

PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF DELAWARE

STATE OF DELAWARE, DIAMOND STATE	:	
PORT CORPORATION,	:	
	:	PERB Review of the
Appellant,	:	Executive Director's
	:	Decision
v.	:	
	:	
INTERNATIONAL LONGSHOREMEN'S	:	<u>ULP 11-02-787</u>
ASSOCIATION, AFL-CIO, LOCAL 1694-1,	:	
	:	
Appellee.	:	

Appearances

*William W. Bowser, Esq. & Michael Stafford, Young Conaway Stargatt & Taylor, LLP,
for Diamond State Port Corporation
Bernard F. Katz, Esq., for ILA Local 1694-1*

BACKGROUND

The State of Delaware (“State”) is a public employer within the meaning of §1302(p) of the Public Employment Relations Act (“PERA”). 19 Del.C. Chapter 13 (1994). Diamond State Port Corporation (“DSPC”) is an agency of the State.

The International Longshoremen’s Association, AFL-CIO (“ILA”) is an employee organization which admits to membership DSPC employees and has as a purpose the representation of those employees in collective bargaining, pursuant to 19 Del.C. §1302(i). The ILA, by and through its Local 1694-1, represents a bargaining unit of DSPC employees (as defined by DOL Case #103) for purposes of collective bargaining and is certified as the exclusive bargaining representative of that unit. 19 Del.C. §1302(j).

ILA Local 1694-1 and DSPC are and have been parties to numerous collective bargaining agreements. The current agreement includes a contractual grievance procedure which culminates in final and binding arbitration. Article 8.9 of the agreement states, in relevant part, that the arbitrator's decision, "shall be final and binding if made in accordance with the arbitrator's jurisdiction and authority under this Agreement and not prohibited by any ordinance or statutes..."

On or about February 7, 2011, the ILA filed an unfair labor practice charge alleging DSPC had violated 19 Del.C. §1307 (a)(1), (a)(3), (a)(4), (a)(5), (a)(6), and/or (a)(7). Specifically, the Charge alleged DSPC had refused to comply with a final and binding arbitration award and had ignored the arbitrator's decision, in violation of its statutory obligations under the PERA.

On February 15, 2011, DSPC filed its Answer to the Charge, in which it admitted to the material facts, but denied the legal conclusions set forth by the ILA. The Answer also included New Matter.

The ILA filed its Response to DSPC's Answer to the Charge on February 22, 2011, in which it denied the New Matter included in the Answer.

By decision dated April 17, 2011, the Executive Director determined there were no material issues of fact raised by the pleadings. Upon review of those pleadings and supporting documentation, the Executive Director found DSPC had violated its duty to bargain in good faith and 19 Del.C.1307(a)(5), by unilaterally modifying the negotiated terms of the grievance procedure (a mandatory subject of bargaining), by failing or refusing to implement a final and binding arbitration decision for at least eight months after its issuance, and by failing to seek timely judicial review of the award. By so doing, the employer also interfered with the rights guaranteed to employees by the PERA, in violation of 19 Del.C. §1307(a)(1). The Executive Director also concluded there were no

facts alleged in the Charge which, even if true, would support a finding that DSPC violated 19 Del.C. §1307(a)(3), (a)(4), (a)(6) and/or (a)(7); consequently, those charges were dismissed.

On or about April 26, 2011, the Appellant requested the full Public Employment Relations Board review the Executive Director's decision, asserting it was contrary to law. The request included legal argument in support of its positions, to which was appended cited legal support. DSPC requested PERB reverse the Executive Director's decision and defer the underlying issue to resolution in Chancery Court, or alternatively, remand the matter back to the Executive Director to develop the record in order to consider DSPC's assertion that the arbitration award in question did not draw its essence from the collective bargaining agreement. DSPC also requested the Board stay the implementation of the Executive Director's decision pending completion of its review.

ILA Local 1694-1 filed its response (including written argument and supporting case law) to DSPC's Request for Review on May 6, 2011, requesting the stay and appeal be denied and that the Hearing Officer's decision be affirmed. The ILA also requested DSPC be directed to cease and desist from failing or refusing to abide by the terms and conditions of the parties' negotiated collective bargaining agreement, and be further directed to immediately implement the arbitrator's July 26, 2010 award.

A copy of the complete record in this matter was provided to each member of the Public Employment Relations Board. A public hearing was convened on May 18, 2011, at which time the full Board met in public session to hear and consider this request for review. The parties were provided the opportunity to present oral argument and the decision reached herein is based upon consideration of the record and the arguments presented to the Board.

DISCUSSION

PERB Rule 5.6 requires the Executive Director to review the pleadings and determine whether they are sufficient to establish probable cause to believe that an unfair labor practice in violation of the statute may have occurred. The Rule further requires that when the Executive Director determines that an unfair labor practice has, or may have occurred, she “shall, where possible, issue a decision based on the pleadings.” A decision based upon the pleadings is subject to review by the full Public Employment Relations Board. PERB Rule 5.6(b).

The scope of the Board’s review of the Executive Director’s decision is limited to the record created by the parties. On review the Board must determine whether the decision is arbitrary, capricious, contrary to law, or unsupported by the record. Following its review, the Board may decide to affirm the decision, overturn the decision, and/or remand the matter for further action by the Executive Director.

The Board and the parties recognize this case constitutes a matter of first impression. The underlying facts of the case are not in dispute. The pleadings establish that ILA filed a grievance on behalf of two “B” (casual) bargaining unit employees alleging DSPC violated the requirements of the collective bargaining agreement and the employees’ seniority rights by awarding two available “A” (permanent) positions to less senior bargaining unit employees. An arbitration hearing was conducted before a mutually selected arbitrator on November 13, 2009, following which the arbitrator ordered DSPC to re-evaluate the applicants for promotion and to submit additional information concerning the relative qualifications of the applicants. The arbitrator rendered his award on July 26, 2010, denying the grievance as to one B employee and sustaining the award as to the second B employee, Grievant Harris. The Arbitrator directed:

The Employer shall award an “A” position to Grievant Harris forthwith, and shall make him whole by paying Mr. Harris the difference in the hourly rate between an “A” Operator and an “B” Operator for any lost work opportunity attributable to the failure to promote him at the same time that the junior selectees were awarded their “A” positions, retroactive to the first date that the junior selectees began their work as “A” Operators.

The arbitrator retained jurisdiction for the limited purpose of “resolving any dispute that may arise regarding the computation or implementation of the remedy.”

Thereafter, DSPC requested the arbitrator clarify the Award to indicate which junior employee should be removed from an “A” position. The ILA opposed this request as beyond the scope of the initial grievance submitted to the arbitrator. The Arbitrator declined (by letter dated January 12, 2011) to grant DSPC’s petition to consider this “derivative dispute not encompassed in the original issue submitted for adjudication,” absent mutual agreement of the ILA to submit the issue for arbitration.

It is undisputed that DSPC has taken no action to either comply with the arbitrator’s award, nor has it sought judicial review of the award at any time relevant to this Charge.

The ILA asserts the Executive Director’s decision should be affirmed because: 1) DSPC failed to timely apply for an order to vacate the arbitrator’s decision; 2) the Public Employment Relations Act does not require or provide for judicial enforcement of labor arbitration awards; and 3) DSPC violated 19 Del.C. §1307(a)(1) and (a)(5) by refusing to comply with the final and binding arbitration award.

The State argues on appeal that the Executive Director erred by not deferring enforcement of the arbitrator’s award to require the ILA to file an action to compel enforcement in the Court of Chancery. It notes that PERB has routinely applied a *pre-arbitral* deferral policy where statutory unfair labor practice charges raise issues of contractual interpretation and/or application which are identical to those pending in the

grievance and arbitration process. The State asserts the Court of Chancery has established equitable jurisdiction in Delaware to review arbitration awards rendered pursuant to a collectively bargained agreement, despite the fact that Delaware's Uniform Arbitration Act, specifically "... shall not apply to labor contracts with either public or private employers where such contracts have been negotiated by, or the employees covered thereby are represented by, any labor organization or collective bargaining agent or representative." 10 Del.C. §5725.

In this case, there is no pending matter in any another forum to which the Board could defer its consideration of this issue. Essentially, the State argues the ILA should be compelled to prospectively file a motion for enforcement of the arbitrator's award in the Court of Chancery. It is not clear that such a motion would be entertained by the Court, nor is there any statutory obligation on the prevailing party (the ILA in this case) to expend time and resources to affirm a decision which affirmed its position. Because the issue raised by this charge is not currently pending before any other tribunal, the Board declines at this time to exercise its discretion to fashion or implement a *post*-arbitral deferral policy, as urged by the State.

The State also asserted the Executive Director committed a legal error when she concluded DSPC's failure to implement the arbitration award constituted a unilateral change in status quo of a mandatory subject of bargaining. There is no dispute that the PERA explicitly establishes the grievance procedure is a mandatory subject of bargaining. It is also well established in Delaware case law under the PERA that a unilateral change in the status quo of a mandatory subject of bargaining constitutes a *per se* violation of the duty to bargain in good faith under the PERA. The charge does not allege, nor does the Executive Director's decision find, that there has been a universal repudiation of the grievance and arbitration procedure by DSPC. A single act of

repudiation of the grievance and arbitration process is sufficient to constitute a *per se* violation.

The State asserts the parties' negotiated grievance and arbitration procedures inherently include the requirement that a party seek judicial review of an arbitration award, either through a motion to vacate or a motion enforce filed in the Court of Chancery. There is nothing in the contractual language negotiated by these parties or in the PERA to support this assertion. The General Assembly did not choose to include in the PERA a provision to allow for suits for violation of collective bargaining agreements to be filed in court, as is provided for by Article 301 of the National Labor Relations Act. Delaware's Uniform Arbitration Act explicitly excludes collectively bargained agreements from its coverage. To accept the State's argument would defeat the purpose of the negotiated grievance procedure to resolve disputes arising under the agreement in a timely, efficient and effective matter. As argued by the State, an employer could fail or refuse to implement an arbitration award, without taking any affirmative action to challenge the validity of that award, and wait for the union to file motion for enforcement before raising a defense that the arbitrator exceeded his authority or that the award did not draw its essence from the agreement. This argument flies in the face of the good faith obligations imposed by the PERA.

Finally, the State argued the Executive Director erred in refusing to consider DSPC's argument that the arbitrator's award did not draw its essence from the collective bargaining agreement. It asserted DSPC should have the right to attack the underlying validity of the arbitrator's award because the ILA is essentially seeking to enforce the award by filing this unfair labor charge with PERB. This argument is contrary to the facts in this case. DSPC did not seek to challenge the validity of the award in any forum for more than eight months, prior to defending its inaction in response to this unfair labor

practice charge.

This decision does not interfere with or in any manner impugn the integrity of the grievance and arbitration procedure negotiated by these parties. Rather, it requires the parties to abide by their agreement, in good faith, consistent with their statutory obligations. DSPC was not deprived of its right to challenge the integrity of the arbitration award; this decision requires, however, that it take affirmative action do so in a timely manner if it is interested in avoiding the consequences of the arbitration award.

It is also important to note that the PERA provides any party adversely affected by an unfair labor practice decision of the Board the right to appeal that decision to the Court of Chancery. Consequently, rather than relying upon a discretionary exercise of equitable jurisdiction, the determination in this case is subject to direct review by the Court, pursuant to 19 Del.C. §1309.

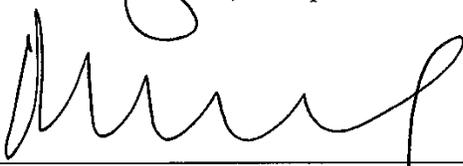
DECISION

After reviewing the record, hearing and considering the arguments of the parties, the Board unanimously affirms the decision of the Executive Director. By failing or refusing to implement the decision rendered by an arbitrator and not pursuing any rights the employer may have for judicial review of that decision for more than eight months after its issuance, DSPC unilaterally altered the negotiated grievance and arbitration procedures and thereby committed a *per se* violation of 19 Del.C. §1307 (a)(1) and (a)(5).

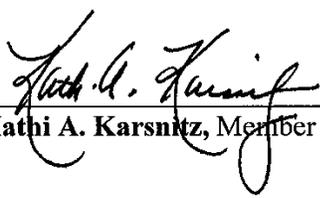
It is so ordered.



Elizabeth D. Maron, Chairperson



R. Robert Currie, Jr., Member


Kathi A. Karsnitz, Member

Dated: June 21, 2011