

PUBLIC EMPLOYMENT RELATIONS BOARD
FOR THE STATE OF DELAWARE

AMERICAN FEDERATION OF STATE, COUNTY	:	
AND MUNICIPAL EMPLOYEES, COUNCIL 81,	:	
LOCAL 218,	:	
	:	
Charging Party,	:	
	:	<u>ULP No. 09-10-709</u>
v.	:	
	:	Probable Cause Determination
BRANDYWINE SCHOOL DISTRICT,	:	
	:	
Respondent.	:	

BACKGROUND

The Brandywine 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 section 1302(j) of the Public Employment Relation Act, 19 Del.C. Chapter 13, ("PERA").

AFSCME and the District are parties to a collective bargaining agreement with a term of July 1, 2006 – June 30, 2009, which was in effect at all time relevant to this dispute.

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 21, 2009, the District filed its Answer to the Charge, essentially denying the material allegations contained therein. The District responded:

... [P]ursuant to Section 25(n)(vi) of House Bill No. 295, 145th General Assembly, [the District], in concurrence with certified bargaining representatives, including the Union, submitted a plan to the Secretary of Education, Director of Office of Management and Budget, and the Controller General providing for 5 fewer workdays.

... Section 9.5.1¹ of the [collective bargaining] Agreement provides that the hourly rate or employees is determined by dividing the employee's annual salary by 2,080 hours. Brandywine custodial employees are being paid for the hours worked at the hourly rate calculated pursuant to Section 9.5.1. Furthermore, Section 1335² of Title 14 specified that the custodial salary schedule set forth in 14 *Del.C.* §1311 was based on a 261 day work year. The revised State salary schedule effective July 1, 2009, was reduced to reflect 5 fewer workdays, and the Brandywine supplement to the State salary schedule was adjusted consistent with the mandate of House Bill 295 to reduce the number of work days to allow for savings in personnel costs.

... By way of further answer, Section 17.1.4³ of the [collective bargaining] Agreement provides that, if any part of the Agreement is in conflict with State law, State law shall prevail. Section 25(n)(vi) mandates that Brandywine, in concurrence with certified bargaining representatives for Brandywine employees, shall submit a plan to the State reducing the number of work days to allow for savings in personnel costs. [The District], in concurrence with the Union, complied with this mandate. *Answer ¶9, 10.*

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

¹ 9.5 Rate of Pay and Shift Differential

9.5.1 The Employee's hourly rate of pay shall be determined by dividing the Employee's annual salary by 2,080 hours. Part-time Employee's hourly rate shall be proportionally determined. Full-time Employees regularly assigned to work on a shift which begins at 11:00 a.m. or after, shall receive a differential of \$625 per year. Full-time Employees regularly assigned to work on a shift which begins at 10:00 p.m. or after, shall received a differential of \$700 per year. Part-time Employees whose hours begin at or after 3:00 p.m. or 11:00 p.m. shall be paid pro-rata of the differential established for such shifts. The above premium pay shall be calculated in the same manner as the hourly rate mentioned above.

² § 1335. Hours per day and per year per salary schedule.

The annual state salaries contained in this chapter are based upon the following:

	Hours per Day	Days per Year	Hours per Year
§ 1311	8.0 inclusive of 1/2 hour lunch	261	2,088.0

Absent an existing collective bargaining agreement to the contrary, district employees who work less than the specified time shall have their annual salary adjusted accordingly. Upon ratification of a new or extension of an existing collective bargaining agreement, the local district shall establish hours and days worked that are consistent with those specified above.

³ 17.1.4. It is understood and agreed that if any part of this Agreement is in conflict with mandatory Federal or State Laws, that such part shall be suspended and the appropriate mandatory provision shall prevail, and the remainder of this Agreement shall not be affected thereby.

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 C to their 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, in concurrence with the Union, submitted a plan providing for five fewer workdays in FY 2010, as required by HB 295, which states in relevant part,

Section 25 Amend the Fiscal Year 2010 Appropriations Act (House Bill 290 of the 145th General Assembly) by adding subsection (n) of Section 8 to read as follows:

- (n) For Fiscal Year 2010, it is the intent of the General Assembly and the Governor for all state agencies and the Judiciary, excluding Delaware State University and the University of Delaware to implement fair and balanced temporary plans, in which said plans allow for leave to approximate the savings in Personnel Costs resulting from the 2.5% reduction in salary, as defined in Section 8(c) of this Act. The Director of the Office of Management and Budget, with the concurrence of the Controller General, shall approve such plans; provided, however, that no such plan shall create any additional overtime burden on the State,

or result in staffing shortages. Such plans must also be equitably and consistently applied to all employees. Any approved plan shall not impact the salary reduction delineated in this Act; however, upon elimination of leave plans approved pursuant to this Section, the pay scales for all employees shall be restored to their Fiscal Year 2009 pay levels.

- (i) For all state agencies except Legislative, the Judiciary, Delaware Technical and Community College and school districts and charter schools, the respective Cabinet Secretary, Agency Head and/or Other Elected Official shall submit for approval a plan that provides for five (5) days of leave during Fiscal Year 2010 for all employees not currently covered by a collective bargaining agreement, subject to the same criteria outlined in this Section.
- (ii) Certified bargaining representatives for employees currently covered by and/or negotiating a collective bargaining agreement, other than those representing employees covered by paragraph (vi) below, shall submit for approval a plan that provides for five (5) days of leave during Fiscal Year 2010 for all such employees, subject to the same criteria outlined in this Section. The decision to approve or disapprove such a plan shall not constitute a violation of the collective bargaining law or be construed as a breach of any collective bargaining agreement, and the approval of any such plan shall constitute a waiver on the part of the certified bargaining representative and any covered employees for any claims arising out of the collective bargaining law or collective bargaining agreement in connection with Section 8(c) of the Fiscal Year 2010 Annual Appropriations Act.
- (iii) For employees of the General Assembly-House and the General Assembly-Senate, the Speaker of the House of Representatives and the President Pro-Tempore of the Senate shall submit for approval a plan that provides for five (5) days of leave during Fiscal Year 2010, subject to the same criteria outlined in this Section.
- (iv) The Chief Justice of the Delaware Supreme Court shall implement a plan for all Merit and Merit comparable employees of the Judiciary subject to same criteria outlined in this Section.
- (v) Delaware Technical and Community College shall implement a plan for all employees, including those employees covered under Salary Plans A, B and D, upon approval of the President. Any such plan approved by the Board of Trustees shall be subject to the same criteria outlined in this Section.

(vi) For school district employees compensated under 14 Del. C. §1305, §1308(a), §1311(a), §1322(a), §1322(c), and §1324(b), and any other pertinent employees compensated with state funding, the Superintendent of each respective school district shall be required to, in concurrence with certified bargaining representatives for school district employees currently covered by and or negotiating a collective bargaining unit, submit a plan to the Secretary of Education, Director of Office of Management and Budget and the Controller General for approval and implementation during the 2009-2010 school year. Said plan shall be subject to the same criteria outlined in this Section, and shall not reduce the number of hours and days of instructional time that were provided by each school district during the 2008-2009 school year. For purposes of implementation of each district plan, the Secretary of Education, Director of the Office of Management and Budget and the Controller General may, by unanimous agreement, waive provisions of the Delaware Code, other than those relating to instruction time, necessary to implement said plan.

The District asserts that HB 295 requires that the plan submitted to the Secretary of Education, Director of Management and Budget and the Controller General provide for five (5) fewer workdays in Fiscal Year 2010.⁴ Attached to the District's Answer was a letter from the District's Interim Superintendent, which was signed by representatives of all six bargaining units (including AFSCME LU 218's Acting Vice President, Tom Byrne), to which was attached a chart entitled "Brandywine School District House Bill 295 Plan". The portion of the chart relating to custodial employees specifies both the number of days and the dates on which bargaining unit employees will be on unpaid leave:

Contract Employee Group:	Custodial Employees
# Days:	5
Calendar Days:	9/28/09, 12/28/09, 12/29/09, 4/5/10, 4/6/10
Rationale:	District to be closed. No impact on instructional time. [<i>District Answer -Exhibit 1</i>]

⁴ FY 2010 – July 1, 2009 through June 30, 2010.

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 as to whether the District's action was required by HB 295, as it asserts.

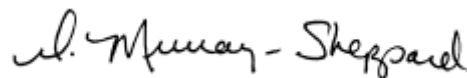
DETERMINATION

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: February 22, 2010



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