

PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF DELAWARE

CHARLES HARRIS,	:	
	:	PERB Review of the
Appellant,	:	Executive Director's
	:	Decision
v.	:	
	:	
DIAMOND STATE PORT CORPORATION AND	:	<u>ULP 11-10-827</u>
INTERNATIONAL LONGSHOREMAN'S	:	
ASSOCIATION, LOCAL 1694-1, AFL-CIO,	:	
	:	
Appellees.	:	

Appearances

Samuel L. Guy, Esq., for the Appellant
Michael P. Stafford, Esq., Young Conaway Stargatt & Taylor LLP, for DSPC
Bernard N. Katz, Esq., Meranze, Katz, Gaudioso & Newlin, for ILA Local 1694-1

BACKGROUND

Charles Harris (“Appellant”) is a public employee within the meaning of §1302(o) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (“PERA”). He is employed by the Diamond State Port Corporation and is a member of the bargaining unit represented by International Longshoremen’s Association, Local 1694-1.

The State of Delaware (“State”) is a public employer within the meaning of 19 Del.C. 1302(p). The Diamond State Port Corporation (“DSPC”) is an agency of the State.

The International Association of Longshoremen, Local 1694-1, AFL-CIO (“ILA”) is the certified exclusive bargaining representative of a unit of DSPC employees, within

the meaning of 19 Del.C. §1302(j).

DSPC and the ILA are and have been parties to numerous collective bargaining agreements. The current agreement¹ includes a contractual grievance procedure which culminates in final and binding arbitration.

On or about October 7, 2011, the Appellant filed this unfair labor practice charge alleging conduct by DSPC in violation §1307(a) of the PERA. The Appellant charged DSPC failed to comply with an arbitration award which held that he had been improperly bypassed for promotion to a full-time Fork Lift Operator position (an “A” position as defined in the parties’ collective bargaining agreement). The Charge asserted the Appellant continues to be harmed by DSPC’s failure to provide him with the benefits granted by the July 26, 2010 award; that DSPC is “practicing racism” because the Appellant is “black”; and that DSPC and the ILA are acting in concert to the detriment of the Appellant through their combined failure to act.

The Appellant also charged the ILA failed to meet its statutory duty of fair representation through its failure to take any action to enforce the arbitration award or this Board’s decision that DSPC had committed an unfair labor practice in refusing to implement the binding grievance arbitration award.

On or about October 19, 2011, the ILA filed its Answer denying the allegations contained in the Charge. The ILA asserted the Appellant was promoted to an “A” Forklift Operator position, that the Appellant has received a substantial (if not all) of the back pay to which he is entitled, and that DSPC and ILA met to finalize the back pay and benefit calculations. Should a dispute arise as to those calculations, the arbitrator retained

¹ The term of the parties’ most recent agreement is October 1, 2007 through September 30, 2010. During negotiations for a successor Agreement, the terms of this Agreement have remained in full force and effect and were applicable at all times relevant to the processing of this Charge.

jurisdiction for the limited purpose of assisting with the implementation of the remedy, if necessary. Consequently, any dispute concerning the award is within the exclusive authority of the arbitrator.

On or about October 21, 2011, the State filed its Answer denying the allegations contained in the Charge. It asserts DSPC reached agreement with the ILA concerning the Appellant's financial entitlement and that two checks totaling the agreed upon amount were issued to Charging Party. DSPC also asserted under New Matter that the Charge did not comply with PERB Rule 5.2(c)(3) because it did not connect the factual allegations to specific statutory violations; the Charge was deficient because it failed to state a claim for relief under the PERA; and racial discrimination does not constitute an employer unfair labor practice under the PERA.

Upon review of the pleadings, the Hearing Officer dismissed the charge with prejudice on November 18, 2011, holding, "Considered in a light most favorable to Charging Party, the pleadings fail to provide a basis upon which to conclude that a violation of 19 Del.C. §1307(a) by the DSPC or a failure to represent Charging Party by ILA, may have occurred."

On or about November 28, 2011, the Appellant requested the full Public Employment Relations Board review the Hearing Officer's decision, asserting the decision was not supported by substantial evidence, was arbitrary and capricious, and was contrary to law. Charging Party requested a probable cause determination be issued and a hearing be conducted on the underlying issue; that PERB seek enforcement of its decision in *ILA 1694-1 v. State of Delaware, Diamond State Port Corporation*² in the Court of Chancery; and that remedial and punitive damages be assessed against DSPC.

² ULP 11-02-787, VII PERB 4977 (4/13/11); affirmed by the full PERB, VII PERB 5069 (6/21/11)

On December 8, 2011, the ILA filed its response to the Appellant's Request for Review requesting the appeal be denied, and reiterating that the Appellant had been placed in an "A" position, and had received back pay in compliance with the Arbitrator's Award.

DSPC filed its response to the Request for Review on December 20, 2011, requesting the appeal be denied and that the Hearing Officer's decision dismissing the Charge for lack of probable cause be affirmed.

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 January 18, 2012, 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 argument³ and the decision reached herein is based upon consideration of the record and the arguments presented to the Board.

DISCUSSION

Prior to presenting argument on the merits of the appeal, counsel for the Appellant moved for recusal of two of the three Board members on the grounds of personal bias or prejudice. The Board discussed the standard for recusal established by the Delaware Supreme Court in *Ebersole v. Evans Building*, 2011 WL 379409. Each challenged Member affirmed on the record that she subjectively believed she could hear the case free of any bias or prejudice, and that there was no objective appearance of bias sufficient to cause doubt concerning her impartiality. The full Board unanimously denied Charging Party's motion and proceeded to consider the merits of the appeal.

³ Counsel filed a written response on behalf of the ILA to the Appellant's request for review but declined the opportunity to present oral argument before the full Board.

The Board's scope of review is limited to the record created by the parties and consideration of whether the decision is arbitrary, capricious, contrary to law, or unsupported by the record. After consideration of the record and the arguments of the parties on appeal, the Board must vote to affirm, overturn, or remand the decision to the Executive Director for further action.

In response to the Board's question, the Appellant affirmed the purpose of this unfair labor practice charge is to dispute whether or not Mr. Harris has been made whole, as directed by the arbitrator's award. The collective bargaining agreement is negotiated by and between DSPC and ILA Local 1694-1 on behalf of bargaining unit employees and the Appellant is a beneficiary of that agreement. Employee rights created by the collective bargaining agreement are enforceable by the ILA through the negotiated grievance procedure.

The record establishes the ILA filed and processed a grievance on the Appellant's behalf through the grievance and arbitration procedure. It continued to represent the Appellant's contractual interests when it filed and prevailed in an unfair labor practice proceeding before this Board, contesting DSPC's failure or refusal to implement a final and binding arbitration award.

The record establishes that Mr. Harris was placed in an "A" Fork Lift Operator position shortly after this Board's decision in June, 2011. He received moneys due him in the amount of \$73,716.34 in back wages and benefits and \$7,295.20 in health care reimbursements. The record also supports the conclusion DSPC and the ILA were engaged in efforts throughout the late summer and fall to determine the proper amounts due to the Appellant. Both the ILA and DSPC confirmed their understanding that the arbitrator retained jurisdiction to resolve any issues between the parties concerning

moneys due Mr. Harris under the terms of the arbitration award, should it be necessary.

There is no merit to the Appellant's assertion that there is "...nobody at the table with the Union and the Port adequately fighting to protect Mr. Harris' right to receive his money." *TR, p. 15.* ILA 1694-1 is the exclusive bargaining representative of all employees in the bargaining unit, including Mr. Harris. The Appellant argues he should have received additional moneys but provides no support for his conclusion that because he did not receive as much as he wanted or expected his statutory rights were violated.

The pleadings do not support the conclusion that the ILA has failed or refused to fairly represent the Appellant in the grievance procedure or in its efforts to resolve the application of the arbitrator's award. The duty of fair representation requires an exclusive bargaining representative to act honestly, in good faith and in a non-arbitrary manner. The Board does not accept the Appellant's inference that because DSPC agreed the ILA has exercised due diligence in performance of its duties on behalf of the Appellant, that this Board must conclude that DSPC and the ILA acted collusively to deny the Appellant of his rights under the PERA. Both the employer and the union are obligated under the statute to engage in good faith efforts to resolve disputes. The record indicates DSPC and the ILA actively engaged in those efforts in this case.

The Appellant seeks to have this Board enforce its prior order in the Court of Chancery, to order "immediate retroactive compliance by DSPC with the arbitrator's decision," and to order a 15% interest rate be applied to all moneys owed, the award of damages and the imposition of monthly non-compliance and punitive penalties of \$20,000, retroactive to July 26, 2010. The Board finds the Hearing Officer correctly found the pleadings fail to provide a basis on which it might be concluded that either DSPC and/or the ILA failed to act or violated their duties under the PERA, as alleged.

Consequently, there is no basis for any remedy, much less the extraordinary remedy requested by the Appellant.

For these reasons, Charging Party has failed to establish the Hearing Officer's decision was arbitrary, capricious, contrary to law, or unsupported by the record.

DECISION

After reviewing the record, and considering the arguments of the parties, the Board unanimously affirms the decision of the Hearing Officer finding the pleadings fail to establish just cause to believe Diamond State Port Corporation and/or the International Longshoremen's Association, Local 1694-1, AFL-CIO, committed unfair labor practices as alleged.

Wherefore, the dismissal of the Charge is affirmed.

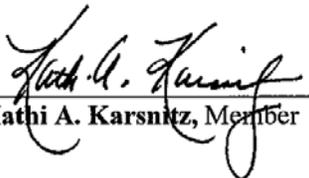
IT IS SO ORDERED.



Elizabeth D. Maron, Chairperson



R. Robert Currie, Jr., Member



Kathi A. Karsnitz, Member

DATE: February 13, 2012