

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

<b>INTERNATIONAL LONGSHOREMEN’S ASSOCIATION,</b>	)	
<b>LOCAL 1694-1, AFL-CIO,</b>	)	
	)	
Charging Party,	)	<b>ULP 14-02-943</b>
	)	
<b>v.</b>	)	<b>PROBABLE CAUSE DETERMINATION</b>
	)	
<b>DIAMOND STATE PORT CORPORATION,</b>	)	
	)	
Respondent.	)	

**APPEARANCES**

*Claiborne S. Newlin, Esq. & Bernard N. Katz, Esq.,  
Meranze, Katz, Gaudio & Newlin, for ILA 1694-1*

*Danielle M. Pinkston, SLREP/HRM/OMB, for DSPC*

**BACKGROUND**

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

The International Longshoremen’s Association, Local 1694-1, (ILA) is an employee representative within the meaning of 19 Del.C. §1302(i). By and through its affiliated Local 1694-1, the ILA is the exclusive bargaining representative of a bargaining unit of DSPC employees within the meaning of 19 Del.C. §1302(j).

At all times relevant to the processing of this Charge, the ILA and DSPC have been parties to a collective bargaining agreement. That agreement includes a Recognition Clause,

which states in relevant part:

2.2 “A employees” as included herein shall include all hourly rated employees made part of the bargaining unit by virtue of certification that was granted on January 17, 1976, Case No. 154, under the authority of Chapter 13, Title 19, Delaware Code.

“B employees” as used herein shall include all hourly rated people made part of the bargaining unit by virtue of certification that was granted on December 23, 1996, Petition No. 96-06-179, under 19 *Del.C.* Chapter 13. Alternatively, whenever the term “all employees” is used herein, such reference shall apply to “A” employees and “B” employees.

2.4 The term “casual employee” as used herein is someone employed for a temporary period when the work of the Port is such that, as determined by the Employer, it cannot be handled expeditiously by permanent “A” and/or “B” employees. Casual employees shall not be entitled to and are not covered by the provisions of this Agreement.

On February 11, 2014, the ILA filed an unfair labor practice charge (“Charge”) with the Delaware Public Employment Relations Board (PERB) alleging conduct by the Port in violation of 19 Del.C. Sections 1307(a)(1), (3), (5), and (7), which provide:

§1307 (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:

- (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.
- (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.
- (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.
- (7) Refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract.

Specifically, the Charge alleges that on or about January 1, 2013, without notice to or bargaining with the ILA, DSPC notified a certain number of “C” employees<sup>1</sup> that they were being elevated to “B” employee status. The ILA maintains that all such moves are routinely

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<sup>1</sup> The parties refer to casual employees as “C” employees.

effective on January 1<sup>st</sup> of the calendar year and the sole criteria for promotion from “C” to “B” job classification is that a “C” employee complete the contractually required 800 hours in the prior calendar year. A major benefit of attaining “B” status is that the employees are then afforded the benefits and protections of the collective bargaining agreement. The Charge further alleges that after being notified of their “B” status, the employees were required to submit to a drug and alcohol test, which the ILA contends is “contrary to the terms of the collective bargaining agreement and negotiated drug testing policy.”

DSPC filed its Answer on or about February 25, 2014, essentially denying the material allegations contained in the Charge. The Port maintains that the terms of the collective bargaining agreement between the parties applies exclusively to the “A” and “B” classifications, and that “C” employees are not covered by the agreement. It argues that “C” employees are also not covered by the parties’ negotiated Drug and Alcohol Policy<sup>2</sup>. DSPC asserts that any time a “C” employee tests positive under that policy, he/she is immediately prevented from working at the Port. It further argues that there has never been a “bargained-for” protocol for drug and alcohol testing “C” employees and that it has no obligation to bargain with the ILA concerning employees who are not in the bargaining unit.

DSPC included in its Answer to New Matter, in which it asserts the question of when a qualified “C” employee becomes a “B” employee has been previously considered by PERB in a bargaining unit clarification petition. It also argues that PERB’s jurisdiction is limited to consideration and resolution of unfair labor practices and does not extend to questions of contract interpretation. Thus, DSPC asserts PERB has no authority to resolve this matter.

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<sup>2</sup> Appended to its Answer to the Charge, DSPC included a document entitled “International Longshoremen Local 1694-1 Drug and Alcohol Abuse Program Effective August 2, 1999.” *Attachment 5*. In its Response to New Matter, ILA 1694-1 asserts the appended document is not the current negotiated Drug and Alcohol policy which was in effect at the time of the incidents giving rise to this Charge.

On March 5, 2014, Charging Party filed a Response to New Matter essentially denying the allegations therein.

### **DISCUSSION**

Regulation 5.6 of the Rules of the Delaware Public Employment Relations Board requires:

- (a) Upon review of the Complaint, the Answer and the Response the Executive Director shall determine whether there is probable cause to believe that an unfair labor practice may have occurred. If the Executive Director determines that there is no probable cause to believe that an unfair labor practice has occurred, the party filing the charge may request that the Board review the Executive Director's decision in accord with the provisions set forth in Regulation 7.4. The Board will decide such appeals following a review of the record, and, if the Board deems necessary, a hearing and/or submission of briefs.
  
- (b) If the Executive Director determines that an unfair labor practice may have occurred, he shall where possible, issue a decision based upon the pleadings; otherwise, he shall issue a probable cause determination setting forth the specific unfair labor practice which may have occurred.

For purposes of reviewing the pleadings to determine whether probable cause exists to support the Charge, factual disputes revealed by the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing a valid charge without the benefit of receiving evidence in order to resolve factual differences. *Flowers v. DART/DTC*, PERB Probable Cause Determination, ULP 04-10-453, V PERB 3179, 3182 (2004).

The following facts do not appear to be disputed in the pleadings: By letter dated November 26, 2013, DSPC's Safety Manager notified twenty-two "C" employees they had met the 800 hour requirement for "B" status.<sup>3</sup> On December 11, 2013, 19 of the 22 candidates

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<sup>3</sup> No copies of any notification letters were provided in the pleadings; consequently, no determination can be made at this point as to whether these individuals were notified that their "B" status would become

participated in an orientation which included drug and alcohol testing. By December 18, 2013, all 22 employees had completed the required orientation and drug screen. Three of the initial twenty-two “C” employees did not pass the drug and alcohol test and were advised they could “no longer be considered for employment at the Port of Wilmington”. *Attachment 6 to DSPC Answer.*

On or about December 27, 2013, five additional “C” employees were identified who met the 800 hour requirement for “B” status. They were also advised of their eligibility for move into “B” positions and were instructed to report for orientation and drug and alcohol testing prior to December 31, 2013. Although only three of these employees were tested prior to December 31, all five successfully completed the required orientation and passed the drug and alcohol testing. At no time prior to January 1, 2014 were any of the employees who passed the drug and alcohol test scheduled to work as or considered “B” employees.

The ILA contends that completing the minimum 800 hours of service during calendar year 2013 is the only requirement necessary for eligible “C” employees to move to “B” status. It asserts that upon notice of having met that 800 hour threshold, the affected employees were entitled to protection under the terms of the collective bargaining agreement. The ILA contends that any actions and/or obligations involving drug and alcohol testing must first be bargained.

DSPC asserts it has historically and consistently advised “C” employees who have completed the required 800 hours that they will be elevated to “B” status effective January 1 of the following calendar year. It argues two conditions must be met in order to become a “B” employee, namely, a “C” employee must have worked at least 800 hours in a calendar year and 2) must cross the threshold of January 1 of the following calendar year. Until both conditions

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effective on January 1, 2014 and/or whether they were advised that this was contingent upon successfully completing orientation and/or passing a drug and alcohol test.

are met and the employees become B's, DSPC has no duty to notify or bargain with the ILA concerning the drug and alcohol testing of these employees.

It is noted that the appended Drug and Alcohol Abuse Program (effective August 2, 1999) specifically states in a provision entitled "Coverage":

All DSPC employees including union, full time and part time employees are covered by this policy. Testing will not discriminate and will follow a set procedure to ensure fairness, accuracy and confidentiality.

The appended policy also includes identical language concerning when drug and alcohol testing may be conducted:

[T]esting must be conducted just before, during, or after the employee's performance of work. Employees shall not be required to report to work outside these time periods for the purpose of testing under this policy except under special situations associated with post-accident testing. DSPC agrees that the intent of this section is to adhere to these time frames whenever possible.

The central question raised by this Charge is what, if any, rights accrued to the "C" employees once they were notified that they had met the criteria to move into bargaining unit positions. When viewed in a light most favorable to the Charging Party, the Charge also raises an issue as to whether these individuals were singled out for discriminatory application of the drug and alcohol policy because they had been identified as being eligible to move into bargaining unit positions.

The pleadings raise numerous factual and legal issues upon which a determination as to whether DSPC acted in violation of its obligations under the PERA can only be resolved after receipt and consideration of evidence and argument. Questions raised by these pleadings include (but may not be limited to) whether the appended drug and alcohol policy was in effect in December, 2013; to whom does the drug and alcohol policy apply; is there an established practice of drug and alcohol testing "C" employees who are eligible to move into bargaining

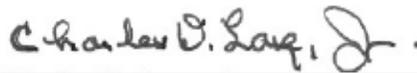
unit positions prior to January 1; what rights and obligations accrued to the eligible “C” employees when they were notified they had met the 800 hour service requirement ; and were these employees singled out for discriminatory treatment because they were about to be moved into bargaining unit positions.

### **DETERMINATION**

Considered in their entirety and in a light most favorable to Charging Party, the pleadings are sufficient to constitute probable cause to believe that the unfair labor practices alleged may have occurred.

A hearing will be promptly scheduled for the purpose of receiving testimony, documentary evidence and argument concerning whether DSPC violated 19 Del.C. §1307 (a) (1), (3), (5), and (7), as alleged, by requiring “C” employees who were eligible to move into bargaining unit positions to submit to and pass a drug and alcohol test prior to January 1, 2014.

Dated: March 31, 2014



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Charles D. Long, Jr., Hearing Officer  
Del. Public Employment Relations Board