STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

NORMAN L. DAVIS and RICHARD SMITH,	)	
Charging Parties,	)	
	)	
v.	)	**ULP No. 00-12-301**
	)	
DIAMOND STATE PORT CORPORATION,)		
and	)	
ILA, LOCAL 1694-1, AFL-CIO,	)	
Respondents.	)	

PROBABLE CAUSE DETERMINATION

The Diamond State Port Corporation ("Port"), is a public employer within the meaning of Section 1302(n) of the Public Employment Relations Act, 19 Del.C., Chapter 13 (1994) ("Act"). Norman Davis and Richard Smith ("Davis" or "Smith") both employees of the Port, are public employees within the meaning of Section 1302(m). The International Longshoreman's Association ("ILA") is an employee organization within the meaning of Section 1302(h) of the Act and the exclusive representative of certain employees of the Port, including Davis and Smith, within the meaning of Section 1302(i) of the Act.

At all times relevant to this dispute, the Port and the ILA were parties to a collective bargaining agreement.

BACKGROUND

On December 11, 2000, Charging Party Davis filed an unfair labor practice complaint alleging the following:

Sometime prior to January, 2000, the Port, in partnership with the ILA, initiated a Coordinator Program for the purpose of providing bargaining unit employees with the opportunity to gain supervisory experience in the cargo handling and warehousing operations, on an as-needed basis. For all hours worked in the Coordinator position bargaining unit employees were paid a premium over the negotiated hourly rate. During the period of January through April 7, 2000, Charging Party Davis worked as a Coordinator in the warehouse approximately every other week.

Approximately two to three weeks after his last Coordinator assignment, Davis learned from other bargaining unit employees that the Port had removed his name from the list of eligible employees eligible for the Coordinator position. **[1]** Davis contacted Phil Immediato, the Port's Human Resource Manager, who confirmed that Davis' name had been removed from the list of eligible employees. Mr. Immediato explained that the Coordinator program was a joint labor/management effort involving the Port and the ILA which was open only to ILA members in good standing.

Mr. Immediato provided Davis with a copy of a letter from ILA President, Julius Cephas, dated April 7, 2000, of which Davis claims he had no prior knowledge. The letter provides, in relevant part:

> Norman L. Davis is not a member in good standing of ILA, Local 1684-1.
>
> As such, we request that Norman L. Davis be immediately removed from the Coordinator's list.
>
> In view of the partnership between the union and management of DSPC, we thank you in advance for your cooperation in this matter.

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[1] Port records indicate that, except for two days in October, 2000, April 7, 2000, was the last day Davis was selected to work in the Coordinator position.

> Once this member brings his membership current, we can again review his eligibility for the coordinator position.

Mr. Immediato memorialized this discussion in a memorandum dated June 13, 2000, which provides:

> You were removed from the Coordinator's Program at the request of ILA Local 1694-1. Since the program is a partnership between ILA Local 1694-1, such a request from ILA Local 1694-1 was considered an appropriate response.

In response to Davis' letter of June 21, 2000, requesting that the Port reconsider his removal from the program, Mr. Immediato informed Davis by letter dated June 26, that the matter was not grievable and, therefore, closed.

On or about July 7, 2000, Davis spoke with ILA Acting President Paul Cutler, Business Agent Joe Smithers, and Shop Steward Clarence Byrd, concerning his removal from the program and requested that the ILA stop interfering with his eligibility to earn premium wages and grieve his removal from the list. By letter dated July 12, 2000, Davis requested that the ILA respond to his request. As of the date of the filing of this charge on December 11, 2000, Davis had received no response from the ILA.

By agreement of the parties, the processing of the Charge filed by Davis was held in abeyance pending settlement discussions involving Davis and the Port. Unable to resolve the matter, the Charge was amended on February 23, 2001, to include a second employee, Richard Smith.

Section II of the Amended Charge alleges that during the period of January through April, 2000, Smith was assigned to work as a Coordinator on a regular basis for which he was paid the premium rate. On April 7, 2000, Smith was informed by Manager William Stansbury that at the request of the ILA his name had been removed from the list of employees eligible to participate in the Coordinator program.

Smith immediately contacted Human Resource Manager Immediato who verified Smith's removal from the list stating the program was open only to ILA members in good standing. Mr. Immediato provided Smith with the following letter dated April 7, 2000, from ILA President, Julius Cephas, of which Smith had no prior knowledge. The letter provides, in relevant part:

> Richard Smith is not a member in good standing of ILA Local 1694-1.

> As such, we request that Richard Smith be immediately removed from the Coordinator's list.
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> In view of the partnership between union and management of DSPC, we thank you in advance for your cooperation in this matter.
>
> Once this member brings his membership current, we can again review his eligibility for the coordinator position.

Smith was not placed in the Coordinator position again until after he paid the ILA approximately $1,300.00, as reimbursement for disallowed expenses incurred during his term as ILA President.

Section III, of the Amended Charge alleges that the Port and the ILA were required to bargain over the terms and conditions of the position and reduce all agreements to writing, which they did not.

Charging Parties contend that by its conduct the Port violated Sections 1307(a)(1), (2), (3) and (5), 0f the Act. **[2]** Charging Parties contend that by its conduct the ILA violated Sections 1307(b)(1) and (2), of the Act. **[3]**

The Answers to the Amended Petition filed by the Port and the ILA on February 27 and March 16, 2001, respectively, deny certain material allegations set forth in the Complaint. Both the Port and the ILA contend the initial Complaint filed by Davis on December 11, 2000, and the Amended Complaint filed by Davis and Smith on February 23, 200, are not timely filed within the required 180 day filing period set forth in PERB Rule 5.2, and must, therefore, be dismissed.

On March 23, 2001, Charging Party's filed their Response essentially denying the New Matter.

DISCUSSION

19 Del.C. Section 1308(a), as amended effective July 12, 1999, provides, in relevant part:

> 1308: Disposition of complaints.
>
> . . . . . no complaint shall issue based on any unfair labor practice occurring more than 180 days prior to the filing of the charge with the Board.

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

> 5.2(a) A public employer, labor organization, and/or one or more employees may file a complaint alleging a violation of 14 Del.C. §4007, 19 Del.C. §1607 or 19 Del.C. §1307. Such complaint must be filed within one hundred eighty (180) days of the alleged violation. This limitation shall not be construed to prohibit introduction of evidence of conduct or activity occurring outside the statutory period, provided the Board or its agent finds it relevant to the question of commission of unfair labor practice within the limitations period.

Recognizing the importance of time limitations, the PERB specifically addressed timeliness in PERB Rule 1.10, which provides:

> Notwithstanding the provisions of Regulation 1.9, and so that the Act may be efficiently enforced and disputes thereunder swiftly resolved, the Board shall strictly construe all time limitations

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[2] §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. (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.

[3] §1307(b) It is an unfair labor practice for a public employee or for an employee organization 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) Refuse to bargain collectively in good faith with the public employer or its designated representative if the employee organization is an exclusive representative.

> contained in the Act and in these Regulations. **[4]**

Davis initially filed an unfair labor practice charge against the Union with the National Labor Relations Board (NLRB) on July 17, 2000. This NLRB charge does not, however, suspend the period for filing a charge before the PERB under 19 Del.C.§1308(a). Moreover, Davis was advised by the NLRB approximately one (1) month after he filed his charge, or on or about August 17, 2000, that the NLRB did

not have jurisdiction to process his complaint. For whatever reason, his charge was not filed with the PERB until nearly four (4) months, thereafter.

In their Response to the New Matter set forth in the Port's Answer to the Amended Charge, Charging Parties allege that the Port, "continued to engage in prohibited conduct for the entire period during which Charging Party Davis was excluded from the Coordinator's position based on his union status." There is no corresponding argument appearing in the Response to the New Matter filed by the ILA. Nor is this contention raised on behalf of Charging Party Smith. These pleading technicalities aside, it is clear that if the continuing violation theory is valid to render the initial Charge by Davis timely, the same rationale would, in all likelihood, also apply to Smith.

Charging Parties' reliance on the continuing violation theory is unpersuasive. A continuing violation generally occurs when there is a continuing course of conduct. In such cases, the party charged cannot escape responsibility for wrongdoing by claiming that the charge was not filed within the required filing period when measured from the onset of the contested course of conduct.

Such is not the case here. According to the Amended Charge, Charging Party Smith was informed on April 7, 2000, by Manager William Stansbury of his removal from the list of employees eligible to participate in the coordinator program. Smith went "immediately" to Human Resource Immediato who confirmed Smith's removal

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[4] 1.9 Construction of the Regulations. These regulations set forth rules for the efficient operation of the Board and the orderly administration of the Act. They are to be liberally construed for the accomplishment of these purposes and may be waived
or suspended by the Board at any time and in any proceeding unless such action results in depriving a party of substantial rights.
.

and provided him with a copy of the letter from ILA President Cephas, dated April 7, 2000. This notice constitutes the incident which triggered the statutory 180 day filing period. For Smith, the 180 filing period expired on October 4, 2000, 180 days after April 7, 2000. The Amended Charge was not filed until February 23, 2001, over four (4) months past this date.

The circumstances involving Charging Party Davis are less clear. Davis was

initially informed by Human Resource Manager Immediato on or about April 28, 2000, that his name had been removed from the eligibility list at the request of the ILA. Based upon the pleadings, precisely what transpired thereafter is uncertain. Written confirmation of his removal from the list of employees eligible to participate in the Coordinator program was requested by Davis and provided by Mr. Immediato in a memorandum dated June 13, 2000. It is this memorandum which Davis relies upon as the official confirmation of his status and the triggering event. In the absence of credible evidence to the contrary, the initial Charge filed with the PERB on December 11, 2000, was within the 180 day filing period.

DECISION

Consistent with the foregoing discussion:

I. Considered in a light most favorable to Charging Party Davis, the pleadings constitute probable cause to believe that an unfair labor practice may have occurred.

This finding of probable cause does not preclude the introduction of evidence during the hearing to determine the facts upon which this matter can be resolved concerning the timeliness of the Charge.

II. Consistent with the foregoing discussion, the pleadings fail to establish probable cause to believe that an unfair labor practice may have occurred against Charging Party Smith.

As to Charging Party Smith the Amended Charge is dismissed as untimely in that it was filed more than four months beyond the 180 day filing period required by 19 Del.C. Section 1308(a).

May 29, 2001
(Date)

/s/Charles D. Long
Charles D. Long, Jr.,
Executive Director