

## PSBA Summary of Act 1 Base Index Calculation Dispute

November 14, 2012

This issue arises from a recent change in the method by which PDE calculates an index limiting any increase in school taxes for a particular fiscal year, a change which would have the effect of significantly eroding the discretion left by law to local school officials regarding the revenue and expenditures necessary to support educational programs. The question is whether PDE properly applied a 2011 amendment of a provision of the Unemployment Compensation Law in calculating the index under Act 1 of 2006 (the Taxpayer Relief Act), or whether instead the change is contrary to legislative intent and the express statutory language of Act 1.

As most school officials are generally aware, Act 1 of 2006, known as the "Taxpayer Relief Act," prohibits a school district from increasing the rate of any tax by more than a percentage "index" defined in Act 1, unless the increase is approved by voters in a local referendum, or unless certain limited exceptions apply. The index for each school district is determined by a statewide base index, which is then further modified for each district based on the district's aid ratio.

The Act 1 base index is the average of the percentage increase in the "statewide average weekly wage" (SAWW), and the federally calculated "employment cost index" (ECI) specific to elementary and secondary schools. PDE is required by Act 1 to calculate and publish the base index by September 1 of each year, applicable to tax levies for the fiscal year commencing the following July.

The SAWW, in turn, is defined in Act 1 as "That amount determined by the Department of Labor and Industry in the same manner that it determines the average weekly wage under section 404(e)(2) of the act of December 5, 1936 known as the Unemployment Compensation Law, *except that it shall be calculated for the preceding calendar year.*" 53 P.S. § 6926.302 (bold italic emphasis added).

Act 6 of 2011, effective immediately on July 17, 2011, amended the Unemployment Compensation Law (UCL) provision describing how the SAWW is to be determined. Prior to Act 6 the UCL provision read in pertinent part as follows:

"For the purpose of determining the maximum weekly benefit rate, the Pennsylvania average weekly wage in covered employment shall be computed on the basis of the total wages reported (irrespective of the limit on the amount of wages subject to contributions) for the *twelve-month period ending June 30* and this amount shall be divided by the average monthly number of covered workers (determined by dividing the total covered employment reported *for the same fiscal year by twelve*) to determine the average annual wage. The average annual wage thus obtained shall be divided by fifty-two and the average weekly wage thus determined rounded to the nearest cent."

43 P.S. §804(e)(2) (bold italic emphasis added).

As a result of the Act 6 amendment, the same UCL provision now reads as follows:

“For the purpose of determining the maximum weekly benefit rate, the Pennsylvania average weekly wage in covered employment shall be computed on the basis of the average annual total wages reported (irrespective of the limit on the amount of wages subject to contributions) for the ***thirty-six-month period ending June 30 (determined by dividing the total wages reported for the thirty-six-month period by three)*** and this amount shall be divided by the average monthly number of covered workers (determined by dividing the total covered employment reported ***for the same thirty-six-month period by thirty-six***) to determine the average annual wage. The average annual wage thus obtained shall be divided by fifty-two and the average weekly wage thus determined rounded to the nearest cent.”

43 P.S. §804(e)(2)(ii) (bold italic emphasis added).

PDE published notice of the base index for fiscal year 2013-2014 in the September 22, 2012 issue of the Pennsylvania Bulletin, at Vol. 42, page 5974. The 1.7% index rate appearing in that notice was determined using a SAWW based on a three-year look back, rather than the one-year calendar year look back specified in Act 1 and used in previous years. The 1.7% rate resulting from a three-year look back is about 25% lower than the 2.2% base index that it is estimated would result based on a twelve-month look back period as done in calculations for prior years.

PSBA’s understanding is that PDE changed the calculation because of the Act 6 amendment to the Unemployment Compensation Law. PSBA believes that PDE’s change in the calculation of the Act 1 base index is contrary to law, and ignores the express exception in Act 1 specifying a twelve-month calendar year look back.

PSBA believes that basic principles of statutory construction compel the conclusion that the PDE interpretation is in error. Pennsylvania’s Statutory Construction Act provides that when a statutory provision makes reference to a different statute, the reference is presumed to include all later amendments to that other statute, ***but not*** if the context or express statutory language indicate otherwise. 1 Pa.C.S. § 1937. Both the context of Act 1 and its express language clearly indicate otherwise, including Act 1’s express exception to the calculation of the SAWW otherwise set forth in the UCL that specifically prescribes the use of a twelve-month calendar year look back period.

The Statutory Construction Act also mandates a presumption that the General Assembly intends for all provisions of a statute to be given effect. 1 Pa.C.S. § 1922. The Pennsylvania Supreme Court has declared that “in construing a statute, the courts must attempt to give meaning to every word in a statute as we cannot assume that the legislature intended any words to be mere surplusage.” *Holland v. Marcy*, 883 A.2d 449 at 456 (Pa. 2005). PDE’s application of a three-year look back period in the Act 1 index calculation violates this principle because it deprives the exception in Act 1’s index definition of any effect or meaning (“except that it shall

be calculated for the preceding calendar year.”) By contrast, continuing to apply the twelve-month look back specified in that exception still gives full effect to all of the language of the Act 1 index definition, because other than the expressly specified calendar year look back period, the SAWW still would be calculated “in the same manner” that the SAWW is determined under the UCL. The SAWW still would be “computed on the basis of the total wages reported (irrespective of the limit on the amount of wages subject to contributions)” for the applicable look back period, and “divided by the average monthly number of covered workers (determined by dividing the total covered employment reported)” to determine the average annual wage, which in turn still is “divided by fifty-two and the average weekly wage thus determined rounded to the nearest cent.” 43 P.S. §804(e)(2)(ii).

Further light on the statutory context and intent is shed by the fact that the Act 1 base index is to be based on the average of the SAWW with a second index determined based on a twelve-month look back period, the Employment Cost Index. In fact, Act 1 expressly specifies a twelve month period in defining the ECI for Act 1 purposes:

“Employment cost index.” The most recent official figures, *for the previous 12-month period beginning July 1 and ending June 30* for the Employment Cost Index Series for Elementary and Secondary Schools, reported by the Bureau of Labor Statistics of the Federal Department of Labor.”

53 P.S. § 6926.302 (bold italic emphasis added).

It is useful to understand that when Act 1 was enacted, the twelve-month look back for the SAWW calculation under the UCL had been a stable point of reference for 35 years, so there would have been little reason for the General Assembly to expect at that time that this would change in the foreseeable future. Indeed, PSBA has been informed that Senator Gordner, the sole sponsor of the legislation that became Act 6 (Senate Bill 1030 of 2011), had no intention that the bill would affect the Act 1 index, and that the Senator and his staff were displeased to hear that the legislation was being blamed for that. Senator Gordner’s Chief of Staff explained that Act 6 instead was intended only to slow the growth of Unemployment Compensation Benefits so that the Commonwealth’s Unemployment Compensation Fund could become solvent after falling in debt to the federal government by about \$4 billion. Senator Gordner's original co-sponsorship memo for the legislation makes no mention of Act 1.

See, <http://www.legis.state.pa.us/WU01/LI/CSM/2011/0/9334.pdf>.

At least one school district superintendent has been told by PDE that PDE recognizes there was more than one way to interpret the effect of Act 6, but that this was the interpretation PDE chose to go with and PDE has no intention of changing it. It is noteworthy that PDE has not been consistent about applying its new interpretation. Although the Act 6 changes took effect in July 2011, PDE did not apply those changes last year to the determination of the Act 1 index for the 2012-2013 fiscal year that PDE published in the September 24, 2011 issue of the Pa. Bulletin, at Vol. 41, page 5066. Instead, PDE continued to determine the base index as it had in prior years, using the twelve-month look back period for determining the SAWW. PDE either was wrong last year, or is wrong this year.

Numerous school districts have expressed concerns and objections to PSBA about PDE's sudden flip-flop regarding the effect of Act 6, and the consequent reduction of the base index. For many school districts, the switch could have a severely adverse financial impact on a school district's ability to fully consider all the options that were intended to be available to them in upcoming budget development and in evaluating how to support critical educational programs. Just in the fifteen school districts within Delaware County, this change reduces funding otherwise available for their programs by nearly \$4 million, averaging more than \$250,000 per district.

PSBA has been in discussion with a number of school district officials about possible court action to resolve the issue, which would be led by PSBA and PSBA-retained counsel, but also would include several school districts as named plaintiffs. Typically, such litigation would take the form of a declaratory judgment action brought against the Commonwealth, the Department of Education and the Secretary of Education, filed in the original jurisdiction of the Commonwealth Court, asking the court to rule on the proper interpretation of Act 1 in light of the Act 6 amendments. Also common in such cases are additional counts seeking an injunction and a writ of mandamus prohibiting PDE from applying the new interpretation and directing PDE to recalculate the index properly.

If a school board is interested in their district's becoming involved in such litigation as one of the named plaintiff school districts (at no cost to the district), the superintendent or solicitor should contact PSBA Chief Counsel Stuart Knade as soon as possible. Stuart can answer further questions and put the district in contact with the attorneys handling the case for PSBA. Stuart can be reached at (800) 932-0588, or at [stuart.knade@psba.org](mailto:stuart.knade@psba.org).

Lastly, in discussing this issue among school board members and other stakeholders, it is important to stress that the issue is whether PDE's interpretation improperly takes away the full measure of discretion the General Assembly intended local school boards to have under Act 1 with regard to budget and revenue decisions. The need to resolve this controversy does not mean that any plaintiff school district necessarily desires or intends to raise taxes at all. Rather, the principle at stake is that school boards in their budget considerations should have the full intended range of options available in determining what educational programs can be supported with available funds, and that they should not be forced to deprive students unnecessarily of needed programs and services as a result of constraints on the revenue options intended to be available under Act 1 created by PDE's arbitrary and unlawful change in interpretation.