PUBLIC EMPLOYMENT RELATIONS BOARD

FOR THE STATE OF DELAWARE

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 81, LOCAL 218,	:	
Charging Party,	:	**ULP No. 09-10-707**
v.	:	
RED CLAY CONSOLIDATED SCHOOL DISTRICT BOARD OF EDUCATION,	:	Decision on the Merits
Respondent.	:	

Appearances

Perry F. Goldlust, Esq., for AFSCME Local 218

Alfred J. D'Angelo, Esq., for Red Clay Consolidated School District

BACKGROUND

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

The American Federation of State, County and Municipal Employees, Council 81, Local 218 ("AFSCME") is the exclusive representative of custodial employees of the District for purposes of collective bargaining, pursuant to 19 Del.C. §1302(j).

On or about October 12, 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 provide:

(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.* This unilateral change in compensation was "not based on any law or right given to the Board" and was "done intentionally and with reckless disregard for the confusion and anger this unilateral action would have on members of the bargaining unit." *Charge* ¶ *12*.

On October 30, 2009, the District filed its Answer to the Charge, essentially denying the material allegations contained therein. Included in its Answer was New Matter wherein the District asserted AFSCME waived any right to negotiate concerning any mandatory or permissive subject of bargaining during the term of the agreement by including the zipper clause in Article 16.1[1] of the parties' collective bargaining agreement ("Agreement")

[1] 16:1 This Agreement incorporates the entire understanding of the parties on all matters which were or could have been the subject of negotiation. During the term of the Agreement, neither party shall be required to negotiate with respect to any such matter whether or not covered at the time this Agreement was executed; however, should the parties agree to discuss and conclude agreement on any issue(s) such agreement(s) shall be effected only by an instrument in writing duly executed by both parties with appropriate ratification and approval of the parties.

The Charge raises a question as to whether bargaining unit employees are entitled to be paid for time not worked, which the District argues is a matter subject to resolution through the negotiated grievance and arbitration process. The District asserts, therefore, that PERB should defer this issue to the contractual process. The District argues it did confer with the union and that AFSCME agreed to five furlough days on which bargaining unit employees would not work. Finally, the District avers it has never paid bargaining unit employees the hourly wage set forth in Appendix A for any hours not worked, other than the paid leave explicitly negotiated and included in the Agreement.

AFSCME filed its Reply to New Matter on or about November 5, 2009, in which it denied the material allegations set forth by the District in New Matter. AFSCME admits it entered into required negotiations with the District concerning how the "extra days off were to be taken", that the parties mutually identified specific dates for furlough days, and that those dates were submitted to and ratified by the Union's membership. When the District subsequently presented a written agreement to AFSCME for signature, it included the 2.5% reduction in local salary. AFSCME refused to sign or agree to the District's amendment of the collective bargaining agreement. AFSCME asserts the issue of reduction of pay was never raised in negotiations and the District unilaterally implemented the change.

A Probable Cause Determination was issued on March 25, 2010, which found probable cause to believe an unfair labor practice may have been committed as alleged. A hearing was scheduled and held on June 23, 2010, for the purpose of receiving evidence and argument upon which a determination could be made as to 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). During the

hearing the parties entered testimonial and documentary evidence into the record.[2] The record closed following receipt of written argument from both parties.

FACTS

The parties entered into the following partial Stipulation of Facts:

1. Red Clay Consolidated School District (hereinafter "the District") is a public school district that operates in northern New Castle County. The District has collective bargaining agreements with AFSCME Local 218 (hereinafter "Local 218"), which covers its custodial and maintenance employees, and with AFSCME Local 962 (hereinafter "Local 962"), which covers its clerical and secretarial employees.
2. The District and Local 218 are parties to a collective bargaining agreement, which is in evidence as Joint Exhibit 2.
3. The District and Local 962 are parties to a collective bargaining agreement, which is in evidence as Joint Exhibit 1.
4. The wages paid to the custodial and maintenance employees have two (2) components: A State component and a local component, which is negotiated between the District and Local 218.
5. On or about July 1, 2009, the State advised each school district that it was reducing the State's portion of the compensation of the custodial maintenance and clerical employees by 2.5%. The affected employees were to be allowed leave (5 days) to approximate the savings in personnel costs resulting from the 2.5% reduction in salary.
6. Pursuant to §25 of Joint Exhibit 5, the District and the Charging Parties met and agreed upon the leave days as required by Joint Exhibit 5. Pursuant to Joint Exhibit 5, the parties' agreement on said days is reflected in Joint Exhibits 3 and 4, addressed to the Secretary of Education.

The following facts are derived from the testimonial and documentary evidence contained in the record created by the parties to this Charge.

Article 14, Salaries and Employee Benefits, of the Agreement between the District and AFSCME Local 218 (Joint Exhibit 2) states:

14.1 The salaries of all employees covered by this Agreement shall be the

[2] For the convenience of the parties, evidence was received during the June 23, 2010 hearing on both this Charge and the corollary Charge filed by AFSCME Local 962 on behalf of the bargaining unit of clerical and secretarial employees of the District. Both Charges arise from similar circumstances concerning the District's implementation of HB 295.

salaries as prescribed by Chapter 13, Title 14, Delaware Code, plus a supplement from District funds in the amounts in the schedule set forth in Appendix A which is attached hereto and made a part thereof.

Appendix A includes the following matrix[3]:

FY 2010
Red Clay Consolidated School District
Custodial Salary Schedule
Effective July 1, 2009

EXP.	Custodian	Fireman	Chief 1	Chief 2	Maint C	Maint B	Maint A	Crafts-man
0	4,131	4,755	7,234	8,887	8,267	12,397	14,468	14,468
1	4,959	5,704	7,811	9,463	8,683	12,815	14,984	14,984
2	5,786	6,655	8,391	10,044	9,092	13,227	15,500	15,500
3	6,613	7,605	8,968	10,624	9,505	13,640	16,016	16,016
4	7,440	8,557	9,547	11,202	9,921	14,054	16,533	16,533
5	8,267	9,505	10,126	11,782	10,334	14,468	17,048	17,048
6	8,683	9,983	10,706	12,361	10,748	14,878	17,565	17,565
7	9,092	10,460	11,286	12,938	11,162	15,293	18,081	18,081
8	9,505	10,931	11,861	13,516	11,573	15,708	18,600	18,600
9	9,921	11,409	12,441	14,094	11,988	16,120	19,120	19,120
10	10,334	11,884	13,021	14,675	12,397	16,533	19,637	19,637
11	10,747	12,359	13,601	15,256	12,806	16,946	20,153	20,153
12	11,160	12,834	14,180	15,837	13,216	17,359	20,669	20,669
13	11,573	13,309	14,760	16,418	13,625	17,772	21,186	21,186
14	11,673	13,409	14,860	16,518	13,725	17,872	21,286	21,286
15	11,673	13,409	14,860	16,518	13,725	17,872	21,286	21,286
16	11,673	13,409	14,860	16,518	13,725	17,872	21,286	21,286

…

NOTE: This salary schedule does not reflect Red Clay's custodial compensation for the 2009-2010 school year due to changes in the number of days worked based on House Bills 290 and 295. Adjusted schedules are available on-line on the intranet.

Article 12, Hours of Work and Premium Rates, of the parties' agreement states, in relevant part:

[3] There is a dispute between the parties as to the actual negotiated salary schedule for custodial bargaining unit employees effective July 1, 2009. The salary schedule included herein was submitted as Appendix A in Joint Exhibit 2, which was an unexecuted copy of the collective bargaining agreement between AFSCME 218 & the Board of Education. A different three page salary matrix (entitled "Effective July 1, 2009") was submitted as a portion of the 2007-2011 collective bargaining agreement attached to the Charge. This matrix is included herein for the limited purpose of evidencing that the matrix identifies annual salaries (rather than hourly rates) for locally funded compensation. The record was insufficient to determine which of the submitted matrices is accurate.

12.1 The employer shall establish hours of work for employees based upon the need for employees. The normal work week for full-time employees will be forty hours except as overtime is required to carry out the mission of the employer. All hours worked in excess of forty hours per week or eight hours in any twenty-four hour period shall be at one and one-half times the employee's hourly rate. Time worked on Saturday morning or on a holiday to complete a scheduled third shift shall be paid at the employee's straight time rate of pay including shift differential…

12.5 RATE OF PAY AND SHIFT DIFFERENTIAL: The employee's hourly rate of pay shall be determined by dividing the employee's annual salary by 2,080 hours. Part-time employees' hourly rate shall be proportionately determined. Full-time employees regularly assigned to work on a shift which begins at 1:00 p.m. or after shall receive a differential of $570 per year, and full-time employees regularly assigned to work on a shift which begins at 10:00 p.m. or after shall receive a differential of $670 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…

On or about July 1, 2009, the Governor signed into law 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" ("FY 2010 Budget Act"). Section 8 (c) of the FY 2010 Budget Act reduced all State salaries by 2.5%, effective July 1, 2009:

(c) SALARIES FOR FISCAL YEAR 2010.

The amount appropriated by Section 1 of this Act for salaries provides increases for:

(1) Salary adjustments for departments 01 through 77 and Delaware Technical and Community College Plan B:

i) Effective July 1, 2009, the salary of each employee shall be reduced by 2.5 percent;

Subsection (m), Salary Plan – Public Education, states:

Amend 14 Del. C. § 1311(a), by striking the salary schedule contained in said

subsection in its entirety and by substituting in lieu thereof the following:

Years of Experience	Custodian	Custodian Firefighter	Chief Custodian 5 or Fewer	Chief Custodian 5 or More	Maintenance Mechanic	Skilled Craftsperson
0	17,746	18,249	18,505	19,516	19,985	20,430
1	18,125	18,629	18,885	19,896	20,459	21,003
2	18,505	19,009	19,264	20,291	20,960	21,572
3	18,884	19,389	19,642	20,717	21,453	22,141
4	19,264	19,767	20,025	21,147	21,886	22,713
5	19,642	20,144	20,432	21,576	22,445	23,282
6	20,025	20,576	20,862	22,000	22,943	23,851
7	20,432	21,005	21,287	22,426	23,439	24,422
8	20,862	21,431	21,716	22,855	23,936	24,992
9	21,287	21,859	22,141	23,282	24,430	25,564
10	21,716	22,286	22,570	23,710	24,929	26,132
11	22,141	22,716	22,999	24,135	25,424	26,703
12	22,578	23,156	23,438	24,568	25,932	27,288
13	23,024	23,606	23,888	25,011	26,450	27,887
14	23,478	24,065	24,350	25,452	26,979	28,500
15	23,943	24,532	24,818	25,920	27,518	29,126

This matrix reflected a 2.5% reduction in each cell from the matrix in the Fiscal Year 2009 Budget Act (which was effective July 1, 2008 through June 30, 2009).

On or about July 1, 2009, the Governor also signed into law House Bill 295, "An Act making Appropriations for certain Grants-in-Aid for the Fiscal Year ending June 30, 2010; Specifying Certain Procedures, Conditions and Limitations for the Expenditure of such Funds, Amending the Fiscal Year 2001 Appropriations Act; and Amending Certain Pertinent Statutory Provisions" ("FY 2010 Grants-in-Aid Act", Joint Exhibit 5) Section 25 of House Bill 295 stated in relevant part:

> 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.

During the hearing on this Charge, the District's Assistant Superintendent for Schools, Dr. Hugh Broomall, Jr., testified the District's Chief Financial Officer and Deputy Superintendent met with ASFCME LU 218 representatives to negotiate concerning HB 295. He further testified that he was not personally or directly involved in the negotiations. AFSCME's Vice President and the District's Superintendent signed a memorandum addressed to the State Secretary of Education, Director of the Office of Management and Budget, and the Controller General which states:

RE: Furlough Days

As a result of HB 295 Section 25 and the requirements for Districts to develop leave plans for 5 days for the 2009-2010 school year, Red Clay Consolidated School District submits the following plan with concurrence from the respective collective bargaining unit:

Furlough Days (5)
November 25
December 23
February 1

June 14
Select one day from the winter or spring break

/s/ Agnes Wilson, Vice President, Local 218 of Council 81 7/22/09
/s/ Mervin B. Daugherty, Ed.D, Superintendent 7/24/09
Joint Exhibit 3.

Subsequent to the submission of this memorandum and its approval by the State Department of Education, the District "agreed to make [February 1, 2010] a work day." Dr. Broomall explained February 1 was an in-service day for the District's teaching staff, and all other employee groups (except transportation and nutrition staff) were offered the opportunity and worked that day. He further testified the District "utilized their local money to pay for a full day salary for those individuals that worked." Employees were permitted to use available paid leave in lieu of working on February 1. The District submitted into the record an undated and unsigned document which states:

> Red Clay Consolidated School District
>
> Recommendation to the Red Clay Board of Education:
>
> The following employee groups will work one of the state mandated furlough days and will be compensated for that day by paying both the state and local portions of their salaries from the local Red Clay budget. This would fall on February 1, 2010 for teachers, secretaries and custodians and on August 26, 2009 for paraprofessionals, with the exception of bus aides. *District Exhibit 1.*

Dr. Broomall recalled this recommendation was passed by the Red Clay Board of Education at its regular meeting on the third Wednesday of September in 2009.[4] He conceded on cross-examination there is no signed agreement that AFSCME agreed to bargaining unit employees working on February 1, 2010.

Dr. Broomall also testified that the total salaries of bargaining unit employees are

[4] Although a copy of the Board of Education's Minutes reflecting the adoption of the recommendation was requested at the close of the June 23, 2010 hearing, nothing was submitted after the hearing in response to the request.

comprised of approximately 60% State funding and 40% local funding, although the exact percentages vary across the matrix. He testified that if total wages for a single day's work are paid exclusively from local funds it approximates 2 ½ "local days".

Dr. Broomall also testified that the salary matrix attached as Appendix A to the parties' collective bargaining agreement was recalculated and posted on the District's website. The District stipulated there is no signed agreement with AFSCME which reflects an agreement concerning the substitute local salary schedule for July 1, 2009 – June 30, 2010.

ISSUE

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.

PRINCIPAL POSITIONS OF THE PARTIES

AFSCME:

AFSCME argues the District did not have a contractual right to unilaterally change the terms and conditions of employment for bargaining unit employees. The District's Assistant Superintendent confirmed there was no written agreement between the District and AFSCME to reduce the local compensation matrix by 2.5%, or to change the agreed upon State furlough days to make February 1, 2010 a work day. AFSCME argues that if the District were to follow its own argument that employees could be docked for time not worked, the reduction should have been made in the pay period which included the State furlough day. The District has failed to cite any contractual

support for its unilateral change to the negotiated annual local salary. Contrary to the District's argument, it did not treat State furlough days as it does any other unpaid missed time.

Nor did the District have statutory authority to unilaterally reduce negotiated local annual salaries. Section 8 of the Budget Bill effectuated a 2.5% reduction in the State share of salaries. Neither Section 8 nor Section 25 of the Grants-in-Aid Bill addressed or dictated an impact on locally negotiated salaries, except to direct districts to negotiate with the unions concerning furlough days to be taken in lieu of the reduction in the State salary contribution. HB 295 did not authorize unilateral changes to negotiated local salary agreements nor was this subject ever discussed during the negotiations between AFSCME and the District.

District:

The District argues all bargaining unit employees are compensated, in part, based upon a locally negotiated salary matrix which is "converted to an hourly rate for all hours paid (work hours and paid leave)." It asserts the collective bargaining agreement gives the District discretion to establish hours of work based on its need for employees. If an employee misses work time for which the employee is not eligible for paid leave (e.g., holiday, sick or annual), the employee is not paid for the hours not worked. The State required that bargaining unit employees be allowed five furlough days to approximate the 2.5% reduction in State compensation and directed that employees could not use accrued leave on those days. Because the employees would not be working on the furlough days, the District argues it was not obligated to pay the local portion of the employees' salaries for time not worked.

At some point after the District and AFSCME agreed on the dates of the five designated furlough days, the District reinstated February 1, 2010, as a working in-service day, on which it paid employees their full salaries completely out of local funds. Consequently, the District argues bargaining unit employees were fully compensated by the District from local funds for all hours worked during the 2009 – 2010 school year.

The District also argues AFSCME is estopped from arguing the District failed to bargain in good faith because the zipper clause of the parties' Agreement (Art. 16.1) provides "neither party shall be required to negotiate with respect to any such matter whether or not covered at the time this Agreement was executed." It asserts that by agreeing to include Article 16.1 in the collective bargaining agreement, AFSCME waived all statutory rights to negotiate "changes in hours and compensation" during the term of the Agreement. Consequently, the only avenue for redress available to the union is to allege a breach of the collective bargaining agreement, which is subject to resolution solely through the negotiated grievance and arbitration procedure.

DISCUSSION

At the conclusion of the unfair labor practice hearing, the parties agreed to bifurcate consideration of the issue. The parties agreed that the limited issue before PERB at this time concerns whether the District violated the statute. If it is determined that the District violated its duties under the PSERA as alleged, the parties will seek to agree on a remedy, and, if unsuccessful, will request to create a record on which a remedial order may be issued.

There are no facts alleged or established in this record which support AFSCME's assertion that the District violated 19 Del.C. §1307(a)(2), (a)(3) or (a)(6). Consequently,

these charges are dismissed.

With respect to the alleged violated of §1307(a)(5), it is well established that unilateral change in a mandatory subject of bargaining constitutes a *per se* violation of the statutory duty to bargain in good faith. One of PERB's first decisions, held:

> While a collective bargaining agreement is in existence, its terms serve to preserve the relationship between the parties and govern the operations and functions of the school system. Thereafter, to permit one party to unilaterally impose a change in the existing terms and conditions of employment without prior negotiation, at least to the point of impasse, would be to permit that party to acquire unfair tactical advantage effectively prohibiting the establishment of terms and conditions of employment through bilateral negotiation. *Appoquinimink Education Assn. v. Bd. of Education*, ULP 1-2-84A, I PERB 23, 29 (1984).

Unilateral disruptions of the *status quo* have been held to violate the duty to bargain in good faith because such changes frustrate the statutory objective of establishing terms and conditions of employment through the collective bargaining process. The *status quo* of a mandatory subject of bargaining is subject to change only through the collective bargaining process. *New Castle County Vo-Tech Education Assn. v. Bd. of Education*, ULP 88-05-025, I PERB 257, 259 (1988); *Christina Education Assn., Inc. v. Bd. of Education*, ULP 88-09-026, I PERB 359, 366 (1988).

In order to determine whether an action violates that duty, PERB engages in a sequential analysis:

- Does the alleged change concern a mandatory subject of bargaining?
- Was there, in fact, a change made from the status quo?
- Was the duty to negotiate the issue superseded by an intervening event or circumstance?
- Was the union provided with a reasonable opportunity to negotiate the proposed change prior to implementation; was the change, in fact,

negotiated; or did the union waive its right to negotiate?

It is undisputed that the local portion of the annual salaries of the bargaining unit employees are mandatorily negotiable and that the District and the Union had negotiated a Local Salary Matrix for Fiscal Year 2010, which was included in their collective bargaining agreement at Appendix A. Each cell of Appendix A sets forth the annual supplement for bargaining unit employees based on their classification and years of experience.

Having determined that local salaries are mandatory subjects of bargaining and that the parties negotiated a local salary matrix for FY 2010, the analysis turns to whether there was a change in the status quo. The District stipulated it recalculated the local salary matrix to reflect "changes in the number of days worked" and posted the revised schedule on the District's website at some point after July 24, 2009.

The District's argument that the local salary matrix in Appendix A was negotiated based upon a work year of 2,080 hours is unsubstantiated by the record. The negotiated matrix does not set forth hourly rates. Further, the contractual language of Article 12 of the collective bargaining agreement, Hours of Work and Premium Rates, does not support the District's position. Subsection 12.5 establishes the method by which the annual salary is to be deconstructed in order to establish an hourly rate for purposes of calculating premium payments. Had the parties, in fact, negotiated local hourly rates, it would be unnecessary to agree upon a method for calculating an hourly rate and the matrix would reflect the negotiated hourly rates rather than the total annual local supplement. Simply stated, there is nothing in the record to support the District's assertion that the parties negotiated hourly rates rather than annual local salary supplements. Consequently, the record supports the conclusion that there was a change

made in the negotiated local salary matrix for FY 2010 in Appendix A of the collective bargaining agreement.

The District argues HB 295 required 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; therefore, the change in the local salary matrix was mandated by State law. Section 25 of the Grants-in-Aid Bill (HB 295) amends the FY 2010 Budget Act (HB 290) by adding subsection (n) to Section 8 of the FY 2010 Budget. Section 8(n) requires implementation of "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" required by Section 8(c) of the FY 2010 Budget Act (HB 290). A comparison of the State salary matrix for school custodial and maintenance employees as established by 14 Del.C. §1311(a) for FY 2009 (school year 2008-09) and FY 2010 (school year 2009-2010) reveals that each cell of the FY 2010 matrix was reduced by 2.5%. The scale was not reduced to reflect a reduction of five days based upon a calculation of a *per diem* rate.

The State portion of the salaries of these bargaining unit employees is not negotiable under state law. The parties do not dispute that the State is responsible for approximately 60% of the annual salaries of bargaining unit employees, with the negotiated local salary constituting the remaining 40% of total annual salary. The "2.5% reduction in salary" addressed in the FY 2010 Budget applies only to the State funded portion of the bargaining unit employee salaries, as established by 14 Del.C. §1311(a).

The language of Section 8(n) of the FY 2010 Budget is clear on its face. In requiring that "fair and balanced temporary plans" be implemented to allow for leave to approximate the 2.5% reduction in State wages, subsections were included that applied to

specifically identified groups of employees compensated in whole or in part with State revenues. Subsection 8(n)(vi) applied to the plans to be developed for school district employees, required the plans be reached in concurrence with union representatives of employees, and be submitted to the Secretary of Education, the Director of the Office of Management and Budget and the Controller General for approval prior to implementation in the 2009-2010 school year. It is important to note that subsection (n)(vi) does not establish a specific number of days of leave, in contrast to subsection (n)(i) which requires all State agencies (excepting Legislative, Judiciary, Delaware Technical and Community College, and school districts and charters) to develop plans that provide five (5) days of leave during FY 2010.

It is undisputed that AFSCME agreed to the five furlough dates identified in the approved HB 295 plan executed by the District's Superintendent on July 24, 2009; that the plan was approved by the required State officials; and that the furlough plan was implemented for the 2009-2010 school year. It is also undisputed that the local salary supplement received by bargaining unit employees during the 2009-2010 school year was less than the amounts set forth in Appendix A. The District admits it recalculated the matrix for 2009-2010 school year to reflect "five fewer days of work."

Consistent with PERB precedent, Appendix A establishes the negotiated *status quo* for local compensation for AFSCME 218 bargaining unit employees of the District. As PERB held in one of its earliest decisions, "… in no case was the District permitted the right to alter a mandatory subject of bargaining by unilaterally implementing an alternative method of compensation, prior to negotiations." *Smyrna Educators' Association v. Board of Education of Smyrna School District*, ULP 87-08-015, I PERB 207, 218 (1987). PERB also evaluated whether the conduct of the parties in that case

constituted good faith negotiations as required by the statute:

> … What constitutes good faith bargaining can only be determined from a review of the totality of conduct by the parties, on a case by case basis. The National Labor Relations Board has gone so far as to state that no party may institute a change in terms and conditions of employment covered in a current collective bargaining agreement without the consent of the other party. *C&C Industries, Inc.*, 158 NLRB 454 (1966). While we do not venture so far in this decision, we do hold that there existed a duty to bargain, the first step of which required the District to provide the [union] with adequate notice that it was considering or desirous of altering a mandatory subject of bargaining whose terms were addressed in the existing collective bargaining agreement… In conclusion, the Smyrna School District was required to adhere to the agreed upon mandatory terms and conditions of employment during the term of the existing collective bargaining agreement, and to bargain desired modifications with the exclusive representative of the affected employees. *Smyrna*, p. 221.

The District has argued AFSCME is estopped from asserting a statutory right to negotiate during the term of the collective bargaining agreement concerning compensation or hours of work because it waived that right by operation of the negotiated "zipper clause" in Article 16.1. Parties are certainly entitled to the benefits and responsibilities they create in their negotiated collective bargaining agreement. A zipper clause, however, cannot be relied upon to create a unilateral right for one party to institute unilateral changes in mandatory subjects of bargaining in violation of the PERA, absent a clear and unequivocal waiver by the other party. In this case, the parties agreed to a specific method by which the Agreement could be modified during its terms (i.e., "where the parties agree to discuss and conclude agreement on any issue…") and required that such modification could only be effected by written instrument "duly executed by both parties with appropriate ratification and approval of the parties." It is undisputed that there was no written agreement between these parties to modify the specific terms of the local salary matrix for the 2009-2010 school year.

Consequently, the District's argument that PERB lacks jurisdiction to hear and

decide this matter under the Public Employment Relations Act is without merit. Similarly, this issue is not subject to deferral under PERB's discretionary deferral policy because the contractual zipper clause is inapplicable to this dispute.

The record does not support a conclusion that the District met its good faith bargaining obligation prior to effectuating a change in the negotiated local salary matrix for the 2009-2010 school year. Nor does the record support a conclusion that AFSCME agreed to a reduction in the negotiated matrix or that the parties had reached or sought to resolve an impasse in negotiations prior to the District modifying the matrix. By unilaterally altering the status quo of a mandatory subject of bargaining, the District committed a *per se* violation of its duty to bargain in good faith and 19 Del.C. §1307(a)(5).

CONCLUSIONS OF LAW

1. The Red Clay Consolidated School District is a public employer within the meaning of 19 Del.C. §1302(p).

2. The American Federation of State, County and Municipal Employees, Council 81, Local 218 is the exclusive bargaining representative of custodial and maintenance employees of the Red Clay Consolidated School District, for purposes of collective bargaining, pursuant to 19 Del.C. §1302(j).

3. At all times relevant to this Charge, the District and AFSCME were parties to a collective bargaining agreement which had a term of July 1, 2007 through June 30, 2010. That collective bargaining agreement includes a negotiated Appendix A, which set forth annual local salary supplements for bargaining unit employees based on classification and years of experience.

4. Total annual salaries received by bargaining unit employees include (in addition to the negotiated Local Supplement in Appendix A) State funding established by 14 Del.C. §1311(a). State funding constitutes approximately 60% of the total annual salaries of bargaining unit employees.

5. On July 1, 2009, the FY 2010 Budget Act (HB 290) was signed into law, reducing state funded salaries set forth in 14 Del.C. §1311(a) by 2.5% from the state salaries set forth in 14 Del.C. §1311(a) for FY 2009.

6. On July 1, 2009, HB 295 was also signed into law which amended the FY 2010 Budget Act to require school districts to "implement fair and balanced temporary plans … which allow for leave to approximate the savings in Personnel Costs resulting from the 2.5% reduction in salary…". Plans for unpaid leave were required to be reached "in concurrence with certified bargaining representatives for school district employees currently covered by and/or negotiating a collective bargaining agreement," and had to be submitted to State officials prior to implementation.

7. By memorandum executed by Local 218 Vice President Agnes Wilson on July 22, 2009, AFCME agreed to dates for five furlough days to be taken during the 2009-2010 school year. The five selected dates were ratified by AFSCME

8. At some point thereafter, the District presented AFSCME with a written agreement which reduced the negotiated local salary matrix to reflect "five fewer days of work" in FY 2010. AFSCME refused to sign the document, asserting the reduction in local salaries had not been negotiated. Thereafter, the District posted a salary matrix on its website which reflected a reduction in FY 2010 local salary matrix for bargaining unit employees.

9. Local salary supplements constitute terms and conditions of employment

within the meaning of 19 Del.C. §1302(t) which are mandatorily negotiable under the statute.

10. By unilaterally altering the negotiated salary matrix the District violated its duty to bargain in good faith and 19 Del.C. §1307(a)(5).

11. There is insufficient evidence on the record to establish the District violated 19 Del.C. §1307(a)(2), (a)(3), and/or (a)(6) as alleged; consequently those charges are dismissed.

WHEREFORE, THE DISTRICT IS HEREBY ORDERED TO TAKE THE FOLLOWING AFFIRMATIVE STEPS:

A) Advise all bargaining unit employees that the local salary supplements paid in the 2009-2010 school year were improperly modified and that the negotiated rates in the collective bargaining agreement were the proper rates for that period of time.

B) Make all bargaining unit employees whole for any and all compensation lost by recalculating local wages based upon the FY 2010 Local Supplement Salary Schedule in Appendix A, for the period of July 1, 2009 through June 30, 2010.

C) Notify the Public Employment Relations Board in writing within sixty (60) calendar days of the steps taken to comply with this Order.

IT IS SO ORDERED.

DATE: September 6, 2011

D. Murray-Sheppard

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