

**Statement of Alaine S. Williams  
General Counsel to Council 13 AFSCME, AFL-CIO  
to the Pennsylvania Senate State Government Committee**

On behalf of AFSCME Council 13, I would like to thank the Senate State Government Committee for this opportunity to appear before you today regarding Senate Bill 1122. Council 13 AFSCME wholeheartedly supports Senate Bill 1122. Additionally, Council 13 AFSCME believes that Senate Bill 1122 is constitutional and is necessary to avoid state employee's becoming a political pawn in the annual battle to enact a General Appropriations Bill.

As this Committee is aware, Council 13 AFSCME has represented Commonwealth employees since 1973. As a result, AFSCME is painfully aware of the skirmishes that have occurred most every year over the enactment of a state budget. In 1991, AFSCME filed suit against Governor Casey to compel the Commonwealth and Governor to pay 19,781 employees their salaries due on July, 1991 for work performed during June, 1991. The Governor refused payment on the grounds that an appropriations bill had not been passed and Article III, Section 24 of the Pennsylvania Constitution prohibited the issuance of payment without the authorization of an appropriation law. The Pennsylvania Commonwealth Court ultimately ruled that the Governor was obligated to pay these employees for work done prior to June 30,

notwithstanding the fact that a new appropriation bill had not been adopted. Council 13 AFSCME v. Robert P. Casey, 595 A.2d 670 (Pa. Cmwlth. 1991).

1991 was a particularly difficult year in that a budget was not finally adopted until sometime late in August. The result was that employees worked but were not paid until after the fact. Although a subsequent law suit was filed by the State Troopers Association seeking payment of wages, a claim was not made under the Fair Labor Standards Act and so employees worked without pay for two months. State Troopers Association v. Commonwealth of Pennsylvania, 606 A.2d 586 (Pa. Cmwlth. 1991).

In 1993 a budget crisis reoccurred although the facts were different. The Commonwealth ran out of money at the end of May and did not have sufficient money to meet the payroll during June, 1993 for approximately 10,000 employees, many of whom were employed by the Pennsylvania Department of Transportation. Governor Casey sent notice to the employees advising them that they should continue to work and would receive payment when a budget was ultimately adopted. AFSCME filed suit in Commonwealth Court seeking summary relief in the nature of declaratory judgment and peremptory mandamus against the Governor and the State Treasurer requiring payment to these employees. In a decision issued by Judge Craig and found at Council 13 AFSCME v. Commonwealth of Pennsylvania, 626 A.2d 683 (Pa. Cmwlth. 1993), the Court ruled in AFSCME's favor and ordered Governor Casey to pay the employees. I recommend that all members of the Committee review this decision as it

is the case that Governor Rendell relies upon as justification for furloughing state employees.

In that litigation, AFSCME argued that if these employees were ordered to continue to work, then the Fair Labor Standards Act required that they be paid on their regular pay days. Once again, the Commonwealth argued that Article III, Section 24 of the Pennsylvania Constitution prohibited them from making payments because the appropriations line had been exhausted. The Treasurer intervened and asserted that she was prohibited by the Administrative Code from making any payment unless pursuant to an appropriation bill. Judge Craig had little trouble finding that the Fair Labor Standard Act applied to the 10,000 represented employees involved in that litigation and, therefore, they must be paid if they worked. The Court found that the Fair Labor Standards Act supersedes the Pennsylvania Constitution and the Pennsylvania Administrative Code by virtue of the Supremacy Clause of the United States Constitution. As such, the Commonwealth was ordered to pay the employees in question. The Court rejected AFSCME's request for liquidated damages because no violation had occurred in that a payday had not yet been missed when the suit was filed.

Contrary to assertions made by the Rendell Administration, this case does not stand for the proposition that the Commonwealth should make a distinction between critical and non-critical employees or between those employees necessary to protect the health safety and welfare of the community and those not so engaged. It merely

stands for the proposition that if employees covered by the Fair Labor Standards Act are required to work, they must be paid.

The Fair Labor Standards Act is a fairly straightforward piece of legislation which requires that employees who are subject to the Act be paid minimum wage and that the payment be made on their regular pay days. It further provides for overtime pay for the vast majority of employees who are subject to the Fair Labor Standards Act. The Fair Labor Standards Act makes no mention of critical or non-critical workers. Furthermore, the Fair Labor Standards Act makes no mention of employees necessary for the health, safety and welfare of a community. Comments made by Governor Rendell or his spokesman, Chuck Ardo, that “federal law and legal precedent prohibit the Commonwealth from requiring employees to work when money is not appropriated to pay them” is just dead wrong. The Fair Labor Standards Act requires that if employees work, then they must be paid. Mr. Ardo was also quoted as saying “federal law creates an exception for those employees defined as critical to protecting public safety, health and welfare of Pennsylvania citizens.” This is absolutely incorrect. The Federal Fair Labor Standards Act makes no distinction between employees who are “critical” or “non-critical” or those employees necessary to protect the public health safety and welfare.

The critical/non-critical distinction is one which has been created by the Rendell Administration. It is neither supported by the Fair Labor Standards Act nor is it supported by Pennsylvania law. AFSCME believes that following the Commonwealth

Court decision in 1993, the Commonwealth of Pennsylvania would be legally justified to continue to employ all Commonwealth employees notwithstanding the fact that an annual appropriations bill has not been adopted. AFSCME v. Commonwealth of Pennsylvania, 626 A.2d 683 (Pa. Cmwlth. 1993) stands for the proposition that the Governor and the Treasurer of the Commonwealth of Pennsylvania are legally justified in continuing to pay Commonwealth employees even where an annual appropriations bill has not been passed. Neither Article III, Section 24 of the Pennsylvania Constitution nor the Administrative Code is an impediment to payment.

To avoid state employees being used as pawns in the annual budget negotiations, the Governor would be legally justified in continuing the employment of all Commonwealth employees. Furloughs would not occur thereby avoiding the significant financial hardships that will be suffered by those furloughed employees and their families. Additionally, the Governor could avoid inconveniencing the citizens of the Commonwealth of Pennsylvania by shutting down vital state services. Clearly, this is an option available to the Governor.

Significantly, should the Governor choose to do this, he would certainly not risk violating the Fair Labor Standards Act as all employees would be paid. To the extent that he and the Treasurer may have had concerns regarding whether continuing employment would violate the Pennsylvania Constitution, they would be completely justified in relying upon Council 13 AFSCME v. Commonwealth of Pennsylvania, 626 A.2d 683 (Pa. Cmwlth. 1993). In the 1993 case, the Commonwealth had no money

available. It had completely exhausted its entire appropriation. That is certainly not the case in Pennsylvania in June, 2008. The Commonwealth has a significant surplus which would be legally available for payment of state employees. Once again, legal precedent would allow the Governor to rely upon that money to meet the state payroll.

I feel compelled to respond to the claims that have been made by the Governor's Office with regards to the Commonwealth's financial liability for liquidated damages should it not pay people pursuant to the Fair Labor Standards Act. As noted above, there is no question but that the Fair Labor Standards Act requires employees to be paid for services performed and that the payment be made in a timely fashion. The Governor's Office has suggested that if employees were not paid, the Commonwealth would incur liquidated damages at the rate of three million dollars per day. First of all, these liquidated damages would only come into play if the employees were not paid. As noted above, the Commonwealth has the legal authority to make payroll and therefore there would be no reason for the employees to go without pay. Most significantly however, is the fact that pursuant to the Eleventh Amendment to the United States Constitution, the Commonwealth is virtually immune from liquidated damages under the Fair Labor Standards Act. In Alden v. State of Maine, 527 U.S. 706 (1999), the United States Supreme Court ruled that the only litigant who could attempt to enforce a judgment against a state such as the Commonwealth of Pennsylvania for a Fair Labor Standards Act violation would be the Secretary of the United States Department of Labor. Therefore, reliance upon potential liquidated damages which are essentially legally uncollectible, is not realistic.

For state employees and the Unions that represent those employees, the annual budget battle is and always has been a traumatic time. Senate Bill 1122 would go a long way towards avoiding the threat of furloughs and actual furloughs as it would eliminate the Commonwealth's ability to pick and choose which employees should be furloughed. When the United States Supreme Court issued its decision in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), in which the Court made the FLSA applicable to state employees, it gave public employer's a weapon to avoid discontinuing services and furloughing employees notwithstanding the fact that a new appropriations bill had not been adopted. We urge passage of Senate Bill 1122 to bring an end to this quagmire.

Respectfully submitted,

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