

**PUBLIC EMPLOYMENT RELATIONS BOARD**  
**FOR THE STATE OF DELAWARE**

<b>AMERICAN FEDERATION OF STATE, COUNTY</b>	:	
<b>AND MUNICIPAL EMPLOYEES, COUNCIL 81,</b>	:	
<b>LOCAL 218,</b>	:	
	:	
Charging Party,	:	
	:	<b><u>ULP No. 09-10-707</u></b>
v.	:	
	:	Probable Cause Determination
<b>RED CLAY CONSOLIDATED SCHOOL DISTRICT,</b>	:	
	:	
Respondent.	:	

**BACKGROUND**

The Red Clay Consolidated School District ("District") is a public employer within the meaning of §1302(p) of the Public Employment Relations Act ("PERA"), 19 Del.C. Chapter 13 (1994).

The American Federation of State, County and Municipal Employees, Council 81, Local 218 ("AFSCME") is the exclusive representative of custodial employees of the District for purposes of collective bargaining (as defined in DOL Case 141), pursuant to §1302(j) of PERA.

AFSCME and the District are parties to a collective bargaining agreement with a term of July 1, 2007 – June 30, 2011.

On or about October 15, 2009, AFSCME filed an unfair labor practice charge with the Public Employment Relations Board ("PERB") alleging conduct by the District in violation of Section 1307(a)(2), (a)(3), (a)(5) and (a)(6) of the PERA, which provides:

- (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.
- (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.
- (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.
- (6) 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.

The Charge alleges that on or about July 1, 2009, the District “unilaterally reduced the Board’s supplement to the total compensation paid to bargaining unit employees by 2.5%.” *Charge ¶9*. AFSCME asserts that this unilateral change in compensation was “not based on any law or right given to the Board” and was “done intentionally and with reckless disregard for the confusion and anger this unilateral action would have on members of the bargaining unit.” *Charge ¶12*.

On October 30, 2009, the District filed its Answer to the Charge, essentially denying the material allegations contained therein. The District responded:

On or about July 1, 2009, the State advised the District that all employees would have their State portion of their compensation reduced by 2.5%. In order to compensate the employees the State directed the District to schedule five (5) unpaid days off for the bargaining unit which days were to be agreed between the District and the Union. *Answer ¶8*.

... On or before July 22, 2009, the District met with representatives of the Union to discuss scheduling the unpaid days off for the bargaining unit. The District and the Union agreed that on the following days employees would not work. Those days are as follows: November 29, 2009; December 23, 2009; February 1, 2009; June 14, 2010; and one day to be scheduled by the employee over winter or spring break. On these days on which employees do not work, they would not be paid either State or Local salary. Written notification of these no work days, signed by the District and Union, was sent to Secretary Lillian Lowery at the Department of Education. *Answer ¶9*.

The District also alleged New Matter in its Answer, including:

1. By operation of Article 16.1<sup>1</sup> of the 2007-2011 collective bargaining agreement, the Union has waived any obligation by the District to negotiate over any subject whether mandatory or permissive during the term of the Agreement.
2. The issue concerns “whether employees are entitled to be paid for time not worked”, which is a subject to the parties’ negotiated grievance and arbitration proceeding. Consequently, PERB should defer resolution of this issue to that process.
3. The District conferred with and the Union agreed to the days on which no work would be scheduled.
4. “At no time has the District paid employees the hourly wage rate set forth in the Agreement for hours not worked under the Collective Bargaining Agreement, except with respect to paid leave provided in [the Collective Bargaining Agreement].

The District moved the Charge be dismissed in its entirety, with prejudice.

On or about November 6, 2009, AFSCME filed its Response to New Matter in which it denied both the waiver and deferral arguments raised by the District. In response to the third affirmation, AFSCME responded:

It is admitted that the Board entered into the required negotiation (not consultation) over the identification as to how the extra days off were to be taken. The agreement that was reached by the parties (the days when the extra days off were to be taken) was submitted to the AFSCME Council 81 Local 218 membership for ratification and was ratified. The Board presented the written agreement, which it unilaterally changed by including the 2.5% reduction in salary. The Union has refused to sign or agree to the Board’s unilateral amendment of the agreement. The Board implemented the reduction in pay without notice or opportunity to negotiate or for that matter, it never even conferred with the Union regarding the reduction in pay. The action taken by the Board was willful and is an intentional effort to have the Union sign a document that did not contain the actual terms agreed upon by the parties.

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<sup>1</sup> 16.1 This Agreement incorporates the entire understanding of the parties on all matters which were or could have been the subject of negotiation. During the term of the Agreement, neither party shall be required to negotiate with respect to any such matter whether or not covered at the time this Agreement was executed; however, should the parties agree to discuss and conclude agreement on any issue(s) such agreement(s) shall be effected only by an instrument in writing duly executed by both parties with appropriate ratification and approval of the parties.

AFSCME also denies the District's fourth affirmation, citing §10.1, §10.2, and §11.1<sup>2</sup> of the parties Collective Bargaining Agreement and arguing that "the 5 days should be with pay unless there was a negotiated exception."

This Probable Cause Determination is based upon a review of the pleadings.

### **DISCUSSION**

The Rules and Regulations of the Delaware PERB require that upon completion of the pleadings in an unfair labor practice proceeding, a determination shall be issued as to whether those pleadings establish probable cause to believe the conduct or incidents alleged may have violated the Public Employment Relations Act, 19 Del.C. Chapter 13. *DE PERB Rule 5.6*. For the purpose of this review, factual disputes established by the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing what may prove to be a valid charge without the benefit of receiving evidence concerning that factual dispute. *Richard Flowers v. State of Delaware, Department of Transportation, Delaware Transit Corporation, Probable Cause Determination, ULP No. 04-10-453, V PERB 3179 (2004)*.

There is no dispute that wages are a mandatory subject of bargaining and that the District and AFSCME have negotiated a local wage rate (included in Appendix A to their

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<sup>2</sup> 10.1 The following are holidays with pay for custodial employees: Independence Day; Labor Day; General Election\*, Veteran's Day (as prescribed by law); Thanksgiving Day; Friday following Thanksgiving Day; Christmas Eve; Christmas Day; New Year's Eve; New Year's Day; Martin Luther King's Birthday; Presidents' Day; Good Friday; Memorial Day; Any day proclaimed by the Governor, including a State of Emergency, and approved by the Superintendent.

\* In non-election years, one additional holiday will be mutually agreed upon by the District and the Union before January 1 of that year.

10.2 Holidays set forth in 10:1 will follow approved school calendar each year; however, there shall be no fewer than thirteen (13) for the fiscal year.

11.1.1 Leaves of absence, including sick leave and absences for other reasons, shall be according to Delaware State Law. A summary of State Law is placed at the end of this Agreement as Appendix C.

collective bargaining agreement) which supplements the State-funded portion of bargaining unit employees' salaries.

AFSCME's allegation that the District unilaterally implemented a "2.5% reduction in total compensation" is denied by the District. The District asserts that it was directed by the State "to schedule five (5) unpaid days off for the bargaining unit which days were to be agreed between the District and the Union."

In order to determine whether the alleged unilateral change in compensation paid to bargaining unit members violated the cited sections of the PERA as asserted by AFSCME, a record must be established which includes facts on which argument can be made.

The District also asserts that the issue of "whether employees are entitled to be paid for time not worked" is subject to the negotiated grievance and arbitration procedure, and should therefore be deferred. The issue raised by the Charge, however, is whether the District unilaterally implemented a change in a mandatory subject of bargaining in violation of its statutory responsibilities.

PERB has adopted a discretionary deferral policy and defers consideration of an unfair labor practice charge to resolution through the contractual grievance procedure where there is unity in the contractual issue and the statutory claim. The District cites no specific contractual provision which it alleges controls the resolution of this Charge, nor does it allege that a grievance is pending or that an active grievance is pending arbitration. There is no statutory authority requiring the filing of a grievance as condition precedent to filing an unfair labor practice charge. *Poli v. Delaware Transit Corp.*, ULP 09-03-669, V PERB 4337, 4341, Probable Cause Determination (2009).

For these reasons, the District's request for deferral is denied.

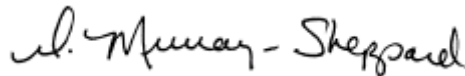
**DETERMINATION**

Considered in a light most favorable to the Charging Party, the pleadings constitute probable cause to believe that an unfair labor practice may have occurred.

Based on the pleadings, a hearing will be scheduled in order to establish a record on which it may be determined whether the District implemented a unilateral change in the negotiated local salary supplement for FY 2010, in violation of 19 Del.C.§1307(a)(2), (a)(3), (a)(5) and/or (a)(6), as alleged.

**IT IS SO ORDERED.**

DATE: March 25, 2010



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DEBORAH L. MURRAY-SHEPPARD  
Executive Director  
Del. Public Employment Relations Bd.