

**PUBLIC EMPLOYMENT RELATIONS BOARD
FOR THE STATE OF DELAWARE**

DIAMOND STATE PORT CORPORATION,	:	
	:	
Charging Party,	:	
	:	<u>ULP No. 09-05-682</u>
v.	:	
	:	Probable Cause Determination
INTERNATIONAL LONGSHOREMEN’S ASSOCIATION,	:	
LOCAL 1694-1, AFL-CIO	:	
	:	
Respondent.	:	

BACKGROUND

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

The International Longshoremen’s Association, Local 1694-1, AFL-CIO, (“ILA”) is an employee organization within the meaning of 19 Del.C. §1302 (i) and the exclusive representative of certain DSPC employees within the meaning of 19 Del.C. §1302 (j).

On or about May 29, 2009, DSPC filed an unfair labor practice charge alleging the ILA had violated 19 Del.C. §1307(b)(2) and (b)(3):

- (b) It is 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.

The Charge alleges that by filing a single arbitration demand for what are purportedly four separate grievances to AAA the ILA has:

- ... unilaterally changed mandatory terms and conditions of employment, namely the provisions of the Grievance and Arbitration Procedure set forth in Article 8 of the parties' collective bargaining agreement.
- [U]nilaterally changed mandatory terms and conditions of employment, namely attempting to require the State to arbitrate multiple grievances before a single arbitrator at the same time, in contravention of the parties' collective bargaining agreement.
- Undermined the availability of the arbitration mechanism to be a final and binding means of resolving disputes arising out of the application and interpretation of the collective bargaining agreement.
- Failed to bargain in good faith in violation of 19 Del.C.§1307(b)(2) and (3). *Unfair Labor Practice Charge 09-05-582, ¶¶ 17 – 20.*

On June 9, 2009, the ILA filed its Answer to the Charge denying all material allegations and stating that the four individually numbered grievances “are, in fact, a single grievance.” The ILA asserts that a determination as to whether the grievance “must be treated as a single consolidated matter requires a construction of the intent, meaning and reasonable application of the collective bargaining agreement,” which is within the exclusive responsibility of an arbitrator.

This Probable Cause Determination is based upon a review of the Charge and Answer.

DISCUSSION

The Rules and Regulations of the Delaware PERB require that upon completion of the pleadings in an unfair labor practice proceeding, a determination shall be issued as to whether those pleadings establish probable cause to believe the conduct or incidents

alleged could have violated the Public Employment Relations Act, 19 Del.C. Chapter 13. DE PERB Rule 5.6.

DSPC's charge alleges that by submitting a Demand for Arbitration to the American Arbitration Association for a panel for a single grievance (rather than four separate grievances) without the Employer's consent, the ILA has unilaterally altered the status quo of a mandatory subject of bargaining. Specifically, DSPC asserts the ILA has violated Article 8.7 of the parties' current collective bargaining agreement, which states:

Except by mutual agreement between the Employer and the Union, only one grievance may be heard by the same arbitrator at the same time. The American Arbitration Association shall provide separate lists, for each grievance or group of grievances, or a least 9 arbitrators' names and for such supplemental lists as are provided by the rules of the American Arbitration Association. The parties may at any time mutually agree upon an arbitrator who is either on the list(s) or from any other source.

It is well established by statute, as well as by prior case law, that the grievance procedure is a mandatory subject of bargaining. 19 Del.C. §1302(e), (t). Consequently, if the ILA's actions are proven to effect a unilateral change in the negotiated grievance procedure, an unfair labor practice will have occurred.

The DSPC's charge, however, is premised upon a purported violation of a specific contractual provision. When disputes arise which concern matters of statutory construction and application, and the interpretation of a provision(s) of the parties' collective bargaining agreement, dual jurisdiction exists in the PERB and the arbitrator. Similar issues concerning the relationship between alleged unfair labor practices and contractual violations have been considered by the National Labor Relations Board and US Supreme Court, from which an established case line has developed:

1. The availability of arbitration does not preclude Board exercise of jurisdiction over unfair labor practice charges;
2. The availability of a Board remedy does not bar arbitration; and
3. The Board has discretion to refuse to exercise its jurisdiction when in its judgment federal policy would best be served by leaving the parties to contract remedies.¹

Following guidance gained from the federal policy,² PERB has frequently exercised its discretion to defer a dispute which requires a determination as to the meaning and application of specific contractual language where the parties have mutually consented to binding arbitration of grievances. The Board's deferral policy supports the premises that where parties have committed themselves to mutually agreeable procedures for resolving contractual disputes, it is prudent and reasonable to afford those procedures the full opportunity to function. *FOP Lodge 1 v. City of Wilmington*, Del.PERB, ULP 89-08-040, I PERB 449 (1989).

Where, as here, the determination of whether an unfair labor practice may have occurred depends upon the interpretation of a specific provision of the parties' collective bargaining agreement, staying the processing of the charge and deferring to the negotiated arbitration procedure serves the statutory purpose of promoting effective labor relations. *FOP Lodge 1 v. City of Wilmington: Decision on Respondent's Motion to Dismiss or Stay*, Del.PERB, ULP 98-02-226, III PERB 1695, 1697 (1998).

DSPC's charge does not raise an issue of substantive arbitrability, but rather a question of procedural arbitrability, i.e., can the ILA process the dispute through a single arbitration proceeding or does the contract require that each grievance be processed

¹ Brown, *The National Labor Policy, the NLRB and Arbitration in Developments in American and Foreign Arbitration*, Proceedings of the 21st Annual Meeting of the NAA 83, 84 (Rehmus, ed., BNA Books, 1968).

² "In cases where problems raised under Delaware's labor laws are similar to those that arise under the (federal law), Delaware could be expected to consider, and in all likelihood follow federal law." *Cofranceso v. City of Wilmington*, 419 F.Supp 109, 111 (D.Del. 1976)

separately. Questions of procedural arbitrability are reserved to the contractual grievance procedure and the exclusive jurisdiction of the arbitrator. *Sussex County Vo-Tech Teachers Assn. & Jo-An Atkinson v. Sussex County Vo-Tech School District, Del. PERB, ULP 96-07-183, III PERB 1629, 1643 (1997).*

DETERMINATION

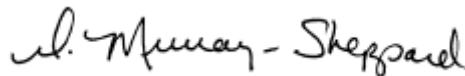
Consistent with the foregoing discussion, when reviewed in a light most favorable to the Charging Party, the pleadings provide a sufficient basis for finding probable cause to believe that an unfair labor practice may have occurred.

WHEREFORE, because resolution of the charge requires interpretation and application of a specific contractual provision, the dispute is currently pending before an arbitrator who has authority to resolve the issue, and because the determination of the contractual question in arbitration will serve the statutory interest in promoting effective collective bargaining relationships, the DSPC's Charge is deferred for consideration by a grievance arbitrator selected by the parties pursuant to applicable provisions of their collective bargaining agreement.

The parties are directed to advise the Public Employment Relations Board on or before October 1, 2009, as to the whether this matter has been resolved through arbitration.

IT IS SO ORDERED.

DATE: July 2, 2009



DEBORAH L. MURRAY-SHEPPARD
Executive Director
Del. Public Employment Relations Bd.