# STATE OF DELAWARE

# PUBLIC EMPLOYMENT RELATIONS BOARD

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| **MICHELLE THOMAS,** | : | |
| | : | |
| **Petitioner,** | : | |
| | : | **ULP No. 04-06-436** |
| **v.** | : | **Notice of Dismissal** |
| | : | |
| **DELAWARE STATE UNIVERSITY,** | : | |
| | : | |
| **Respondent** | : | |

## BACKGROUND

Charging Party, Michelle I. Thomas is employed by Delaware State University ("DSU"), and is a public employee within the meaning of Section 1302(o) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1986) ("Act" or "PERA").

Respondent, Delaware State University, is a public employer within the meaning of Section 1302(p) of the Public Employment Relations Act.

On September 12, 2003, Charging Party filed a formal grievance against DSU under provisions set forth in a collective bargaining agreement between AFSCME Local 1007 and DSU. The grievance alleged that Charging Party was being required to perform work outside her job description. On September 30, 2003, Charging Party received a performance evaluation in which she was rated unsatisfactory in a number of categories. Dissatisfied with the evaluation, Charging Party attempted to resolve the matter internally "through University channels, without any decision or resolution until May, 2004." (ULP

para. 13) On June 28, 2004, charging Party filed the instant unfair labor practice charge, as amended, alleging that the evaluation was retaliation for her having filed a formal grievance.

DSU's Answer to the unfair labor practice charge denied all material allegations and raised one affirmative defense that "at all times relevant to the underlying facts of [the] case, respondent was unaware that the petitioner was engaged in any Union activities."

At the close of the pleadings the Hearing Officer issued a Probable Cause Determination in which he concluded that probable cause existed to believe that an unfair labor practice may have occurred.

Charging Party subsequently amended the Charge changing only the alleged statutory violations. Both the original and amended charge requested that the 180 day filing period in which an unfair labor practice charge may be filed under the PERA, be calculated from May 3, 2004, when the Respondent, after months of discussion, refused to remove the disputed evaluation from Charging Party's personnel file.

The Respondent then filed a motion to amend its Answer. The Amended Answer raised for the first time the affirmative defenses that the complaint is barred by the statute of limitations and the doctrines of laches, waiver and/or estoppel. The respondent specifically requested that Charging Party's contention that the 180 day filing period be modified to allow the complaint to go forward should be denied, that the charge be dismissed and that Charging Party pay all reasonable costs and expenses, including attorney's fees.

Charging Party responded that Respondent's failure to address the statute of limitations in its initial answer constitutes an admission and waiver of its right to file an amended answer raising the statute of limitations as an affirmative defenses. Charging Party not only denied the affirmative defenses but also moved to strike the Respondent's amended answer.

## ISSUE

Whether the Respondent's affirmative defense of timeliness was properly raised and, if so, whether the unfair labor practice charge was timely filed within the 180 day statutory filing period?

## DISCUSSION

19 Del.C. §1308, Disposition of Complaints, provides that . . . "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." Consequently, if this statutory requirement is not satisfied the Public Employment Relations Board has no jurisdiction to process the charge.

Here, Respondent included the affirmative defense of the statute of limitations in its amended answer. PERB Rule 5, Unfair Labor Practice Proceedings, provides at Section 5.8, Amendment of Complaint and/or Answer:

> ( c ) Subject to the approval of the Board, an Answer may be amended in a timely manner, upon motion of the party filing it. Such motion shall be in writing, unless made at the hearing and before the commencement of testimony. In the event the Complaint is prejudiced by the amendment,

a motion for continuance will be granted.

Charging Party did not allege prejudice nor request a continuance as provided for in PERB Rule 5.8( c ).

Pursuant to Rule 5.8( c ) an answer may be amended with the approval of the Board. This is consistent with the Federal Rules of Civil Procedure. Under Fed.R.Civ.P. 15(a), a responsive pleading may be amended at any time with the approval of the court to include an affirmative defense and "leave shall be freely given when justice so requires." Kleinknecht v. Gettysburg College, 989 F.2d 1360 (3d Cir. 1993).

Even if Respondent failed to raise the timeliness defense during the pleading stage, the result here would be the same. The Third Circuit Court of Appeals determined that failure to raise an affirmative defense in a responsive pleading does not necessarily waive the defense if later raised at a pragmatically sufficient time and the Charging Party was not prejudiced in its ability to respond. Charpentier v. Godsil, 937 F.2d 859, 863-864 (3d Cir. 1991) (citing Lucas v. U.S., 807 F.2d 414, 418 (5th Cir. 1986), quoting Allied Chemical Corp v. McKay, 695 F.2d 854, 855-56 (5th Cir. 1983). Charging party was not prejudiced in its ability to respond. The amended charge was filed on September 7, 2004. Respondent's motion to amend its answer and the amended answer were filed on September 14, 2004, at which time the hearing date was still one (1) month away.

Charging Party specifically charges that DSU violated 19 Del.C. §1307 (a) (1) and (a) (6) when the unsatisfactory evaluation was issued on September 30, 2003, in retaliation for her protected activity in filing a grievance earlier that month. The fact that she attempted to resolve the matter internally does not toll the filing period. A charge

based on the issuance of the September 30, 2003, evaluation had to be filed on or before March 28, 2004, in order to conform to the requirements of 19 Del.C. §1308.

## DECISION

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.

*September 30, 2004*
(Date)

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