

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

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 81, LOCAL 962,	:	
	:	
Charging Party,	:	
	:	<u>ULP No. 09-11-715</u>
v.	:	
	:	
RED CLAY CONSOLIDATED SCHOOL DISTRICT BOARD OF EDUCATION,	:	Decision on the Merits
	:	
Respondent.	:	

Appearances

Perry F. Goldlust, Esq., for AFSCME Local 962

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 962 ("AFSCME") is the exclusive representative of secretarial and clerical employees of the District for purposes of collective bargaining, pursuant to 19 Del.C. §1302(j).

The District and AFSCME are parties to a collective bargaining agreement which

has a term of July 1, 2008 through June 30, 2011.¹

On or about November 3, 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.* 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 November 13, 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 a mandatory or permissive subject of bargaining during the term of the agreement by

¹ A fully executed copy of this Agreement was introduced at hearing as Joint Exhibit 1.

including the zipper clause in Article 19.1² of the parties' collective bargaining agreement ("Agreement")

The District asserts the Charge raises an issue concerning whether bargaining unit employees are entitled to be paid for time not worked, which it argues is a matter subject to resolution through the negotiated grievance and arbitration process. Consequently, the District asserts PERB lacks jurisdiction to consider the Charge.

AFSCME filed its Reply to New Matter on or about November 16, 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 May 7, 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

² 19:1 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 by this Agreement, provided that in the event both parties reopen negotiations on any issue, any resultant modification to this Agreement will be effected only by an instrument in writing duly executed and approved by both parties.

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.³ 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 secretarial and clerical employees have two (2) components: A State component and a local component, which is negotiated between the District and Local 962.
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 18, Salaries and Employee Benefits, of the Agreement between the

³ 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 218 (ULP 09-10-707) on behalf of the bargaining unit of custodial and maintenance employees of the District. Both Charges arise from similar circumstances concerning the District’s implementation of HB 295.

District and AFSCME Local 962 (Joint Exhibit 1) states:

18.1 The salaries of all employees covered by this Agreement shall be the salaries as prescribed by 14 DeL.C. Chapter 13, plus a supplement from District funds in the amounts in the schedule set forth in Appendix A [*sic*] which is attached hereto and made a part thereof. Effective July 1, 2005, employees shall receive a \$250.00 total longevity [*sic*] beginning the 21st year of credited service, \$750.00 total longevity beginning the 26th year of credited service. Such longevity increment shall become a permanent part of the employee's salary and be paid each year thereafter...

18.4 All State salary increases and schooling supplements, state bonuses, and cost-of-living adjustments will be passed on to all employees as prescribed by law.

Appendix B includes the following matrix:

FISCAL YEAR 2010
Red Clay Consolidated School District
SECRETARIAL SALARY SCHEDULE
1 July 2009

EXP.	CLERK 3	CLERK 2	CLERK 1	SECRE- TARY	SR. SEC- RETARY	FINAN/EXEC SECRETARY	ADMIN SECRETARY
0	4,497	4,725	5,670	6,092	6,933	7,141	7,771
1	4,795	5,039	6,046	6,554	7,395	7,654	8,326
2	5,092	5,350	6,420	7,020	7,860	8,161	8,882
3	5,392	5,665	6,798	7,483	8,322	8,673	9,435
4	5,689	5,978	7,174	7,950	8,790	9,184	9,989
5	5,992	6,296	7,555	8,413	9,256	9,693	10,544
6	6,288	6,607	7,928	8,878	9,718	10,204	11,100
7	6,586	6,920	8,304	9,340	10,180	10,712	11,654
8	6,882	7,231	8,678	9,806	10,644	11,227	12,207
9	7,180	7,544	9,053	10,269	11,107	11,734	12,760
10	7,481	7,860	9,432	10,733	11,575	12,246	13,317
11	7,779	8,174	9,809	11,197	12,035	12,755	13,871
12	8,078	8,488	10,185	11,662	12,502	13,266	14,425
13	8,375	8,800	10,560	12,127	12,964	13,777	14,977
14	8,790	9,236	11,084	12,787	13,638	14,491	15,772
15	8,790	9,236	11,084	12,787	13,638	14,491	15,772
16	9,010	9,467	11,361	13,171	14,075	14,968	16,217
17	9,010	9,467	11,361	13,171	14,075	14,968	16,217
18	9,048	9,507	11,409	13,215	14,225	15,141	16,373
19	9,048	9,507	11,409	13,215	14,255	15,141	16,373
20	9,425	9,903	11,884	13,855	15,036	16,135	17,428
21	9,425	9,903	11,884	13,855	15,036	16,135	17,428

22	9,425	9,903	11,884	13,855	15,036	16,135	17,428
23	9,425	9,903	11,884	13,855	15,036	16,135	17,428
24	9,425	9,903	11,884	13,855	15,036	16,135	17,428

NOTE: This salary schedule does not reflect Red Clay’s secretary 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 13, Hours of Work and Premium Rates, states:

13.1 The employer will establish hours of work for employees based upon the need for employees. The normal work week for full-time employees will be thirty-seven and one-half (37½) hours, exclusive of lunch, except as overtime is required to carry out the mission of the employer. All hours worked in excess of thirty-seven and one-half (37½) hours per week or seven and one-half (7½) hours per day will be at one and one-half (1½) times the employee’s hourly rate.

Article 14, Work Year, provides in relevant part:

14.1.1 The work year for ten month clerks hired before July 1998 will be 216, 217, or 218 days including vacation days and holidays. These employees will be entitled to 10/12 vacation time and all holidays listed in the contract that fall during the ten months of their employment. Employees on a ten-month work year will also receive 10/12 of the salary established for twelve-month positions.

14.2 The work year for eleven month secretaries will be 238, 239, or 240 days, including vacation days and holidays, dependent upon the twelve month work year calendar. Employees on an eleven-month work year will be entitled to 11/12 vacation time and all holidays listed in the contract that fall during the eleven months of their employment. Employees on an eleven-month work year will also receive 11/12 of the salary established for twelve-month positions.

14.3 The work year for twelve-month secretaries will be 260, 261, or 262 days including vacation days and holidays, dependent upon the work year calendar.

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. § 1308(a), by striking the salary schedule contained in said subsection in its entirety and by substituting in lieu thereof the following:

Years of Experience	Clerk	Secretary	Senior Secretary	Financial Secretary	Admin Secretary
0	14,824	16,309	17,116	17,562	18,302
1	15,367	16,852	17,617	18,066	18,812
2	15,908	17,351	18,119	18,571	19,324
3	16,452	17,851	18,621	19,074	19,833
4	16,960	18,350	19,123	19,578	20,404
5	17,441	18,851	19,625	20,107	20,980
6	17,920	19,350	20,156	20,677	21,558
7	18,399	19,847	20,724	21,245	22,133
8	18,880	20,407	21,289	21,815	22,712
9	19,360	20,971	21,856	22,383	23,287
10	19,839	21,534	22,420	22,954	23,864
11	20,377	22,097	22,986	23,523	24,440
12	20,918	22,660	23,553	24,090	25,018
13	21,460	23,225	24,120	24,661	25,594
14	22,002	23,788	24,684	25,231	26,169
15	22,544	24,353	25,251	25,798	26,749
16	23,085	24,914	25,817	26,366	27,325
17	23,629	25,479	26,384	26,936	27,901
18	24,169	26,042	26,950	27,504	28,478
19	24,711	26,607	27,515	28,076	29,055
20	25,252	27,169	28,081	28,645	29,630
21	25,806	27,746	28,659	29,226	30,220
22	26,375	28,335	29,251	29,819	30,823
23	26,957	28,937	29,855	30,426	31,438
24	27,552	29,551	30,473	31,045	32,067

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 962 representatives to negotiate concerning HB 295. He further testified that he was not personally or directly involved in the negotiations. AFSCME's 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 24 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) – 10 Month employees

August 27

November 25

December 23

February 1

June 14

Furlough Days (5) – 12 month employees

November 25

December 23

February 1

June 14

Select one day from the winter or spring break

NOTE: Those required to work due to payroll/business needs will select another day(s) in accordance with operational needs. Approval will not be unreasonably withheld.

/s/ Rhonda Henry-Carter, President, Local 962 of Council 81 8/5/09

/s/ Mervin B. Daugherty, Ed.D, Superintendent 8/5/09

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 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 B 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

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.

reflects an agreement on 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.

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. 19.1)

provides “neither party shall be required to negotiate with respect to any such matter whether or not covered by this Agreement.” It asserts AFSCME, by agreeing to include Article 19.1 in the collective bargaining agreement, 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 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 PERA 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 violation 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 AFSCME had negotiated a Local Salary Matrix for Fiscal Year 2010, which was included in their collective bargaining agreement at Appendix B. Each cell of Appendix B 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 August 5, 2009.

The District’s argument that the local salary matrix in Appendix B was negotiated based upon an hourly rate is unsubstantiated by the record. The negotiated matrix does not set forth hourly rates. Further, the contractual language of Article 14 of the collective bargaining agreement, Work Year, does not support the District’s position. Subsections 14.1.1 and 14.2 establish that employees who work either a ten-month or an eleven-month schedule are compensated at 10/12 or 11/12 of the salary set forth in Appendix B, respectively. Had the parties, in fact, negotiated local hourly rates, it would be unnecessary to agree upon a method for calculating a salary for ten-month and eleven-month employees 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 B 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 secretarial and clerical employees as established by 14 Del.C. §1308 for FY 2009 (school year 2008-2009) 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. §1308(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 August 5, 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 B. The District admits it recalculated the matrix for 2009-2010 school year to reflect "five fewer days of work."

Consistent with PERB precedent, Appendix B establishes the negotiated *status quo* for local compensation for AFSCME 962 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 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 19.1. 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., “in the event both parties reopen negotiations on any issue...”) and required that such modification could only be effected by a written instrument “duly executed and approved by both 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 962 is the exclusive bargaining representative of secretarial and clerical 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, 2008 through June 30, 2011. That collective bargaining agreement includes a negotiated Appendix B, 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 B) State funding established by 14 Del.C. §1308(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. §1308(a) by 2.5% from the state

salaries set forth in 14 Del.C. §1308(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 962 President Rhonda Henry-Carter on August 5, 2009, AFSCME agreed to dates for five furlough days to be taken during the 2009-2010 school year. The five selected dates were ratified by the bargaining unit.

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:

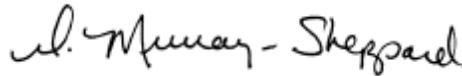
A) Advise all bargaining unit employees that the local salary supplements paid in the 2009-2010 school year were improperly modified and that the negotiated rates in the collective bargaining agreement were the proper rates for that period of time.

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 B, 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 7, 2011



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