

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

AMERICAN FEDERATION OF STATE, COUNTY,	:	
& MUNICIPAL EMPLOYEES, COUNCIL 81, LOCAL	:	
247, LOCAL 516, LOCAL 640, LOCAL 837, LOCAL	:	
879, LOCAL 936, LOCAL1036, LOCAL 1443,	:	
LOCAL 1525, LOCAL 1832, LOCAL 2030, LOCAL	:	
2031, LOCAL 2072, LOCAL 2305, LOCAL 2362,	:	
LOCAL 3514,	:	
	:	
<b>Charging Parties,</b>	:	<b><u>ULP No. 09-07-693</u></b>
	:	
v.	:	
	:	
STATE OF DELAWARE DEPARTMENT OF HEALTH	:	
AND SOCIAL SERVICES, STATE OF DELAWARE	:	
DEPARTMENT OF CORRECTION, AND STATE	:	
OF DELAWARE DEPARTMENT OF TRANS-	:	
PORTATION,	:	
	:	
<b>Respondents.</b>	:	

**Appearances**  
*Perry F. Goldust, Esq. for AFSCME Council 81*  
*Aaron Shapiro, State Labor Relations & Employment Practices, for the State*

**BACKGROUND**

The State of Delaware (“State”) is a public employer within the meaning of §1302(p) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13 (1995). The State Departments of Health and Social Services, Corrections, and Transportation (“Departments”) are all cabinet departments of the State of Delaware.

The American Federation of State, County, & Municipal Employees (“AFSCME”) is an employee organization which admits public employees to membership and has as a purpose the representation of those employees in collective bargaining pursuant to 19

Del.C. §1302(i). Council 81 and its affiliated Locals enumerated in the caption of this Charge are certified exclusive bargaining representatives of State employees who work in the Departments of Health and Social Services, Corrections, and Transportation, within the meaning of 19 Del.C. 1302(j).

On or about July 15, 2009, AFSCME and its affiliated Locals filed an unfair labor practice charge alleging the State had violated 19 Del.C. §1307(a)(2), (3), (5), and (6):

- (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 in early July, 2009, without consultation with Council 81 or the affiliated Local Unions, each Department (DHSS, DOT and DOC) communicated directly with bargaining unit employees its intention to unilaterally change the method of computing overtime payments. The Charge alleges each Department:

- Unilaterally implemented a new method for calculating overtime which results in employees receiving overtime at time and one-half their regular hourly rate after working 40 hours in a work week instead of 37.5 hours. Hours worked only includes hours actually worked but does not include the hours paid for vacation time, sick time, holiday time, or other benefit time for purposes of calculating overtime, as it had prior to July, 2009.

- The announcement of the change being sent directly to bargaining unit members was intentionally done to circumvent Council 81 and the Local Unions for the purpose of creating confusion and distrust between the Union members and Council 81 and its Local Unions.
- The announcement of the change being sent directly to bargaining unit members was not based on any law or right given to either the authors of the individual agency memoranda or to the Secretary of the Department. The action was taken to intentionally mislead bargaining unit members and was done with reckless disregard for the confusion and anger the distribution of the knowingly false information would have on bargaining unit employees.

On or about July 27, 2009, the State filed its Answer to the Unfair Labor Practice Charge, denying all material allegations contained therein. The Answer also included New Matter in which the State alleges the Charge should be dismissed because:

- PERB does not have jurisdiction over the alleged unfair labor practice charge because the acts complained of in the Charge are within the exclusive authority of the Executive and Legislative Branches of government under constitutional, common and case law, as well as otherwise.
- The Charge fails to state a claim for which relief can be granted because improper unilateral changes must affected mandatorily negotiable subjects of bargaining under the PERA. “Pay for Overtime Service” is excluded from the scope of mandatory bargaining by Section 18 of the Fiscal Year 2010 Appropriate Act.
- The Charge fails to state a claim for which relief can be granted under §1307(a)(2) because AFSCME does not allege any conduct which tends to “dominate, interfere with or assist in the formation, existence or administration of any labor organization.”
- The Charge fails to state a claim for which relief can be granted under §1307(a)(3) because AFSCME does not allege any conduct which tends to “encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.”
- The Charge fails to state a claim for which relief can be granted under §1307(a)(5) because AFSCME does not allege any conduct which would support the conclusion that the State failed or refused to bargain collectively in good faith with the exclusive representative of represented employees.

- The Charge fails to state a claim for which relief can be granted under §1307(a)(6) because AFSCME does not allege any conduct which would support the allegation that the State failed or refused to comply with any provision of the PERA or with PERB rules.

On or about August 4, 2009, AFSCME filed its Response to New Matter denying all material allegations contained therein.

A Probable Cause Determination was issued on October 6, 2009, in which it was found the pleadings were insufficient to support a finding of probable cause to believe that there may have been a violation of 19 Del.C. §1307 (a)(3) and/or (a)(6). Those charges were, therefore dismissed. The pleadings were, however, found to provide a sufficient basis to believe that an unfair labor practice in violation of 19 Del.C. §1307(a)(2) and/or (a)(5) may have occurred.

A hearing was scheduled and convened on November 17, 2009, at which time the parties entered preliminary argument on the record and AFSCME's request that the Charge be held in abeyance pending its petition to the judiciary on the constitutional issues raised by the Charge was granted. On or about December 16, 2009, AFSCME requested processing of the Charge be reactivated. The parties entered into a factual stipulation and written argument on the legal issues raised was received from the parties. This decision results from the record thereby created by the parties.

### **FACTS**

By submission executed on March 9, 2010, the parties provided the following Factual Stipulations to the Public Employment Relations Board:

The Charging Parties and the Respondent hereby agree to conclude the factual record in this matter by submitting stipulations to the PERB in lieu of conducting a full evidentiary hearing. The stipulations are in addition to the existing record which is

comprised of the parties' pleadings, the Probable Cause Determination and the transcript from a hearing before PERB on November 17, 2009. The parties also agreed to proceed with the submission of written argument following acceptance of the stipulations by PERB and proposed a briefing schedule.

1. The employees alleged to be affected by the State's actions are "public employees" as defined by 19 Del.C §1302(o), and are "Merit Employees" as defined by 29 Del.C. §5903. They are represented for collective bargaining purposes by the Charging Parties which are "exclusive bargaining representatives" as defined by 19 Del.C.§1302(j), and all of which have Collective Bargaining Agreements ("CBA") with the State.

2. For the purpose of this Charge, the respective CBAs have, at all times material to this Charge, been in full force and effect. Each agreement defines a standard work week of 37.5 or 40 hours for the covered employees.

3. The three memoranda attached as exhibits to the Charge are true and correct copies of the memoranda distributed to bargaining unit employees in the respective Departments, on or about the dates identified therein. They were distributed without prior notice to the Charging Parties and were not sent in error.

4. Authorized work in excess of the defined work week is paid at the overtime premium rate of time and one half of the employees' effective hourly wage rate. Prior to July 1, 2009, the method for calculating overtime eligibility included paid leave as referenced in Merit Rule 4.13. Effective July 1, 2009, the overtime eligibility standards were amended to require Merit Employees to work at least 40 hours per week to qualify for the overtime rate, and that all hours must be hours actually worked. The amended overtime eligibility standards have

affected the amount of overtime compensation employees could earn subsequent to the change.

The three memorandum referenced in Paragraph 3 of the parties' stipulation were issued by the three named Departments. The Department of Transportation communication stated:

Pursuant to Section 8(j) of the FY10 Appropriations Act, overtime at time and one-half will no longer be paid after 37.5 hours a week but will be paid when an employee has actually worked over 40 hours a week. The time worked between 37.5 and 40 hours will be compensated at a straight time rate.

In addition, only time actually worked by the employee will be used in determining total hours worked per week for calculating overtime. "Actual hours worked" do not include any type of paid leave, including holidays."

These changes will be effective for the July 31, 2009 check date which includes time worked from 7/5/09 – 7/18/09. *Exhibit 1 to the Charge, July 2, 2009 e-mail to DOT merit employees.*

Identical language was included in Department of Correction memorandum dated July 6, 2009, which was provided to all DOC employees by the departmental Director of Human Resources and Development. *Exhibit 3 to the Charge.*

Exhibit 2 to the Charge is a Memorandum issued by Department of Health and Social Services, which is dated July 7, 2009, and was apparently authored by Human Resource Specialist II working in the Department's New Castle County Regional Office, which states in relevant part:

**1. Overtime Pay Policy Changes**

Overtime at time and one-half will no longer be paid after 37.5 hours a week but will now be paid when an employee has actually worked over 40 hours a week. The time worked between 37.5 – 40 hours will be compensated at a straight time rate. In addition, only time actually worked by the employee will be used in determining total hours worked per week for calculating overtime. Hours

worked for this purpose will not longer include any form of paid leave such as annual leave, sick leave, compassionate leave, holidays, jury duty, military leave. The new 40-hour threshold applies to overtime as well as the determination of Compensatory Time at time and one-half for employees in positions covered by the Fair Labor Standards Act (FLSA). **These changes are effective Sunday, July 5, 2009, which is the beginning of the next pay period of July 5<sup>th</sup> through July 18<sup>th</sup>...**

Attached to the DHSS memorandum was an e-mail of July 7, 2009, which provided examples for calculating overtime under the changed rules. The examples provided were authored by the Deputy Director for the Division of Social Services.

### **ISSUE**

WHETHER EITHER THE STATE AND/OR THE NAMED DEPARTMENTS FAILED TO BARGAIN GOOD FAITH IN VIOLATION OF 19 DEL.C. §1307(A)(5) AND/OR DOMINATED, INTERFERED WITH OR ASSISTED IN THE EXISTENCE OR ADMINISTRATION OF AFSCME AND THE LOCAL UNIONS IN VIOLATION OF 19 DEL.C. §1307(A)(2) IN CONNECTION WITH CHANGES TO THE CALCULATION AND ELIGIBILITY FOR PREMIUM OVERTIME COMPENSATION?

### **PRINCIPAL POSITIONS OF THE PARTIES**

#### **AFSCME:**

AFSCME argues overtime is a mandatory subject of bargaining. Consequently, the State does not have the unilateral right to make changes in overtime, because to do so is contrary to both the PERA and the State merit rules. It asserts such unilateral change would also constitute a violation of due process, a taking of property rights without due process and impairment of contract.

Relying on *State v. AFSCME Local 1726*<sup>1</sup> (“*Local 1726*”), AFSCME asserts that the duty to negotiate in good faith implies the employer will perform those acts within its power necessary to bring about performance of contractual obligations. It argues the Court’s finding in *Local 1726* that health care is a mandatory subject of bargaining (because it is a term or condition of employment) requires a similar finding the overtime eligibility and compensation are also mandatorily negotiable. “[The] statute enacted to reconcile statutory merit system provisions with statutory collective bargaining provisions did not limit the subjects includable in collective bargaining agreements entered into by the public employer to subjects specifically mentioned in statutes pertaining to merit system of personnel administration.”

AFSCME argues the State seeks to separate the Executive Branch from its constituent parts but asserts it had not provided support for this position with statutory references. The “State of Delaware” as defined in 29 Del.C. Chapter 59 includes “state agencies” which mean “any office, department, board, commission, committee, court, school district, board of education and all public bodies existing by virtue of an act of the General Assembly or of the Constitution of the State”, and includes cabinet secretaries and division directors. 29 Del.C. §5812.

It disputes the Office of Management and Budget (“OMB”) has been granted powers independent of the Governor. OMB is an agency of the Governor and has no greater powers than those the Governor has delegated to it. There is no evidence in this record that the Governor ordered OMB to nullify collective bargaining agreements, to exercise authority voiding a collective bargaining agreement, or to exempt any state agency from the PERA.

---

<sup>1</sup> *State v. AFSCME Local 1726*, 298 A.2d 362 (Del.Ch., 1972)



It asserts the State cannot hide behind an alleged separate identity of the Executive Branch. Neither the Governor nor the State nor the Department may hide behind a veil of administrative inaction when it has committed itself to terms and conditions of employment. The Governor is responsible for terms and conditions that are agreed upon with the unions. *State Troopers FOP Lodge #6 v. State*, 1996 WL 435432 (Del.Ch., 1996); *Local 1726*, Supra. If the subject of an unfair labor practice charge is mandatory subject of bargaining not yet included in a collective bargaining agreement, a unilateral change constitutes a *per se* violation of the duty to bargain in good faith.

AFSCME also asserts the State committed a *per se* violation of the PERA by announcing the changes in overtime eligibility and compensation directly to bargaining unit members. *Southern California Gas Co.*, 316 NLRB 979 (1995). It argues this action was “intended to undermine the effectiveness of the Union and to diminish the opinion that the bargaining unit members had in the Union.” It argues the NLRB standard should be adopted, finding the employer engages in direct dealing with employees in violation of the Act when (1) the employer communicates directly with union-represented employees; (2) the discussion is for the purpose of establishing or changing wages, hours and/or terms and conditions of employment or undercutting the role of the union in bargaining; and (3) such communication is made to the exclusion of the union.

Finally, in response to the State’s alternative argument that the union waived any right it had to negotiate concerning changes to overtime eligibility and compensation, AFSCME asserts federal NLRB precedent establishes that a finding of *fait accompli* will prevent a finding that a failure to request bargaining is a waiver of rights to bargain because there is no “retroactive” burden to demand negotiations after a *fait accompli*. *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1024-25 (2001); *Intersystems Design*

*Corp.*, 278 NLRB 759 (1986).

**State:**

The State argues there has not been a unilateral change to modify overtime eligibility standards because the General Assembly exercised its constitutional authority to pass a law that modified the Merit standards. The changes to overtime eligibility which are the subject of this charge were mandated by passage of the Fiscal Year 2010 Appropriations Act<sup>2</sup> which was enacted by the General Assembly on July 1, 2009. Subsection 8(j) specifically overrode the provisions of Merit Rule 4.

The scope of negotiability for public sector collective bargaining is created and circumscribed by statute. The General Assembly retains constitutional authority to modify all terms and conditions of employment at its discretion. Once a statutory change was made which dictated overtime eligibility standards, the Governor, by and through executive branch agencies, was constitutionally bound to implement the mandate of the FY 2010 Appropriations Act.

The State asserts AFSCME lacks authority to demand to bargain for overtime compensation because overtime payment constitutes compensation under the Merit Law, and is a prohibited subject of bargaining for State merit employees. Compensation is not within the scope of mandatory bargaining for any of the Charging Parties in this matter because they are not certified bargaining representatives of compensation bargaining units which have collective bargaining agreements with the State, pursuant to 19 Del.C. §1311A. Collective bargaining for State merit employees (other than compensation bargaining pursuant to §1311A) does not include bargaining for compensation, including

---

<sup>2</sup> HB 209, §8(j), July 1, 2009.

overtime compensation.

The State asserts Section 18 of the FY 2010 Appropriations Act specifically excludes bargaining over compensation. This provision states:

Notwithstanding any provisions of this Act or any provision of this Act or the Delaware Code to the contrary, no provision of Chapter 4.0 of the Merit Rules shall be considered compensation for the purposes of collective bargaining.

Merit Rule 4.12 establishes the rate of pay, eligibility and availability standards for the payment of overtime premium wages. Section 18 above expressly limited the authority of certified compensation bargaining unit representatives to bargain overtime compensation.

Alternatively, the State argues AFSCME waived any right to bargain because it failed to request bargaining. It asserts that the NLRB and federal courts have found that protesting a change by filing an unfair labor practice charge is not a substitute for requesting to bargain.

Finally, the State asserts there is no basis for AFSCME's charge that it "knowingly communicated false information" to bargaining unit employees to "intentionally circumvent AFSCME for the purpose of creating confusion and distrust" among the employees and their representatives. The FY 2010 Appropriations Act (including 8(j)) was a matter of public record and a binding public law which the State was obligated to implement.

## **DISCUSSION**

Section 8(j) of the FY 2010 Appropriations Act (HB 290) states, in relevant part:

(j) OVERTIME.

(1) Merit Rule Chapter 4 notwithstanding:

(i) All overtime paid at time and half will not commence until

an employee has actually worked 40 hours that week.

(ii) Hours worked includes only hours actually worked by the employee.

To the extent or where an employee is covered by a collective bargaining agreement pursuant to 19 Del. C. § 1311A, the terms and conditions in said agreement shall supersede this Subsection.

The State of Delaware Merit Rules<sup>3</sup>, which were adopted pursuant to 29 Del.C. §5914, state at Rule 4.13, Pay for Overtime Service:

- 4.13.1 FLSA-covered employees with a standard work week of 37.5 hours who are authorized to perform overtime service shall be paid at 1.5 times their regular rate for each hour worked after 37.5 hours per week. FLSA-covered employees with a standard work week of 40 hours who are authorized to perform overtime service shall be paid at 1.5 times their regular rate for each hour worked after 40 hours. The form of pay, time off or cash, is at agency discretion and shall be agreed to in advance. Only hours worked over 40 hours per week are covered by the overtime provisions of the FLSA. The regular rate of pay shall include all payments (e.g., shift differential, stand-by duty pay and hazardous duty pay). Agencies may assign reasonable periods of overtime to meet operational needs.
- 4.13.2 Any authorized service in excess of the standard work week or work schedule allowed by the FLSA shall be overtime service. Employees working flexible schedules shall be paid for overtime service in accordance with that schedule and not the standard schedule of 37.5 or 40 hours per week.
- 4.13.3 A workweek is a period of 168 hours during 7 consecutive 24-hour periods.
- 4.13.4 Hours worked includes paid leave plus hours actually worked by the employee.
- 4.13.5 Employees in FLSA exempted classes authorized to work beyond the standard work week may be paid with equal time off.
- 4.13.6 In unusual circumstances of overtime service by employees normally not eligible for overtime pay in cash, the agency may recommend, for approval by the Director that such employees be paid at straight time rates.
- 4.13.7 Merit compensatory time shall be used within 180 calendar days of accrual or be forfeited. Under extenuating circumstances, the Director may approve exceptions to this rule. FLSA compensatory time may be accrued up to 240 hours of compensatory time-off

---

<sup>3</sup> Adopted by Merit Employee Relations Board January 01, 2004—Last Update 07/31/09. Overtime rules were set forth in Rule 5.1310, Overtime Services, in the predecessor Rules, which expired on December 31, 2003.

unless the employee is engaged in work in a public safety activity, an emergency response activity, or a seasonal activity in which case the employee may accrue not more than 480 hours of compensatory time-off. Hours in excess of the 240 hours FLSA maximum shall be paid overtime.

- 4.13.8 Agencies may request the Director review the prevailing overtime rates for one or more FLSA exempted classes where external market pressures including excessive turnover rates, recruitment problems and high vacancy rates necessitate that such employees be paid at the rate of 1.5 times the regular rate of pay for any authorized overtime service.

Subsequent to the passage of the FY 2010 Appropriations Act on July 1, 2009, the three Departments named in this Charge issued memorandum to their employees advising them that overtime premium wages would only be paid after an employee had actually worked forty hours in a standard work week. The memoranda also advised that the time between 37.5 and 40 hours (which had previously been compensated at time and a half under Merit Rule 4.13) would now be compensated at the straight-time wage rate.

AFSCME asserts the State violated its duty to bargain in good faith by unilaterally altering the eligibility and the rate of compensation for overtime hours worked by State employees. It bases its allegations of bad faith predominately on Vice Chancellor Short's decision in *Local 1726* (Supra.), arguing the decision in that case stands for the proposition that 29 Del.C. Chapter 59 "does not limit the permissible scope of collective bargaining to matters mentioned in that chapter, but rather provides a set of rules to resolve any conflicting provisions that may arise between [personnel] commission rules and negotiated agreements." *Local 1726*, Supra. p. 365.

Collective bargaining agreements are not ordinary contracts. And this is especially true in the case of those entered into by public employees. As an organic document, a collective bargaining agreement must be considered and interpreted in the broader context in which it arises. The most significant part of that context here is the fact that our constitution forbids the expenditure of public funds without appropriation, and the power to appropriate

cannot be delegated. Although the statute authorizes and requires public employers to engage in collective bargaining, the legislature could not in so doing go beyond or waive these constitutional limits upon the power to spend. [citations omitted]

While finding that health insurance programs for employees and members of their families was within the scope of permissible bargaining in that case, Vice Chancellor Short also held, "... at least one limitation upon the collective bargaining statute, and upon any agreement entered into thereunder, is that the State or any of its agencies cannot be bound to the expenditure of funds which have not been properly appropriated. This condition would pertain whether or not the parties formally recognized it by including it in the negotiated agreement." *Local 1726*, supra. p. 367.

Chancery Court's decision in *Local 1726*, however, was refined in a number of subsequent decisions which examined the relationship between the State merit statute and the rules adopted thereunder, and the State's collective bargaining obligations as a public employer. In *Laborers' International Union Local 1029 v. State, Dept. of Health & Social Services*, 310 A.2d 664 (Del.Ch. 1973), aff'd Del.Supr., 314 A.2d 919 (1974), the Court held:

Having studied the statutes and the available legislative history, I am of the opinion that where there is uncertainty as to areas where the General Assembly has indicated a clear intention to deny collective bargaining, any doubt should be resolved in favor of the Merit System. The Merit System has been instituted to create a uniformity of protection and treatment of public employees. The sections listed in section 5938(c) are those in which uniformity of treatment would seem most essential if the system is to have meaning, particularly those which attempt to deal with classification based on ability, equal compensation for commensurate ability and responsibility, promotions and time off from work with pay. If each agency is to bargain with the bargaining representative of its employees on such things as the amount of pay for holidays and double shifts worked, the amount of authorized leave with pay, the use of accumulated sick leave as additional vacation with pay, etc., then the obvious result will be to

have employees of the same classification receiving different compensation and different leave arrangements for different purposes based solely upon the agency they work for and the success of their collective bargaining representatives. Section 5938(c) seems designed to prevent this while the remainder of the statute allows for bargaining on various other matters. I am therefore reluctant to expand the scope of collective bargaining so as to effectively encroach upon rules adopted pursuant to the statutes protected by Section 5938(c) without clear legislative direction to do so. *Laborers' International Union Local 1029 v. State, Dept. of Health & Social Services*, Del.Ch., 310 A.2d 664 (1973), *aff'd* Del.Supr., 314 A.2d 919 (1974).

In specifically considering whether 29 Del.C. §5916 provided authorization for Merit Rule 5.0 (Pay Plan Policies) and Merit Rule 6.0 (Employee Benefits), the Court found:

... the statute directs the [Personnel] Commission to enact such rules as may be necessary to provide a pay plan which may then be submitted for appropriations and approval. True, the pay plan to be submitted for approval is limited to a wage and salary schedule. However, it would seem that in order to arrive at a realistic pay plan there would have to be certain understandings and limitations as to such wage related matters as extra duty, pay, etc. Section 5916 does not limit the Commission to the adoption of a pay plan, per se, but rather authorizes it to adopt such rules as may be necessary to provide for the overall pay plan. I am therefore of the opinion that although Rule 6.0312 is not a salary or wage scale as such, it could reasonably have been adopted pursuant to Section 5916 as part of the general rule-making power incident to the formulation of a pay plan. Consequently, as provided by Section 5938(c), the Facility cannot be required to negotiate over the Union's premium pay proposal. *Laborers'*, *supra.*, p. 668.

In agreeing that the Merit System does not “categorically exclude collective bargaining of fringe benefits”, the Superior Court held the decision in *State of Delaware v. AFSME v. Local 1726*<sup>4</sup> was modified by the *Laborers'* decision, noting “the Court decided that §5916 did more than merely authorize a wage and salary schedule. The statute was construed to authorize a ‘general rule-making power incident to the

---

<sup>4</sup> 298 A.2d 362 (Del. Ch., 1972) (“AFSCME”)

formulation of a pay plan.” *Delaware Nurses Association v. State Dept. of Health & Social Services* (Del.Super, WL 484508 (1984)) (“DNA”). The *DNA* decision continued to set forth the standard for determining which fringe benefits were excluded from the scope of collective bargaining,

...merely because a fringe benefit has economic value does not automatically preclude collective bargaining. Rather, the analysis must be somewhat broader. The benefit must have economic value and be such that uniformity with regard to the distribution of the benefit be essential.

The Court concludes that both of the fringe benefits sought to be collectively bargained by the plaintiff have economic value; however, only the tuition assistance program is of a nature requiring mandatory statewide uniformity of distribution. ... It is the Court’s opinion that although malpractice insurance has economic value, the type and coverage required by this particular type of employee may well be unique with respect to other similarly classified employees in different occupations. Consequently, uniformity of treatment is not essential.

Chancery Court further clarified the impact of the *Local 1726* decision in *Delaware State Troopers Lodge, FOP Lodge 6 v. State*, 1984 WL 8217 (Del.Ch. 1984) on the State’s obligation to bargain in good faith:

*Local 1726* requires a State agency to do all those things contemplated and to perform all acts within its power that are ‘necessary’ to bring about the performance of its undertakings under a collective bargaining agreement with its employees. 298 A.2d 368. In *Local 1726* the dereliction of the State agency was its failure to designate monies needed for health insurance coverage which it was committed to provide under the collective bargaining agreement as a ‘priority’ item in the agency’s budget request so as to necessarily cause that expense to be included by the Governor in the budget proposed by him to the General Assembly. It was found to be within the power of the State agency to do this so as to assure that its request for funds from the State treasury for that purpose would be considered by the General Assembly, and it was found necessary for the agency to do so since it had undertaken the obligation to attempt to obtain funds for this purpose under the agreement. It was in that context that the Vice Chancellor found that the agency had failed to take all steps within its power to see



that the obligation of the contract was funded by the General Assembly.

Whether the passage of Section 8(j) violates the 29 Del.C. Chapter 29 is not subject to resolution by the PERB, which jurisdiction is confined to administration of the State's public sector collective bargaining laws. The General Assembly entrusted to the Merit Employee Relations Board jurisdiction to resolve issues concerning application and interpretation of the State merit law, 29 Del.C. Chapter 59.

PERB, however, does have jurisdiction and responsibility to interpret and apply the provisions of the PERA and in this case, to determine whether the State, through its named Departments, violated the statute as alleged when it advised employees of the changes to overtime compensation and effectuated the changes set forth in §8(j) of the FY 2010 Appropriations Act.

AFSCME's argument in the case *sub judice* is more nuanced than asserting the §8(j) violates a provision of any or many collective bargaining agreements. Rather AFSCME asserts compensation is mandatory subject of bargaining, overtime compensation is an issue concerning or related to compensation, and that Merit Rule 4 establishes the *status quo* as it relates to overtime compensation. PERB has consistently held that where a public employer unilaterally alters the status quo of a mandatory subject of bargaining, it commits a *per se* violation of its duty to bargain in good faith.

19 Del.C. 1313(e) states, "No collective bargaining agreement shall be valid or enforceable if its implementation would be inconsistent with any statutory limitation on the public employer's funds, spending or budget, or would otherwise be contrary to law." The passage the Fiscal Year 2010 Appropriations Act limits the conditions for payment of authorized overtime compensation. The language of §8(j) is clear and unequivocally establishes the conditions which must be met for employees to be eligible for overtime

compensation (i.e., the employee must have actually worked 40 hours during the work week) and the rate at which eligible employees would be compensated for hours worked in excess of 40 during the work week. Consequently, any collectively bargained agreement<sup>5</sup> which is contrary to the provisions of §8(j) is void and unenforceable, as it is inconsistent with a statutory limitation on the employer's spending and is, therefore, contrary to law.

This determination is consistent with PERB's decision in *Appoquinimink Education Assn v. Bd. of Education*, ULP 1-3-84-3-2A, I PERB 35 (1984):

§4013(e)<sup>6</sup> of the Delaware statute precludes the validity and enforceability of contractual provisions which are inconsistent with the designated statutory limitations on or which would otherwise be contrary to law, and therefore establishes illegal subjects of bargaining.. If such subjects are, in fact, bargained they are invalid and unenforceable. For example, 14 Del.C. §1023 mandates the number of days required in the school year to be not less than 180. The parties are not free to alter this statutory mandate through the collective bargaining process because they do not have authority to do so, nor are they free to bargain over matters determined to be statutorily reserved to the "exclusive prerogative of the public school employer". In either case to do so would be a clear violation of §4013(e). Statutory prohibitions to be effective must be "explicit and definitive". *Pa.L.R.B. v. State College Area School District*, (Supra.); *Huntington Board of Education of Union Free School District v. Huntington Association of Teachers*, 282 N.E. 2d 109, 112, (1972); *Danville Board of School Directors v. Fairfield, Vt.Supr.*, 35 A.2d 473 (1974). *Appoquinimink*, Supra. p. 44.

Parties are precluded from agreeing to ignore such an explicit and definitive statutory prohibition; any contractual provision to the contrary would be invalid and

---

<sup>5</sup> Section 8(j) specifically provides that only terms and conditions of employment included in a collective bargaining agreement reached pursuant to 19 Del.C. §1311A would supersede this portion of the Appropriations Act. It is undisputed that there were no such agreements in existence in July, 2009, or at any point to date thereafter through the date of this decision.

<sup>6</sup> Prior Delaware PERB rulings decided under the Public School Employment Relations Act, 14 Del.C. Chapter 40 (1982) and/or the Police Officers' and Firefighters' Employment Relations Act, 19 Del.C. Chapter 16 (1986), are controlling to the extent that the relevant provisions of those statutes are identical to those of the Public Employment Relations Act, 19 Del.C. Chapter 13. *AFSCME v. Del.DOT*, ULP 95-01-111, II PERB 1279 (1995). 14 Del.C. §4013(e) is identical to 19 Del.C. §1313(e).

unenforceable. *Kent Vo-Tech Teachers Association and Kent Vo-Tech School District*, DS No. 93-06-084, II PERB 877, 880 (1993).

Having determined that §8(j) of the FY 2010 Appropriations Act voided any collectively bargained provisions to the contrary and further precluded bargaining on this topic for State employees except under §1311A, AFSCME's position must fail.

Similarly, AFSCME's allegation that the State violated of 19 Del.C. §1307(a)(2) by communicating directly with bargaining unit members and circumventing the union is also without merit. AFSCME's reliance on the NLRB's decision in *Southern California Gas Co.*<sup>7</sup> is misplaced. The NLRB states in that decision:

In order to prove such a violation, it must be shown that the Respondent [Employer] is communicating with its represented employees and that the discussion is for the purpose of establishing or changing wages, hours and terms of conditions of employment within the meaning of Section 8(d) or undercutting the Union's offer to establish or change them, and finally, such communication must be to the exclusion of the Union. {citing *Obie Pacific, 196 NLRB 458,459 (1972)*}.<sup>8</sup>

Having determined that §8(j) removed from the legal scope of bargaining overtime eligibility and computation for the bargaining units at issue in this case, there is no basis for concluding that the State impermissibly communicated directly with the employees or that it otherwise violated 19 Del.C. §1307 (a)(2), as alleged.

### **CONCLUSIONS OF LAW**

1. The State of Delaware is a public employer within the meaning of 19 Del.C. §1302(p). The Department of Health and Social Services, the Department of

---

<sup>7</sup> 316 NLRB 979 (1995)

<sup>8</sup> *Southern California Gas Company and Utility Workers Union of America, AFL-CIO, Local 132*, 316 NLRB 979, 982 (1995).

Correction and the Department of Transportation are agencies of the State of Delaware.

2. The American Federation of State, County, & Municipal Employees, Council 81, AFL-CIO, is an employee organization which admits public employees to membership and has as a purpose the representation of those employees in collective bargaining pursuant to 19 Del.C. §1302(i). Through its affiliated Locals named in the caption of this Charge, AFSCME is the certified exclusive bargaining representative of State merit employees in bargaining units established pursuant to 19 Del.C. §1310 for purposes of bargaining “terms and conditions” agreements.

3. The State and AFSCME are parties to a current collective bargaining agreement for the units referenced above. These collective bargaining agreements were not reached pursuant to 19 Del.C. §1311A.

4. On or about July 1, 2009, the General Assembly of the State of Delaware passed the FY 2010 Appropriations Act, including §8(j) which appropriated funding for overtime compensation for State employees only when “an employee has actually worked 40 hours that week”, clarifying that “hours worked includes only hours actually worked by the employee.”

5. Within a week of the passage of the §8(j) of the FY 2010 Appropriations Act., memoranda were issued by the three Departments advising bargaining unit employees that overtime at time and a half would no longer be paid after 37.5 hours, and employees would only receive overtime premium wages only after they had actually worked forty hours in the work week.

6. 19 Del.C. §1313(e) establishes illegal subjects of bargaining. The language of §8(j) of the FY 2010 Appropriations Act clearly and unequivocally establishes the conditions which must be met for employees to be eligible for overtime compensation.

7. Any provision of a collectively bargained agreement to the contrary would be void and unenforceable in light of the clear statutory language of §8(j) as it would stand in violation of 19 Del.C. §1313(e).

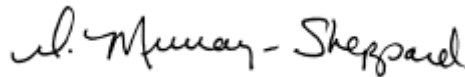
8. The State did not violate its duty to bargain in good faith or 19 Del.C. §1307(a)(5) when it implemented changes to the computation and eligibility of overtime premiums based on §8(j) of the FY 2010 Appropriations Act.

9. The State did not violate 19 Del.C. §1307 (a)(2) when it communicated with bargaining unit employees concerning the changes to overtime eligibility and compensation mandated by §8(j) of the FY 2010 Appropriations Act.

**WHEREFORE, THE CHARGE IS DISMISSED IN ITS ENTIRETY.**

**IT IS SO ORDERED.**

DATE: February 22, 2011



---

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