

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

<b>INTERNATIONAL LONGSHOREMEN’S ASSOCIATION,</b>	)	
<b>LOCAL 1694-1, AFL-CIO,</b>	)	
	)	
Charging Party,	)	<b>ULP 14-02-943</b>
	)	
v.	)	<b>DECISION ON THE MERITS</b>
	)	
<b>DIAMOND STATE PORT CORPORATION,</b>	)	
	)	
Respondent.	)	

**APPEARANCES**

*Claiborne S. Newlin, Esq., Meranze, Katz, Gaudioso & Newlin, for ILA 1694-1*

*Aaron Shapiro, SLREP/HRM/OMB, for DSPC*

**BACKGROUND**

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

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

At all times relevant to the processing of this Charge, the ILA and DSPC have been parties to a collective bargaining agreement. That agreement includes a Recognition Clause, which states in relevant part:

2.2 “A employees” as included herein shall include all hourly rated employees made part of the bargaining unit by virtue of certification that was granted on January 17, 1976, Case No. 154, under the authority of Chapter 13, Title 19, Delaware Code.

“B employees” as used herein shall include all hourly rated people made part of the bargaining unit by virtue of certification that was granted on December 23, 1996, Petition No. 96-06-179, under 19 *Del.C.* Chapter 13. Alternatively, whenever the term “all employees” is used herein, such reference shall apply to “A” employees and “B” employees.

2.4 The term “casual employee” as used herein is someone employed for a temporary period when the work of the Port is such that, as determined by the Employer, it cannot be handled expeditiously by permanent “A” and/or “B” employees. Casual employees shall not be entitled to and are not covered by the provisions of this Agreement.

On February 11, 2014, the ILA filed an unfair labor practice charge with the Delaware Public Employment Relations Board (PERB) alleging conduct by the Port in violation of 19 *Del.C.* Sections 1307(a)(1), (3), (5), and (7).<sup>1</sup>

DSPC filed its Answer and New Matter on or about February 25, 2014, denying the material allegations contained in the Charge. On March 5, 2014, Charging Party filed a Response to New Matter essentially denying the allegations therein.

A Probable Cause Determination was issued on March 31, 2014. Thereafter, the hearing was scheduled and postponed by the parties numerous times. The hearing was held on February 10, 2015. Written argument was submitted by the parties and the record closed on April 27,

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<sup>1</sup> §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.
- (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.
- (7) Refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract.

2015.

This decision is based upon review of the record created by the parties and consideration of their arguments as well as related case law established by and before this Board.

### **DISCUSSION**

The bargaining unit certification for the unit represented by ILA Local 1694-1 was defined in Representation Petition 96-05-179 (DOL Case 103):

All regular full time employees of the Diamond State Port Corporation, and employees who have worked 800 or more hours in a calendar year, in cargo positions, including related warehousing functions. This unit excludes all office personnel, supervisors, and guards.<sup>2</sup>

The unit definition also included the following PERB notation:

This unit definition reflects PERB's understanding that the 800 hour threshold for unit inclusion will be calculated on an annual basis. Unless the parties agree to the contrary, the annual determination of employees who meet the threshold for inclusion will occur on January 1 of each calendar year.

The Charge alleges DSPC notified a certain number of "C" employees<sup>3</sup> in late October, 2013, that they "will become a ILA Local 1694-1 B Union member as of January 1, 2014," and directed them to report to Employee Orientation on November 5, 2013. *Union Ex. 3*. The ILA asserts DSPC unilaterally and without prior discussion or negotiation, required these employees to submit to a drug and alcohol test. As a result of a negative test result, three of these

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<sup>2</sup> On March 12, 2015, the bargaining unit was modified by agreement of the parties as follows:

All regular full-time employees of the Diamond State Port Corporation and employees who have worked one thousand (1,000) or more actual hours in a calendar year, in cargo handling positions, including related warehouse functions. This unit excludes all office personnel, supervisors and guards.

The modification also noted the parties' agreement that effective upon the date of modification of the certification, all existing B employees shall retain their B status for the duration of employment so long as each B employee works the required 800 hours in the preceding year. Should any B employee fail to work the required 800 hours, he would be reduced to C status and would be required to work 1,000 hours in a calendar year to regain B status the following calendar year.

<sup>3</sup> The parties refer to casual employees as "C" employees.

employees were subsequently notified that their promotions were revoked and that they could no longer be considered for employment at the Port of Wilmington. *Exhibit S-2*. It is undisputed that not only were these three employees not advanced to B status, but DSPC also refused to allow them to continue their C status employment.

ILA's claim that the bargaining unit certification only requires a "C" employee to work at least 800 hours in a calendar year, at which time progression to "B" status is automatic, is contrary to the clear records of the unit determination. The ILA errs in its contention that DSPC "confounds administrative convenience with threshold certification". The notation included on the certification documents establish there is an annual certification of "B" employees which occurs on January 1. "C" employees who have worked at least 800 hours in the prior calendar year are not "B" employees (with the attenuated benefits of bargaining unit status) until January 1 of the next calendar year. The record establishes the B seniority list is prepared annually on January 1 of each year, at which time "C" employees who have worked at least 800 hours the prior year are added to the list, and "B" employees who failed to work at least 800 hours in the prior calendar year are dropped from the seniority list (consistent with certain negotiated exceptions).

It is uncontested that "C" employees do not and have not enjoyed contractual advantages such as medical coverage, wage rates and access to the grievance procedure nor do they pay union dues or a service fee prior to January 1st of the calendar year following their attainment of the 800 hour threshold.

The ILA's charge that the testing of the "C" employees constitutes a unilateral change to the discipline set forth in the Drug and Alcohol Abuse Policy is without merit. "C" employees do not hold bargaining unit positions, and are not represented by ILA Local 1694-1. The PERA obligates public employers to confer and negotiate in good faith with respect to terms and

conditions of employment with the exclusive representative of bargaining unit employees. There is no statutory obligation to collectively bargain with any organization or group of employees for whom an exclusive bargaining representative has not been certified in the manner set forth by the PERA.

Consequently, the charge that DSPC has violated its duty to bargain and/or has refused to reduce an agreement reached as a result of collective bargaining is without foundation in the facts of this matter. The charges that DSPC violated 19 Del.C. §1307(a)(5) and (a)(7) are, therefore, dismissed.

The remaining allegations that DSPC violated, interfered with, restrained or coerced any employee because of the exercise of their protected statutory rights and/or encouraged or discouraged membership in the union by discriminating in regard to hiring, tenure or other terms and conditions of employment are not as easily dispensed. The analysis must begin with the question of whether “C” employees are, in fact, DSPC employees.

DSPC asserted through the testimony of its Director of Human Resources and Safety that “casual day-laborers” are not employees, basing her conclusion on the fact that they are not entitled to any benefits and are not represented by the union. Her conclusion is not supported by the facts of record or precedent. An employee has been defined by PERB to be “one employed by another for wages or salary.” To employ an individual is “to provide [that individual] with a job that pays wages or a salary.” *DSPC & ILA 1694-1*, DS 00-10-294, III PERB 2095, 2097 (2000) (*citations omitted*). It is undisputed that “C” employees are paid wages for hours worked, that taxes are withheld from their wages and reported by DSPC to the appropriate governmental agency annually. “C” employees are also eligible to receive workers’ compensation benefits if injured on the job. Additionally, Section 2.4 of the collective bargaining agreement (which constitutes the agreement of these parties) specifically refers to “casual employees” in a manner

consistent with its referral to “A” and “B” employees. That contractual provision reflects the parties’ understanding of the status of day-laborers.

DSPC does not randomly hire its “day laborers” from anyone who happens to show up on a given morning. It is undisputed that individuals must complete an employment application (*Union Exhibit 1*) to be eligible for hire as a “C” employee. Upon determining that an applicant is a viable candidate for hire, DSPC offers employment contingent upon passage of a drug screen. Following receipt of a negative drug test, the individual is provided with an employee or “clock” number which is used throughout his or her employment career at DSPC. An employee’s clock number does not change from the time that they are initially hired as a casual employee, through any advancement to B or A positions.<sup>4</sup> Thereafter “C” employees are hired on a daily basis as work is available which exceeds the volume which can be handled by DSPC’s available “A” and “B” employees. Consequently, “C” employees are DSPC employees within the meaning of 19 Del.C. §1302(o).

There is no dispute that the Drug and Alcohol Abuse Program policy (the policy) which was introduced into evidence as Joint Exhibit 2 (A and B) is the policy that was in effect at all times relevant to this Charge. This policy (which was adopted in 1999 after the bargaining unit certification was issued), defines its coverage to include, “All DSPC employees including union, full time and part time employees are covered by this policy”. There is no need to include “full time and part time” if DSPC’s intent was to limit application of this policy to ILA 1694-1 bargaining unit employees. This conclusion is supported by the first sentence of the Pre-Employment Testing provision of the policy, which applies to: “...All applicants seeking a position (full-time, part-time, casual)...” The evidence of record is sufficient to establish that

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<sup>4</sup> Testimony established that when a “C” employee works the 800 hours necessary to become a “B”, that individual is placed on the seniority list the following January 1, (within the group who advanced to “B” status that year) based upon his or her employee or clock number, not the date on which he or she met the 800 hours threshold.

casual employees are covered by the Drug and Alcohol Policy.

The Policy states under the heading “Testing”, “All employees shall be subject to the following testing programs: 1) Pre-employment; 2) Reasonable Cause; 3) Post-Accident; 4) Return to Duty.” There is no provision in the existing policy for random testing.

“Pre-employment” testing is defined and described in the policy:

All applicants seeking a position (full-time, part-time, casual) with DSPC will be tested as a condition of an offer of employment. All applicants will be notified at the time they complete a job application that they will be subject to testing as a condition of employment and prior to such testing will be advised in writing of the time and location for the testing. Any applicant who refuses to undergo a test will not be given further consideration for employment for a minimum period of one year.

Testimony established that all employees who are hired from outside the Port are subject to pre-employment testing, whether they are hired as “C” employees or “A” employees. There are no outside hires into “B” positions because only “C” employees who make the 800 hour threshold can become “B” employees.

The Union asserts that the existing practice is to conduct pre-employment testing only when an individual is originally hired for “C” employment. In the February 14, 2011 “Employment Application Form” completed by one of individuals who was affected by DSPC’s drug testing in December, 2013, he was required to sign a certification which states:

... I understand and agree that:

1. Diamond State Port Corporation (DSPC) employees or applicants for employment are subject to testing for drug use, including marijuana. Employment is contingent upon the outcomes of such testing. DSPC considers drug use a serious problem and maintains a drug-free environment. If I accept a job offer, I will be tested for current substance abuse during the pre-employment health evaluation. In addition, to protect my fellow co-workers, I will submit to such physical examinations as the DSPC may regard as necessary...

*Union Exhibit 1, p. 4.*

1. **CONDITIONAL OFFERS:** All offers are contingent upon

successful drug screening, reference and other background checks, and proof of authorization to legally work in the United States...

2. DRUG TEST: I understand that all offers of employment by DSPC are conditional upon results of a drug test arranged and paid for by DSPC. I further understand if the test result is positive, if I fail or refuse to provide a specimen for analysis at the time requested, or if the specimen shows any signs of adulteration or substitution, the employment offer will be revoked, and I will not be eligible for further employment consideration.

Union Exhibit 3 is the results of the pre-employment drug test to which this individual submitted on February 15, 2011. This document supports the conclusion that “C” employees are required to complete the pre-employment testing at the time of initial hire.

Testimony of DSPC’s witnesses established that C employees who have worked at least 800 hours in a calendar year have not been drug tested prior to being added to the B employee seniority list. The January 1, 2015 “B” seniority list evidences that of the employees who attained “B” status in each year, the following number remain on the list (with the corresponding date of attainment of B status)<sup>5</sup>:

1/1/14	24
1/1/12	11
1/1/08	1
1/1/07	8
1/1/06	15
1/1/05	5
1/1/04	8
1/1/02	6
1/1/01	17

There is no evidence of record that any of these current “B” employees (except the 6 on the list with a seniority date of 1/1/02) were drug tested prior to attaining B status or that any prior B

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<sup>5</sup> It is possible that more employees were advanced to B status in any one of these years but the number has been reduced over time by separations from employment or failure of a “B” employee to maintain the requisite 800 hours annually necessary to remain on the B list.



eligible employee was terminated as a result of a positive drug test given as a condition precedent to advancing to B status.

DSPC has argued it has a past practice requiring transitioning employees to complete pre-employment drug screening, relying exclusively on the screening records for the six “B” employees on the 2015 seniority list who attained B status on January 1, 2002. In one of this Board’s earliest decisions, the necessary elements to establish a past practice were set forth:

The nature of a past practice is such that one must first establish a given course of conduct occurring in response to a specific set of facts. Once this is accomplished, the question becomes whether or not the established course of conduct is sufficient to qualify as a past practice. To do so, several conditions must be present: first, the course of conduct must be clear and unambiguous; secondly, it must involve a period of time sufficient for it to be established on a consistent basis; and thirdly, those involved must have knowledge of the conduct and accept it as the appropriate means of handling the given situation. *Brandywine Affiliate v. Brandywine School District Board of Education*, ULP 85-06-005, I PERB 131, 144 (1986).

The evidence presented is insufficient to establish that a past practice existed of drug testing “C” employees who were eligible to move to B status, or that there was any other practice of random or targeted drug testing of other “A”, “B” or “C” employees covered by the policy.

DSPC’s contention that the testing of the casuals constituted pre-employment testing fails on all counts. The most compelling reason is the prior determination that “C” employees are, in fact, employees of the Port subject to the provisions of the policy. Consequently, it is unnecessary for “C” employees who qualify to advance to B status on the next January 1 to complete an employment application because they are already DSPC employees. Further, the affected “C” employees were not informed of the testing in advance as the policy requires. Nor were they advised in advance of the time and location for the testing as the policy requires. In fact, none of the indicia of pre-employment testing is present.

Because the testing at issue here does not qualify as pre-employment testing, the focus

shifts to why this specific group of employees was singled out to be randomly tested, when there undisputedly had never been any random testing conducted on any other “C” employees in the past. DSPC’s Human Resource Director testified she had the authority and did authorize the testing of the “C” employees who were eligible to advance to B status in December, 2013. She testified that although she was aware that notice was required for pre-employment testing and that there was a sufficient period of time between her decision to test and the actual testing to provide the required notice, she chose not to provide notice. She admitted there was nothing in either the initial orientation letter (*Union Exhibit 3*) or the December “training” letter sent by the Safety Director which notified or advised the “C” employees that they would be drug tested as a condition precedent to attaining B status. She also admitted that “C” to “B” employees had never been tested before in her ten year tenure at DSPC. She testified she directed these employees be drug tested because she “...felt it would be better if we included [drug testing] in the orientation of an employee going from non-benefitted to benefit status.” *TR. p. 121.*

The “C” to “B” transitioning employees constituted a group of unrepresented employees who were entitled to move to represented status and who would be entitled to the benefits, rights and protections provided for in the collective bargaining agreement. DSPC acknowledges it would much prefer to direct unrepresented employees over whom they believe they have unfettered control. In this instance, a way to minimize the number of additional bargaining unit employees was to disqualify any “C” employee testing positive for drugs or alcohol from becoming a “B” employee.

This group of employees was clearly singled out and treated differently than any group of transitioning employees in the previous twelve years and differently than any other DSPC employee who was being advanced or promoted to a bargaining unit position. DSPC failed to provide a valid justification for this disparate treatment of a group that was clearly identifiable

because they had reached a necessary threshold for attaining representation. The testing was not pre-employment testing within the understanding of these parties, regardless of how DSPC characterized it to the tested employees. In fact, the drug screen results provided as Union Exhibit 5 indicate the testing facility was directed to conduct a random drug test.

Basing an employment decision on one's protected right to be represented under the PERA violates both §1307(a)(1) and (a)(3).

### **CONCLUSIONS OF LAW**

1. The Diamond State Port Corporation is a public employer within the meaning of 19 Del.C. §1302(p).

2. The International Longshoremen's Association (ILA) is an employee representative within the meaning of 19 Del.C. §1302(i). By and through its affiliated Local 1694-1, the ILA is the exclusive bargaining representative of a bargaining unit of DSPC employees within the meaning of 19 Del.C. §1302(j).

3. By requiring drug and alcohol testing of the "C" employees as a condition- precedent to their progression to the "B" classification, DSPC violated 19 Del.C. §1307(a)(1) and (a)(3).

**WHEREFORE**, the Delaware State Port Corporation is hereby ordered to take the following affirmative steps:

1. Cease and desist from engaging in conduct which violates 19 *Del.C.* Section 1307(a)(1) and (a)(3).

2. Promptly reinstate all employees who were denied progression to the "B" classification as a result of the drug and alcohol testing they were required to undergo in

December, 2013, as a condition precedent to attaining “B” classification on January 1, 2014.

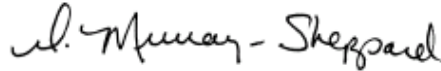
3. Make all affected employees whole for the 800 hours of work necessary to achieve and maintain “B” employee status for calendar years 2014 and 2015.

4. Immediately post the Notice of Determination in all areas where notices affecting employees in the bargaining unit represented by ILA, Local 1694-1 are normally posted throughout the Port and in its administrative offices. These notices must remain posted for a period of thirty (30) days in order to provide notice to all affected employees of the decision in this matter.

5. Notify the Public Employment Relations Board in writing within sixty (60) calendar days of the steps taken to comply with this Order.

**IT IS SO ORDERED.**

DATE: June 24, 2015



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