

PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF DELAWARE

CHARLES HARRIS	:	
	:	PERB Review of the
Appellant,	:	Executive Director’s
	:	Decision
v.	:	
	:	
DIAMOND STATE PORT CORPORATION,	:	<u>ULP 11-04-800</u>
	:	
Appellee.	:	

Appearances

Samuel L. Guy, Esq., for Charging Party
Michael P. Stafford,, Esq., Young Conaway Stargatt & Taylor LLP, for DSPC

BACKGROUND

Charles Harris (“Appellant”) is a public employee within the meaning of §1302(o) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (“PERA”). He is employed by the Diamond State Port Corporation and is a member of the bargaining unit represented by International Longshoremen’s Association, Local 1694-1.

The State of Delaware (“State”) is a public employer within the meaning of 19 Del.C. 1302(p). The Diamond State Port Corporation (“DSPC”) is an agency of the State.

On or about April 25, 2011, the Appellant filed an unfair labor practice charge alleging DSPC violated 19 Del.C. §1307. The Appellant charged DSPC failed to comply with an arbitration award which was issued in his favor. The Charge asserted the Appellant continues to be harmed by DSPC’s failure to provide him with awarded

benefits; that because the Appellant is black, DSPC is “practicing racism;” and that by failing or refusing to pay him in accordance with the arbitration award, DSPC is “operating in violation of the Wage Payment and Collection Act of the State of Delaware, 19 Del.C. Chapter 11.”

On or about May 4, 2011, the State filed its Answer to the Charge. It asserted the allegations of race discrimination and violations of the Wage Payment and Collection Act do not constitute unfair labor practices under the PERA. It also asserted that this Charge is superseded by the Charge which was previously filed by Charging Party’s exclusive bargaining representative, ILA Local 1694-1. *ILA 1694-1 v. State of Delaware, Diamond State Port Corporation*, ULP 11-02-787, VII PERB 4977 (4/13/11); *affirmed* VII PERB 5069 (6/21/11). The State asserted, “In the absence of an allegation that the ILA has violated its duty of fair representation, or that [Charging Party] has an interest in this matter which is not adequately represented by the ILA, [Charging Party] is precluded from bringing a second charge under the same set of facts raising identical issues.”

On or about May 16, 2011, Charging Party filed a Response to New Matter, denying the affirmative defenses.

Upon review of the pleadings, the Hearing Officer dismissed the charge without prejudice on June 1, 2011, holding, “Considered in a light most favorable to Charging Party, the pleadings fail to provide a basis upon which to conclude any specific violation of 19 Del.C. §1307(a) may have occurred.”

On or about June 6, 2011, the Appellant requested the full Public Employment Relations Board review the Hearing Officer’s decision, asserting the decision was not supported by substantial evidence, was contrary to law, and was arbitrary and capricious. Charging Party requested a probable cause determination be issued and a hearing be

conducted on the underlying issue; that PERB seek enforcement of the Arbitrator's award in Chancery Court; and that remedial and punitive damages be assessed against DSPC.

DSPC filed its response to the Request for Review on June 15, 2011, requesting the appeal be denied and that the Hearing Officer's decision dismissing the Charge for lack of probable cause be affirmed.

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 July 20, 2011, at which time the full Board met in public session to hear and consider this 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 the arguments presented to the Board.

DISCUSSION

At the beginning of the Board's hearing on July 20, 2011, counsel for Charging Party moved to have the Board's Chairwoman recused on grounds of personal bias, based on a vague allegation that at some point during a three year period more than 20 years ago the Chairwoman engaged in conduct which counsel viewed as evidencing racial bias toward him.¹ The Chairwoman considered the standard for recusal set forth by the Delaware Supreme Court in *Ebersole v. Evans Building*, 2011 WL 379409, at *2 (Del., Feb. 7, 2011), which requires:

When addressing a motion for recusal on grounds of personal bias or prejudice, a judge must engage in a two-part analysis. First, the judge must subjectively determine that she can proceed to hear the case free of bias or prejudice. Second, if the

¹ By letter dated July 5, 2011, the parties were notified to have all motions filed by July 13, 2011 so the Board could timely address said motions. Neither party filed any motion nor informed the Board that the party intended to raise any motion(s) at the time of the Board's July 20th hearing.

judge has determined subjectively that she has no bias, then she must determine objectively whether there is an appearance of bias sufficient to cause doubt about her impartiality. If an objective observer viewing the circumstances would conclude that a fair or impartial hearing is unlikely, recusal is appropriate. *[citations omitted]*

After deliberation, the Chair affirmed not only was she subjectively not biased against counsel for the Charging Party but that due to the ambiguity of the alleged conduct and the significant lapse of time an objective observer would conclude that she could act without bias. The full Board unanimously denied Charging Party's motion and the Board proceeded to consider the merits of the appeal.

The Board's scope of review is limited to the record created by the parties and consideration of whether the decision is arbitrary, capricious, contrary to law, or unsupported by the record. After consideration of the record and the arguments of the parties on appeal, the Board must vote to either affirm, overturn, or remand the decision to the Executive Director for further action.

PERB Rule 5.6 requires the Executive Director (or her designated Hearing Officer) to review the pleadings and determine whether they are sufficient to establish probable cause to believe that an unfair labor practice in violation of the statute may have occurred. In reviewing the sufficiency of a Charge for purposes of determining probable cause, this Board has held:

Sufficient information must be included in the pleadings to allow a preliminary assessment of the procedural and substantive viability of the charge, i.e., the probability that there is sufficient cause to continue to process the charge. *AFSCME Council 81, Local 3911 v. New Castle County, Delaware*, ULP 09-07-695, VI PERB 4445 (2009).

The Hearing Officer concluded the Charge did not meet the requirements of PERB Rule 5.2 (c)(3) because it failed to allege with sufficient specificity facts to support

its allegations that DSPC acted in violation of 19 Del.C. §1307(a). The Charge was dismissed without prejudice, providing the option for the Charging Party to refile the Charge if there are additional facts which might be alleged to support the allegations.

The initial burden rests with the Charging Party to allege facts to support his Charge that the unfair labor practice prohibitions contained in the PERA have been violated. *Sonja Taylor-Bray v. AFSCME Local 2004*, ULP 10-01-727, VII PERB 4622 (2010). Charging Party has failed to set forth a sufficient basis for concluding DSPC has violated the statute as alleged.

For these reason, Charging Party has failed to establish the Hearing Officer's decision was arbitrary, capricious, contrary to law, or unsupported by the record.

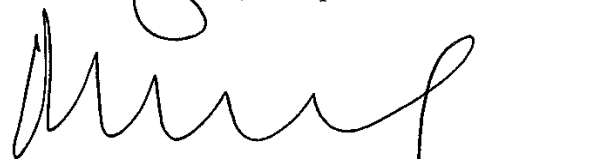
DECISION

After reviewing the record and hearing and considering the arguments of the parties, the Board unanimously affirms the decision of the Hearing Officer finding the pleadings fail to establish just cause to believe Diamond State Port Corporation committed an unfair labor practice as alleged.

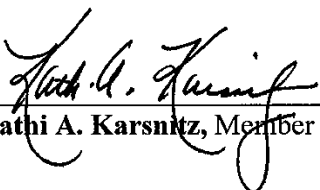
Wherefore, the dismissal of the Charge, without prejudice, is affirmed.



Elizabeth D. Maron, Chairperson



R. Robert Currie, Jr., Member


Kathi A. Karsnitz, Member

DATE: August 2, 2011