

**STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD**

STATE OF DELAWARE, DIAMOND	*	
STATE PORT CORPORATION,	*	
	*	
Charging Parties & Respondents,	*	
	*	
	*	<u>ULP No. 04-08-443</u>
and	*	Charge and Counter
	*	Charge
	*	
ILA, LOCAL 1694-1, AFL-CIO,	*	
Respondent & Charging Party.	*	

BACKGROUND

The State of Delaware, Diamond State Port Corporation (“DSPC”) is a public employer within the meaning of §1302(p) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13 (1986).

The ILA, Local 1694-1, AFL-CIO, (“ILA”) is an employee organization which admits to membership employees of a public employer and which has as a purpose the representation of such employees in collective bargaining, pursuant to 19 Del.C. §1302(i). The ILA is certified as the exclusive bargaining representative of DSPC employees as defined in DOL case #103.

The parties participated in an arbitration hearing pursuant to Article 8, of their 2002-2004 collective bargaining agreement. The issue involved the discharge of the grievant, a “B unit” DSPC employee, whom the Arbitrator reinstated to his former position but without “any compensation nor should he receive any credit for seniority lost as a result of the discipline.”

DSPC reinstated the grievant with no seniority and the ILA, believing that the lost seniority should be limited to the period of the discipline, requested that DSPC agree to have the arbitrator clarify his award. DSPC declined maintaining that the arbitrator's award was clear and unambiguous on its face and had been complied with in all respects.

The ILA then filed a grievance protesting the total loss of the grievant's seniority. DSPC's position was that the second grievance was improper in that the initial decision of the arbitrator was final and binding and not subject to review through the grievance procedure.

Unable to resolve the matter the ILA filed for arbitration. Reiterating its position, DSPC filed an objection with the American Arbitration Association ("AAA"), the administrative agency processing the arbitration. AAA responded that it was obligated to process the matter and would assign an arbitrator if DSPC failed to participate in the arbitrator selection process. AAA's position was that the issue of arbitrability should be presented to and resolved by the arbitrator.

On August 17, 2004, DSPC filed an unfair labor practice charge with the Delaware Public Employment Relation's Board alleging that the ILA was attempting to re-arbitrate the prior decision of the arbitrator reinstating the grievant. DSPC contends that the dispute does not concern the application or interpretation of the parties' collective bargaining agreement as required by Article 8, of the Agreement and is not, therefore, a proper subject for the grievance and arbitration procedure.

Rather, DSPC contends, as documented by the ILA's communications to AAA, the disputed grievance concerns, "the construction to be given of the remedy" directed by

the Arbitrator when reinstating the grievant, or, alternatively, “a dispute. . . concerning the proper construction of Arbitrator Symonette’s opinion and award.”

The Charge alleges that by its actions, the ILA has:

- (1) Unilaterally changed mandatory terms and conditions of employment; to wit, the provisions of the Grievance and Arbitration Procedure set forth in Article 8 of the collective bargaining agreement in attempting to require DSPC to arbitrate a dispute over the interpretation and application of a prior arbitration decision;
- (2) Undermined the availability of the arbitration mechanism to be a final and binding means of resolving disputes arising out of the application or interpretation of the collective bargaining agreement;
- (3) Violated 19 Del.C. §§1307(b)(2) and (3).

DSPC requests the PERB issue injunctive relief that will prevent the arbitration case from going forward; issue an Order finding that the ILA violated the PERA, as alleged; issue a cease and desist order; and, make the Charging Party whole for all losses resulting from the ILA’s illegal actions.

By letter dated August 25, 2004, DSPC requested PERB expedite the processing of its request for injunctive relief in order to halt the further processing of the arbitration by AAA. DSPC fears that unless its request for injunctive relief is processed on an expedited basis the arbitration hearing could be held before PERB has ruled, resulting in irreparable harm to DSPC.

By letter to the parties dated August 26, 2004, the PERB agreed to the expedited processing of this matter.

Also on August 26, 2004, the ILA filed its “Answer to the Unfair Labor Practice Charge, New Matter and Counter Charge”. The ILA contends that an arbitrator’s award

becomes a part of the collective bargaining agreement and in this instance a disagreement over an award exists. Because DSPC has refused to join the ILA in requesting clarification from the original arbitrator, the ILA was required to file a separate grievance which is now properly postured for arbitration, as contractually mandated.

The ILA denies that it is attempting to re-arbitrate the original grievance. Rather, it is attempting only to clarify whether the period of lost seniority was simply and solely the period of the grievant's disciplinary suspension. Because DSPC has failed to comply with the arbitrator's award and refused to ask the arbitrator for clarification, the seniority provisions of the collective bargaining agreement are being violated.

Under "New Matter", the ILA alleges that as a result of DSPC's refusal to seek a clarification of the initial arbitration award and to agree to arbitrate the current grievance, DSPC has acted in bad faith a result and deprived the grievant of his employment rights and security.

The ILA filed a Counter Charge alleging that DSPC's conduct has violated 19 Del.C. §§1307(a)(1), (3), (4), (5), (6) and(7), of the PERA. As a result the grievant has been caused to work jobs and shifts which are incorrect and has been denied the choices of work to which he would be entitled if DSPC had not improperly stripped him of all seniority rights.

The ILA seeks an Order that DSPC has violated the Act, as alleged, and directing that the grievant receive full compensation for all employment opportunities, hours, wages and benefits lost as a result of DSPC's misconduct and that the ILA be compensated for all costs, charges and counsel fees incurred as a result of DSPC's misconduct.

On August 31, 2004, DSPC filed its Reply to New Matter and the Counter Charge essentially denying the allegations set forth, therein.

ISSUES

1. Whether the injunctive relief sought by DSPC is warranted?
2. Whether the ILA has violated the Act, as alleged?
3. Whether DSPC has violated the Act, as alleged??

DISCUSSION

Article V of the Rules and Regulations of the Delaware Public Employment Relations Board, Unfair Labor Practice Proceedings, provides:

5.6 Decision or Probable Cause Determination

- (a) Upon review of the Complaint, the Answer and Response, the Executive Director shall determine whether there is probable cause to believe that an unfair labor practice may have occurred. . .
- (b) 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.

The pleadings in this matter do not raise any material issues of fact. The pleadings raise a question that could potentially constitute an unfair labor practice. Because DSPC's request for expedited processing has been granted, this decision will address the issues as raised by the pleadings.

Article 8 of the collective bargaining agreement, entitled Grievance and Arbitration Procedure, provides, in relevant part:

8.1 Any grievance or misunderstanding which may arise between the parties concerning the application or interpretation of this Agreement shall be acted upon in the manner described below. Items which are not part of this Agreement shall not be subject to the grievance procedures. . .

Article 6, of the Agreement, entitled Seniority, provides, in relevant part:

6.2 For “B” employees, “portwide seniority” shall mean the length of continuous service with DSPC since July 1, 1997, or from the time they attained B employee status, whichever date is later.

Portwide seniority shall be used for determining the amount of vacations and pensions for all employees, and as additionally provided for elsewhere in this Agreement for either A and/or B employees.

6.13 Seniority shall be lost in any one of the following ways:

(e) For “B” employees, working less than 800 actual hours in any given calendar years.

This dispute does not center upon the prior arbitration award issued by Arbitrator Alan Symonette. The Arbitrator’s Award is clear and succinct: “The grievant should be reinstated to his former position after he is cleared to report to work, but he shall not receive any compensation nor should he receive any credit for seniority lost as a result of the discipline.” ULP Charge, Attachment 2, p.12.

The critical consideration here is the application and interpretation of Article 6, Seniority, and its impact, if any, upon the grievant’s post-reinstatement seniority status. The ILA acknowledges in its Counsel’s July 14, 2004 letter to the AAA Case Manager, that the issue grieved is, “Is the Employer violating the terms of the contract and the Symonette Award by its treatment of the seniority of [the grievant]”. ULP Charge,

Attachment 3. The ILA reinforces the statement of the issue in Paragraph 11 of its Answer to the Charge, “The only question for which the Union sought to have a clear declaration made . . . was whether the period of seniority loss was simply and solely the period of suspension.”

The Arbitrator’s Award does not address or consider the application of Article 6, Seniority, in effectuating the dictated remedy. Consequently, there is nothing to “clarify” in the Award. Rather there is a question raised as to the applicability of Article 6 in determining the post-reinstatement seniority status of the grievant.

Since the relevant provisions of Article 6 relate directly to employee seniority they clearly come within the Article 8.1 definition of those matters subject to the grievance and arbitration procedures set forth in Article 8. Having been processed through the various steps of the grievance procedure the disputed grievance is properly postured to be heard at arbitration.

DECISION

After considering all of the relevant surrounding circumstances, it is determined that:

1. DSPC’s request for injunctive relief to stop the processing of the disputed grievance is denied.
2. The grievance is properly postured to be heard at arbitration on the question of whether DSPC violated Article 6 of the parties Agreement when it reinstated the grievant with no seniority.
3. The ILA did not violate 19 Del.C. §§1307(b)(2) and (3), as alleged.

4. DSPC did not violate 19 Del.C. §§1307(a)(1), (3), (4), (5), (6), and (7), as alleged.
5. All other requested monetary relief is denied.
6. Relief to which the grievant may or may not be entitled is to be resolved by the arbitration.

WHEREFORE, both the Charge and the Counter-Charge are dismissed without prejudice.

September 8, 2004
(Date)

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