STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

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

The Diamond State Port Corporation ("State" or "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 ("Charging Party" or "Davis"), is a public employee within the meaning of Section 1302(m) of the Act. The International Longshoreman's Association ("Union" or "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 Charging Party, 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 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. (Complaint-para. 9) For all hours worked

in the Coordinator position bargaining unit employees were paid a premium over the negotiated hourly rate. (Complaint-para. 10) During the period of January through April, 2000, Charging Party Davis worked as a Coordinator in the warehouse approximately every other week. (Complaint-para. 11)

Approximately two (2) or three (3) weeks after his last Coordinator assignment, Charging Party learned from other bargaining unit employees that the Port had removed his name from the list of employees eligible for assignment to the Coordinator position. (Complaint-Para. 12) **[1]**

Charging Party contacted Phil Immediato ("Immediato"), the Port's Human Resource Manager who confirmed that Davis' name was removed from the list of employees eligible to participate in the Coordinator program at the request of the ILA. Immediato explained to Davis that the Coordinator program was a joint labor/management effort open only to ILA members in good standing. (Complaint-para. 13)

At Charging Party's request, Immediato provided Davis with a copy of a letter from ILA President, Julius Cephas, dated April 7, 2000. 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.
>
> Once this member brings his membership current, we can

[1] Port records indicate that, except for two days in October, 2000, April 7, 2000, was the last day Charging Party worked in the Coordinator position.

> again review his eligibility for the Coordinator position.
> (Complaint-para. 14)

Sometime in early to mid June, 2000, Charging Party requested written confirmation from Immediato of his removal from the Coordinator position at the request of the Union. Mr. Immediato provided the following memorandum dated June 13, 2000:

> 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. (Complaint-Para. 16)

In a letter dated June 21, 2000, Charging Party requested the Port to reconsider his removal from the program. By letter dated June 26, Immediato informed Davis that the matter was not grievable and, therefore, closed (Complaint-para. 18).

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 in January, 2001, to include a similarly situated employee, Richard Smith.

The following paragraphs of Davis' unfair labor practice charge set forth the alleged violations:

> 25. By failing to reduce the agreement reached between ILA 1694-1 and DSPC concerning the wages and working conditions of bargaining unit employees performing Coordinator responsibilities, DSPC violated its duty to bargain in good faith and 19 Del.C. §1307(a)(5). **[2]**
>
> 26. ILA 1694-1 violated its duty to bargain in good faith and 19 Del.C. §1307(b)(2) by failing to execute a written agreement concerning the wages and working conditions of bargaining unit employees. **[3]**
>
> 27. ILA Local 1694-1 has an obligation under the Public Employment Relations Act to represent all bargaining unit employees without discrimination. By entering into an agreement with DSPC whereby only "Union members in good-standing" were eligible to be considered for premium rate positions, the ILA has illegally discriminated against bargaining

unit employees based on union activity, and has violated 19 Del.C. §1307(b)(1). **[3]**

28. By removing Charging Party from eligibility from premium rate work based on his union membership, DSPC has interfered with the exercise of an employee's right, in violation of 19 Del.C. §1307(a)(1). **[2]**

29. By these actions, DSPC has assisted in the existence and administration of a labor organization, in violation of 19 Del.C §130 (a)(2). **[2]**

30. By these actions, DSPC has unlawfully encouraged membership in an employee organization by discrimination in regard to hiring and other terms and conditions of employment, in violation of 19 Del.C. §1307 (a)(3). **[2]**

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

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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.

On March 23, 2001, Charging Party filed his Response essentially denying the New Matter.

A Probable Cause Determination issued on May 29, 2001, concluded that, as to employee Smith, the amended charge was untimely filed and therefore dismissed. As to Charging Party Davis, the Executive Director concluded that probable cause existed to believe that an unfair labor practice may have occurred. The finding of probable cause did not, however, preclude the introduction of evidence to determine the facts upon which the timeliness of the initial Charge filed by Charging Party Davis on December 11, 2001, could be resolved.

At the request of the State and the ILA, the issue of timeliness was addressed separately from the underlying substantive issue. A hearing was held on September 21, 2001, for the limited purpose of addressing the timeliness issue. The parties presented testimony, documentary evidence and oral argument in support of their respective positions. The following discussion and decision result from the record thus compiled.

ISSUE

Was the unfair labor practice charge filed by Norman Davis on December 11, 2001, timely filed within the 180 day period required by 19 Del.C. Section 1308(a), PERB Rule 1.10 and Rule 5(a)?

APPLICABLE STATUTORY SECTIONS AND PERB RULES

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

> 1308: Disposition of complaints.

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[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.

> . . . . . 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.

PERB Rule 1.10, 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 contained in the Act and in these Regulations.

DISCUSSION

According to work records maintained by the Port, which Davis does not contest, the last day Charging Party worked as a Coordinator was April 7, 2000. (Employer Ex. No. 2) According to Davis, approximately three (3) weeks thereafter, he heard from other employees that he had been removed from the list of employees eligible for assignment to the Coordinator position. (Complaint-para. 12) Davis contacted Human Resource Manager Immediato to discuss his status. (Complaint-para. 13) During that meeting Immediato confirmed that Davis was, in fact, removed from the eligibility list at the request of the Union (Complaint-para. 13) Immediato also provided Davis with a copy of the letter from Union President Cephas dated April 7, 2000, requesting his removal. (Complaint-para. 14)

The material allegations set forth in the Complaint are consistent with the testimony of the various witnesses and the documentary evidence. Human Resources Manager Immediato testified that he received the letter from Union President Cephas on April 7, 2000. Following several e-mails between Immediato and William Stansbury, the Supervisor responsible for Coordinator assignments, it was agreed

the grievant would be informed of his removal by Supervisor Stansbury on April 12, 2000. (State Ex. No. 2a-2e) **[4]** The testimony of Supervisor Stansbury corroborates this series of events.

During April and May, Davis and Immediato discussed the grievant's status on several occasions. At Davis' request, Immediato provided Davis with a copy of the April 7, 2000, letter from Union President Cephas. In early June Davis requested that Immediato provide him with a written statement confirming his status. Immediato responded with the letter dated June 13, 2000.

Julius Cephas, President of ILA, Local 1694-1, authored the letter of April 7, 2000, requesting the removal of Charging Party Davis from the Coordinator eligibility list. Although denied by Charging Party, President Cephas testified that he hand-delivered both the letter to Immediato and a copy for Davis on April 7, 2000.

Richard Smith and Steven Hinkle, two (2) other bargaining unit employees who were removed from the Coordinator eligibility list in April of 2000, testified on behalf of Charging Party Davis. Their testimony did not contradict the testimony of Stansbury and Immediato concerning the last day Mr. Davis worked as a Coordinator or the timing or circumstances surrounding the notice of his removal from the Coordinator program.

To the contrary, employee Hinkle testified that he was removed from the Coordinator program sometime in April, 2000, about the same time as Davis and employee Richard Smith. Mr. Hinkle also testified that Mr. Davis told Mr. Hinkle about Mr. Davis' removal from the Coordinator program at the May, 2000, Union meeting.

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[4] Davis and Richard Smith were to be told of their removal at the same time. Because employee Smith had already been assigned to work as a Coordinator on April 12, 2000, it was agreed to wait and inform them near the end of the shift on April 12th.

The grievant's knowledge of his removal from the program in April 2000, is further corroborated by the unfair labor practice charge filed by him with the National Labor Relations Board on July 19, 2000. The basis of the Charge filed with the federal labor board is that:

> In or about April 2000, the Union violated its duty of fair representation to me when it solicited my employer to remove me from a position, resulting in my demotion, based on conflicts I have had

with officers in the Union.

Union President Cephas, Human Resource Manager Immediato and Paul Cutler, the interim Union President following Mr. Cephas worker's compensation injury in late April 2000, were also called to testify by Charging Party. Their testimony did not contradict prior evidence concerning the last date Charging Party worked as a Coordinator, the circumstances leading to his removal from the program or the actual notice provided by Supervisor Stansbury and Mr. Immediato.

Charging Party's reliance upon the letter from Mr. Immediato dated June 13, 2000, as the date from which the statutory 180 day filing period should be calculated is misplaced. The June 13th letter simply confirmed the information of which Charging Party had already been informed on two prior occasions. The June 13, 2000, letter from Immediato upon which Charging Party relies as the start of the 180 day filing period was provided in response to Charging Party's request The PERB has previously held that a Charging Party cannot circumvent the 180 day filing requirement by relying upon an independent action which he or she unilaterally creates. To conclude otherwise would violate Section 1308(a), of the Act and PERB Rule 1.10. George Smith v. State of Delaware, Diamond State Port Corporation (Del.PERB, ULP 00-12-299, III PERB 2101 (2001).

Both the statute and the PERB Rules are clear and unambiguous. An unfair labor practice charge must be filed within 180 days of the incident giving rise to the charge. The critical date is the date on which Charging Party was notified of his removal from the list of employees eligible for assignment to the Coordinator position and the reason why. Charging Party received personal notice of his removal from the Coordinator position from Supervisor Stansbury on or about April 12, 2000, and from Human Resource Manager Immediato no later than early May, 2000. The Charge was not filed with the PERB until December 11, 2001, some seven (7) or (8) months and approximately 210 to 240 days, thereafter.

DECISION

Consistent with the foregoing discussion, it is determined that the unfair labor practice charge filed by Norman Davis on December 11, 2000, was not timely filed within the 180 day period required

by 19 Del.C. Section 1308(a), PERB Rule 1.10 and Rule 5(a)?

Consequently, the charge is dismissed.

December 12, 2001
(Date)

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