

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL LONGSHOREMEN’S ASSOCIATION,)	
LOCAL 1694-1, AFL-CIO,)	
)	
Charging Party,)	PERB REVIEW OF EXECUTIVE
)	DIRECTOR’S DECISION ON THE
v.)	<u>MERITS</u>
)	
DIAMOND STATE PORT CORPORATION,)	ULP 14-02-943
)	
Respondent.)	

APPEARANCES

Claiborne S. Newlin, Esq., Meranze, Katz, Gaudioso & Newlin, for ILA 1694-1
Aaron Shapiro, SLREP/HRM/OMB, for DSPC

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 (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.

On February 11, 2014, the ILA filed an unfair labor practice 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).¹

DSPC filed its Answer and New Matter on or about February 25, 2014, denying the material allegations contained in the Charge. On March 4, 2014, Charging Party filed a Response to New Matter essentially denying the allegations therein.

A probable cause determination was issued on March 31, 2014. Thereafter, the hearing was scheduled and postponed numerous times because the parties were also engaged in on-going negotiations. Ultimately, the hearing was held on February 10, 2015, after which the parties submitted written argument. The Executive Director found that by requiring drug and alcohol testing of the “C” employees who had worked 800 hours in the 2013 calendar year as a condition-precedent to their progression to the “B” classification, DSPC violated 19 Del.C. §1307(a)(1) and (a)(3).² The decision directed the Port to promptly reinstate all three employees who were denied progression to the “B” classification as a result of the drug and alcohol testing they were required to undergo in December, 2013, and to make them whole for the 800 hours of work necessary to achieve and maintain “B” employee status for calendar years 2014 and 2015.

¹ §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.

² Because DSPC effectively reduced the number of “C” employees transitioning to “B” (and therefore represented) status by discriminatory application of its drug and alcohol policy.

On June 29, 2015, ILA Local 1694-1 requested review of the Executive Director's decision by the full Public Employment Relations Board. On July 1, 2015, DSPC filed a response to the ILA's request for review as well as its own Request for Review. Thereafter the Board afforded the parties the opportunity to submit written argument in support of their requests for review. Argument was received from the ILA on July 24, 2015; from the Port on July 23, 2015; and responsive argument was received from the ILA on August 10, 2015.³

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 August 19, 2015, 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

The Board's scope of review is limited to the record created by the parties and consideration of whether the Executive Director's 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.

At the opening of the hearing on August 19, 2015, the State withdrew its request for review of the Executive Director's decision. It requested the decision be affirmed and allowed to stand. DSPC noted, however, its belief that although it may have been

³ DSPC did not choose to file responsive argument, although it was provided with the opportunity to do so.

wrongly conceived and executed, the drug testing of “C” employees eligible to become “B” employees was conducted for “essentially legitimate” reasons.

The ILA argues in its request for review that the Executive Director erred as a matter of law in finding DSPC did not have a statutory duty to bargain over unilateral changes it made to the hiring terms of casual (C) employees who met the threshold requirement for becoming part of the certified bargaining unit as “B” employees on January 1, 2014. The ILA reads the decision below too broadly. The Executive Director issued a limited finding that DSPC did not violate 19 Del.C. §1307(a)(5) and (a)(7) by unilaterally instituting changes to the negotiated Drug and Alcohol policy, as that policy was applied to “C” employees. She found there was no violation of the duty to bargain in good faith with respect to discipline under the policy because “C” employees are not part of the certified bargaining unit; consequently there is no obligation for either side to negotiate with respect to discipline imposed on non-bargaining unit employees. The Board does not find her decision “permits the employer to change hiring requirements or condones the employer’s unilateral amendment of the bargaining unit certification,” as the ILA asserts on appeal.

The ILA argues the Executive Director’s decision should be clarified to state DSPC has an affirmative duty to bargain under the PERA with respect to qualifications for transitioning “C” employees who have worked the required number of hours to advance to B status the following January 1. It argues the bargaining unit certification states “C” employees who work at least 800 hours in a calendar year are entitled to become bargaining unit members, without any additional conditions.

The Board finds, consistent with the Executive Director’s decision, that “C” employees who have attained transition status are protected from conduct designed to

block transition to represented B status due to the prohibitions contained in 19 Del.C. §1307(a)(1) and (a)(3). It is undisputed that the transitioning “C” employees do not receive full benefits of the negotiated agreement accorded to “B” employees until the following January 1. That does not, however, privilege DSPC to unilaterally impose barriers to that transition to bargaining unit status, specifically including screening mechanisms which could reduce the number of eligible “C” employees who actually transition to B status.

The ILA also asserts the remedy portion of the Executive Director’s decision is insufficient to make the three affected employees whole for the damages they suffered as a result of being improperly terminated as a result of a discriminatory drug test administered selectively by the Port. The ILA argues the 800 hour limit ordered by the Executive Director for 2014 and 2015 is less than the number of hours similarly situated “B” employees worked in those calendar years. The ILA does not, however, ask the Board to determine the proper scope of the make whole remedy; rather, it asks the Board to remand the remedy to the parties to determine, consistent with the customary legal standards in employment law for remedying an improper termination.

DSPC does not dispute that a customary make whole remedy seeks to place the affected employee in the same or substantially the same position in which he would have been but for the improper action, with a set-aside for any income or revenue earned during the relevant period. It argues this case is somewhat unique because “B” employees are not guaranteed a specific number of hours annually. Other than perhaps other “B” employees with the same level of seniority, there is no other similarly situated cohort of employees in the State. The number of hours worked by any individual “B” employee, DSPC argues, is dependent on the amount and type of work available at any

time, as well as whether the individual employee is present and available for work when the opportunity arises.

The Board finds the argument of the ILA persuasive but notes that there were no facts placed on the record on which a determination can be made as to whether the 800 hours awarded by the Executive Director constitute an appropriate make whole remedy. Based on the assurances of the parties that such facts do exist and are easily available to them, the remedy is remanded to the parties, who are directed to make every reasonable effort to determine an appropriate make whole remedy for the three affected employees, consistent with the customary methods in labor relations for doing so.

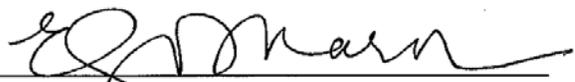
DECISION

After reviewing the record, hearing and considering the arguments of the parties, the Board unanimously affirms the decision of the Executive Director which held that by requiring drug and alcohol testing of eligible “C” employees as a condition precedent to those employees progressing to “B” employee status as bargaining unit employees, DSPC violated 19 Del.C. §1307(a)(1) and (a)(3).

The Board remands the remedy portion of the Executive Director’s decision to the parties and directs that they immediately enter into good faith negotiations to determine an appropriate and mutually acceptable make whole remedy for these employees. The parties are directed to advise the Executive Director within ninety (90) days as to whether they have successfully reached agreement.

Should the parties be unable to reach agreement, the Executive Director is directed to create a record on which a determination can be made as to the appropriate make whole remedy and to make a finding of the same.

IT IS SO ORDERED.



Elizabeth D. Maron, Chairperson



R. Robert Currie, Jr., Member



Kathi A. Karsnitz, Member

DATE: September 9, 2015