

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. 09-10-709</u>
v.	:	
	:	Decision on the Merits
BRANDYWINE SCHOOL DISTRICT,	:	
	:	
Respondent.	:	

Appearances

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

BACKGROUND

The Brandywine 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 141), pursuant to 19 Del.C. §1302(j).

AFSCME and the District are parties to a collective bargaining agreement with a term of July 1, 2006 through June 30, 2009, which was in effect at all times relevant to this dispute.

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 April 8, 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 were parties to a collective bargaining agreement with a term of July 1, 2006 – June 30, 2009. *Joint Exhibit 1*. By letter dated December 22, 2008, the District notified the Union (through its AFSCME Council 81 representative) that the District wished to open negotiations for a successor agreement by February 28, 2009. The parties were unable to agree upon a mutually acceptable date for negotiations and did not meet for the first time until August 21, 2009.

Article 9 of the collective bargaining agreement, Salaries, Employee Benefits, Reimbursements & Premium Rates, states:

- 9.1.1 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. The local supplement for the Fiscal Year beginning July 1, 2006 shall be the amounts in the schedule set forth in Appendix C (3.5% increase over FY 05), which is attached hereto and made a part hereof. The local supplement for the Fiscal Year beginning July 1, 2007 shall be the amounts set forth in Appendix C, increased by 3.5%. The local supplement for the Fiscal Year beginning July 1, 2009, shall be the amounts calculated under the preceding sentence increased by 3.5%

Appendix C includes the following matrix effective July 1, 2008:

**BRANDYWINE SCHOOL DISTRICT
CUSTODIAL EMPLOYEES LOCAL SALARY SCHEDULE
LOCAL 218
EFFECTIVE JULY 1, 2008**

STEP	Custodian	Custodian Firefighter	Chief II	Grounds-keeper	Courier
0	4,345	4,474	5,709	6,839	6,849
1	5,413	6,846	7,553	7,015	8,695
2	7,395	8,562	9,920	7,186	11,128
3	7,423	8,851	9,951	8,718	11,158
4	7,585	8,882	9,986	8,874	11,198
5	8,105	9,401	10,539	9,505	11,749
6	8,619	9,920	11,087	10,028	12,295
7	9,139	10,607	11,639	10,565	12,846
8	9,659	11,153	12,325	11,235	13,535
9	9,920	11,431	12,464	11,765	13,535
10	9,920	11,431	12,464	12,167	13,535
11	9,920	11,431	12,464	12,532	13,535
12	9,920	11,431	12,464	12,907	13,535
13	9,920	11,431	12,464	13,165	13,535
14	9,920	11,431	12,464	13,165	13,535
15	9,920	11,431	12,464	13,165	13,535

Supervisor & Chief	\$ 883
Fireman & Custodian Firemen	\$ 662
Custodian	\$ 439
Night Shift Differential (after 11 a.m.)	\$ 625
Night Shift Differential (after 10 p.m.)	\$ 700
Custodian/Fireman/Building Mechanic	\$ 650
Chief II	\$ 675
Longevity 16 th year or after	\$ 50
Longevity 26 th year or after	\$ 50

Article 9.5, Rate of Pay and Shift Differential, of the parties' agreement states, in relevant part:

9.5.1 The Employee's hourly rate of pay shall be determined by dividing the Employee's annual salary by 2,080 hours. Part-time Employee's hourly rate shall be proportionally determined. Full-time Employees regularly assigned to work on a shift which begins at 11:00 a.m. or after, shall receive a differential of \$625 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 \$700 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 rate as the hourly rates 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:

<u>Years of Experience</u>	<u>Custodian</u>	<u>Custodian Firefighter</u>	<u>Chief Custodian 5 or Fewer</u>	<u>Chief Custodian 5 or More</u>	<u>Maintenance Mechanic</u>	<u>Skilled Craftsperson</u>
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 2010 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 the 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 the 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.

A meeting was convened by the District on or about July 2, 2009, in response to the passage of HB 295. AFSCME Local 218 local Vice President Tom Byrne was requested to attend a meeting concerning recent State legislation and furlough days¹ by a

¹ The leave in lieu of salary reductions mandated by HB 295 will be referred to as “furlough days” herein.

telephone call from Barbara Meredith, the District's Director of Support Services. The meeting was attended by the District's Chief Financial Officer, Director of Legal Affairs, Director of Human Resource and Director of Support Services, and by the Union's local Vice President, local Secretary and the Executive Vice President of Local 218.² At the meeting, the District presented five dates it proposed for furlough days. During the course of the meeting, the District and the Union reached agreement on five dates on which bargaining unit employees would not be required to work in lieu of salary reductions, pursuant to HB 295.

The Union advised the District the proposal would have to be presented to the membership and AFSCME scheduled and quickly held a general membership meeting, at which the agreed upon furlough dates were approved by the membership and the local vice president was authorized to sign the HB 295 agreement for submission to the Department of Education.

The District reached agreement on the HB 295 plan with the representatives of each of the bargaining units. The plan was presented to the District's Board of Education during an executive session on July 13, 2009. The Board unanimously voted to approve the HB Section 25(vi) Five Day Leave Plan when it returned to its open meeting later that evening.

Representatives of all six bargaining units (including AFSCME Local 218's Vice President, Randy Green), signed a letter dated July 16, 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 Brandywine School District."

² A representative of AFSCME Council 81 did not attend this meeting. It was not established whether notice of the meeting was provided to Council 81 by either the District or the Local.

Attached to the letter was a chart entitled “Brandywine School District House Bill 295 Plan”.³ 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 Employees
# Days:	5
Calendar Days:	9/28/09; 12/28/09; 12/29/09; 4/5/10; 4/6/10
Rationale:	District will be closed. No impact on instructional time. <i>[Joint Exhibit 3]</i>

During the course of the July 2nd meeting, the Union asked about the financial impact of working five less days. The District’s Director of Legal Services testified she responded, “[W]e are in active negotiations for a successor agreement and the impact of those five days on salary needs to be discussed in those open negotiations.” Vice President Byrne corroborated this testimony.⁴ No further information was provided to the Union concerning any impact of the five furlough days on the local salary schedule.

By memorandum dated August 10, 2009 from the Chief Financial Officer to all custodial staff, bargaining unit employees were provided the following information concerning their FY 2010 salaries:

I wanted to update you on the status of the FY 10 salary changes.

As you are aware, the State of Delaware did not approve the final budget for FY 10 until July 1, 2009.

As a result of the delay in finalizing these details, we were unable to process salary changes for the July 17, 2009 pay (the first pay of FY10).

We have processed the finalized FY 10 salary information which will be

³ The document appended to the July 16, 2009 letter to the Department of Education was the plan summary approved by the Brandywine Board of Education on July 13, 2009.

⁴ Vice President Byrne testified, however, he believed it was the Director of Support Services who made this comment.

reflected on your August 14, 2009 paycheck. The breakdown is as follows:

- State portion of the salary scale reduced by 2.5%
- Local portion of the salary scale unchanged (pending new contract)
- Total salary scale reduced by 5 days (furlough days required by state code)
- Employees receive a step increase (if applicable) on the salary schedule

As the salary change is retroactive to July 1, 2009, any retroactive reduction in an employee's pay will be spread over 2 pays in August (14th and 28th). A copy of your salary worksheet is attached for your records.

I want to thank you for your understanding with regard to this delay. If you should have any additional questions, you may contact Donna Smallwood, Supervisor of Benefits & Compensation Services ... or me ...

The District generated a Custodial Salary Schedule to be effective on July 1, 2009, which included the State Stipends, revised Local Supplement and Total Salary.

The document indicates it was generated on August 11, 2009. *Joint Exhibit 5.*

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 C of the collective bargaining agreement. AFSCME cites the contractual zipper clause found in Article 17.1.1:

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.

This contractual provision reflects the parties' bilateral agreement to be bound by the

terms of the Agreement and prohibits either party from forcing the other to negotiate any matters “which were or could have been the subject of negotiation” during the contractual term.

AFSCME argues the District had no statutory authority to unilaterally reduce the negotiated local salary supplement. The State’s FY 2010 Budget Bill (HB 290) reduced the State portion of bargaining unit employees’ salaries by 2.5%, and HB 295 provided for leave to approximate the savings in costs (to the State) from that reduction in the State salary. HB 290 and HB 295 were state statutes and impacted only the State portion of the salaries of bargaining unit employees. The General Assembly did not implicitly or explicitly authorize any changes to the negotiated local salary supplements. Consequently, the District’s unilateral reduction in the local salaries of bargaining unit employees violates its duty to bargain in good faith under the PERA and 19 Del.C. §1307(a)(1) and (a)(5).

AFSCME also argues the District committed a *per se* unfair labor practice by communicating directly with bargaining unit employees in the August 10, 2009 memorandum which notified them of the changes in their wages and the retroactive recoupment of past wages. It asserts the District failed to provide a copy of this correspondence to the union or to negotiate or even give the union notice of its intent to modify salaries. Citing *Southern California Gas Co.*,⁵ AFSCME alleges the District violated the PERA by communicating directly with union-represented employees for the purpose of establishing wages and excluded the union from those communications. By these actions, AFSCME asserts the District violated 19 Del.C. §1307(a)(2) and (a)(3).

AFSCME requests the District be directed to reverse its illegal action and make

⁵ 316 NLRB 979 (NLRB, 1995).

the employees whole for moneys wrongfully withheld.

District:

The District argues the parties agreed that the salaries for bargaining unit employees are the “salaries provided by Chapter 13, Title 14, Delaware Code, plus a supplement from District funds.”⁶ 14 Del.C. §1335 specifies that the State portion of the salaries of bargaining unit employees is based on an eight hour day and a 261 day work year.⁷ The statute also requires that “... district employees who work less than the specified time shall have their annual salary adjusted accordingly,”⁸ and requires districts “to establish hours and days worked consistent with those specified above.”

Consequently, the District argues, the salary matrix contained in the parties’ collective bargaining agreement is based on working 8 hours each day for 261 days each year. It also points out that Article 9.1.7⁹ of the Agreement (which provides a “reduced absenteeism incentive” to employees) is based on a work year of 261 days.

It argues that the annual number of hours worked in FY 2010 was reduced by five days by State mandate. A reduction in the number of hours worked by forty (40) hours

⁶ Article 9.1.1 of the collective bargaining agreement

⁷ The District notes that the days/hours actually worked by custodial employees are reduced by paid leave days/hours.

⁸ 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)

⁹ Article 9.1.7 Reduced Absenteeism Incentive

- (a) When, during any Fiscal Year, a member of the Union shall have incurred less than 5 days of absence for personal illness, critical illness/immediate family, and deduct, such member of the Union shall be paid a local salary supplement with the paycheck issued on December 15 during the Fiscal Year immediately following in accordance with the following schedule...

... The supplement established pursuant to the foregoing schedule shall be multiplied by a fraction, the numerator of which shall be the number of full days such Employee was employed by the District during the Fiscal Year in which the absences were incurred, and the denominator of which shall be two hundred sixty one (261).

with no adjustment to the annualized local salary would increase the negotiated hourly rate. Therefore, the District argues it actually maintained the *status quo* by preserving the negotiated hourly rate of pay. AFSCME is seeking a higher rate of pay without negotiations when it argues it is entitled to the full annual local salary supplement for employees who would only be working 2040 hours during the fiscal year.

The District also argues the union failed to negotiate in good faith when it ignored the District's request to open negotiations for a successor agreement in February, 2009. Despite repeated requests from the District, the union failed or refused to meet until August 21, 2009. At the July 2, 2009 meeting concerning HB 295, in response to the union's question about the potential impact of the five days on bargaining unit salaries, the District's Director of Legal Affairs advised the union's representative that the salary impact would need to be discussed in negotiations. The parties' subsequent negotiations did not result in resolution of the salary issue, and although the union indicated it intended to request mediation on November 30, 2009, as of the date of the hearing in this matter no request had been made and there had been no subsequent negotiations between the parties.

HB 295 required the District, in concurrence with the union, to submit a plan to the State reducing the number of workdays in FY 2010 by five. When the union failed or refused to enter into negotiations, the District maintained the *status quo* by continuing to compensate bargaining unit employees at the negotiated hourly rate. Section 25 (n)(ii) specifically states that the "decision to approve a plan providing for 5 days of leave did not constitute a violation of the collective bargaining law, or the CBA." Consequently, the union's argument is contrary to law.

The District asserts AFSCME did not allege in its Charge that the August 10,

2009 communication to bargaining unit employees constituted an unfair labor practice. It has not established that the purpose of the communication was to circumvent the union or to have direct dealing with bargaining unit employees. The District asserts it was common practice for the District to send a “calculation worksheet” to employees whenever there was a change in salary for that employee. At the beginning of the fiscal year, given that the union had failed to enter into salary negotiations, the District simply adhered to its practice of providing each employee with a calculation worksheet summarizing each employee’s change in pay effective July 1, 2009.

DISCUSSION

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).

PERB has also held there is an obligation, even after nominal expiration of a collective bargaining agreement, to maintain the *status quo* concerning mandatory subjects of bargaining, at least to the point of impasse.¹⁰

Maintaining stability during the negotiation process is a crucial factor in continuing the orderly and uninterrupted operations of the public school system and to maintaining an environment where the parties are free to negotiate in good faith on an equal basis. To permit one of the parties to impose a unilateral change in a mandatory subject of bargaining, without prior negotiation at least to the point of impasse, jeopardizes the desired stability and permits one party to effectively circumvent the collective bargaining process, thereby creating the potential for unfair advantage. *citing Appoquinimink Ed. Assn v. Bd. of Ed.*, ULP 1-2-84A, I PERB 23 (1984). *Brandywine, Supra*, p. 87.

In order to determine whether an action constitutes a unilateral change in violation of the duty to bargain in good faith, 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 these bargaining unit employees are mandatorily negotiable and that the District and the Union had negotiated local salary matrices for Fiscal Years 2007 - 2009, which were included in their collective bargaining agreement as Appendix C. Each cell of Appendix C sets forth

¹⁰ *Brandywine Affiliate v. Brandywine School District Board of Ed*, ULP 1-9-84-6B, I PERB 83, 86 (1984).

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 2009 which remained in effect for FY 2010, the analysis turns to whether there was a change in the *status quo*. Chief Financial Officer Blowman testified the hourly rate was calculated by dividing the annual salary contained in each cell of the FY 2009 matrix in Appendix C by 2080 hours. In order to generate the matrix for FY 2010, the hourly rate in each cell was multiplied by 2040 hours (2080 less five 8-hour days),

The District's argument that the local salary matrix in Appendix C 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.

The contractual language of Article 9 of the collective bargaining agreement does not support the District's position.¹¹ Subsection 9.5.1 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 and wages for part-time employees. 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 C of

¹¹ In fact, the negotiated language for calculating hourly rates in §9.5.1 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."

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.¹²

The State portion of the salaries of these bargaining unit employees is not negotiable under state law. 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 District relies upon Section 25(n)(ii) of HB 295 to support its position that the decision to approve five days of leave (and the corresponding reduction in annual local salary) could not constitute a violation of either the collective bargaining agreement or the collective bargaining law. The District specifically quotes a portion of that section:

¹² 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 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.

The District's argument disregards, however, the preceding sentence in this section,

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. (*emphasis added*)

Subsection 8(n)(vi) applied to the plans to be developed for school district employees; consequently, the cited portion of Section 25(n)(ii) is inapplicable to the plan developed by these parties.

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 public 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 of July 16, 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 annual salaries set forth in Appendix C.

The District argues that it made sustained good faith efforts to enter into negotiations for a successor agreement with AFSCME, as early as February, 2009, but the union was unwilling to agree to a date to begin negotiations. It also argues AFSCME was placed on notice during the July 2, 2009 meeting concerning HB 295 that changes to bargaining unit salaries as a result of the five furlough days would have to be negotiated. Because negotiations for a successor agreement did not begin until August 21, 2009, proceeded at a leisurely pace, and were still not concluded by the April 8, 2010 hearing date for this charge, the District asserts AFSCME had a reasonable opportunity to negotiate but chose not to do so.

The District's argument is unpersuasive because it did not provide reasonable notice to the union of its intention to reduce local annual salaries of bargaining unit employees prior to implementing the change. As discussed above, the negotiated local salary matrix included annual salaries. The District's assertion that during the July 2 meeting it advised the union that changes to local salaries would have to be negotiated does not constitute reasonable notice of the District's intent or its interpretation that the local salary matrix was based on hourly rates, rather than annual salaries. The evidence of record is not sufficient to establish that the union was on notice that the District

intended to modify the local salary matrix until the August 10, 2010 memorandum to each employee. At that point, the union was presented with a *fait accompli*. Consequently, I conclude AFSCME did not waive its right or refuse to bargain concerning the FY 2010 salary matrix.

AFSCME asserts that by sending the August 10 memoranda directly to bargaining unit employees without first notifying the union and providing the opportunity to bargain, the District interfered with employee and union rights and committed a *per se* violation of 19 Del.C. §1307(a)(2) and/or (a)(3). The record establishes, without refutation, that the District had a customary practice of sending a calculation worksheet to bargaining unit employees whenever there was a salary change. The August 10 memoranda were consistent with that practice and the record does not support the conclusion that there was a reasonable tendency of this correspondence to interfere with either employee or union rights under the statute.

Consistent with PERB precedent, Appendix C establishes the negotiated *status quo* for local compensation for AFSCME 218 bargaining unit employees of the Brandywine 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 supports the conclusion that the District failed to meet its good faith bargaining obligation prior to effectuating a change in the negotiated local salary matrix for the 2009-10 school year. 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). The record does not, however, support the conclusion that the District violated §1307(a)(2), (a)(3), and/or (a)(6), as alleged in the Charge.

CONCLUSIONS OF LAW

1. The Brandywine 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 employees of the Brandywine School District, for purposes of collective bargaining, pursuant to 19 Del.C. §1302(j).
3. The District and AFSCME were parties to a collective bargaining agreement which had a term of July 1, 2006 through June 30, 2009. That collective bargaining agreement includes a negotiated Appendix C, Custodial Employees Local Salary Schedule (Effective July 1, 2008), which set forth annual local salary supplements

for bargaining unit employees based on classification and step.

4. Total annual salaries received by bargaining unit employees include (in addition to the negotiated Local Supplement in Appendix C) 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 July 16, 2009, signed by Vice President Randy Green (along with representatives of all other bargaining units and District officials), AFSCME agreed to dates for five furlough days to be taken during the 2009-10 school year.

8. On or about August 10, 2009, the District’s Chief Financial Officer issued a memorandum to each bargaining unit employee notifying them that their FY 2010 salary would reflect a 2.5% decrease in the state portion of their salary and a reduction of five furlough days in the local portion.

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

Public Employment Relations Act.

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:

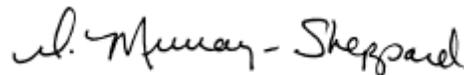
A) Advise all bargaining unit employees that the local salary supplements paid in the 2009-10 school year were improperly modified and that the negotiated rates set forth in Appendix C of the collective bargaining agreement were the proper rates for that period of time.

B) Make all bargaining unit employees whole for any and all compensation lost by recalculating local wages based upon the FY 2009 Local Supplement Salary Schedule in Appendix C, 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: January 23, 2012



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