

**STATE OF DELAWARE**

**PUBLIC EMPLOYMENT RELATIONS BOARD**

MICHELLE THOMAS,	:	
	:	
Petitioner,	:	<b>PERB Review of the</b>
	:	<b>Executive Director’s</b>
v.	:	<b>Decision</b>
	:	
DELAWARE STATE UNIVERSITY,	:	<b><u>ULP No. 04-06-436</u></b>
	:	
Respondent.	:	

**BACKGROUND**

Michelle Thomas (“Charging Party”) is an employee of Delaware State University and a public employee within the meaning of section 1302(o) of the Delaware Public Employment Relations Act, 19 Del.C. Chapter 13 (“PERA”).

Delaware State University (“Respondent”) is a public employer within the meaning of §1302(p) of the PERA.

On June 28, 2004, Charging Party filed an unfair labor practice complaint alleging the Respondent violated 19 Del.C. §1307(a)(1) and (a)(6) when its agent issued an unsatisfactory performance evaluation on September 30, 2003, in retaliation for the Charging Party having grieved being required to perform work outside of her job description. The Charge was amended to clarify the specific statutory allegations on September 3, 2004.

The Respondent filed its Answer denying the Charge and setting forth New Matter on July 14, 2004, in which it denied all material allegations of the Charge. An Amended Answer was filed on September 14, 2004, in which the Respondent raised a timeliness defense.

On September 30, 2004, the Executive Director of the PERB issued a Notice of Dismissal in which he concluded:

The instant unfair labor practice charge was not timely filed within the required 180 day statutory filing period.

- Wherefore:
1. The charge is dismissed without prejudice.
  2. All subpoenas related to the charge are quashed.
  3. The hearing date of October 14, 2004, is cancelled.

On October 13, 2004, Charging Party filed an Appeal of the Executive Director's Decision which included legal argument in support of the appeal. The Respondent filed its Response to Petitioner's Request for Review on October 27, 2004.

Charging Party then filed a Supplemental Brief on November 4, 2004, and the record closed with the filing of the Respondent's Reply to the Petitioner's Supplemental Brief on November 16, 2004.

The full Delaware Public Employment Relations Board was provided with the complete record created by the parties. The Board met in public session to consider Charging Party's Request for Review on November 17, 2004. Member Karsnitz recused herself from participating in these proceedings and the review was conducted by Members Currie and Maron.

### **DISCUSSION**

The request for review filed by Charging Party urges this Board to reverse the Executive Director's decision and order that the case be heard on its merits.

Pages 3149 through 3151 of the Executive Director's decision set forth the background and facts underlying this case and are incorporated herein by reference. Thomas v. Delaware State University., Del. PERB, ULP 04-06-436, V PERB 3149 (2004).

The Executive Director found the triggering event for the underlying issue was the issuance of the critical performance evaluation on September 30, 2003, which Charging Party alleged was issued in retaliation for her having filed a grievance. Because the charge was not filed until June 28, 2004, it did not comply with the 180 day time period established by 19 Del.C. §1308, and the charge was, therefore, dismissed without prejudice. The Director further held that Charging Party's

efforts to have the evaluation removed from her records through an informal appeal process to DSU administrators did not toll the statutory filing period.

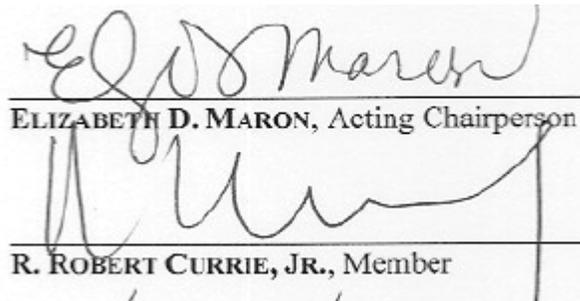
The scope of the Board's review is limited to consideration of the record created by the parties before the Executive Director and whether the decision rendered below is arbitrary, capricious, contrary to law, or otherwise unsupported by the record.

Upon review of the complete record in this matter, the two sitting members of the Board were unable to reach consensus. Member Currie moved to uphold the Executive Director's decision and the vote was 1- 1 with Member Maron voting in opposition.

Consistent with the decision of the Delaware Superior Court in Warrington v. State Personnel Commission (1994 WL 387028, Del. Super.), the motion of the Board has no legal significance and the Executive Director's decision, therefore, controls.

**DECISION**

**WHEREFORE**, the decision of the Executive Director in this matter controls and the charge is dismissed without prejudice.



ELIZABETH D. MARON, Acting Chairperson  
R. ROBERT CURRIE, JR., Member

Dated: 23 December 2004