

PUBLIC EMPLOYMENT RELATIONS BOARD
FOR THE STATE OF DELAWARE

| | | |
|---|---|---------------------------------|
| AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 81, LOCAL 218, | : | |
| | : | |
| Charging Party, | : | |
| | : | <u>ULP No. 09-10-710</u> |
| v. | : | |
| | : | Decision on the Merits |
| CHRISTINA SCHOOL DISTRICT, | : | |
| | : | |
| Respondent. | : | |

Appearances

Perry F. Goldlust, Esq., for AFSCME Local 218
David H. Williams, Esq., for Christina School District

BACKGROUND

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

The American Federation of State, County and Municipal Employees, Council 81, Local 218 ("AFSCME") is the exclusive representative of custodial employees of the District for purposes of collective bargaining (as defined in DOL Case 139 and 144), pursuant to 19 Del.C. §1302(j).

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

(a) It is an unfair labor practice for a public employer or its designated

representative to do any of the following:

- (2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization.
- (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.
- (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.
- (6) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

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

On October 21, 2009, the District filed its Answer to the Charge, essentially denying the material allegations contained therein.

A Probable Cause Determination was issued on February 22, 2010, which found probable cause to believe an unfair labor practice may have been committed as alleged. A hearing was scheduled and held on March 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. The

record closed following receipt of written argument from both parties.

FACTS

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

AFSCME and the District are parties to a collective bargaining agreement with a term of July 1, 2007 – June 30, 2010. *Joint Exhibit 1*. Article 14, Salaries and Employee Benefits of that agreement states:

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

Appendix A includes the following matrix:

CHRISTINA SCHOOL DISTRICT CUSTODIAL LOCAL SUPPLEMENT SALARLY SCHEDULE July 1, 2007 – June 30, 2010

| EXP. | Custodian | Custodian Fireman | Chief II | Chief I | Maint C | Maint B | Maint A |
|-------------|------------------|------------------------------|-----------------|----------------|--------------------|--------------------|--------------------|
| 0 | 4318 | 4966 | 5617 | 6264 | 4966 | 6264 | 6914 |
| 1 | 5184 | 5962 | 6741 | 7518 | 5962 | 7518 | 8294 |
| 2 | 6048 | 6954 | 7862 | 8771 | 6954 | 8771 | 9676 |
| 3 | 6914 | 7948 | 8985 | 10024 | 7948 | 10024 | 11061 |
| 4 | 7775 | 8945 | 10109 | 11278 | 8945 | 11278 | 12453 |
| 5 | 8642 | 9937 | 11232 | 12529 | 9937 | 12529 | 13824 |
| 6 | 9074 | 10433 | 11797 | 13156 | 10433 | 13156 | 14519 |
| 7 | 9506 | 10931 | 12359 | 13780 | 10931 | 13780 | 15207 |
| 8 | 9937 | 11429 | 12918 | 14408 | 11429 | 14408 | 15900 |
| 9 | 10274 | 11818 | 13356 | 14899 | 11818 | 14899 | 16440 |
| 10 | 10368 | 11926 | 13479 | 15036 | 11926 | 15036 | 16591 |
| 11 | 10480 | 12055 | 13624 | 15198 | 12055 | 15198 | 16770 |
| 12 | 10686 | 12292 | 13892 | 15497 | 12292 | 15497 | 17100 |

1. Total maintenance salaries are derived by combining the above schedule and the appropriate amount of experience on the State schedule as noted below:
Maintenance C – Custodian Fireman
Maintenance B – Chief I

Maintenance A – Maintenance Mechanic

2. The State training supplement is in addition to the above schedule.
3. The above schedule will be increased by \$250 longevity increment beginning the 16th year of credited service.
4. The above schedule will be increased by \$375 beginning the 25th year of credited service.
5. The above schedule will be increased by \$425 longevity increment beginning the 29th year of credited service.

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

- 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 \$625 effective July 1, 2002 per year. Full-time employees regularly assigned to work on a shift which begins at 10:00 P.M. or after shall receive a differential of \$745 effective July 1, 2000, \$770 effective July 1, 2001 and \$795 effective July 1, 2002 per year. Part-time employees whose hours begin at or after 3:00 P.M. or 11:00 P.M. shall be paid pro-rate [*sic*] 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”) 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.

On July 29, 2009, AFSCME 218 representatives Randy Green (Vice President for the Christina School District unit of Local 218) and Joana Kreske (Secretary) were summoned to a meeting with the District's Chief Financial Officer and Assistant Superintendent, Robert Silber, and the District's Director of Human Resources, Josette Tucker. Mr. Silber explained the purpose of the meeting was to discuss HB 295 and to develop a plan for furlough days. The District offered AFSCME the option to work three

days and receive two unpaid furlough days to maintain the negotiated local compensation included in Appendix A of the parties' collective bargaining agreement. Mr. Green testified he asked why the District was only offering two of the five furlough days referenced in HB 295 when the State paid between 60% and 70% of bargaining unit employees' total annual salaries. Mr. Green testified Mr. Silber responded that the purpose of the meeting was to discuss HB 295, and that the District would need an answer from AFSCME as to whether it would agree to work three days, as proposed by the District, in order to maintain the negotiated local salaries. Shortly after Mr. Green and Ms. Kreske left the meeting with the District representatives, Ms. Tucker telephoned Mr. Green to revise the District's proposal to only require bargaining unit employees work 2 ½ days in order to maintain the negotiated local salary supplement.

Mr. Green advised the District the proposal would have to be presented to the membership and AFSCME scheduled and held an emergency General Membership meeting on the evening of July 29 2009. Attending that meeting was an AFSCME Council 81 representative, Local 218 President (Nina Ferrara) and many bargaining unit members. According to Mr. Green, the membership felt they were entitled to "take the five days that the State gave us." During the meeting, five dates for suggested furlough days were identified and those dates were forwarded to the District's Human Resources office on July 30, 2009 by Local 218's President.

Within less than a week, Mr. Green and Ms. Kreske were called to a meeting of the District's Calendar Committee. The meeting was convened by the District's Director of Instruction and included representatives of the District's Administration and of each of the bargaining units of the District's represented employees. During the meeting, AFSCME agreed to five furlough dates, although they were not the dates originally

suggested in Ms. Ferrara's July 30, 2009 correspondence.

Representatives of all six bargaining units (including AFSCME Local 218's Vice President, Randy Green), signed a letter dated August 6, 2009 which stated, "Pursuant to Section 25(vi) of HB 295 General Assembly, we the undersigned hereby concur with the attached leave plan submitted by the Superintendent of the Christina School District." Attached to the letter was a chart entitled "Christina School District House Bill 295 Plan". The portion of the chart relating to custodial employees specifies both the number of days and the dates on which bargaining unit employees will be on unpaid leave:

| | |
|--------------------------|---|
| Contract Employee Group: | Custodial/Maintenance Employees |
| # Days: | 5 |
| Calendar Days: | 10/9/09; 11/25/09; 12/28/09; 2/12/10; 4/9/10 |
| Rationale: | No impact on instructional time. <i>[District Answer -Exhibit 1]</i> |

At some point thereafter, AFSCME became aware that the District had reduced the local salary supplement it was paying bargaining unit employees for school year 2009-10 below the rates established in Appendix A of the collective bargaining agreement. The reduced supplement was not implemented until the September 13 – 26 pay cycle.

PRINCIPAL POSITIONS OF THE PARTIES

AFSCME:

AFSCME argues the District did not have a contractual right to unilaterally change the negotiated salaries included in Appendix A of the collective bargaining agreement. AFSCME cites the contractual zipper clause found in Article 16.1:

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

AFSCME asserts a reduction in salary was only discussed at the July 29, 2010 meeting between the parties, at which time the “the District gave the Union a choice of a reduction in pay or working for a period of time without pay.” AFSCME further alleges the District unilaterally revised the negotiated salary matrix found in Appendix A to the collective bargaining agreement to a per diem based scale, without presenting that matrix to the union for discussion or agreement at any time. There is no support for the District’s assertion that the salary schedule in Appendix A reflects negotiation based on an hourly rate for 8 hours per day, 261 days per year.

AFSCME argues the implementation of the 2.5% State wage decrease by the General Assembly did not have any applicability to the negotiated local salary supplements granted and paid for from local school district funds. House Bill 295 did not authorize any changes to the negotiated local salary schedules. Consequently, the District’s unilateral reduction in the local salaries of bargaining unit employees violates its duty to bargain in good faith under the PSERA and 19 Del.C. §4007(a)(1) and (a)(5).

District:

The District does not dispute that the total compensation received by bargaining unit employees is comprised of both “salaries as prescribed in Chapter 13, Title 14, Delaware Code, plus a supplement from District funds in the amounts in the schedule set

forth in Appendix A.” CBA, Article 14:1. It asserts that because the State salary is based upon an eight-hour day and a 261 day work year¹, the local salary schedule is similarly based upon that premise. It also relies upon Article 12:5 of the collective bargaining agreement which states the hourly rate of pay is determined by dividing the employee’s annual salary by 2,080 hours.

The District asserts that 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. It argues that it maintained the status quo by preserving the negotiated local hourly rate when the State mandated a reduction in work days.

Faced with the State mandate to reduce the work year by five days, the District asserts it offered AFSCME the opportunity to avoid a salary reduction by agreeing to work 2 ½ of the five furlough days. The District asserts when AFSCME signed the August 6 letter agreeing to the five identified furlough days, it knew there would be a reduction in the local salary supplement because this was discussed in the July 29 meeting between Mr. Silber, Ms. Tucker, Mr. Green and Ms. Kreske.

DISCUSSION

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.

¹ 14 DeL.C. § 1335. Hours per day and per year per salary schedule.

The annual state salaries contained in this chapter are based upon the following...
§1311 (Salary Schedule for School Custodians): 8.0 (hours per day) inclusive of 1/2 hour lunch; 261(days per year); 2,088.0 (hours per year)

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 Years 2008 - 2010, which was included in their collective bargaining agreement as 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 confirmed that the local salary matrix was “recalculated ... predicated upon a reduction in the number of days” worked for FY 2010. *Testimony of Silber, TR p. 33.*

The District’s argument that the local salary matrix in Appendix A was negotiated based upon a work year consistent with the state mandate in 14 Del.C. §1335 of 261 days 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 does not support the District’s position.² 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

² In fact, the negotiated language for calculating hourly rates in §12.5 does not adopt the “work year” of 261 days or 2088 hours per year established by 14 Del.C. §1335. The contract provides the hourly rate to be used for purposes of calculating premium payments “shall be determined by dividing the employee’s annual salary by 2,080 hours.”

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 “far 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, as suggested by the District.³

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 contributes between 60% and 70% of the annual salaries of bargaining unit employees, with the negotiated local salary constituting the remaining 40% to 30% 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).

³ In fact, a 2.5% decrease in the annual number of hours worked (2,088) would equal 54 hours, equivalent to nearly seven 8-hour work days. Reducing the annual work year by five 8-hour days is an approximate decrease of only 1.8%.

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.

The District’s Chief Financial Officer testified that Section 26 of HB 295 reduced the number of days for public school employees from 188 to 183 for the 2009-10 school year, reflecting a difference of five days. Section 26, however, modified 14 Del.C. §1305 which establishes the state salary schedule for teachers, nurses, principals, superintendents and other administrative and supervisory employees. Section 26 is, therefore, inapplicable, to this bargaining unit of custodial employees whose state salaries are established by 14 Del.C. §1311(a).

It is undisputed that AFSCME agreed to the five furlough dates identified in the approved HB 295 plan of August 6, 2009, as submitted by the District; 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 2009-10 school year was less than the amounts set forth in Appendix A. The District admits it recalculated the matrix for 2009-10 school year by dividing each cell in Appendix A by 261 days and then multiplying that *per diem* rate by 256 days (the State work year of 261 days minus the 5 furlough days). It is also undisputed that the recalculated matrix was not applied to the salaries of bargaining unit employees until the September 13 -26, 2009, pay cycle and that there were no retroactive deductions in local salary supplements for the period of July 1, 2009 through September 12, 2009.

The District's Chief Financial Officer testified that because AFSCME agreed to five identified furlough days, he understood that AFCME had rejected the District's offer to work 2 ½ days in order to maintain the full local salary supplement and had, therefore, agreed to a five day reduction in the negotiated supplement. The District admits there is no signed document which indicates AFSCME agreed to any decrease in the negotiated local salary supplement and that the only document AFSCME signed was the plan which identified five furlough days.

The District's Chief Financial Officer also testified he understood the District's obligation pursuant to HB 295 to enter into a "fair and equitable plan" required the District to compare these bargaining unit employees to "similar employees" whose salaries were 100% compensated by State funds. Unfortunately, the record does not support this conclusion. AFSCME Local 218 bargaining unit employees are not similarly situated to other State employees because there is no obligation on the State to negotiate concerning wages with its custodial employees at this time.

Consistent with PERB precedent, Appendix A establishes the negotiated *status quo* for local compensation for AFSCME 218 bargaining unit employees of the Christina

School 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 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 2009-10 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 Christina 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 Christina 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, Custodial Local Supplement Salary Schedule (July 1, 2007 – June 30, 2010), 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 between 60% and 70% 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 letter dated August 6, 2009, signed Vice President Randy Green (along with representatives of all other bargaining units and District officials), AFCME agreed to dates for five furlough days to be taken during the 2009-10 school year.

8. At some point between August 6 and September 26, 2009, AFSCME and bargaining unit employees became aware that the local salary supplement the District was paying bargaining unit employees for school year 2009-10 was less than the supplement established in Appendix A of the collective bargaining agreement. The reduced supplement was not implemented until the September 13 – 26 pay cycle.

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 2009-10 school year were improperly modified and that the negotiated rates set for in Appendix A of the collective bargaining agreement were the proper rates for that period of time.

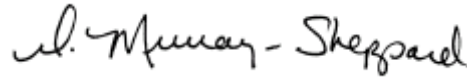
B) Make all bargaining unit employees whole for any and all compensation

lost by recalculating local wages based upon the FY 2010 Local Supplement Salary Schedule in Appendix A, for the period of September 13, 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: July 12, 2011



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