

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

<b>FRATERNAL ORDER OF POLICE, PROBATION AND PAROLE LODGE 10,</b>	:	
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<b>Charging Party,</b>	:	<b><u>ULP No. 09-08-698</u></b>
	:	
<b>v.</b>	:	<b>DECISION ON THE MERITS</b>
	:	
<b>STATE OF DELAWARE DEPARTMENT OF CORRECTION,</b>	:	
	:	
	:	
<b>Respondents.</b>	:	

**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 Department of Correction (“DOC”) is an agency of the State of Delaware.

Fraternal Order of Police, Lodge 10, (“FOP”) 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). The FOP is the certified exclusive bargaining representative of a bargaining unit of Probation/Parole Officers who work in the Department of Correction, Bureau of Community Correction as defined in DOL Case 165, within the meaning of 19 Del.C. 1302(j).

The FOP and DOC are parties to a collective bargaining agreement which was in effect at all times relevant to this Charge. That agreement has a term of January 1, 2007, through December 31, 2009.

The State denies (in its Answer to the Charge) the FOP is part of a compensation

bargaining coalition under 19 Del.C. §1311A, as PERB has made no determination or certified a bargaining coalition of Merit Employee Bargaining Unit 9, as required by §1311A(b).

On or about August 4, 2009, the FOP filed an unfair labor practice charge alleging the State had violated 19 Del.C. §1307(a) (5) and (6), which provide:

- (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
  - (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 on or about July 1, 2009, “DOC unilaterally announced and implemented a new method of calculating overtime, whereby employees would only receive overtime paid at time and one-half their regular hourly rate after working 40 hours in a week, and hours worked would only include hours actually worked, and not vacation time, sick time, holiday time, or other benefit time.” *Charge ¶6*. The FOP alleges that by failing or refusing to bargain over these changes in a mandatory subject of bargaining, it has committed an unfair labor practice in violation of 19 Del.C. §1307(a)(5) and (a)(6).

On or about August 11, 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)(5) because the FOP 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 because the FOP is not party to a compensation agreement under 19 Del.C. §1311A. The FOP represents a bargaining unit of merit employees for whom payment for overtime is not within the scope of bargaining.
- The Charge fails to state a claim for which relief can be granted under §1307(a)(6) because the FOP 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 26, 2009, the FOP filed its Response to New Matter denying all material allegations contained therein. The FOP also alleged in its Response that 29 Del.C. §5914 explicitly sets forth the manner in which the State Merit Rules are to be changed:

The Director shall prepare and submit to the [Merit Employee Relations] Board proposed rules governing the classified service. The rules shall be reviewed by the Board at a public hearing held following the public notice. The rules, as proposed by the Director, shall become final upon completion of the public hearing, unless rejected by a majority of members appointed to the Board.

A Probable Cause Determination was issued on December 15, 2009, finding the pleadings provide a sufficient basis for finding probable cause to believe that an unfair labor practice in violations of 19 Del.C. §1307(a)(5) and/or (a)(6) may have occurred. That Determination also concluded PERB had exclusive authority under 19 Del.C. §1301 to administer the unfair labor practice provisions of the PERA, consistent with the

statutory mandates of §1308 of the Act.

On or about February 13, 2010, the parties submitted a partial stipulation of facts to PERB. A hearing was scheduled and convened on February 23, 2010, at which time the parties entered exhibits into the record and agreed upon a briefing schedule. The State also presented its opening argument at the hearing.

Written argument on the legal issues raised was subsequently received from the parties. Following the receipt of written argument, the FOP moved to include a May 2, 2009 Government Performance Review Report (which it referenced in its brief) into the record. Based upon PERB Rule 7.1,<sup>1</sup> the document was admitted into the record, over the State's objection, in a letter opinion which stated:

There is no merit to the State's argument that including the Report in the record will result in "undue burdens and necessarily delay the process." The circumstances leading to the filing of FOP Lodge 10's Motion are unique in that the issue which led to submission of the Report was initially introduced by the State in its post-hearing brief. The record in this case was not developed through a hearing process, but consists of a limited stipulation establishing the relationship of and between the parties. The purpose of the unfair labor practice procedure is to render an informed decision. Including the Report in the record at this point in the process imposes no irreparable harm upon the State.

This decision results from the record thereby created.

### **FACTS**

By submission executed on February 19, 2010, the parties provided the following Factual Stipulations to the Public Employment Relations Board:

1. Fraternal Order of Police Lodge #10 ("FOP Lodge #10") is an employee

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<sup>1</sup> 7.1 Hearings Generally

(f) The Hearing Officer shall have full authority to control the conduct of the hearing, including authority to admit or exclude evidence, ... rule upon motions and objections, and determine the order in which evidence shall be presented. The Hearing Officer in conducting a hearing shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure.

organization within the meaning of 19 Del.C.§13-2(j) (paragraph 1 of Charge and Answer).

2. The State of Delaware, Department of Correction (“the State”) is a public employer within the meaning of 19 Del.C. §1302(p) (paragraph 3 of the Charge and Answer).
3. FOP #10 and the State are parties to a Collective Bargaining Agreement, a copy of which is attached hereto and incorporated herein as Exhibit A, for the three year period of January 1, 2007 through December 31, 2009. (paragraph 5 of the Charge and Answer).

Following the submission of the above cited partial Stipulation of Facts, a hearing was convened during which the parties jointly entered the following documents in the record:

- Collective Bargaining Agreement between Fraternal Order of Police Probation and Parole Lodge #10 and State of Delaware, Department of Correction, Bureau of Community Correction, Division of Probation and Parole, effective January 1, 2007 through December 30, 2009. *Joint Exhibit 1*
- Email of July 6, 2009, authored by the DOC Director of Human Resources and Development, sent to the “DOC\_MailList”, with a subject captioned “Dept. News: Budget information on overtime, short term disability.” *Joint Exhibit 2*
- House Bill 290, “An Act Making Appropriations for the Expense of the State Government for the Fiscal Year ending June 30, 2010; Specifying Certain Procedures, Conditions and Limitations for the Expenditure of Such Funds; and Amending Certain Pertinent Statutory Provisions” *Joint Exhibit 3*
- State of Delaware Merit Rules (Adopted by Merit Employee Relations Board January 1, 2004 – Last Updated July 31, 2009) *Joint Exhibit 4*
- Rules for Merit System of Personnel Administration (effective July 1, 1968) *Joint Exhibit 5*

The State also entered into the record a copy of the decision in *Laborer's International Union of North America, Local 1029 v. State of Delaware, Department of Health and Social Services*, 310 A.2d 664 (Del.Chan., 1973). *State Exhibit 1*

The FOP entered into the record a copy of the "State of Delaware Government Performance Review: Preliminary GPR Report to Governor Jack A. Markell (May 2009)". *FOP Exhibit 1*

The July 6, 2009 e-mail (admitted as Joint Exhibit 2) reads, in relevant part:

Department of Correction Employees:

As you know, the FY 2010 Budget Act contains several changes to State employees' pay and benefits. In the coming weeks, we will provide detailed information relative to changes that effect Department of Correction employees.

The first change is that all employees must be aware of involves the calculation of overtime pay. We received the following information from OMB:

- Pursuant to Section 8 (j) of the FY 10 Budget Act, 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.
- 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 no longer include any form of paid leave (time that the State pays for but during which the employee does no work) such as annual leave, sick leave, compassionate leave, holidays, jury duty, military leave.

... To reiterate, we will continue to provide you with updated information as we receive it.

The parties' 2007- 2009 collective bargaining agreement states, in relevant part:

10.2 The standard work week for all full-time employees shall be 40 hours Monday through Friday. The standard work day shall be 8:00 a.m. to 5:00 p.m., including a one-hour lunch break...

10.6 The State agrees that overtime shall be divided and rotated as equally as practicable by employees' class title and reasonably designated overtime work location among those employees who are qualified to perform the work and who have expressed a willingness to work overtime.

10.6.1 Toward this end, while the State shall determine overtime availability, the State agrees to permit the Lodge to establish and maintain an overtime call list for each county for each pay cycle within 60 days of the execution of this Agreement.

10.6.2 The State also agrees to permit the Lodge to: (i) determine the distribution of overtime; (ii) establish criteria for the placement of non-probationary employees on the overtime call list; and (iii) establish the process for calling employees on the list, e.g. by seniority, from the last name called, etc. *Joint Exhibit 1*

### **ISSUE**

WHETHER EITHER THE STATE AND/OR THE DEPARTMENT OF CORRECTION FAILED TO BARGAIN IN GOOD FAITH IN VIOLATION OF 19 DEL.C. §1307(A)(5) AND/OR REFUSED OR FAILED TO COMPLY WITH ANY PROVISION OF THE STATUTE OR WITH RULES AND REGULATIONS ESTABLISHED BY THE PERB IN VIOLATION OF 19 DEL.C. §1307(A)(6).?

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

#### **FOP Lodge 10:**

The FOP argues the State committed a *per se* violation of its duty to bargain in good faith when it announced and implemented a new method of calculating overtime for State employees. It asserts overtime is a matter "concerning or related to wages, salaries... and working conditions", and is, therefore, a mandatory subject of bargaining as defined by 19 Del.C. §1302(t).

Relying upon application of similar statutory language by Chancery Court in *State v. AFSCME Local 1726* (“Local 1726”),<sup>2</sup> the FOP argues it is established law in Delaware that “wages... embraces within its meaning ‘direct and immediate economic benefits flowing from the employment relationship.’” Further Delaware Courts have held there is no categorical exclusive of fringe benefit bargaining from the scope of permissible bargaining for State employees. In determining whether an issue is subject to bargaining, the analysis should focus on whether the benefit has economic value and whether uniformity with regard to the distribution of that benefit is essential to maintain a merit system of personnel administration. *Delaware Nurses Association v. State Dept. of Health & Social Services* (Del.Super, WL 484508 (1984)) (“DNA”). The FOP also cites numerous cases from other states which held that overtime is a mandatory subject of bargaining.

The FOP rejects the State’s argument that the scope of bargaining for this bargaining unit is limited because the FOP is not a certified bargaining representative with authority to bargain compensation under 19 Del.C. §1311A. The FOP argues “nothing set forth in §1311A(b)(3) and/or Senate Bill 36 vitiated existing employee organizations and/or their collective bargaining agreements.”

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 a mandatory subject of bargaining not yet included in a collective bargaining agreement, a

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

unilateral change constitutes a *per se* violation of the duty to bargain in good faith.

The FOP asserts the May 2009 Preliminary Government Performance Review Report to Governor Jack Markell (“GPR”) clearly establishes that any modification to Merit Rule 4.13 was initiated by the Executive Branch was not simply the exercise of authority by the General Assembly to modify that merit rules. It argues the Executive Branch, in fact, planned and initiated the change in overtime calculations. Specifically, the FOP points to the GPR’s recommendation for FY 2010 to “Align with Fair Labor Standards Act (FLSA) Overtime Policy”, found on page 13 of the report, which states:

The federal Fair Labor Standards Act (FLSA) requires payment of time and one-half for non-exempt employees working over 40 hours per week. The State’s standard work week is 37.5 hours (except those employees on a 40 hour standard) and many of those employees are paid overtime after 37.5 hours rather than at the 40-hour standard.

The statewide cost of overtime payments was approximately \$40 million in FY 2008. For employees on the 37.5 hour standard, overtime payments totaled \$17 million. One-third of this amount of [*sic*] \$5.6 million is the amount of additional compensation that employees received over and above straight time. A sampling of 200 employees found that approximately 60% of all overtime hours are worked between 37.5 and 40 hours. Assuming 60% is a reasonable estimate for all state employees, using the federal 40-hour standard for overtime payment for all state employees and paying only straight time between 37.5 and 40 hours in a week would save the State approximately \$3.3 million across all funds.

The implementation of this recommendation requires a change in merit rule 4.13.1 which requires time and one-half payment after 37.5 hours for employees with that schedule and merit rule 4.13.8, which permits the payment of time and one-half after 37.5 hours for nurses. The change could be included in epilogue language and take effect in FY 2010. Approximately 80% of the affected employees are covered by collective bargaining agreements; however, a change in statute would take precedent over terms of those agreements. *FOP Exhibit 1, p. 13.*

The FOP argues the State Merit law specifically acknowledges the right of State merit employees to organize in the purpose statement of that statute:

The general purpose of this chapter is to establish for this State a

system of personnel administration based on merit principles and scientific methods governing the employees of the State in the classified service consistent with the right of public employees to organize under Chapter 13 of Title 19. 29 Del.C. §5902. (emphasis added)

The legislature provided for unions to have the right to bargain collectively over terms and conditions of employment. 29 Del.C §5938. The Merit Employee Relations Board was charged with adopting rules for the implementation of the Merit law, and the rules adopted or amended by MERB were not applicable to any merit employee represented by an exclusive bargaining representative to the extent that the subject of the rule was covered in whole or in part by a collective bargaining agreement under the PERA. The FOP concludes changes to the Merit Rules are within the exclusive purview of the MERB, not the General Assembly.

The FOP argues 19 Del.C §1305<sup>3</sup> reserves to public employers the right to decline to negotiate on matters of inherent managerial policy, including the “overall budget.” This provision does not prohibit bargaining over the constituent parts of that budget, including overtime compensation. The FOP cites numerous decisions under the National Labor Relations Act to support its contention that overtime compensation is a mandatory subject of bargaining. Because Delaware Courts have held that where “Delaware’s labor laws are similar to those that arise under the [federal law], Delaware could be expected to consider and, in most likelihood, follow federal law,”<sup>4</sup> A unilateral change in overtime compensation is an unfair labor practice under federal law; PERB should likewise find the State committed an unfair labor practice by unilaterally

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<sup>3</sup> **§ 1305. Public employer rights.** A public employer is not required to engage in collective bargaining on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as the functions and programs of the public employer, its standards of services, overall budget, utilization of technology, the organizational structure and staffing levels and the selection and direction of personnel.

<sup>4</sup> *City of Wilmington v. Wilmington Firefighters Local 1590, IAFF*, 385 A. 2d 720 (Del. Supr, 1978).

announcing and implementing a new method of calculating overtime.

Finally, in response to the State's alternative argument that it waived any right it had to negotiate concerning changes to overtime eligibility and compensation, the FOP 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 burden to demand negotiations after being presented with a *fait accompli*. *Intermountain Rural Electric Assn. v. NLRB*, 984 F.2d 1562 (10<sup>th</sup> Cir 1993). The State was required to notify the FOP as the exclusive bargaining representative, not just the bargaining unit employees of the overtime changes, and to do so "sufficiently in advance of actual implementation to [the] decision to allow reasonable scope for bargaining." *NLRB v. Walker Construction*, 928 F.2d 695 (5<sup>th</sup> Cir. 1991).

**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>5</sup>, enacted by the General Assembly on July 1, 2009. Subsection 8(j) specifically overrode the provisions of Merit Rule 4 and the State had no discretion or authority to refuse or fail to implement a duly enacted, binding law.

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 that dictated overtime eligibility standards, the Governor, by and through

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<sup>5</sup> HB 209, §8(j), July 1, 2009.

executive branch agencies, was constitutionally bound to implement the mandate of the FY 2010 Appropriations Act.

The State asserts the FOP 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 the FOP because it is not a certified bargaining representatives of any portion of a compensation bargaining unit that has a collective bargaining agreement 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 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 the FOP waived any right to bargain because it failed to request bargaining. It asserts that the NLRB and federal courts have found that protesting an alleged unilateral change by filing an unfair labor practice charge is not a substitute for requesting to bargain.

## DISCUSSION

Section 8(j) of the FY 2010 Budget 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>6</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,

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<sup>6</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.

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 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.

Similar (indeed nearly identical) arguments were made in support of a contemporaneous unfair labor practice charge filed by AFSCME Council 81 on behalf of bargaining units of State merit employees it represents in the Departments of Health and Social Services, Correction and Transportation, which also alleged the State had violated the provisions of the PERA by unilaterally announcing and implementing the same changes to overtime eligibility and compensation. The Discussion in that decision concerning the progeny of scope of bargaining cases involving Delaware public sector employees and employers is adopted herein by reference.<sup>7</sup>

The Public Employment Relations Board has jurisdiction and responsibility to interpret and apply the provisions of Delaware's public sector collective bargaining laws (including the PERA). The General Assembly entrusted to the Merit Employee Relations Board exclusive jurisdiction to resolve questions concerning the application and interpretation of 29 Del.C. Chapter 59, State Merit System of Personnel Administration.

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<sup>7</sup> *American Federation of State, County and Municipal Employees, Council 81, et al., v. State of Delaware, DHSS, DOC & DOT, ULP 09-07-693, VII PERB 4885, 4897 – 4990 (February 22, 2011).*

The jurisdiction of these two administrative bodies is not concurrent. The FOP's assertion that any change in Merit Rule 4 is "within the purview of the MERB, not the General Assembly" is not properly before PERB.

Section 1302(t) of the PERA circumscribes the mandatory scope of bargaining by defining "terms and conditions of employment." It includes a limitation in the final phrase of that definition: "... provided however, that such term shall not include those matters determined by this chapter or any other law of the State to be within the exclusive prerogative of the public employer." When read in conjunction with 19 Del.C. §1313 (e)<sup>8</sup>, it specifically removes and makes impermissible the negotiation or implementation of contractual terms which are "inconsistent with any statutory limitation on the public employer's funds, spending or budget, or would otherwise be contrary to law."<sup>9</sup>

The passage of the FY 10 Appropriations Act establishes the conditions for funding and payment for overtime compensation. The language of §8(j) is clear and unambiguous. Effective in FY 2010, State employees were required to actually work 40 hours in a work week to be eligible for premium payment at time and one-half for any hours worked thereafter. Consequently, any collectively bargained agreement<sup>10</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*

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<sup>8</sup> 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."

<sup>9</sup> *Appoquinimink Education Assn v. Bd. of Education*, ULP 1-3-84-2A, I PERB 35 (1984).

<sup>10</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.

*Education Assn v. Bd. of Education*, ULP 1-3-84-3-2A, I PERB 35 (1984):

§4013(e)<sup>11</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 an explicit and definitive statutory prohibition; any contractual provision to the contrary would be invalid and unenforceable. *Kent Vo-Tech Teachers Association and Kent Vo-Tech School District*, DS No. 93-06-084, II PERB 877, 880 (1993).

It is not relevant to a determination on the merits of this case that the law which was ultimately adopted as §8(j) of the FY 10 Appropriations Act may have originated from a recommendation made to the Governor. Indeed, the Governor is required annually to prepare and present to the General Assembly a recommended budget for their consideration. The ultimate decision as to what and how funding is provided for the operation of the State for the next fiscal year is within the constitutional authority of the legislative branch. Once adopted, the Governor is required to faithfully execute and administer the budget passed by the General Assembly.

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<sup>11</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).

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 this bargaining unit, the FOP's position must fail.

In considering the arguments and positions taken in this case, I reviewed all of the supporting case law presented by the parties. I am appreciative of the effort counsel expended in preparing their arguments. As established in early PERB decisions, case law from other states is not binding upon the decision making authority of this Board, but it may provide guidance in developing case law under the PERA in Delaware.<sup>12</sup> In this case the decision is reached based upon application of clear and unambiguous statutory language and the citation of cases outside of this jurisdiction were not determinative of the outcome.

It is unnecessary to reach any conclusion concerning the State's alternative argument that Article 18 of the FY 10 Appropriations Act precludes bargaining of any type of compensation for State merit employees. It is also unnecessary at this point to determine whether overtime is a mandatory subject of bargaining for state merit employees. In this case, the issue of overtime eligibility and compensation was removed from the scope of bargaining by a superseding statutory mandate. Pursuant to 19 Del.C. §1302(t) and §1313(e), because the conditions upon which overtime was to be funded was clearly and unequivocally established by §8(j) of the FY 10 Appropriations Act, they constitute impermissible subjects of bargaining.

### **CONCLUSIONS OF LAW**

1. The State of Delaware is a public employer within the meaning of 19 Del.C. §1302(p). The Department Correction, Bureau of Community Correction is an

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<sup>12</sup> *Appoquinimink*, Supra, p. 40.

agency of the State of Delaware.

2. Charging Party, Fraternal Order of Police Lodge 10, 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). The FOP is the certified exclusive bargaining representative of State merit employees in a bargaining unit established pursuant to 19 Del.C. §1310 for purposes of bargaining “terms and conditions” agreements.

3. The State and the FOP are parties to a current collective bargaining agreements 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, which included §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 Budget Appropriations Act., DOC issued a memorandum to bargaining unit employees advising them 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 40 hours in the work week.

6. 19 Del.C. §§1302(t) and 1313(e) establish illegal subjects of bargaining. The language of §8(j) of the FY 2010 Budget 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).

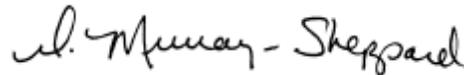
8. The State did not violate its duty to bargain in good faith or 19 Del.C. §1307(a)(5) when it implemented changes to the computation and eligibility of overtime premiums based on §8(j) of the FY 2010 Budget Appropriations Act.

9. The record establishes no basis for concluding the State violated 19 Del.C. §1307(a)(6), as alleged.

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

**IT IS SO ORDERED.**

DATE: February 28, 2011



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