

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

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| CHARLES HARRIS, |) | |
| |) | |
| Charging Party, |) | |
| |) | <u>ULP No. 11-10-827</u> |
| v. |) | |
| |) | Probable Cause Determination |
| STATE OF DELAWARE, DIAMOND STATE |) | and Order of Dismissal |
| PORT CORPORATION AND INTERNATIONAL |) | |
| LONGSHOREMAN’S ASSOCIATION, LOCAL |) | |
| 1694-1, AFL-CIO, |) | |
| Respondents. |) | |

Appearances

Samuel L. Guy, Esq., for Charging Party
William W. Bowser, Esq. and Michael P. Stafford, Esq., YCST, for DSPC
Bernard N. Katz, Esq., Meranze, Katz, Gaudioso & Newlin, for ILA Local 1694-1

BACKGROUND

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

The International Association of Longshoremen, Local 1694-1 (“ILA”) is the certified exclusive bargaining representative of a unit of DSPC employees, within the meaning of 19 Del.C. §1302(j).

Charles Harris (“Charging Party”) is an employee of DSPC and a public

employee within the meaning of §1302(o) of the PERA. He holds a bargaining unit position within the bargaining unit represented by the ILA.

On or about October 7, 2011, Charging Party filed the above-captioned unfair labor practice charge (“ULP”) alleging conduct by DSPC in violation §1307(a) of the PERA, which provides, in relevant part:

§1307. Unfair labor practices

- 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.
 - (2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization.
 - (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 any agreement, reached as a result of collective bargaining, to writing and sign the resulting contract.
 - (8) Refuse to disclose any public record as defined by Chapter 100 of Title 29.

Specifically, Charging Party alleges that on or about July 26, 2010, Arbitrator Daniel Brent issued a decision and award in favor of Charging Party whose grievance against DSPC alleged that he was improperly bypassed for a promotion to an “A” Forklift Operator position. When DSPC did not implement Arbitrator Brent’s award, the ILA filed an unfair labor practice charge with the Public Employment Relations Board (“PERB”), alleging a failure to bargain in good faith. The Executive Director found that:

. . . the pleadings are sufficient to establish that DSPC violated the 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 doing so, the Employer also interfered with the rights guaranteed to employees by the PERA, in violation of 19 Del.C. §1307(a)(1). *International Longshoremen’s Assn. Local 1694-, AFL-CIO v. State of Delaware, Diamond State Port Corp* Del. PERB, VII PERB 4977 (2011).

That decision was affirmed by the full PERB on June 21, 2011. *International Longshoremen’s Assn. Local 169-1, AFL-CIO v. State of Delaware, Diamond State Port Corp* Del. PERB, VII PERB 5079 (2011).

The instant Charge alleges that DSPC has failed to comply with the requirements of Arbitrator Brent’s award because Charging Party is black. The Charge further alleges that ILA has not undertaken any action to enforce PERB’s order thereby breaching its statutory duty of fair representation.

On or about October 19, 2011, Respondent ILA filed its Answer essentially denying the allegations which form the basis of the Charge relating to ILA. ILA maintains that Charging Party was promoted to an “A” Forklift Operator position and that on or about July 22, 2011, the ILA and DSPC agreed that the arbitration decision was

.final and binding and that neither would appeal the PERB decision. DSPC and ILA have been meeting to finalize the back pay and benefit calculations. In the event no agreement is reached, the matter is to be returned to the arbitrator who retained jurisdiction for the limited purpose of assisting with the implementation of the remedy, if necessary

On or about October 21, 2011, the State filed its Answer essentially denying the violations of the PERA alleged in the Charge as they relate to the DSPC. It contends that a prior miscalculation was corrected and on October 20, 2011, DSPC and ILA reached agreement concerning the financial entitlement of Charging Party resulting from his promotional bypass. Two checks totaling the agreed upon amount were issued to Charging Party.

In its New Matter included in its Answer, DSPC maintains that PERB Rule 5.2(c)(3) requires that a charge connect the factual allegations to a specific alleged statutory violations which it asserts, the instant Charge fails to do.

Second, the Charge is deficient because it fails to state a claim for relief under the PERA in that the conduct alleged does not constitute an employer unfair labor practice.

Third, racial discrimination does not constitute an employer unfair labor practice under the PERA.

On or about November 2, 2011, Charging Party filed its Response to New Matter in which contends that, “the concepts comprising unfair labor practices are broad enough to encompass the actions inconsistent with these public policy standards.” Charging Party asserts the following examples as injustices inflicted upon Charging Party by the Respondents, which he alleges acted in concert:

The negative tax consequences of the 2011 lump sum payments made to Charging Party compared to a more even receipt of income;

The failure to honor the time value of money associated with interest that has not been paid;

The failure to accurately determine overtime hours due Charging Party;

The arbitrary calculation and improper deduction of \$14,000 in overtime during a four month period;

The failure to pay for sixty-four hours of vacation at the A rate;

The failure to provide an additional 19 days of vacation moving forward or pay the hourly rate for 19 days of vacation that are owed.

DISCUSSION

Rule 5.6 of the Rules and Regulations of the Delaware Public Employment Relations Board provides:

- (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 will 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.

For purposes of reviewing the pleadings to determine whether probable cause exists to support the Charge, factual disputes revealed by the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing a valid charge

without the benefit of receiving evidence in order to resolve factual differences. *Flowers v. DART/DTC*, ULP 04-10-453, V PERB 3179, 3182 (Probable Cause Determination, 2004).

PERB Rule 5, Unfair Labor Practice Proceedings, provides, in relevant part:

5.2 Filing of Charges

(c) The charge shall include the following information:

- (3) A clear and detailed statement of the facts constituting the alleged unfair labor practice, including the names of the individuals involved in the alleged unfair labor practice, the time, place of occurrence and nature of each particular fact alleged, and reference to the specific provisions of the statute alleged to have been violated. Each fact shall be alleged in a separate paragraph with supporting documentation where applicable.

Rule 5.2(c)(3) requires a Charging Party to include specific information in its Charge to allow a preliminary assessment of the procedural and substantive viability of that charge. PERB has previously held:

The Charging Party must allege facts in the complaint with sufficient specificity so as to, first, allow the Respondent to provide an appropriate answer and second, to provide facts on which PERB can conclude there is a sufficient basis for the charge. The Charge must also explicitly link the factual allegations to the “specific provision of the statute alleged to have been violated.” DE PERB Rule 5.2. The initial burden rests on the Charging Party to allege facts that support the charge that §1307 of the PERA has been violated. *Sonja Taylor-Bray v. AFSCME Local 2004*, ULP No. 10-01-727, VII PERB 4633 (2010); *Flowers v. Amalgamated Transit Union, Local 84*, ULP No. 10-07-752, VII PERB 4749, 4754 (2010).

When a Charging Party chooses not to include specific information in compliance with Rule 5.2(c)(3), it acts at its peril. *AFSCME Council 81, Local 3911 v. New Castle County*, ULP 09-07-695, VII PERB 4445, 4450 (PERB, 2009). The instant Charge contains insufficient information to permit the Respondent DSPC to submit an informed

Answer and for PERB to find probable cause to believe an unfair labor practice may have been committed.

Unfair labor practices are not general in nature and arise exclusively from the specific provisions of 19 Del.C. §1307. The instant Charge does not meet the requirements of PERB Rule 5.2 (c)(3) in that it does not “explicitly link the factual allegations to the specific provision of the statute alleged to have been violated.” Charging Party alleges only broad and sweeping violations of 19 Del.C. Section 1307(a) and thus fails to “explicitly link the factual allegations to the specific provision of the statute alleged to have been violated.”

This failure is not the only deficiency with Charging Party’s pleadings. The two primary allegations are that DSPC failed to comply with the arbitrator’s award and the ILA breached its duty of fair representation by failing to file a motion to enforce the PERB’s decision because Charging Party is black.

The “duty of fair representation” is addressed in 19 Del.C. Section 1303, Public Employee Rights, which provides, in relevant part: “Public employees shall have the right to . . . (4) Be represented by their exclusive representative, if any, without discrimination.” The mere fact that Charging Party is black is not enough to establish probable cause to believe that Charging Party’s right under 19 Del.C. Section 1303(4) of the PERA may have been violated. In this matter, a charge of discrimination also requires, at a minimum, an allegation of disparate treatment in the exercise of rights established by the PERA based upon race supported by reasonable and related factual allegations.

The pleadings contain no allegation of disparate treatment. In its simplest terms, Charging Party’s pleadings simply allege that he disagrees with DSPC’s application of

the arbitrator's award insofar as it concerns the monetary terms of his promotion to "A" Operator which he attributes to the fact that he is black.

The employee right created by Section 1303(4) is not without limitation. Where there is an exclusive representative of the employees, this statutory provision creates the right of employees to be represented *by the exclusive representative* without discrimination. Section 1303(4), however, does not convert racial discrimination by an employer, even if proven, into an unfair labor practice under Section 1307(a) of the PERA. The proper forum for resolving such issues is the Anti-Discrimination Section of the State's Department of Labor.

The statutory duty of fair representation required of an exclusive representative has also been the subject of PERB case law. In *Brandywine Affiliate NCCEA/DSEA/NEA v. Brandywine School District*, ULP 85-06-005 (1985), Del. PERB, I PERB 157, the PERB held that in order to satisfy its statutory duty of "fair representation," an exclusive representative must act "honestly, in good faith and in a non-arbitrary manner." Here, there is no factual allegation to support a conclusion that the ILA may have acted in a manner contrary to this standard. The PERB decision which ILA is accused of failing to pursue enforcement directed the DSPC "to immediately implement the arbitrator's decision." DSPC (in an attachment to its Answer), provided a copy of a settlement agreement it entered into with the ILA, by which it agreed to "immediately implement the Brent award." Consequently, there was no reason or basis for the ILA to petition PERB to enforce its Order.

The Award of the Arbitrator directed that,

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's award is clear. As previously noted, any request for clarity of this award, should a genuine dispute arise between DSPC and the ILA, would be directed back to the arbitrator, under his retention of jurisdiction. The record provided in response to this Charge, however, indicates the parties were able to enter into an agreement which allowed for Charging Party to be made whole, as required by the arbitrator.

DETERMINATION

Consistent with the foregoing discussion, considered in a light most favorable to Charging Party, the pleadings fail to provide a basis upon which to conclude that a violation of 19 Del C. Section 1307(a) by the DSPC or a failure to represent Charging Party by ILA, may have occurred.

The ILA's request for sanctions against Charging Party for filing an "irresponsible, unwarranted and inappropriate action", although considered, is denied as is its request for reimbursement of reasonable attorney's fees and costs.

WHEREFORE, the Charge is dismissed, in its entirety, with prejudice.

Date: November 18, 2011



Charles D. Long, Jr.
Hearing Officer
Del. Public Employment Relations Board