

**STATE OF DELAWARE**

**PUBLIC EMPLOYMENT RELATIONS BOARD**

**STATE OF DELAWARE, DEPARTMENT** )  
**OF STATE, DIAMOND STATE PORT** )  
**CORPORATION,** )  
**Charging Party,** ) **ULP No. 01-07-322**  
 )  
**v.** )  
 )  
**INTERNATIONAL LONGSHOREMEN’S** )  
**ASSOCIATION, LOCAL 1694-1, AFL-CIO,** )  
**Respondent.** )

**PROBABLE CAUSE DETERMINATION**

The State of Delaware, Department of State, Diamond State Port Corporation, (“DSPC” or “State”), is a public employer within the meaning of Section 1302(n) of the Public Employment Relations Act, 19 Del.C. Ch. 13 (1994) (“PERA” or “Act”). The International Longshoremen’s Association (“ILA” or “Association”) is an employee organization within the meaning of Section 1302(h) of the Act and the exclusive bargaining representative of certain employees of the DSPC within the meaning of Section 1302(j), of the Act, as defined in Department of Labor Rep. Case No. 103.

The Unfair Labor Practice Charge filed on July 13, 2001, and the Answer filed on July 24, 2001, establish, inter alia: 1) On June 26, the DSPC and the ILA met for the first time to begin contract negotiations for a successor collective bargaining agreement; 2) The DSPC proposed to limit each bargaining team to five (5) members; 3) The ILA appeared at the meeting with nine (9) permanent members; 4) At the meeting of July 2, 2001, the DSPC offered to modify its proposal by increasing the number of member’s on the ILA’s bargaining team from five (5) to seven (7) members; 5) At the meeting

of July 12, 2001, the ILA arrived with ten (10) members and stating that it could have as many bargaining team members as it desired and that the ground rules should provide for nine (9) members.

The DSPC alleges that by insisting on nine (9) bargaining team members the ILA has failed to bargain in good faith by refusing to consider the DSPC's counterproposal on the size of the ILA's bargaining team. The DSPC contends that by its action the ILA has violated 19 Del.C. Sections 1307(b)(2) and (3).

The ILA denies that it has violated Sections 1307(b)(2) and (3), of the Act, as alleged. The ILA maintains there is nothing in the Act or the PERB's Rules and Regulations which require the ILA to agree to any specific proposal, including the DSPC's proposal limiting the ILA's bargaining committee to nine (9) members.

#### **APPLICABLE STATUTORY PROVISIONS**

19 Del.C. § 1307, Unfair labor practices.

(b) It is an unfair labor practice for a public employee or for an employee organization or its designated representative to do any of the following:

(2) Refuse to bargain collectively in good faith with the public employer or its designated representative if the employee organization is an exclusive representative.

(3) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

## ISSUE

Whether the conduct alleged constitutes probable cause to believe that an unfair labor practice may have occurred?

## DISCUSSION

Section 1303, of the Act, entitled, Public employee rights, provides, in relevant part:

2) Negotiate collectively or grieve through representatives of their own choosing.

In Delaware State Troopers' Association v. State of Delaware, Department of Public Safety and Division of State Police, Del.PERB, DS No. 92-01-068, II PERB Binder 787 (1992), the PERB addressed an issue involving the composition of the State's bargaining team. DSTA requested a determination of whether by including two (2) Majors who were members of the bargaining unit on its bargaining team the State violated 19 Del. C. §1607(a)(5). [1]

While acknowledging that the right of each party to select its bargaining representatives is not absolute, DSTA argued that the inclusion of bargaining unit members on the State's bargaining team represented a clear conflict of interest, a recognized exception to the rule.

The State argued that while there are limited exceptions to a Party's right to select its own bargaining representatives, DSTA, "failed to establish an actual conflict of interest which presents a clear and present danger to the collective bargaining process and which renders it futile." Delaware State Troopers' Ass'n., II PERB Binder (supra) at 790.

The PERB held that each party to the collective bargaining process has the right to designate its representatives and the opposing party has the duty to negotiate with those representatives. The PERB

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[1] Prior PERB rulings issued under the Public School Employment Relations Act, 14 Del.C. Chapter 40 (1982, 1989) and/or the Police Officers and Firefighters Employment Relations Act, 19 Del.C. Chapter 16 (1986), are controlling to the extent that the relevant provisions of those statutes are identical to those of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994). AFSCME, District Council 81 v. State of Delaware, Department of Transportation, Division of Highways, Del.PERB, ULP No. 95-01-111, II PERB Binder 1279 (1995).  
observed, however:

A party's right to designate its representatives to the bargaining process is not, however, absolute. Application of the rule must be reasonable. The integrity of the collective bargaining process must be preserved and to the extent that the designation of a bargaining representative thwarts good faith negotiations, it must be rejected as contrary to the clear intent of the statute.

Under a similar statutory scheme, the National Labor Relations Board has recognized limited exceptions to the general rule that parties can choose their bargaining representatives freely. However, these exceptions are “. . . so rare and confined to situations so infected with ill will, usually personal, or conflict of interest as to make good faith bargaining impractical.” General Electric v. NLRB, C.A.2, 412 F.2d 512 (1969).

The Appeals Court in G.E. held:

. . . the freedom to select representatives is not absolute, but that does not detract from its significance. Rather, the narrowness and infrequency of approved exceptions to the general rule emphasizes its importance. Thus, in arguing that employees may not select members of other unions as ‘representatives’ of their own choosing’, the Company clearly undertakes a considerable burden, characterized in an analogous situation in NLRB v. David Butterick Co. . . . as the showing of a ‘clear and present’ danger to the collective bargaining process. [citations omitted]

Del. State Troopers’ Ass’n. at 791-792.

Here, the State has alleged no adverse impact resulting from ILA’s position which would constitute a valid exception to the recognized right of a party to select its bargaining representatives. In the absence of a valid exception,

Pursuant to Section 1302(e), of the Act, the duty to bargain attaches exclusively to “terms and conditions of employment” which are defined in Section 1302(q), as: “matters concerning or related to wages, salaries, hours, grievance procedures and working conditions; provided, however, that such term shall not include those matters determined by this chapter or any other law of the State to be within the exclusive prerogative of the public employer.” Appoquinimink Ed. Ass’n. v Bd. of Ed. ULP No. 1-3-84-3-2A, I PERB Binder 35 (1984).

The selection of a bargaining team does not qualify as a “term and condition of employment” about which a party is required to bargain. Indian River Ed. Ass’n. v. Bd. of Ed., DS No. 89-03-035, I PERB Binder 439 (1989) The Indian River decision involved the participation of non-bargaining unit employees as part of the Association’s bargaining team. The PERB observed:

The issue before this Board involves the right of an exclusive bargaining representative to choose members of its negotiating team who will represent the interests of an appropriate bargaining unit under the Act. . . .

This case involves the fundamental right of bargaining unit employees to negotiate through representatives of their choosing. The Act clearly states that its policies are best effectuated by granting this right to employees and obligating board[s] of education to enter into negotiations with such representatives. 14 Del.C. section 4001. In defining “employee organization”, the Act clearly establishes that such organizations may have agents or representatives who may act as the organization and are therefore endowed with the same rights and responsibilities under the Act as the parent organization. Nowhere does the Act expressly limit the right of the organization to freely chose(sic) its agents or representatives. The right to choose such agents and/or representatives must be the inherent right of the employee organization. . . . There is no evidence that the persons

chosen to sit on the bargaining committee were chosen for the purposes of disruption or harm to the parties' relationship. Having been authorized to represent the best interests of the teachers in the bargaining unit, the employer is now obligated to bargain in good faith with these representatives. Indian River I PERB Binder at 445-447.

**DETERMINATION**

The Complaint alleges no facts inconsistent with the principles set forth in either DSTA v. State (supra) or Indian River Ed. Ass'n. v. Bd. of Ed. (supra). Consequently, there is no probable cause to believe that a violation of Section 1307(b)(2) or (b)(3) of the Act, as alleged, may have occurred.

Accordingly, the charge is dismissed.

August 15, 2001  
(Date)

/s/Charles D. Long, Jr.  
Charles D. Long, Jr.  
Executive Director