

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

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| <b>DIAMOND STATE PORT CORPORATION,</b>           | ) | <b>PERB Review of</b>       |
| <b>Appellant,</b>                                | ) | <b>Order of Deferral</b>    |
| <b>v.</b>  | ) |                             |
|  | ) |                             |
| <b>INTERNATIONAL LONGSHOREMEN’S ASSOCIATION,</b> | ) | <b><u>ULP 09-05-682</u></b> |
| <b>LOCAL 1694-1,</b>                             | ) |                             |
| <b>Appellee.</b>                                 | ) |                             |

*Appearances*

*Aaron Shapiro, SLREP/HRM/OMB, for DSPC*

*Bernard N. Katz, Esq., Meranze & Katz, for ILA 1694-1*

**BACKGROUND**

Diamond State Port Corporation (“DSPC”) is a public employer within the meaning of §1302 (p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (“PERA”) and is the Appellant in this request for review of the Probable Cause Determination and Order to Defer to Arbitration.

The International Longshoremen’s Association, Local 1694-1 (“ILA”) is an “employee organization” within the meaning of §1302(i) of the PERA and is the exclusive bargaining representative of a bargaining unit of Port employees as defined in DOL Case 103, within the meaning of 19 Del.C. §1302(j).

DSPC and ILA Local 1694-1 are parties to a collective bargaining agreement which has a term of October 1, 2007 through September 30, 2010.

On May 29, 20098, DSPC filed an unfair labor practice charge alleging that the

ILA violated 19 Del.C. §1307 (b)(2) and (b)(3)<sup>1</sup> by instituting a unilateral change in the grievance and arbitration procedure. Specifically DSPC asserts that the ILA violated its duty to bargain in good faith by “attempting to require the State to arbitrate multiple grievances before a single arbitrator at the same time, in violation of the parties’ collective bargaining agreement.”

On June 9, 2009, the ILA filed its Answer to the Charge denying all material allegations, and asserting that whether the grievance “must be treated as a single consolidated matter requires a construction of the intent, meaning and reasonable application of the collective bargaining agreement” which is within the exclusive responsibility of the arbitrator under the parties’ negotiated grievance procedures.

On July 2, 2009, the Executive Director issued a Probable Cause Determination finding the pleadings provided a sufficient basis for finding probable cause to believe that an unfair labor practice may have occurred. She ordered that the matter be deferred to the negotiated arbitration process because: 1) “the resolution of the Charge requires interpretation and application of a specific contractual provision”; 2) the grievance has been appealed to arbitration; 3) the arbitrator has the authority to resolve the contractual issue; and 4) the determination of the contractual question through arbitration serves the statutory mandate of promoting effective collective bargaining relationships. *Diamond State Port Corporation v. ILA Local 1694-1*, ULP 09-05-682, VI PERB 4275, 4279 (2009).

On or about July 7, 2009, DSPC requested review of the Executive Director’s

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<sup>1</sup> It is an unfair labor practice for a public employee or for an employee organization to any of the following:

- (2) Refuse to bargain collectively in good faith with the public employer or its designated representative if the employee organization is an exclusive representative.
- (3) Refuse or fail to comply with any provision of this chapter or with rules or regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

Decision to defer the unfair labor practice charge to arbitration. In its response, the ILA requested the Board: 1) order DSPC to proceed to arbitration; 2) quell DSPC's efforts to delay arbitration; and 3) award compensatory damages to the ILA for unnecessary attorneys' fees incurred in responding to the instant charge.

A copy of the complete record in this matter was provided to each member of the Board. The full Board convened in public session on July 15, 2009 to consider DSPC's request for review.

### **DISCUSSION**

The Board's review of the Executive Director's decision is limited to the scope of the record created by the parties and addresses whether the decision is arbitrary, capricious, contrary to law or otherwise unsupported by the record. The Board's Rules require the Executive Director (based upon review of the pleadings) to determine whether there is probable cause to believe that an unfair labor practice may have occurred. If the Executive Director determines that an unfair labor practice has, or may have occurred, she shall, where possible, issue a decision based upon the pleadings; otherwise he/she shall issue a probable cause determination setting forth the specific unfair labor practice which may have occurred. PERB Rule 5.6.

This Board has a long history of exercising its discretion to defer unfair labor practice charges in a limited number of circumstances in order to allow the parties' negotiated grievance and arbitration procedures to be concluded. Specifically, where the resolution of the unfair labor practice charge turns on the application and interpretation of a specific contractual provision, where the parties have negotiated a binding arbitration process for resolving such questions of application and interpretation of contractual language, and where preliminary resolution through that negotiated arbitration process

will further the statutory purposes, the Board has deferred its consideration of the unfair labor practice charge.

Pre-arbitral deferral does not, however, divest the Board of jurisdiction over the Charge. Either party may petition the Board for reconsideration of the deferral order if any of the following should occur:

- It is alleged that the arbitral process has been unfair;
- The dispute is not being resolved through the negotiated grievance and arbitration process with reasonable promptness;
- Either party refuses to abide by the arbitrator's decision; and/or
- The statutory claim is not resolved by the arbitrator's decision. *DSTA v. Division of State Police*, ULP 92-06-075, II PERB 794, 803 (1992).

It is undisputed that the issue raised by this Charge, whether the ILA has unilaterally altered the status quo of a mandatory subject of bargaining (i.e., the negotiated grievance procedure) by its Demand for Arbitration concerning application of the negotiated seniority provisions, must be resolved by interpretation and application of Article 8.7 of the collective bargaining agreement.<sup>2</sup>

DSPC has raised a procedural objection to arbitration which is within the authority of the arbitrator to decide based upon his or her application of Article 8.7. While the clarity of the contractual provision in issue is debatable, the question of whether or not there are four issues or a single issue in dispute and whether the dispute(s) may be heard by a single arbitrator under the terms of the collective bargaining agreement is clearly a matter of contractual interpretation. Should the arbitrator determine that these matters may be heard as a single grievance, there is no unilateral

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<sup>2</sup> Article 8.7: Except by mutual agreement between the Employer and the Union, only one grievance may be heard by the same arbitrator at the same time. The American Arbitration Association shall provide separate lists, for each grievance or group of grievances, or a least 9 arbitrators' names and for such supplemental lists as are provided by the rules of the American Arbitration Association. The parties may at any time mutually agree upon an arbitrator who is either on the list(s) or from any other source.

change in the grievance procedure, and, therefore, no commission of an unfair labor practice.

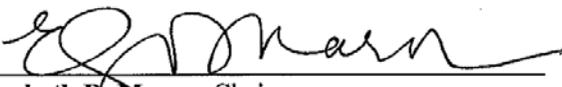
**DECISION**

After reviewing the record and hearing the arguments of the parties, the Board unanimously finds the Executive Director properly applied PERB's deferral policy and that her decision to do so was neither arbitrary, capricious, contrary to law, or unsupported by the record.

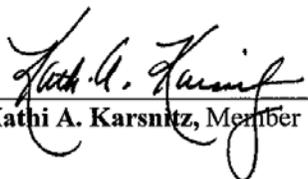
The Board does not find a basis for granting the ILA's Motion to Quash or for the granting of compensatory damages in this matter at this time.

The parties are directed to forthwith proceed to submit this matter to arbitration in accordance with their negotiated procedure and to advise the PERB on or before October 1, 2009 as to whether this matter has been resolved.

**IT IS SO ORDERED.**

  
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**Elizabeth D. Maron, Chairperson**

  
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**R. Robert Currie, Jr., Member**

  
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**Kathi A. Karsnitz, Member**

Dated: August 5, 2009