

**PUBLIC EMPLOYMENT RELATIONS BOARD**

**STATE OF DELAWARE**

<b>STATE OF DELAWARE, DIAMOND STATE PORT CORPORATION,</b>	:	
	:	<b>PERB Review of</b>
<b>Appellant,</b>	:	<b>Executive Director’s</b>
	:	<b>Decision</b>
<b>v.</b>	:	
	:	<b><u>ULP No. 10-07-755</u></b>
<b>INTERNATIONAL LONGSHOREMEN’S ASSOCIATION, LOCAL 1694-1, AFL-CIO,</b>	:	
	:	
<b>Appellee.</b>	:	

*Appearances*

*Bernard N. Katz, Esq., Meranze & Katz, LLC, for ILA 1694-1  
Aaron Shapiro, SLREP/HRM/OMB, for Diamond State Port Corporation*

**BACKGROUND**

The State of Delaware (“State”) is a public employer within the meaning of §1302(p) of the Public Employment Relations Act (“PERA”). 19 Del.C. Chapter 13 (1994). Diamond State Port Corporation (“the Port”) is an agency of the State.

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

ILA Local 1694-1 and DSPC are parties to a collective bargaining agreement which has an expiration date of September 30, 2010.

On or about July 16, 2010, the ILA filed an unfair labor practice charge alleging that the State had violated §§1307(a)(1), (a)(3), (a)(5), (a)(6) and/or (a)(7) of the PERA. The ILA charged the State had bargained in bad faith and had refused to meet its statutory obligation to negotiate for a successor collective bargaining agreement.

On July 20, 2010, the State filed its Answer to the Charge in which it denied the material allegations set forth therein. The Answer included New Matter asserting PERB should defer to arbitration the determination as to whether the State was obligated to enter into negotiations because it depended upon the application and interpretation of Article 23.2<sup>1</sup> of the parties' collective bargaining agreement.

On July 28, 2010, the ILA filed its Reply to New Matter in which it denied the material allegations set forth therein.

Upon review of the pleadings, the Executive Director determined there were no material issues of fact and on August 30, 2010, consistent with PERB Rule 5.6<sup>2</sup>, issued a decision on the pleadings, finding:

By failing to enter into negotiations for a successor agreement where it was aware of the Union's request to do so at least ninety days prior to

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<sup>1</sup> 23.2 This Agreement shall be automatically renewed after September 30, 2010 annually from year to year unless either party shall give the other party written notice by certified mail to the Port Director or the Union President of the party's desire to terminate, modify, or amend this Agreement. Such notice shall be given to the other party not later than 6 calendar months prior to the date of expiration.

<sup>2</sup> (a) 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 the provisions set forth in Regulation 7.4. The Board shall decide such appeals following a review of the record, and, if the Board deems necessary, a hearing and/or submission of briefs.

(b) If the Executive Director determines that an unfair labor practice 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.

expiration of the existing collective bargaining agreement, the State violated its duty to bargain in good faith and 19 Del.C. §1307(a)(5) and (6).

The Executive Director ordered the State to immediately enter into negotiations with ILA Local 1694-1 with the commitment to expedite those negotiations and to advise PERB of the status of these negotiations not later than sixty days after the date of the decision.

On or about September 2, 2010, the State requested the full Public Employment Relations Board review and reverse the Executive Director's decision, asserting the Executive Director erred as a matter of law in reaching the conclusions that: 1) §1313(a)<sup>3</sup> of the PERA categorically supersedes a mutually negotiated notice provision in a collective bargaining agreement; 2) a notice provision is not binding upon parties to the agreement; 3) a notice provision carries no independent weight or authority; 4) the State failed to bargain in good faith by seeking to enforce a mutually negotiated notice provision according to the specific terms of the parties' agreement; and 5) by failing to find some tangible conflict with the Act or other controlling law must be established as a prerequisite to determining whether a term in a collective bargaining agreement may be superseded by the Act or other law. The State also asserted the decision was not based on substantial evidence because the record does not include any evidence that the negotiated notice provision conflicts with the Act, could conflict with the Act, or is otherwise unenforceable.

The ILA submitted its response to the State's request for review on September 8, 2010, requesting the appeal be denied and that the Executive Director's decision be affirmed.

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<sup>3</sup> 19 Del.C. §1313 (a) Collective bargaining shall commence at least 90 days prior to the expiration date of any current collective bargaining agreement or in the case of a newly certified exclusive representative within a reasonable time after certification.

A copy of the complete record in this matter was provided to each member of the Public Employment Relations Board. A public hearing was convened on September 16, 2010, at which time the full Board met in public session to consider the request for review. The parties were provided the opportunity to present oral argument and the decision reached herein is based upon consideration of the record and arguments presented to this Board.

### **DISCUSSION**

The Board's standard of review of the Executive Director's decision is well-established. The scope of the Board's review is limited to 1) the record created by the parties, and 2) deciding whether the decision is arbitrary, capricious, contrary to law, or otherwise unsupported by the record. The Board formally votes to either uphold or overturn the decision, or it may remand the decision for further action by the Executive Director.

PERB Rule 5.6 requires the Executive Director to review the pleadings and determine whether an unfair labor practice may have occurred. The Rule goes on to state "if the Executive Director determines that an unfair labor practice may have occurred, he shall where possible, issue a decision based upon the pleadings...: PERB Rule 5.6(b).

In its Request for Review, the State contends the Executive Director's decision was "based on the pleadings alone, that no evidentiary proceedings were conducted, and that the parties were not afforded the opportunity to submit argument and supporting authority for their respective positions." The pleadings do not reveal any disputed facts concerning the sending and receiving of the correspondence, the existence and content of Article 23.2 of the parties' collective bargaining agreement, the September 30, 2010

expiration date of that agreement, and/or that on June 29, 2010, DSPC informed ILA's counsel that the request to reopen would not be accepted and that terms and conditions in the Agreement would be renewed until September 30, 2011. As there were no material facts in dispute, it was unnecessary for the Executive Director to conduct an evidentiary proceeding.

The pleadings also do not raise issues which necessitated further argument. The pleadings placed in issue the application of §1313 (a)<sup>4</sup> to the facts presented and whether the Charge should be deferred to the contractual grievance procedure. Neither party requested the opportunity to provide argument and the Executive Director did not abuse her discretion by not extending the processing of the Charge to solicit argument.

The Executive Director properly applied this Board's recent decision in *LIUNA Local 1029 v. State of Delaware, DHSS*<sup>5</sup> to the facts in this case. In *LIUNA*, the Board examined a negotiated notice provision, a failure or refusal to reopen negotiations and applied 19 Del.C §1313 (a), holding,

The statute does not condition bargaining on negotiating a notice provision; in fact, the statute requires that “negotiations shall commence at least 90 days prior to the expiration of any collective bargaining agreement.”

The core purpose of the PERA is to promote and support collective bargaining in the public sector in order to “protect the public by assuring the orderly and uninterrupted operations and functions of the public employer.” 19 Del.C. §1301. The statute imposes an equal duty on both the public employer and the exclusive bargaining representative of public employees to “enter into collective bargaining negotiations with the willingness to

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<sup>4</sup> 19 Del.C. §1313(a) Collective bargaining shall commence at least 90 days prior to the expiration of any current collective bargaining agreement or in the case of a newly certified exclusive bargaining representative within a reasonable time after certification.

<sup>5</sup> ULP 08-08-628, VI PERB 4205, 4206 (2009, PERB Decision on Review).

resolve disputes relating to terms and conditions of employment and to reduce to writing any agreements reached through such negotiations.” The statute further requires “collective bargaining shall commence at least 90 days prior to the expiration of any current collective bargaining agreement.” 19 Del.C. §1313(a).

The Board has previously cautioned parties that collective bargaining is not a ‘got cha’ process. Where parties are on notice that one side desires to enter into negotiations for a successor agreement at least ninety days prior to the expiration of an existing agreement, the duty to bargain in §1313(a) attaches. While nothing in the statute prohibits the negotiation of a notice provision, where those provisions require notice well in advance of the ninety day statutory time frame, they cannot be applied to prematurely extend the collective bargaining agreement and do not supersede parties’ statutory duty to bargain.

The State has argued that the Executive Director’s decision forces these parties to ignore a negotiated contractual provision, violates PERB’s case line requiring parties to resolve disputes over the interpretation or application of contractual terms through their negotiated grievance procedure, and leads to chaos in labor-management negotiations because it negates all “notice and roll-over provisions” that exist in other collective bargaining agreements.

The decision is limited to the facts and circumstances presented in the pleadings in this case. Since its very first decision, this agency has recognized the wisdom of refraining from fashioning broad and general rules, and has chosen to follow the wiser course of resolving disputes on a case-by-case basis until there is a sound basis for developing general principles based on experience and a developed case line. *Seaford Education Assn. v. Bd. of Education*, ULP 2-2-84S, 1 PERB 1, 5 (Decision of the

Executive Director, 1984). Whether this decision leads parties to reconsider “notice and roll-over provisions” in other collective bargaining agreements is neither dispositive nor material to the adjudication of the instant Charge. There have been many decisions thorough the twenty-six year history of this Board which have invalidated certain negotiated terms, and have thereby called into question the validity of contractual provisions which were negotiated by employers and unions other than those which were parties to the dispute.

The Executive Director’s decision does not invalidate all notice provisions, nor does it destroy the opportunity for parties to voluntarily agree to extend their existing collective bargaining agreements without alteration. What it does require is that parties meet and negotiate concerning such extensions and that those negotiations begin at least 90 days prior to the expiration of an agreement, consistent with the requirements of §1313(a).

The Board herein reaffirms its decision in *LIUNA* holding the contractual notice provision of a collective bargaining agreement does not supersede the statutory mandate to bargain where a party clearly and unequivocally expresses its intent to negotiate at least ninety days prior to expiration of an existing collective bargaining agreement.

### **DECISION**

After reviewing the record, hearing and considering the arguments of the parties, the Board unanimously affirms the decision of the Executive Director finding the State violated its duty to bargain in good faith and 19 Del.C. § 1307(a)(5) and (a)(6) by failing to enter into negotiations where it was aware of the Union’s request to do so at least ninety days prior to expiration of the existing collective bargaining agreement.

Wherefore, the State's Appeal of the Executive Director's is denied.

**IT IS SO ORDERED.**

  
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**Elizabeth D. Maron, Chairperson**

  
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**R. Robert Currie, Jr., Member**

  
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**Kathi A. Karsnitz, Member**

DATE: October 22, 2010