# COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

LINCOLN UNIVERSITY CHAPTER :
AMERICAN ASSOCIATION OF UNIVERSITY :
PROFESSORS :

:

v. : Case No. PERA-C-05-574-E

:

LINCOLN UNIVERSITY

#### PROPOSED DECISION AND ORDER

On December 1, 2005, the Lincoln University Chapter of the American Association of University Professors (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that Lincoln University (Lincoln) violated Section 1201(a)(5) of the Public Employe Relations Act (Act).

On April 13, 2006, the Secretary of the Board issued an order and notice of hearing in which the matter was listed for hearing on May 24, 2006 at Lincoln University. The hearing was held as scheduled, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

The hearing examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

### FINDINGS OF FACT

1. The parties have a collective bargaining agreement that by its terms is effective from September 1, 2003 to August 31, 2007. That contract incorporates the faculty by-laws as an addendum. Section 9.04 of those by-laws states:

Outside Remunerative Activity. Full-time members of the Faculty shall not engage in remunerative activities outside the University that interfere with the acceptable performance of their duties as members of the Faculty. The Faculty member must file with the Vice President for Academic Affairs, who will make recommendations to the President, a description of the nature and extent of the outside activity. Mutual agreement is expected. If the decision of the President is adverse, the Faculty member may appeal to the Board of Trustees.

### Section 10.01 states:

Adequate Cause. No member of the Faculty shall be deprived of permanent tenure or be dismissed prior to the expiration of his or her term of appointment without adequate cause. Adequate cause shall consist of departure from commonly accepted standards of professional ethics, neglect of duty, incompetence, or illegal conduct prejudicial to the University.

(Lincoln Exhibit 1; Joint Exhibit 3).

2. On August 24, 2005, Grant D. Venerable II, Ph.D. sent the following memorandum and attached form to all Lincoln faculty:

# MEMORANDUM

TO: Dr. Willie Williams
Physics Department

FROM: Grant D. Venerable, II, Ph.D.

Vice President for Academic Affairs

DATE: August 24, 2005

RE: FULL-TIME FACULTY OUTSIDE REMUNERATIVE ACTIVITY

Pursuant to Section 9:04 of the <u>Faculty By-Laws</u>, Outside Remunerative Activity, full-time members of the Faculty shall not engage in remunerative activities outside the University that interfere with the acceptable performance of their duties as members of the Faculty. The Faculty member must file with the Vice President for Academic Affairs, who will make a recommendation to the President, a description of the nature and extent of the outside activity. Mutual agreement is expected. If the decision of the President is adverse, the Faculty member may appeal to the Board of Trustees. Any full-time member of the faculty who expects to have outside remunerative activity must file the attached form with the vice president for academic affairs for prior approval, each contract year.

In accordance with Section 9:04 of the <u>Faculty By-Laws</u>, as printed above, please indicate on the attached form your remunerative activities outside of your contractive duties at Lincoln University.

# FACULTY OUTSIDE REMUNERATIVE ACTIVITY FORM

Name:	Academic Year:		
I have no outside remunerative activities [ ]			
_	Signature	 Date	
REMUNERATIVE ACTIVITIES			
Nature of Employment:			
Extent of Involvement (days/hrs):			
Signature	Date	_	

3. On October 10, 2005 when Drs. Safford and Dade had not returned their outside employment forms (Union Exhibit 10) Venerable sent each of them the following letter certified mail:

"The form for disclosure of Faculty outside Remunerative Activity sent August 24, 2005 was due in the Office of Academic Affairs by September 13, 2005. Failure to return the form has placed you in violation of Section 9.04 of the Faculty By-Laws.

Perhaps this has been due to an oversight on your part. If so, a replacement form is enclosed for you to fill out and return postmarked no later than five days from receipt of this notice."

(Union Exhibit 11; Lincoln Exhibit 6).

(Union Exhibit 10).

4. The first time Lincoln used a form to have faculty members report any outside employment was in 2001 when then interim vice president for academic affairs, Saligrama

Subbarao<sup>1</sup>, designed and sent out a form which asked faculty members to check one of two choices: yes, they were engaged in outside employment; or no, they were not engaged in outside employment. (Union Exhibit 5; Lincoln Exhibit 14).

- 5. In July of 2002, Venerable, as vice president for academic affairs, sent out a form similar to that sent the previous year by Subbarao. The form sent by Venerable also had two alternative selections; one indicating outside employment, and one indicating no outside employment. (Union Exhibit 9).
- 6. Letters such as those written by Venerable to Drs. Safford and Dade, and placed in their permanent personnel file, have a detrimental effect on both promotion and tenure decisions. (N.T. 47, 48; Union Exhibit 11, Lincoln Exhibit 6).
- 7. Institutional integrity was the reason Lincoln wanted all faculty members, whether engaged in outside employment or not, to indicate such to Lincoln, by returning the outside employment forms. (N.T. 96-98).

#### DISCUSSION

The Union charges the University with violating Section 1201(a)(5) of the Act when the "employer threatened to discipline Union member Susan Safford for her failure to return a form asking whether she engaged in outside remunerative activity where she, in fact, has not engaged in any such remunerative activity. Over the course of several years, faculty members not engaged in outside remunerative activity have not been required to return the form." (Specification of Charges). The remedy requested by the Union is that Lincoln be ordered, "to bargain with the Union over its right to impose discipline for not returning the form at issue....The Union further seeks the rescission of any disciplinary warnings in the personnel files of Dr. Safford and any other bargaining unit members in a similar situation with Dr. Safford." (Union's brief at 2).

Lincoln parries these allegations by arguing that it has already bargained over discipline with the union; that the Union can use a contractual provision to remove any offending letters from members' files; and that the requirement for all bargaining unit members to return the form in question is a management prerogative.

To the extent the Union argues that Lincoln had a duty to bargain whether unit members who had no outside employment had to return the form in question the charge is dismissed. However, under Board law, Lincoln had a duty to bargain over the discipline imposed for noncompliance.

The gravamen of this charge is that Lincoln, on an annual basis, requires faculty members to declare on a written form whether or not they are engaged in any outside employment. This reporting requirement is incorporated into the parties' collective bargaining agreement. In 2005, two faculty members out of one hundred faculty members refused to return the form. These two faculty members, Drs. Safford and Dade, were the current and immediate past presidents of the Union. They refused to return the forms because they had no outside employment and asserted only those with outside employment had to return the form. In reaction to these two faculty members' noncompliance, Lincoln had a letter placed in each of their permanent personnel files announcing that each had "violated Section 9.04 of the Faculty By-Laws." The letter also allowed that "this might have been an oversight on your part," and gave each five additional days to send in the form. (Union Exhibit 11).

The Union's position is that only those who have outside employment are required to return the form. Nevertheless, all seventy bargaining unit members who had no outside employment returned the required form to Lincoln, but for Drs. Safford and Dade.

A public employer is free unilaterally to implement a ban on outside employment when the purpose of that ban is to preserve the integrity of that public employer.

 $<sup>^{1}</sup>$  This is the spelling given by the witness at the hearing. Union Exhibit 5, 6, 7, and 8, and Lincoln Exhibit 3, and 14, however each list the name as SubbaRao.

Council 13, AFSCME v. Commonwealth of Pennsylvania, PLRB, 479 A.2d 683 (Pa. Cmwlth 1984), appeal denied, 154 M.D. 1984 (Pa. 1985). The Union in this case does not complain about a ban on outside employment, but rather, only about the Lilliputian requirement that faculty members who do not have outside employment so inform Lincoln on the form provided.

Lincoln's reason for acquiring this information is to maintain the institution's integrity by having notice of which faculty members engage in work elsewhere. Lincoln's vice president for academic affairs testified that close scrutiny by both the state legislature and accrediting organizations require Lincoln to self-regulate such matters as whether faculty have outside employment which might impinge on their ability to devote adequate time to Lincoln's students. If such institutional integrity forms a sufficient basis to ban outside employment, surely it forms a sufficient basis to merely have faculty members inform Lincoln whether they have outside employment or whether they do not.

Moreover, the whilom vice president for student affairs, Saligrama Subbarao testified that he first created a form similar to the instant form because faculty members were simply not telling Lincoln about their outside employment. Before Subbarao created the form a notice was simply sent to faculty members reminding them of the need to report outside employment. According to Sabbarao he would find out later in the year that some faculty members had outside employment but had neglected to report it to Lincoln. To the extent, then, that Lincoln assumed those who did not respond did not have outside employment, Lincoln assumed incorrectly. To correct that situation the current vice president for academic affairs required all faculty members to return the form, regardless of outside employment. Under the rationale enunciated in Council 13, AFSCME v. Commonwealth of Pennsylvania, PLRB, supra, Lincoln was not required to bargain with the Union over its requirement that all faculty members return the outside employment form.

The Union also complains that Lincoln did not bargain over any disciplinary repercussions for faculty members not engaged in outside employment who did not return the form in question. Lincoln counters that it has already bargained discipline with the Union and in support of that argument points to Section 10.1 of the Lincoln University Faculty By-Laws (Lincoln Exhibit 1, Joint Exhibit 3)<sup>4</sup>. Those by-laws have been incorporated into the parties' collective bargaining agreement.

Nevertheless, before the question of bargaining discipline can be reached it must first be determined whether the letters in question are, in fact, discipline. The Union, of course, contends they are, and Lincoln asserts they are not. Lincoln characterizes them as merely "reminder letters." (Lincoln post-hearing brief at 12, n. 3).

A working definition of discipline is an employer action that results in an adverse personnel consequence, and is in response to willful employe behavior that the employer deems undesirable. Pennsylvania State Police v. Pennsylvania State Troopers Association, 34 PPER 174, 840 A. $\frac{1059}{20}$  (Pa. Cmwlth 2004)

Uncontroverted testimony by Dr. Willie Williams, a past president and past contract administrator for the Union, reveals that both tenure and promotion committees review a candidate's personnel file as part of those processes. The presence of material with unfavorable remarks indicating that candidates did not do what they were supposed to do can have a materially detrimental affect on the outcome of the tenure and promotion processes. (N.T.47, 48). Lincoln proffered no contradictory testimony on the effect of

<sup>&</sup>lt;sup>2</sup> But see Abington Transportation Association v. Commonwealth, PLRB, 570 A.2d 108 (Pa. Cmwlth 1988) (employer's reason for outside employment ban was merely to make sure employees were available when employer might need them to work; consequently, ban was bargainable).

<sup>&</sup>lt;sup>3</sup> Sabbarao testified that if a faculty member had no outside employment he did not expect that faculty member to return his form. Yet, the form created by Sabbarao would seem to indicate otherwise since it (Union Exhibit 5) states, "[P]lease indicate below whether or not you are engaged in remunerative activities outside of Lincoln University..." and the form had a place to check-off that the respective faculty member had no outside employment. If the form were only to be returned by those with outside employment, that second alternative would not be on the form.

 $<sup>^4</sup>$  These two exhibits are duplicative, although Joint Exhibit 3 additionally includes the parties' collective bargaining agreement.

the letters in question. Applying the above definition to the record, the letters do constitute discipline.

There is no evidence that any bargaining unit member has ever been disciplined in the past for not returning a completed outside employment form. In 2005, for the first time, Lincoln has unilaterally established discipline for failure to return those forms. Therefore, failure to return those forms constitutes a new basis for discipline.

Disciplinary procedures and matters of employe discipline in the public sector are generally regarded as mandatory subjects of bargaining, City of Philadelphia, 31 PPER  $\P$  31023 (Final Order, 1999), and an "employer cannot institute new bases for discipline without bargaining with the employe representative." <u>Id.</u> at 58. Yet, that is just what Lincoln did here. And in doing so it violated Section 1202(a)(5) of the Act.

Lincoln argues that, "Lincoln University's Vice President of Academic Affairs has the bargained-for right to discipline faculty members for failure to report outside remunerative activities." (Lincoln post-hearing brief at 12). In support of its position Lincoln points to Section 10.01 of the Faculty By-Laws (Lincoln Exhibit 1 and Joint Exhibit 3). However, Section 10.01 plainly and exclusively protects faculty from discharge without "adequate cause."

Lincoln's argument appears to be that because the parties' contract contains a provision that allows Lincoln to dismiss faculty only for "adequate cause"; and, inter alia, adequate cause may include "neglect of duty"; and because the requirement to report outside employment is listed under the section titled, "Duties of Faculty", Lincoln is, therefore, free to unilaterally impose whatever discipline it chooses on faculty who do not have outside employment and who do not return the form. The dénoument of this skewed argument is that Lincoln can terminate faculty members who fail to return the outside employment forms since that failure constitutes adequate cause.

This argument merely highlights the adage that it doesn't work to leap a twenty-foot chasm in two ten-foot jumps. To compensate for the logical shortfall, Lincoln couches this argument as one of sound arguable basis as set forth in <u>Jersey Shore Area School District</u>, 18 PPER ¶ 18061 (Final Order, 1987). That case established that when there are two possible interpretations of a contractual provision specifically on point, and the employer has a sound arguable basis for the interpretation upon which it has acted, the Board will not enter the fray to serve the arbitrator's function of determining which party's characterization is correct. Lincoln attempts to take a contractual provision that protects faculty from being dismissed without adequate cause, and turn it into a waiver by the Union of its right to bargain over a new cause for discipline. That argument is neither sound nor has any basis in the contract. If Lincoln wants to establish disciplinary criteria for the non-return of outside employment forms it must first bargain that issue with the Union.

By way of affirmative remedy Lincoln shall be ordered to remove the offending letters from the files of Drs. Safford and Dade.

# CONCLUSIONS

The examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

- 1. Lincoln is a public employer within the meaning of Section 301(3) of the Act.
- 2. The Union is a public employe organization within the meaning of Section 301(2) of the Act.
  - 3. The Board has jurisdiction over the parties hereto.
- 4. Lincoln has committed unfair practices within the meaning of Section 1201(a)(5) of the Act.

#### ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the hearing examiner

# HEREBY ORDERS AND DIRECTS

#### that Lincoln shall:

- 1. Cease and desist from refusing to bargain collectively in good faith with an employe organization which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative;
- 3. Take the following affirmative action which the examiner finds necessary to effectuate the policies of the Act:
- (a) Immediately remove the letters from Venerable, dated October 10, 2005, from the permanent personnel files of Drs. Safford and Dade;
- (b) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and
- (c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this decision and order by completion and filing of the attached affidavit of compliance.

# IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall be and become absolute and final.

SIGNED, DATED and MAILED this nineteenth day of October, 2006.

PENNSYLVANIA LABOR RELATIONS BOARD

TIMOTHY TIETZE, Hearing Examiner

# COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

LINCOLN UNIVERSITY CHAPTER AMERICAN	
ASSOCIATION OF UNIVERSITY PROFESSORS	:
	:
V.	: Case No. PERA-C-05-574-E
	:
LINCOLN UNIVERSITY	:
AFFIDAVIT O	F COMPLIANCE
Lincoln hereby certifies that it has co	eased and desisted from its violations
of Section 1201(a)(5) of the Act; that	it has removed the letters dated
October 10, 2005 from the files of Drs	. Safford and Dade, and that it has
posted the proposed decision and order	as directed and that it has served a
copy of this affidavit on the Associat:	ion at its principal place of business.
	Signature/Date
	Signature/Date
	Title
SWORN AND SUBSCRIBED to before me	
The day and year first aforesaid	
Signature of Notary Public	

October 18, 2006

Paula R. Markowitz, Esquire
MARKOWITZ & RICHMAN
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LINCOLN UNIVERSITY
Case No. PERA-C-05-574-E

Enclosed please find a copy of the proposed decision and order issued in the above-captioned matter.

Sincerely,

Timothy Tietze Hearing Examiner

Enclosure

lsd

cc: Lincoln University

Jeffrey E. Myers, Esquire