

PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF DELAWARE

INTERNATIONAL LONGSHOREMEN’S ASSOCIATION,	:	
LOCAL 1694-1, AFL-CIO,	:	
	:	
	:	
Charging Party,	:	<u>ULP No. 11-02-787</u>
	:	
v.	:	
	:	DECISION ON THE PLEADINGS
STATE OF DELAWARE, DIAMOND STATE PORT	:	
CORPORATION,	:	
Respondent.	:	

Appearances

*Bernard N. Katz, Esq., Meranze & Katz, LLC, for ILA 1694-1
William W. Bowser, Esq., Young, Conaway, Stargatt & Taylor,
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 (“DSPC”) is an agency of the State.

The International Longshoremen’s Association, AFL-CIO (“ILA”) is an employee organization which admits to membership DSPC employees and has as a purpose the representation of those employees in collective bargaining, pursuant to 19 Del.C. §1302(i). The ILA, by and through its Local 1694-1, represents a bargaining unit of DSPC employees (as defined by DOL Case #103) for purposes of collective bargaining and is

certified as the exclusive bargaining representative of that unit. 19 Del.C. §1302(j).

ILA Local 1694-1 and DSPC are and have been parties to numerous collective bargaining agreements. The current agreement includes a contractual grievance procedure which culminates in final and binding arbitration.

On or about February 7, 2011, the ILA filed an unfair labor practice charge alleging DSPC had violated 19 Del.C. §1307 (a)(1), (a)(3), (a)(4), (a)(5), (a)(6), and/or (a)(7) which provide:

§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.
- (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure, or other terms and conditions of employment.
- (4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition or complaint or has given information or testimony under this Chapter.
- (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.
- (6) 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.
- (7) Refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting agreement.

The Charge alleges DSPC has refused to comply with a final and binding arbitration award and has taken the position that it will simply ignore that decision, in violation of its statutory obligations under the PERA.

On February 15, 2011, DSPC filed its Answer to the Charge, in which it admitted to the material facts, but denied the legal conclusions set forth by the ILA. DSPC also included New Matter in its Answer in which it asserted PERB should require the ILA to

seek enforcement of the Arbitrator's Award in Court, and then defer resolution of this Charge to that judicial enforcement. Alternatively, it argued if PERB does not defer to judicial enforcement, the Charge should be dismissed because the Arbitrator's decision does not draw its essence from the collective bargaining agreement. DSPC provided substantial argument in its New Matter.

The ILA filed its Response to DSPC's Answer to the Charge on February 22, 2011, in which it denied the New Matter asserted therein.

This decision is based upon the pleadings and argument submitted by the parties.

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 therein may have violated the Public Employment Relations Act, 19 Del.C. Chapter 13. DE PERB Rule 5.6(b) requires "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."

There are no material issues of fact presented in these pleadings, which include a copy of the parties' collective bargaining agreement and the Arbitrator's decisions of July 26, 2010 and January 12, 2011. Consequently, a hearing to resolve factual disputes is unnecessary.

The Public Employment Relations Board is statutorily authorized to apply and

interpret the provisions of Delaware's public sector collective bargaining laws, including the PERA. The General Assembly assured PERB's unfair labor practice decisions would be consistent with Delaware law by providing an unsuccessful party with the right to appeal such decisions to Chancery Court.

This Charge presents a purely legal question, namely, did the Employer by failing or refusing to implement the Arbitrator's decision commit an unfair labor practice in violation of its obligations under the Public Employment Relations Act. There are no facts alleged in the Charge which, even if true, would support a finding that DSPC violated 19 Del.C. 1307(a)(3), (a)(4), (a)(6) and/or (a) (7); consequently, those charges are dismissed, based on the pleadings.

Under the terms of the parties' agreement, the Arbitrator's responsibilities and authority are clearly set forth in Article 8 (in relevant part):

- 8.9 The arbitrator shall render a decision no later than 30 calendar days after the conclusion of the final hearing. Such decision shall be final and binding if made in accordance with the arbitrator's jurisdiction and authority under this Agreement and not prohibited by any ordinance or statute...
- 8.12 The arbitrator shall be without power to make decisions contrary to, inconsistent with, modifying, amending, adding to, eliminating, or varying in any way, the terms of this Agreement, or of applicable law or rules and regulations having the force and effect of law. In no event shall the scope of the arbitration award exceed the interpretation and application of this Agreement and will be limited to the specific subject matter jointly submitted.

It is undisputed the Arbitrator conducted a number of hearings and issued his decision on the merits of the ILA's grievance on July 26, 2010, in which he found DSPC had violated the collective bargaining agreement by selecting two casual employees with less seniority than the grievants for full time positions as fork lift operators. His decision concluded:

The Employer shall award an “A” position to Grievant Harris forthwith, and shall make him whole by paying Mr. Harris the difference in the hourly rate between an “A” Operator and a “B” Operator for any lost work opportunity attributable to the failure to promote him at the same time as the junior selectees were awarded their “A” positions, retroactive to the first date that the junior selectees began their work as “A” Operators.

The Arbitrator hereby retains jurisdiction for the purpose of resolving any disputes that may arise regarding the computation or implementation of the remedy awarded pursuant to this Award. *Exhibit A to the Charge.*

It is also undisputed that following issuance of that decision, the employer requested the Arbitrator, under his retained authority, to determine which improperly promoted employee, if any, should be laid-off as a consequence of his Award. By letter dated January 12, 2011, the Arbitrator declined to address the merits of DSPC’s request, stating:

... Although I retained “jurisdiction for the purpose of resolving any dispute that may arise regarding the computation or implementation of the remedy awarded pursuant to this Award”, this jurisdiction is limited to enforcing the remedy ordered for Grievant Charles Harris, who was awarded an “A” position and made whole by payment of the “difference in the hourly rate between an “A” Operator and a “B” Operator for any lost work opportunity attributable to the failure to promote him at the same time as the junior selectees were awarded their “A” positions retroactive to the first day that the junior selectees began their work as “A” Operators.

The Employer’s request that I determine which junior employee be laid off in order to reduce the number of A Operators to the contractual minimal complement requires more than a ministerial reconsideration, such as correction of a clerical error, or invocation of the retained jurisdiction regarding Grievant Harris, either of which can be granted on the request of one party. Both parties must authorize me to address derivative disputes not encompassed in the original issue submitted to me for adjudication, as consideration of such issues upon the petition of one party exceeds proper arbitral authority.

DSPC does not dispute the ILA’s factual assertion that the employer has not

implemented the Arbitrator's award to promote Grievant Harris to an A Operator position and to make him whole for lost work opportunities since a more junior employee was promoted.

Delaware public policy strongly favors the use of contractual dispute resolution procedures to resolve disputes between public employers and the bargaining representatives of their employees.¹ Consistent with the Delaware Supreme Court's direction in *City of Wilmington*², the negotiated grievance procedure, including arbitration, is entitled to great weight and is not to be dispensed with lightly. *Cape Henlopen E.A. v. Bd. of Education*, ULP 90-01-047, I PERB 505, 514 (HO Dec, 1990); *affirmed by PERB*, I PERB 557 (PERB, 1990).

Resolution of this Charge does not require PERB to consider the merits of a dispute concerning interpretation or application of the negotiated promotion and/or seniority provisions of the parties' collective bargaining agreement. The Arbitrator in his July 26, 2010 award determined what the parties bargained for, consistent with the parties' explicit agreement that such disputes are to be resolved through final and binding arbitration. Further, there is no issue of deferral to the arbitrator's award required to resolve this dispute, as there is no identity of issue between that which was presented through the ILA's grievance and the instant unfair labor practice charge.

The PERA explicitly sets forth that the grievance procedure is a mandatory subject of bargaining and requires:

... the public employer and the exclusive bargaining representative shall negotiate written grievance procedures by means of which bargaining unit employees, through their

¹ *City of Wilmington v. IAFF Local 1590*, 375 A.2d 724-25; *City of Wilmington v. FOP Lodge 1*, 510 A.2d 1028, 1029 (Del. 1986).

² *Supra*.

collective bargaining representatives, may appeal the interpretation or application of any term or terms of an existing collective bargaining agreement; such grievance procedures shall be included in any agreement entered into between the public employer and the exclusive bargaining representative. 19 Del.C. §1313(c).

It is also well-established in Delaware PERB case precedent that a unilateral change in the status quo of mandatory subjects of bargaining constitutes a *per se* violation of a party's duty to bargain in good faith and 19 Del.C. §1307(a)(5). PERB has held that the "grievance procedure is a mandatory subject of bargaining and may not be unilaterally changed by either party, either overtly or by inaction." *Donahue v. City of Wilmington*, ULP 08-11-637, VI PERB 4123, 4128 (2008). Once agreed upon, the negotiated grievance procedure may not be modified or ignored unless the parties have mutually agreed to do so. *Caesar Rodney Education Assn. v. Bd. of Education*, ULP 02-06-360, IV PERB 2729, 2733 (PERB Decision on Review, 2002); affirmed C.A. No. 1549-K, IV PERB 2933 (Chan.Ct., 2003).

Consequently, the issue presented is whether the ILA must seek judicial enforcement of the arbitrator's award or whether the scope of PERB's responsibility includes resolution of unfair labor practice charges which allege a unilateral change in the grievance procedure.

Delaware law, unlike the National Labor Relations Act or similar statutes in other states, specifically excludes labor agreements from enforcement under the State's Uniform Arbitration Act. 10 Del.C. § 5725, Exclusion of collective bargaining labor contracts with public and private employers, states:

Notwithstanding anything contained in this chapter by word or inference to the contrary, this chapter shall not apply to labor contracts with either public or private employers where such contracts have been negotiated by, or the employees covered

thereby are represented by, any labor organization or collective bargaining agent or representative.

There is no corollary in the PERA or the other public sector collective bargaining laws in Delaware to Article 301³ of the Taft-Hartley amendments to the National Labor Relations Act, which codified Congressional intent to make binding arbitration provisions in collective bargaining agreements judicially enforceable. Nor is there a corollary in Delaware law to the Florida or Illinois statutes which specifically provide for judicial enforcement of labor arbitration awards and under which the cases cited by the DSPC in its *New Matter* were decided.

The Delaware Court of Chancery has set up a limited and stringent standard for review on motions to vacate labor arbitration awards, as set forth in *Meades v. Wilmington Housing Authority*, 2003 Del.Ch. LEXIS 20, 172 LRRM 2303 (Del.Ch. 2003):

The role of courts in post-arbitration judicial review is limited. Delaware has long had a policy favoring arbitration, and its courts have applied a deferential legal standard when reviewing labor arbitration awards. This Court will not disturb a labor arbitration award unless (a) the integrity of the arbitration has been compromised by, for example, fraud, procedural irregularity, or a specific command of law; (b) the award does not claim its essence from the CBA; or (c) the award violates a clearly defined public policy.

It is important to note that the Charge does not seek to have the arbitrator's award vacated or modified. DSPC does not defend its failure to implement the award for more than eight months by asserting that it has sought to have the award vacated by Chancery Court. Rather, the employer seeks to raise an alternative defense for the first time, in response to this Charge, that the arbitrator's award does not draw its essence from the

³ Sec. 301. [§ 185.] (a) [Venue, amount, and citizenship] Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act [chapter], or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

contract. This issue is clearly of the type which can and should be raised before Chancery Court, as set forth in the case law provided by DSPC.

I note that DSPC cites no Delaware case law in support of its assertion that “the ILA can seek judicial enforcement of the arbitration award in Chancery Court.” The facts of this case are troubling. The employer appears to argue that it does not have a duty or good faith obligation under the PERA to expeditiously seek to vacate an award which it believes “does not draw its essence from the contract.” Nor did the employer’s request to expand the scope of the arbitration award under the guise of seeking clarification provide a reasonable defense to its failure to challenge the award in a timely manner. The arbitrator’s determination that his retention of jurisdiction for the “purpose of resolving any dispute that may arise regarding the computation or implementation of the remedy” did not extend to “determine which junior employee should be laid off in order to reduce the number of A Operators to the contractual minimal complement” was unquestionably correct.

In reaching the decision herein, it is emphasized that the only issue properly before PERB is whether DSPC violated its duty under the PERA to maintain the status quo of a mandatory subject of bargaining. The parties are entitled to the full measure of their negotiated agreement. DSPC and the ILA agreed that the final step of the negotiated grievance procedure is arbitration and that the decision rendered by the arbitrator (who was appointed pursuant to their agreed upon process) is final and binding. By refusing to implement the decision rendered by the arbitrator in this case, and not pursuing any rights the employer may have for review of that decision for more than eight months after its issuance, DSPC effectively altered the negotiated grievance and arbitration procedures, and thereby committed a *per se* violation of 19 Del.C. §1307(a)(5) and also violated 19 Del.C. §1307(a)(1).

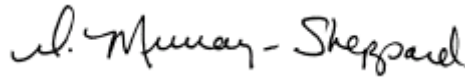
DECISION

For the reasons set forth above and consistent with PERB Rule 5.6(b), the pleadings are sufficient to establish that DSPC violated its duty to bargain in good faith and 19 Del.C.1307(a)(5), by unilaterally modifying the negotiated terms of the grievance procedure (a mandatory subject of bargaining), by failing or refusing to implement a final and binding arbitration decision for at least eight months after its issuance, and by failing to seek review of the same award if it genuinely believed the award to be subject to reversal. By so doing, the employer also interfered with the rights guaranteed to employees by the PERA, in violation of 19 Del.C. §1307(a)(1).

WHEREFORE, DSPC is hereby directed to cease and desist from failing or refusing to abide by the terms of the negotiated grievance procedure and to immediately implement the arbitrator's decision of July 26, 2010.

IT IS SO ORDERED.

DATE: April 13, 2011



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