

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

DIAMOND STATE PORT CORPORATION,)	
)	
Petitioner,)	
)	<u>D.S. 14-03-952</u>
and)	
)	Decision on Petitioner’s Request
INTERNATIONAL LONGSHOREMEN’S)	for Declaratory Statement
ASSOCIATION, LOCAL 1694-1, AFL-CIO,)	
)	
Respondent.)	

Appearances

*William W. Bowser, Esq. & Scott A. Holt, Esq., Young Conaway Stargatt & Taylor LLP,
for Diamond State Port Corporation*

*Claiborne S. Newlin, Esq., Meranze, Katz, Gaudio, & Newlin, P.C.,
for ILA Local 1694-1*

BACKGROUND

The 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 (1994)(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).

The ILA and DSPC were parties to a collective bargaining agreement, which has a term of October 1, 2010 through September 30, 2013. The parties engaged in negotiations for a

successor agreement. Following an unsuccessful mediation effort, on or about October 4, 2013, the ILA requested binding interest arbitration proceedings be initiated. Thereafter, the PERB Executive Director, with the agreement of the parties, engaged in a lengthy facilitation effort to resolve the bargaining impasse. As of the date of this decision, the parties have not mutually agreed upon a successor agreement.

On March 31, 2014, DSPC petitioned the Public Employment Relations Board (PERB) for a declaratory statement concerning whether, “the staffing levels of regular full-time “A” employees and assigned crane operators employed by DSPC are permissive subjects of bargaining under 19 Del.C. §1305.” On April 9, 2014, the ILA filed its response in opposition to the petition, asserting, in part, that the issues raised were not yet ripe for resolution and would “prematurely draw PERB into the parties’ bargaining and would waste precious PERB resources on an undeveloped and possibly hypothetical dispute.”

Thereafter, the petition was held in abeyance while the parties engaged in facilitated negotiations in an effort to resolve the underlying contractual negotiations for a successor agreement.

Following an unsuccessful ILA ratification vote of a proposed successor agreement, the parties were advised on or about November 20, 2014 that “the abeyance is lifted and the binding interest arbitration process is reinstated effective immediately.”

By separate letter, the parties were advised on or about November 25, 2014, concerning this petition for declaratory statement:

The pleadings establish that this petition concerns “whether a matter is within the scope of collective bargaining as defined by the statute.” It involves the statutory rights of the parties to negotiate, the claim is made by a public employer against an exclusive bargaining representative which has an interest in contesting that claim and the controversy is real and adverse. With the lifting of the abeyance on the binding interest

arbitration process, this matter has matured and is in a posture such that the issuance of the requested declaratory statement concerning the scope of mandatory bargaining will facilitate the binding interest arbitration process, as it directly impacts consideration of the last, best, final offers of the parties pursuant to 19 Del.C. 1315. Consequently, it meets the requirements of PERB Rule 6 and will be processed expeditiously.

Dates were offered for hearing.

On or about December 4, 2014, DSPC filed a Motion requesting summary judgment be entered in its favor finding that “the number of regular full-time ‘A’ employees employed by DSPC is a permissive subject of bargaining under 19 Del.C. §1305.” In its motion, DSPC asserts there are no genuine issues of material fact with respect to this issue, that §1305 plainly states that “staffing levels” are matters of inherent managerial policy, and that PERB has interpreted staffing levels to include the “number and mix of employees”. DSPC’s motion included argument in support of its position.

ILA Local 1694-1 filed its response to DSPC’s Motion on or about December 16, 2014, requesting PERB deny DSPC’s Motion and schedule the issue for hearing. The ILA’s response included argument in opposition to DSPC’s motion and in support of the ILA’s position.

DISCUSSION

Summary judgment (or judgment on the pleadings) is appropriate when the pleadings do not establish a genuine issue as to any material fact and where the moving party is entitled to judgment as a matter of law. The material facts in this case, concerning the scope of bargaining under 19 Del.C. §1305, are not in dispute and the parties were provided the opportunity to file written argument with respect thereto. This decision is based upon consideration of the facts and arguments presented.

DSPC's motion essentially limits the scope of consideration on the applicability of 19 Del.C. §1305 to the question of whether the number of full-time employees is a permissive subject of bargaining, and leaves the negotiability of staffing levels for crane operations for later determination.

DSPC's petition for Declaratory Statement (as limited by its motion for summary judgment) seeks a determination by PERB as to whether "the number of regular full-time "A" employees maintained by DSPC is a permissive subject of bargaining under 19 Del.C. §1305." The ILA counters the issue is whether DSPC is obligated by statute to bargain over whether the employees it hires in specific categories are full-time or part-time employees and over how many employees shall be full-time.

Section 1306 of the PERA incorporates by reference 14 Del.C. §4006, which requires PERB to "... provide by rule a procedure for the filing and prompt disposition of petitions for declaratory statement as to the applicability of any provision of this chapter or any rule or order of the Board." The procedures are required to provide for an expeditious determination of "... questions relating to whether a matter in dispute is within the scope of collective bargaining."

PERB established the required rules and procedures in its Regulation 6, "Petitions for Declaratory Statement". The current petition establishes a controversy exists concerning whether a matter is within the scope of collective bargaining as defined by the statute. The controversy involves the rights and obligations of the parties to negotiate within the parameters of the PERA; DSPC is asserting a statutory right to decline to negotiate concerning a matter of inherent managerial policy within the meaning of 19 Del.C. §1305 which the ILA contests; the positions of the parties are real and adverse; and the issue is ripe for issuance of a declaratory statement as the negotiations between these parties have not resolved the terms of a successor

collective bargaining agreement and the matter is currently in binding interest arbitration proceedings. The petition, as limited by DSPC's motion, is ripe and meets the requirements for issuance of a declaratory statement, per PERB Rule 6.

There is a single bargaining unit of DSPC employees for which ILA Local 1694-1 is the exclusive bargaining representative:

All regular full-time employees of the Diamond State Port Corporation and employees who have worked eight hundred (800) or more actual hours in a calendar year, in cargo handling positions, including related warehousing functions. The unit excludes all office personnel, supervisors, and guards.¹ *DSPC and ILA Local 1694-1*, DS 00-10-294, 111 PERB 2095 (2000).²

The collective bargaining agreement negotiated by these parties created and defined "A" and "B" employment status:

Article 2: Union Recognition

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 27, 1976, Case No. 154,³ under the authority of Chapter 13, Title 19, Delaware Code.⁴

¹ The bargaining unit was initially created and ILA 1694-1 was certified as the exclusive bargaining representative by the Department of Labor on or about February 6, 1976. It was unit defined to include: Crane Operators (utility crane), Lift Truck Operators (utility lift truck), Laborers, Mechanics, Electrician-Welder, Janitor and Janitress, and specifically excluded all office personnel, supervisors and guards. DOL Case 103. That bargaining unit was modified by agreement of the parties to also include employees who "worked eight hundred or more actual hours in a calendar year in cargo handling positions, including related warehousing functions," in January, 1997. An election was conducted by PERB on January 16, 1997, in which a majority of the previously unrepresented employees voted to be included in the bargaining unit represented by ILA 1694-1. REP 96-05-179.

² The bargaining unit was again modified by agreement of the parties to include the single incumbent position of "Refrigeration Mechanic" in May, 2001. REP 01-04-313.

³ DOL Case 154 was renumbered by the Department of Labor to be DOL Case 103, as referenced in the first footnote.

⁴ This statutory reference is to the predecessor to the Public Employment Relations Act (1994), which was known as "The Right of Public Employees to Organize" (1965) and was administered by the Delaware Department of Labor, through the Governor's Council on Labor.

“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. 96-05-179, under 19 Del.C. Chapter 13... *Exhibit A, DSPC’s Motion for Summary Judgment.*

The differences in wages, benefits and working conditions of “A” and “B” employees are and have been negotiated by the parties, over time, and are not mandated in any way by the bargaining unit definition.

The terms of the parties’ predecessor 2010-2013 collective bargaining agreement include Article 2.3 which states:

DSPC guarantees that during the term of this Agreement and any subsequent contract extension, it will maintain a work complement of regular full-time “A” employees as follows: effective as of the date this Agreement is signed the minimum full-time “A” complement shall be increased from 76 to 77 employees; and effective October 1, 2012, the minimum full-time “A” complement shall be increased from 77 to 78 employees. Positions vacated by “A” employees shall be filled within 40 days. Furthermore, positions filled in any new Job Classification will be added to this group of “A” employees and shall be in addition to the specified complement.

On April 10, 2014, the ILA submitted a comprehensive proposal in response to the Executive Director’s direction to provide its last, best, final offer, which included, *inter alia*, the following provision:

Article 2.3 – The number of “A” employees should be increased by no less than three each year of the labor contract retroactive to the inception of the Collective Bargaining Agreement.

DSPC did not include in its last, best, final offer (submitted on April 4, 2014) any language to modify Article 2.3, but restated its position that:

... such staffing levels, including provisions related to staffing under Articles 2.3 and 9.3 of the CBA, are within the exclusive prerogative of DSPC and thus are not subject to binding interest arbitration. *See, 19*

Del.C. §1315(a).

The ILA argues in opposition to DSPC's motion that,

... the issue in this case is not the core "staffing levels" specified in the statute. The union does not demand that the State must bargain over its "staffing pattern," that is, the variety of different jobs and the number of employees in each job category necessary to provide efficient cargo handling and warehousing services. The kind and mix of jobs needed by the DSPC and the number of employees needed to fill the positions on a given work day are unilaterally and exclusively determined by the Port. Rather, the union argues that the State must bargain over whether the employees in those pre-determined categories are full-time or part-time. The pivotal issue here, then, is not what job categories are needed and how many employees in each, but what hours the necessary employees shall work, what pay and benefits they shall receive and in which conditions they shall work...

The ILA concedes the employer need not bargain over matters of inherent managerial policy, including "such areas of discretion or policy as ... organizational structure and staffing levels and the selection and direction of personnel." 19 Del.C. §1305. Because the distribution work between full-time and part-employees is a matter of inherent managerial policy, and hours of work, compensation and conditions under which the employees work are mandatory subjects of bargaining, the ILA asserts that the balancing test adopted in *Appoquinimink Education Association v. Board of Education*⁵ must be applied to reach a determination as to the scope of negotiability for this issue.

Analysis of a scope of negotiability issue begins with the understanding that an underlying premise of the PERA is to promote negotiations concerning a broad and encompassing scope of bargaining. There is a rebuttable presumption that issues should be negotiated and should only be excluded where it is clear that a matter is "either not a term and condition of employment, unequivocally falls within the definition of inherent managerial

⁵ ULP 1-3-84-3-2A, I PERB 35 (1984)

discretion, or where the impact of the proposal on the [employer's operation] as a whole 'clearly outweighs' the 'direct impact' on employees." *Laurel Education Association v. Laurel School District*, BIA 13-12-934, VIII PERB 6131, 6167 (2014).

Section 1305 of the PERA enumerates matters of inherent managerial policy which are reserved to the discretion of the public employer, including "organizational structure and staffing levels and selection and direction of personnel." An employer cannot be required to bargain these types of policy matters and is accorded the freedom to choose whether it wishes to negotiate or legally refuse to do so concerning these matters. As noted in the *Laurel* decision:

There are many reasons an employer may choose to negotiate permissive subjects of bargaining and to include them in a negotiated agreement, e.g., finding it is in the best interest of an effective workplace and a positive productive relationship with its employees to do so. Most collective bargaining agreements (including the one at issue in this case) include many terms that are permissive in nature. A permissive subject which is negotiated and included in a collective bargaining agreement binds the employer and the union for the term of that agreement and is enforceable through the negotiated grievance process. Inclusion does not, however, convert that permissive subject into a mandatory subject for purposes of future negotiations.⁶

The PERA expressly reserves to management discretion or policy the "organizational structure and staffing levels" of the operation and unequivocally states that a public employer is not required to engage in collective bargaining on such matters. The Delaware PERB has held that staffing levels includes "the number and type of employees required to perform certain responsibilities required by the employer,"⁷ or "the number and mix of positions necessary to

⁶ *Laurel*, *Supra.* at 6166.

⁷ *AFSCME Council 81, Local 1007 v. Delaware State University*, ULP 01-06-320, IV PERB 2559, 2567 (Del. PERB, 2002).

accomplish the [employer's] mission.”⁸

The *Delaware State University* decision stated:

Staffing constitutes a fundamental and far-reaching right of management which touches not only the employer's financial and budgetary considerations but also the efficient utilization of its employees. In the absence of any reference to staffing at Section 1302(q), staffing decisions do not constitute a term and condition of employment about which the University was required to bargain but rather remain a matter of inherent managerial policy to be bargained at the University's discretion.⁹

The scope of “staffing level” was clarified and limited in the *Brandywine* decision not to extend to the method or procedure (whether voluntary or involuntary) by which employees are assigned to or transferred between positions, once the employer determines the composition and complement of positions to be employed. In fact, PERB has determined that the process and/or mechanism for adjusting the workforce is a mandatory subject of bargaining.¹⁰

Giving full effect to the clear and unambiguous language of 19 Del.C. §1305 and to the prior decisions of the Delaware PERB applying that language, staffing levels (including the distribution of full-time and part-time positions) are permissive subjects of bargaining under the PERA. It is unnecessary in this matter to apply the *Appoquinimink* balancing test because staffing levels “unequivocally fall within the definition of inherent managerial discretion or policy.”¹¹

Finding that the employer retains the right to determine the number and mix of full-time and part-time positions necessary to meet operational need is a permissive matter over which the

⁸ *AFSCME, Council 81, Local 218 v. Brandywine School District*, ULP 07-05-570, VI PERB 3857, (Del. PERB, 2007)

⁹ *AFSCME Council 81, Local 1007 v. Delaware State University*, Supr., p. 2567

¹⁰ *Appoquinimink Education Assn., DSEA/NEA v. Appoquinimink Board of Education*, ULP 1-3-84-3-2A, I PERB 35, 56 (1984).

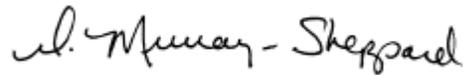
¹¹ *Laurel*, Supra.

employer cannot be required to bargain, does not, however, release the employer from the duty to bargain concerning the effect or impact of that decision on the terms and conditions of employment of bargaining unit employees.

DETERMINATION

For the reasons set forth herein, it is determined that the distribution of bargaining unit work among and between bargaining unit employees, including the number of full-time and part-time employees required to perform that work, is a matter of inherent managerial policy over which the employer is not required to bargain. 19 Del.C. §1305.

DATE: January 12, 2015



DEBORAH L.MURRAY-SHEPPARD
Executive Director, Delaware PERB