

**STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD**

INTERNATIONAL LONGSHOREMEN’S ASSOCIATION,)	
LOCAL 1694-1,)	
)	
Charging Party,)	ULP 15-04-996
)	
v.)	DECISION ON THE PLEADINGS
)	
DIAMOND STATE PORT CORPORATION,)	
)	
Respondent.)	

APPEARANCES

Claiborne S. Newlin, Esq., Meranze, Katz, Gaudioso & Newlin, for ILA 1694-1

Scott A. Holt, Esq., Young, Conaway, Stargatt & Taylor, 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 (ILA) is an employee representative within the meaning of 19 Del.C. §1302(i). By and through its affiliated Local 1694-1 (Local 1694-1), the ILA is the exclusive bargaining representative of a bargaining unit of DSPC cargo handling and warehouse employees within the meaning of 19 Del.C. §1302(j).

DSPC and ILA 1694-1 were parties to a collective bargaining agreement which had a term of the October 1, 2010 through September 30, 2013. In May, 2013 the parties entered into negotiations concerning the terms of a successor agreement, which were successfully completed with ratification of the new agreement in March, 2015. During the intervening period of negotiations, the terms of the predecessor collective bargaining agreement were maintained by

the parties.

On April 21, 2015, the ILA filed an unfair labor practice charge with the Public Employment Relations Board (PERB) alleging DSPC engaged in conduct which violated 19 Del.C. §1307(a)(1), (a)(2) and (a)(5), which state:

- §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.
 - (2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization.
 - (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.

Specifically, the Charge alleges on March 26, 2015, contrary to a side letter to which the parties agreed at the successful conclusion of their negotiations, DSPC posted ten vacant “A” (full-time) positions, including three Laborer and five Lift Truck Operator positions. By so doing, the ILA charges DSPC repudiated the signed side letter within 14 days of its execution and unilaterally converted two vacant seniority-promotion positions (Laborer) to “relative-ability” positions (Lift Truck Operator) in violation of its statutory obligations.

On May 18, 2015, DSPC filed its Answer denying that a violation of the side letter or the PERA occurred. DSPC contends that the side letter did not require that it post the “A” vacancies in any order or by position. DSPC asserts that following the initial posting it substituted a second posting that was consistent and in compliance with the posting requirements set forth in the side letter. The second posting occurred on April 28, 2015, immediately following the parties’ execution of the successor collective bargaining agreement. Also included in its Answer, DSPC included new matter, asserting the Charge fails to state a claim for which statutory relief can be granted.

On May 22, 2015, the ILA filed its Response to New Matter in which it denied DSPC's legal assertions set forth therein. The ILA asserts neither the April 28, 2015 posting (which occurred 7 days after the filing of this Charge) nor the ratification of the collective bargaining agreement is relevant to the resolution of this matter.

This determination results from a review of the pleadings.

FACTS

The underlying facts in this matter are undisputed and include the following:

In reaching a comprehensive settlement of their lengthy negotiations, the parties entered into a "Side Letter Regarding Posting of 'A' Vacancies", which stated:

Within 20 days of the ratification of the collective bargaining agreement, DSPC shall post four (4) of the "A" vacancies which existed on the date of ratification, March 4, 2015. Within 60 days of ratification, four (4) additional "A" vacancies will be posted by DSPC. Within 100 days of ratification, all remaining vacancies existing on the date of ratification will be posted, in order to restore its work complement of regular full-time A employees to 78. Each employee promoted to fill one of the vacancies existing at the time of ratification shall receive a lump sum payment of \$5,000 in lieu of back pay.

The parties agree to filling vacated "A" positions within 40 days in accordance with section 2.3. *Charge, Exhibit B.*

This document was signed by representatives of both parties on March 12, 2015. On its face, the side letter required DSPC to post the existing vacancies according to the following schedule:

4 vacant positions to be posted within 20 days	(3/24/15)
4 vacant positions to be posted within 60 days	(5/4/15)
Remaining positions to be posted within 100 days	(6/12/15)

The parties agree that the "A" vacancies which existed on March 4, 2015 included five (5) Laborer positions, five (5) Lift Truck Operator positions, one (1) Plant Maintenance position

and at least one (1) Crane Operator position.¹

The promotional criteria for both laborer and non-laborer positions was an issue in the parties' negotiations for the successor agreement. The parties agreed to modify Article 6.6 of their agreement as follows (changes noted by underlining and strikethroughs):

In the case of promotions for laborer positions within the bargaining unit the Employer shall award the position to the most senior employee provided that the employee has no documented qualification related discipline in the twenty-four (24) month period prior to the job posting. "Qualification related discipline" may include attendance, performance, or misconduct infractions that would render an applicant unfit to perform the essential functions of the job.

In the case of promotion for non-laborer positions within the bargaining unit relative ability of the employees to perform the job and no documented qualification related discipline in the twenty four (24) month period prior to the job posting as defined above shall be the determining factors. Where relative ability of 2 or more employees is equal, Portwide seniority shall be the determining factor ~~prevail~~. Where relative ability of 2 or more employees is equal and applications are from both within and without the bargaining unit for a bargaining unit position, employees from the bargaining unit shall have preference.

In the case of job openings for "A" positions, the positions may be filled by qualified "B" employees, unless the position is filled by another qualified "A" employee. "A" positions are filled by "B" employees according to relative ability of the employees to perform the jobs. Where relative ability of 2 or more employees is equal, seniority shall prevail. *Charge, Exhibit A.*

On March 26, 2015, DSPC posted ten vacant "A" positions for three (3) Laborer positions and seven (7) Lift Truck Operator positions. It is undisputed this posting did not occur until two days after March 24, 2015, which the parties had agreed in the side letter would be the outer limit for the posting of the first four vacancies.

In response to an email from the ILA's counsel questioning why the initial posting

¹ The ILA contends there were two Crane Operator vacancies; DSPC asserts there was one. For purposes of this proceeding, the exact number of Crane Operator vacancies is immaterial.

apparently converted two Laborer positions to Lift Truck Operator positions, DSPC's counsel responded:

The decision to post (7) lift truck operators and (3) laborers was based on the workforce need to strengthen the lift truck classification. Please be assured the Port will honor its obligations to fill all vacancies in accordance with the parties' agreement. *Response to New Matter, Exhibit A.*

The instant unfair labor practice charge was filed on April 21, 2015.

Thereafter, by email dated April 28, 2015, DSPC's counsel advised the ILA:

I have been informed that representatives of Local 1694-1 met with representatives of DSPC yesterday and executed the 2014-2016 collective bargaining agreement.

In accordance with the parties' agreement, DSPC has revised the posting of regular full-time "A" vacancies to reflect five (5) vacancies for Laborers and five (5) vacancies for Lift Truck Operators. Copies of these revised postings are attached.

DSPC will fill all other remaining vacancies existing as of March 4, 2015 in accordance with the parties' agreement in order to restore DSPC's work complement of regular full-time "A" positions to 78. Once the work complement of "A" positions has been restored to 78 employees, any future "A" vacancies arising during the term of the agreement shall be filled by DSPC in accordance with its operational needs. *Answer, Exhibit C.*

DISCUSSION

Rule 5.6 of the Rules and Regulations of the Delaware Public Employment Relations

Board provides:

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 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.

If the Executive Director determines that an unfair labor practice has, or 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*, ULP 04-10-453, V PERB 3179, 3182 (Probable Cause Determination, 2004).

The initial posting of ten vacancies on March 26, 2015, did not comply with the express terms of the “Side Letter Regarding Posting of “A” Vacancies”, which the parties executed on March 4, 2015, in that the vacancies were not posted until two days after the agreed upon date for the initial posting and it included vacancies which were not subject to the terms of the Side Letter. Specifically, it is undisputed that the vacancies which existed on March 4, 2015 (which were the subject of the Side Letter) included only five (5) Lift Truck Operator positions, not seven (7).

When the posting was questioned by the ILA, DSPC did not contend the posting was in error or that it was in compliance with the Side Letter. DSPC attempted to justify the posting by stating it “was based on the workforce need to strengthen the lift truck classification”. Clearly, this is not what the terms of the Side Letter required or permitted.

For these reason, the initial posting of ten vacancies on March 26, 2015, is found to be conduct in violation of 19 Del.C. §1307(a)(1) and (a)(5) as alleged. It does not, however constitute a violation of 19 Del.C.§1307(a)(2), as the Charge fails to establish how the posting dominated, interfered with, or assisted in the formation, existence or administration of the ILA.

The ILA requests the alleged violation be remedied by finding DSPC violated the statute as alleged, directing DSPC to abide by the side letter and restore the two Laborer vacancies to be filled on the basis of seniority, awarding attorney fees and the costs of filing the charge, and awarding such other relief as deemed just and proper.

The ILA does not dispute that the revised posting is consistent with the Side Letter. When DSPC rescinded the initial posting and substituted the April 28 posting, it substantively came into compliance with the side letter and its statutory good faith obligation. The Charge does not allege that any member of the bargaining unit was harmed during the thirty-two day period between the postings.

Awarding attorney fees is an extraordinary remedy reserved for situations in which a party engages in egregious misconduct *AFSCME Council 81, Local 3936 v. State of Delaware, DOS/DVH, ULP 10-09-765, VII PERB 5313, 5333 (PERB, 2012)*. The Court of Chancery has addressed application of the standard for awarding attorney fees in an unfair labor practice proceeding:

... The type of bad faith which justifies fee shifting, however, is not to be found in so facile a manner, or else every successful unfair labor practice complaint would bring with it attorney fees:

This Court has suggested that in certain egregious circumstances, a party's fraudulent behavior that underlies or forms the basis of the action may justify an award of attorney's fees against that party. The Court has recognized, however, that an award of attorney's fees is "unusual relief," and that the American Rule would be eviscerated if every decision holding the defendant liable for fraud and the like also awarded attorney's fees. For that reason this quite narrow exception is applied only in the most egregious instances of fraud or overreaching. *Arbitrium Handels AG v. Johnston*, Del.Ch., 705 A.2d 225, 231 (1997).

In order to find that the State's initial action was taken in bad faith requiring the shifting of fees, I must find more than that the State breached a contract with the Union or decided to argue a position which ultimately is found to be unsuccessful. I must find that the motives of the State in abrogating the Agreement were to act in a way which was fraudulent or inequitable, in a callous disregard of its obligations and for an improper purpose. *Dept. of Corrections, State of Delaware v. Delaware Correctional Officers Association*, Chancery

DSPC's actions in this matter do not rise to the level of being "fraudulent or inequitable, in a callous disregard of its obligations and for an improper purpose". Accordingly, the ILA's request for attorney fees is denied.

CONCLUSIONS OF LAW

1. 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").

2. 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 (Local 1694-1), the ILA is the exclusive bargaining representative of a bargaining unit of DSPC cargo handling and warehouse employees within the meaning of 19 Del.C. §1302(j).

3. DSPC and ILA 1694-1 were parties to a collective bargaining agreement which had a term of the October 1, 2010 through September 30, 2013. In May, 2013 the parties entered into negotiations to determine the terms of a successor agreement, which were successfully completed with ratification of the new agreement in March, 2015.

4. In reaching a comprehensive settlement of their lengthy negotiations, the parties entered into a "Side Letter Regarding Posting of 'A' Vacancies", which required that bargaining unit vacancies which existed on March 4, 2015 be posted as follows:

Within 20 days of the ratification of the collective bargaining agreement, DSPC shall post four (4) of the "A" vacancies which existed on the date of ratification, March 4, 2015. Within 60 days of ratification, four (4) additional "A" vacancies will be posted by DSPC. Within 100 days of ratification, all remaining vacancies existing on the date of ratification will be posted, in order to

restore its work complement of regular full-time A employees to 78.

5. The “A” vacancies which existed on March 4, 2015 included five (5) Laborer positions, five (5) Lift Truck Operator positions, one (1) Plant Maintenance position and at least one (1) Crane Operator position.

6. On March 26, 2015, DSPC posted ten vacant “A” positions for three (3) Laborer positions and seven (7) Lift Truck Operator positions.

7. By posting vacancies after the agreed upon date for the initial posting and by including in that posting positions which were not addressed in the parties’ side letter of agreement, DSPC violated its ongoing obligation to bargain in good faith and also interfered with the rights guaranteed to employees by the PERA, in violation of 19 Del.C. §1307 (a)(1) and (5).

8. The allegation that DSPC violated its statutory obligations by dominating, interfering with or assisting in the formation of a labor organization is dismissed as there are insufficient facts asserted to support this charge.

9. On April 28, 2015, DSPC removed the initial posting and replaced it with a posting for five (5) Laborer and five (5) Lift Truck Operator positions was in compliance with the parties’ side letter of agreement.

WHEREFORE, Diamond State Port Corporation is hereby directed to take the following affirmative actions:

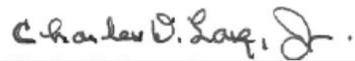
1. To cease and desist from engaging in conduct in dereliction of its obligations under the Public Employment Relations Act.

2. To immediately post a copy of the Notice of Determination in all places where notices of general interest to the bargaining unit members are usually posted. The notice shall

remain posted for a period of thirty (30) days.

IT IS SO ORDERED.

Dated: July 31, 2015



Charles D. Long, Hearing Officer
Del. Public Employment Relations Bd.