be a member. . . . Similarly, you now have the right to revoke your dues deduction from your paycheck. You can simply send me a note (signed and dated) indicating that you no longer want any deduction taken from your paycheck for either dues or service fees. (Employer Exhibit 8)

DSU's argument that the content of the July 5, 2005 letter is factual is not dispositive of this issue. The impact of the letter upon the overall bargaining environment and the relationship of the Union to its members must be considered in evaluating the charge that this communication constitutes conduct that interferes with the administration of the union. *Seaford Ed. Assn. v. Seaford Bd. of Ed.,* Del. PERB, ULP No. 88-01-020, I PERB 263 (1988).

Issues of union membership and dues are of no concern to DSU, and had no logical impact upon its bargaining strategy. The statute provides at §1304(c):

> Upon the written authorization of any public employee within a bargaining unit, the public employer shall deduct from the payroll of the public employee the monthly amount of dues or service fee as certified by the secretary of the exclusive bargaining representative. . . Such authorization is revocable at the employee's written request. Such deduction shall commence upon the exclusive representative's written request to the employer. Such right to deduction shall be in force for so long as the employee organization remains the exclusive bargaining representative for the employees in the unit. The public employer is expressly prohibited from any involvement in the collection of fines, penalties or special assessments levied on members by the exclusive representative. 19 Del.C. §1304(c) (emphasis added).

There is no notice requirement nor were any of the provisions of this section of the statute triggered by the inability of these parties to successfully conclude their negotiations. Questions concerning dues deduction are between AFSCME and its members.

DSU's disclaimer that the University has no position on these matters is disingenuous. The only common-sense conclusion concerning the July 5, 2005, communication is that it was intended to undermine the credibility of the Union and encourage a defection from its ranks and, by so doing, to weaken the Union's bargaining strength. For this reason the July 5, 2005 letter constitutes both a *per se* violation of 19 Del.C. §1307(a)(2) and (a)(5), of the Act and a valid consideration when evaluating the totality of the conduct engaged in by DSU throughout the negotiation.

There is also an issue as to whether Mr. Farley's letter of August 18, 2005, constitutes a violation of the PERA. The letter states, in relevant part: "The Unions' outright refusal to bargain in good faith has created an impasse, privileging the University to implement its proposals." (Employer Ex. 12) At the time this letter was written, both DSU's charge of bad faith by AFSCME, and AFSCME's counter-charge alleging that the unilateral implementation of a contract by DSU likewise constituted bad faith by the University had

been filed and was pending. It was not until the issuance of the instant decision (9 months later) that any determination was made as to whether either side had met its statutory obligation to bargain in good faith. Therefore, the communication is factually incorrect and for that reason alone the letter constitutes a *per se* violation of § 1307(a)(5) of the Act.

More importantly, by requiring the resolution of collective bargaining impasse through binding interest arbitration, established Delaware law prohibits the post-expiration change in the status quo of mandatory subjects of bargaining. The above-quoted statement in the August 18, 2005, letter was not only false but could also reasonably be construed by bargaining unit employees as blaming the Union for the unilateral imposition of DSU's proposal. This could only serve to undermine the Union's authority and diminish the confidence of the membership in AFSCME's competence to participate in meaningful and productive negotiations.

The letter of August 18, 2005, is also confusing. It provides, in relevant part: "Additionally, consistent with the fact that there is no agreement between the parties, the University will not arbitrate grievances concerning matters that arise on or after July 1, 2005." (Employer Ex. 12) This statement is inconsistent with the instruction found elsewhere in the letter for employees to " . . . please follow the proposal as if it were the agreement." Notably, the proposal unilaterally implemented by DSU in early July, 2005, contains a binding arbitration provision at Step IV of the Grievance and Arbitration procedure included therein on page four (4) of each proposal.

Another major problem with the letter is that it takes issues which are mandatory subjects of bargaining directly to the employees, apparently bypassing the Union which is the exclusive representative of all bargaining unit employees. The statute provides:

> The employee organization designated or selected for the purpose of collective bargaining by the majority of the employees in an appropriate collective bargaining unit shall be the exclusive representative of all the employees in the unit for such purpose and shall have the duty to represent all unit employees without discrimination. Where an exclusive representative has been certified, a public employer shall not bargain in regard to matters covered by this chapter with any employee, group of employees or other employee organization. 19 Del.C. §1304(a) (emphasis added).

The deleterious effect upon the Union of the direct communication with the employees is obvious.

As with the letter of July 5, 2005, the letter of August 18, 2005, constitutes a *per se* violation of 19 Del.C. §1307(a)(2) and (a)(5), of the Act and a valid consideration when evaluating the totality of the conduct engaged in by DSU throughout the negotiations.

Turning attention now to DSU's charge that AFSCME's refusal to bargain over DSU's April proposal for a collective bargaining agreement to be effective July 1, 2005, Section 1313 (a) of the PERA, Collective Bargaining Agreements, provides, in relevant part:

> Collective bargaining shall commence at least 90 days prior to the expiration date of any current collective bargaining agreement or in the case of a newly certified exclusive representative within a reasonable time after certification.

DSU presented AFSCME with its comprehensive proposal for a new collective bargaining agreement in April, 2005, well within ninety (90) days of the effective date of July 1, 2005. The record establishes that AFSCME did not meet with DSU to discuss this proposal but conditioned such discussions on resolution of the terms of the 2002-2005 agreement. AFSCME's refusal to meet to bargain concerning contract terms for the period beginning July 1, 2005, therefore constitutes a *per se* violation of the duty to bargain in good faith.

The final issue involves DSU's refusal to participate in binding grievance arbitration concerning issues arising after June 30, 2005. DSU relies on the Delaware Chancery Court's decision in *City of Wilmington v. Wilmington FOP Lodge No. 1* (Supra), which adopted the holding and rationale of the United States Supreme Court in *Litton Financial Printing Division V. National Labor Relations Board, et al.*,501 U.S. 190 at 199, 111 S. Ct. 2215 (1991).

The Vice Chancellor framed the issue in *Wilmington FOP* as "whether arbitration under a collective bargaining agreement may be compelled after the agreement's expiration when all facts giving rise to the dispute occurred after the expiration date." That holding of the court is limited to post-expiration arbitration. The Vice-Chancellor's decision constitutes a narrow exception to the longstanding proposition that mandatory subjects of bargaining may not be changed except by mutual agreement or the final and binding decision by an interest arbitrator.

In AFSCME LU 1102 v. Wilmington (Supra), the PERB affirmed the Executive Director's decision adopting the reasoning of the Third Circuit Court of Appeals in *Luden's Inc. v. Local 6 of Bakery, Confectionery & Tobacco Workers, Int'l.*,28 F.3rd 347, 146 LRRM 2587 (3d Cir., 1994), which held:

> . . . [T]hat in a continuing employment relationship an arbitration clause may survive the expiration or termination of a CBA intact as a term of a new, implied- in-fact CBA unless (i) both parties in fact intend the term not to survive, or (ii) under the totality of the circumstances either party to the lapsed CBA objectively manifests to the other a particularized intent, be it expressed verbally or non-verbally, to disavow or repudiate that term.
>
> This result injects substantially more stability and certainty into labor law, and promotes the primary statutory objectives of peaceful and stable labor relations underpinning the NLRA, at

> the slight cost of a notice requirement forcing a party to make clear its wish no longer to abide by the arbitration clause.
>
> In the circumstances of this case, where neither party in any palpable way challenged the continued vitality of the arbitration provision in particular (as opposed to the CBA as a whole) before the dispute erupted, and where no evidence shows that both the parties in fact intended their obligation to arbitrate grievances to be discharged, we think that the parties' duty to arbitrate grievances according to the terms of their 1988 CBA was never totally discharged. In other words, Luden's general, undifferentiated termination of the 1988 CBA effective July 2, 1992, merely transmuted the parties' duty to arbitrate into a term of an implied-in-fact CBA which the parties formed on that date. 146 LRRM @ 2599-2600.

In a letter from Mr. Farley to Ms. Valentine dated August 18, 2005, Mr. Farley, quoted from a prior letter of July, 2005, to M. Valentine, which stated: "Additionally, consistent with the fact that there is no agreement between the parties, the University will not arbitrate grievances concerning matters that arise on or after July 1, 2005." That July communication to Ms. Valentine provides the required notice to the Union after which DSU's duty to arbitrate grievances no longer existed consistent with the Delaware PERB holding in *AFSCME LU 1102 v. Wilmington* (Supra). Thus, the notice itself did not violate 19 Del. C. §1307 (a)(5), as alleged.

Unfortunately, both parties to this matter have been found to have violated their respective responsibility under the Public Employment Relations Act to collectively bargain – to meet and confer at reasonable times with the genuine, good faith intent to resolve differences and to arrive at a negotiated agreement that establishes the terms and conditions of employment for bargaining unit employees for the negotiated term of that agreement. There has been a complete breakdown and refutation of the negotiation process, one which

even the involvement of two professional mediators (provided by PERB consistent with 19 Del.C. §1314) could not resolve.

Consistent with the statutory mandate of 19 Del.C. §1315, the continuing impasse between these parties is subject to binding interest arbitration under 19 Del.C. §1315. I note the binding interest arbitration process has been initiated and that the hearing in that matter is currently on-going. Absent an agreement by these parties resolving their impasse outside of that process, the terms of the successor to the 1998 – 2002 agreement for these bargaining units will be determined by the interest arbitrator, whose decision is "limited to a determination of which of the parties' last, best, final offers shall be accepted in its entirety" considering the statutory factors enumerated in §1315(d). 19 Del.C. §1315.

CONCLUSION

1. Delaware State University ("DSU") is a public employee within the meaning of 19 Del.C. §1302(p).

2. American Federation of State, County and Municipal Employees, AFL-CIO, Council 81 and Local Unions No. 1007 and 1267 ("AFSCME"), is an employee organization within the meaning of 19 Del.C. §1302(i). It is the exclusive bargaining representative of employees in Locals 1007 and 1267 within the meaning of 19 Del.C. §1302(j).

3. Consistent with the foregoing discussion, the evidence of record in this case is sufficient to establish that DSU engaged in a continuing course of conduct which violated its duty to bargain in good faith by:

a. presenting proposals to the Union in the form of a complete contract and without explanatory comment and without adequate time to prepare an informed response;

b. unilaterally implementing its proposal for a successor collective bargaining agreement;

c. making unilateral changes in the status quo of mandatory subjects of bargaining;

d. communicating directly with bargaining unit employees by letter dated July 5, 2005; and

e. communicating directly with bargaining unit employees by letter dated August 15, 2005.

19 Del.C. §1307(a)(5) which provides it is an unfair labor practice for a public employer or its designated representative to:

> (a)(5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.

4. Individually, letters b, c, d, and e above, also constitute *per se* violations by DSU of the duty to bargain in good faith as required by 19 Del.C. §1307(a)(5).

5. Individually, letters d, e and f, above, also constitute violations by DSU of 19 Del.C. §1307 (a)(2) which provides:

> (a)(2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization.

6. By refusing to bargain over the proposal(s) submitted by DSU in April, 2005, and July, 2005, for terms of an agreement to be effective July 1, 2005, AFSCME committed

a *per se* violation of its duty to bargain in good faith as required by 19 Del.C. §1307(b)(2), which provides it is an unfair labor practice for a public employee or for an employee organization or its designated representative to do any of the following:

> (b)(2) Refuse to bargain collectively in good faith with the public employer or its designated representative if the employee organization is an exclusive representative.

WHEREFORE, DSU and AFSCME are ordered to cease and desist from refusing to bargain in good faith. DSU is further ordered to post copies of the Notice of Determination in all locations where notices affecting employees represented by AFSCME Locals 1007 and 1267 are normally posted, including in the workplace and DSU administrative offices. The Notice must remain posted for thirty (30) days.

IT IS SO ORDERED.

Date: June 2, 2006

Charles D. Long, Jr.,
Executive Director,
Del. Public Employment Relations Board