

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

<b>AMERICAN FEDERATION OF STATE, COUNTY, AND</b>	)	
<b>MUNICIPAL EMPLOYEES, AFL-CIO, COUNCIL 81,</b>	)	<b>PERB Decision</b>
<b>LOCALS 1007 &amp; 1267,</b>	)	<b>on Motions on</b>
<b>Petitioner,</b>	)	<b>Appeal</b>
<b>v.</b>	)	
	)	<b>UNFAIR LABOR PRACTICE</b>
<b>DELAWARE STATE UNIVERSITY,</b>	)	<b><u>NO. 05-06-487</u></b>
<b>Respondent.</b>	)	

Appearances

*Perry F. Goldlust, Esq., Aber, Goldlust, Baker & Over, for AFSCME*

*Kathleen Furey McDonough, Esq., Potter Anderson & Corroon, LLP*

*Sarah E. DiLuzio, Esq., Potter Anderson & Corroon, LLP*

*Robert Duston, Esq., Schmeltzer, Aptaker & Shepard, PC*

*for Delaware State University*

**BACKGROUND**

Delaware State University (“DSU”) is a public employer within the meaning of 19 Del.C. §1302(p). American Federation of State, County and Municipal Employees (“AFSCME”), AFL-CIO, Council 81 is an employee organization within the meaning of 19 Del.C. §1302(i) and through its Locals 1007 and 1267 is the exclusive representative of two bargaining units of DSU employees. 19 Del.C. §1302(j)

On June 2, 2006, the Executive Director of the Public Employment Relations Board (“PERB”) issued an unfair labor practice decision wherein he found both parties had failed to bargain in good faith and ordered that they cease and desist from such conduct. The decision

was transmitted to the parties by electronic and United States mail, under a cover letter which advised that any request for review must be filed by the close of business on Monday, June 12, 2006.

On Friday, June 9, 2006, counsel for DSU contacted PERB by e-mail:

The University intends to appeal the Executive Director's decision of June 2, 2006. The appeal is due on June 12. Please confirm that filing by e-mail is acceptable and that such an appeal received by email on June 12 shall be deemed timely.

PERB staff responded by e-mail that afternoon, "That will be fine. The hard copy should be mailed and served on opposing counsel as well."

On June 12, AFSCME filed its Appeal of the Executive Director's decision.

Late on the afternoon of June 14, 2006, PERB received by e-mail transmission, DSU's Request for Review of the Executive Director's Decision and a Motion for Leave to file that Request out of time.

In response to DSU's Motion for Leave to File Out of Time, AFSCME filed a Motion to Dismiss DSU's Appeal as Untimely on June 21, 2006.

On June 28, DSU (through new counsel) filed a Memorandum of Law in Support of Its Motion to File Out of Time.

On July 19, 2006, the full Public Employment Relations Board convened in public session to consider DSU's Motion for Leave to File Out of Time and AFSCME's Motion to Dismiss DSU's Appeal as Untimely. The Board was provided with and reviewed the submissions of the parties and the Executive Director's decision prior to its meeting. Counsel for the parties were provided the opportunity to present oral argument.

#### **ARGUMENTS OF THE PARTIES**

DSU's Request to File Out of Time sets forth the following facts and arguments:

1. The PERB issued its decision on June 2, 2006. The cover letter stated that, in accordance with PERB Regulation 7.4, a Request for Review must be in writing and served on both the PERB and the other party, filed within 5 days of the date of service of the decision, i.e., by close of business on Monday, June 12, 2006.
2. DSU's counsel, Gary Lieber, is an experienced attorney who has appeared in a number of matters before PERB, and is familiar with its rules, including the importance of timely filing. His Administrative Assistant, Patricia Keller, has worked with Mr. Lieber for more than 25 years.
3. The Request for Review was prepared last week and over the weekend, so that all that needed to be done on Monday morning, June 12, 2006, was for it to be finalized, filed and served. The Request for Review was in fact finalized and signed on Monday morning, June 12, 2006, as shown on the attached scanned version of the document. Pursuant to usual practice and consistent with the certificate of service, it was intended to be served by e-mail and first class mail on the Respondent's counsel, Perry Goldlust, and sent by e-mail to the PERB. Indeed, Mr. Lieber contacted the PERB's Assistant, Debbie Murray-Sheppard, on or about June 9, 2006 to determine whether service by e-mail on June 12 would be deemed timely. Mr. Lieber was assured that email service on June 12 would be timely.
4. Ms. Keller scanned the Request for Review at approximately 11:30 a.m. Her normal process would have been to forward that document as a PDF to Mr. Lieber, who would have then forwarded the document both to PERB and Mr. Goldlust. Ms. Keller failed to do so. Approximately twenty minutes before, Ms. Keller had forwarded to Mr. Lieber a pdf of a different document (Attachment 18) that he forwarded by e-mail to Mr. Goldlust.
5. On the morning of June 12, 2006, Mr. Lieber and Ms. Keller were handling a number of matters for different clients, and firm administrative details, that they were trying to conclude prior to the time Mr. Lieber had to leave on a business trip to North Carolina that afternoon and, thereafter an overseas trip Mr. Lieber was starting on June 15, 2006. When Mr. Lieber left the office at approximately 12 p.m., neither he nor Ms. Keller realized they had failed to email the Request for Review to the PERB. Ms. Keller, believing that Mr. Lieber had timely e-mailed the service copy to Mr. Goldlust, did not put a hard copy in the mail until Tuesday, June 13, 2006.
6. This oversight was discovered on Wednesday morning, June 14, 2006 when DSU called to inform counsel that Respondent AFSCME was urging members to file grievances under the prior contract on the grounds that DSU had failed to appeal the Executive Director's decision.

DSU argued in support of its Motion that it understands the importance of the timely and orderly filing of appeals before the Board and that this delay resulted from human error. It argued PERB (under its Rule 1.9) can choose to extend the deadline or accept appeals out of

time to serve the purposes of the Public Employment Relations Act. It argues the interests of justice require the deadline be waived in this case. Further, by analogy, DSU points out that Delaware's trial courts under Rule 60(b) allows a party to move for relief from a judgment or order on the basis of mistake, inadvertence or excusable neglect, citing a number of cases wherein the courts have found that inadvertence by an attorney or an attorney's employee to file a pleading within a deadline may constitute inadvertence or excusable neglect. The interests of justice require that the client not suffer as a result of the inadvertent mistake of its counsel.

DSU asserts PERB Rule 7.4 is not jurisdictional because it does not involve appeal to a reviewing court, but rather review within the same administrative agency. Therefore, it argues, its request "is more akin to that addressed by Rule 60, *i.e.*, for relief from a judgment or order of the court (or in this case tribunal) in which the case is pending." *DSU's Memorandum of Law in Support of Its Motion for Leave to File Out of Time*, p. 2.

It further argues AFSCME will not be prejudiced by DSU's appeal, as it was served on AFSCME immediately upon learning of the error. Because no immediate action had been scheduled on PERB's consideration of the merits of the appeal by June 14, DSU did not receive an unfair advantage. AFSCME had also filed an appeal of portions of the Executive Director's June 2 decision.

In its Motion to Dismiss DSU's Appeal of the Executive Director's Decision as being Untimely, AFSCME argues:

While the PERB (Executive Director or designee) has the power to enlarge the time for filing of many documents prior to expiration, there is no grant of power to ignore missed appeal deadline dates. The failure to appeal the Director's decision in a timely manner deprives the PERB from jurisdiction to hear the appeal. *Frances Irvin-Wright v. State of Delaware*, Del.Super. 2003 No. Civ.A. 03-A-04-010PLA. The Decision, to the extent it was not appealed by the Union, should be considered as final and binding on DSU.

AFSCME argues that the Board's rules are promulgated to permit parties to understand the parameters within which they are expected to operate. There is no dispute here that both parties were fully aware of the deadline for filing a request for review of the Executive Director's decision. Filing a request for review is not an onerous task before PERB, because the arguments of the parties are already set forth in the record created before the Hearing Officer. The Board does not have authority to follow its rules when it wants to and to suspend them whenever it decides it is expedient to do so. DSU has not provided a good reason in this case to consider suspending the rules.

### **DISCUSSION**

Upon consideration of the record and arguments of the parties, the Board unanimously grants Delaware State University's Motion to File Its Appeal Out of Time and denies AFSCME's Motion to Dismiss DSU's Appeal as Untimely.

The Board is mindful that the statute vests it with specific powers, authority and responsibility, including the responsibility to promulgate rules for the efficient and effective administration of the statute and for the convenience of the parties and its hearing officers in regulating practice before the agency. PERB Rule 1.9 provides:

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 a substantial right.

This rule reserves to the Board the authority to waive or suspend its rules in the interests of efficient operation and/or orderly administration of the Act, unless to do so would deprive a party of a substantial right.

Rule 1.9 must be read in conjunction with Rule 1.10, Timeliness:

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.

Both Rule 1.9 and Rule 1.10 must be read to effectuate the purposes of the statutes and to protect the interests of the parties. In this case, the facts support the conclusion that the two day delay in complying with the deadline for appeal was, in fact, inadvertent. The Board is convinced that the documents were prepared in a timely manner but were not sent as a result of inadvertent error. Upon discovering that the documents had not been sent, counsel for DSU immediately acted to correct the error.

The Board has discretion to allow the appeal to be filed out of time if it determines the interest of justice so demand under Rule 1.9. The Board is not deprived of jurisdiction to hear this appeal because this is review within the same agency. A very different decision may well have been reached had the question been on the timeliness of filing an appeal into Chancery or Superior Court on review of a Board decision.

Based on the prolonged and continuing nature of the dispute between these parties, the interests of justice are best served by hearing the underlying merits of the comprehensive cross-appeals in this case. AFSCME is not prejudiced by the appeal (which was filed within two days of the deadline) as the underlying merits are not scheduled to be heard until the Board's August 16, 2006 meeting.


Having so decided, parties are cautioned, however, that this decision does not indicate an intent or proclivity by this Board to ignore its rules and regulations governing practice and procedure. This motion is granted under the very limited set of circumstances in which both the PERB and the opposing counsel knew that the moving party intended to file an appeal, both were aware that counsel would be out of the office for a significant period of time, and the record supports the allegation that the documents were prepared but not sent through a clerical

oversight. The decision is also heavily influenced by the long-standing, continuing and contentious nature of the dispute between these parties, in light of the Board's responsibility to promote productive and cooperative labor management relationships. This case begs for a full consideration of the merits on review.

### **DECISION**


Consistent with the foregoing discussion, the University's Motion to File Its Appeal Out of Time is granted and AFSCME's Motion to Dismiss DSU's Appeal as Untimely is Denied.

**IT IS SO ORDERED.**



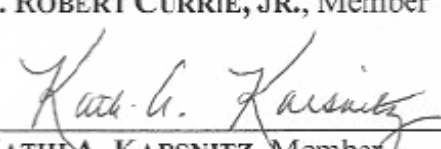
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ELIZABETH D. MARON, Acting Chairperson



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R. ROBERT CURRIE, JR., Member



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KATHI A. KARSNITZ, Member

DATE: 30 August 2006