

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

TEMPLE ASSOCIATION OF UNIVERSITY :  
PROFESSIONALS, AFT LOCAL 4531 :  
 :  
v. : Case No. PERA-C-06-274-E  
 :  
TEMPLE UNIVERSITY :

**FINAL ORDER**

Temple University (Temple) filed timely<sup>1</sup> exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board), challenging a Proposed Decision and Order (PDO) issued on August 2, 2007. In the PDO, the Board's Hearing Examiner concluded that Temple violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA) by failing to timely provide requested information regarding a grievance and engaging in direct dealing with a bargaining unit employee. The Temple Association of University Professionals, AFT Local 4531 (Union) filed an answer in opposition to the exceptions and a supporting brief on September 11, 2007.

The facts of this case can be summarized as follows. In 2004, Allen Hornblum, a full-time instructor in Temple's Department of Geography and Urban Studies and a member of the bargaining unit represented by the Union, entered into an agreement with Temple University Press, a subdivision of Temple, to publish his book entitled Confessions of a Second Story Man: Junior Kripplebauer and the K&A Gang, a chronicle of organized crime rings. In the summer of 2005, Temple received a letter from John Berkery, an individual named in the book, indicating that Berkery intended to sue both Hornblum and Temple for defamation if the book was published. Thereafter, Temple indicated that it no longer intended to move forward with the publication of Hornblum's book.

In October 2005, Hornblum and Temple entered into a Copyright Transfer and Release Agreement (2005 Agreement) that terminated the original publishing agreement and transferred the copyright back to Hornblum. The 2005 Agreement required Hornblum to defend, indemnify, and hold Temple harmless from all claims relating to the book and to release any claims or demands he might have against Temple that pertained to the book. The 2005 Agreement also included a confidentiality clause, barring disclosure of its terms to a third party without the prior written consent of the non-disclosing party, or only as required by law. The Union was not party to the negotiations between Hornblum's private attorney and George Moore, Temple's in-house counsel, or to the resulting 2005 Agreement.

Hornblum subsequently published his book through another publisher. In February 2006, Berkery filed a defamation suit against Hornblum. Hornblum's private attorney then notified Temple of Berkery's suit, and requested that Temple arrange for liability coverage under Article 22, Section O of the collective bargaining agreement (CBA) between the Union and Temple. Article 22, Section O requires Temple to "maintain coverage to insure bargaining unit members against liability claims or suits (including coverage against libel and slander claims) in connection with their responsibilities to Temple or at Temple." (Union Exhibit 4 at p. 76). Temple refused to provide liability coverage to Hornblum.

On March 6, 2006, the Union filed a Step 1 grievance challenging Temple's denial of coverage. The grievance included a request for the following information: (1) the names of bargaining unit members who had requested liability coverage under Article 22, Section O of the CBA along with Temple's responses; (2) any and all documents upon which Temple based its decision denying coverage to Hornblum; and (3) a copy of Temple's insurance policy purchased pursuant to Article 22, Section O. On April 6, 2006, Temple denied the

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<sup>1</sup> Although the Board received Temple's exceptions on August 23, 2007, a United States Postal Form 3817 Certificate of Mailing, dated August 22, 2007, accompanied the exceptions. Section 95.98(a)(1) of the Board's regulations provides, in relevant part, that "[e]xceptions will be deemed received upon actual receipt or on the date deposited in the United States mail, as shown on a United States Postal Form 3817 Certificate of Mailing enclosed with the statement of exceptions." 34 Pa. Code § 95.98(a)(1).

Union's grievance on the ground that the 2005 Agreement between Hornblum and Temple superseded any duty that Temple might have otherwise owed to Hornblum pursuant to the CBA.

The Union then filed a Step 2 grievance, renewing its request for the information sought in its Step 1 grievance and adding a specific request for the 2005 Agreement between Hornblum and Temple. On May 4, 2006, Temple again denied the Union's grievance, asserting that Hornblum was not entitled to liability coverage because the writing of his book did not fall within his "responsibilities to Temple or at Temple" under Article 22, Section 0 of the CBA. Further, Temple maintained that even if the terms of the CBA did apply, its 2005 Agreement with Hornblum constituted a separate, independent, and wholly sufficient ground for denying coverage under the CBA. Temple attached to its denial of the grievance Berkery's February 27, 2001 letters threatening to sue Hornblum for defamation and one page of the 2004 publishing contract between Hornblum and Temple. Temple also informed the Union that a copy of the 2005 Agreement between Hornblum and Temple would be provided if the Union obtained written authorization from Hornblum.

On May 18, 2006, the Union delivered the requested authorization from Hornblum to Moore. On June 19, 2006, Deborah Hartnett, Temple's Associate Vice President for Human Resources, forwarded a copy of the 2005 Agreement to the Union. On or about July 14, 2006, Hartnett arranged for a redacted copy of Temple's insurance policy purchased pursuant to Article 22, Section 0 of the CBA to be hand delivered to the Union. During the hearing held on November 9, 2006, Temple provided some of the requested names of other bargaining unit members who had sought liability coverage under Article 22, Section 0 of the CBA and Temple's responses to such requests.

The Union's Charge alleged that Temple violated Section 1201(a)(1) and (5) of PERA by failing to provide requested information relating to the Union's grievance and by engaging in direct dealing when Temple negotiated the 2005 Agreement with Hornblum. The Union subsequently amended its Charge to indicate that Temple had provided a copy of the 2005 Agreement to the Union. In the PDO, the Hearing Examiner rejected Temple's allegation that it provided all of the requested information to the Union as soon as it became available. The Hearing Examiner also rejected Temple's argument that the direct dealing charge should be deferred to arbitration.

In its exceptions, Temple initially argues that the Hearing Examiner failed to make various findings of fact. The Hearing Examiner must set forth those findings that are relevant and necessary to support the conclusion reached, but need not make findings summarizing all the evidence presented. Page's Department Store v. Velardi, 464 Pa. 276, 346 A.2d 556 (1975). The Board finds that the Hearing Examiner made the findings that are necessary to support the proposed decision, and that Temple's suggested findings of fact are not necessary or relevant. Therefore, the Hearing Examiner did not err in failing to make these findings.

Temple contends that the Hearing Examiner erred by concluding that it failed to timely provide the requested information to the Union. Temple asserts that it provided all of the requested information as it became available and that it offered a legally sufficient reason for the delay in providing the information to the Union.

Pursuant to Section 1201(a)(5) of PERA, a public employer is obligated to provide the employe representative with information that is relevant to its processing of a grievance. Commonwealth of Pennsylvania v. PLRB, 527 A.2d 1097 (Pa. Cmwlth. 1987). Relevancy is determined under a liberal, discovery-type standard whereby the Board need only find (1) that the employe representative is advancing a grievance which on its face is governed by the parties' agreement, and (2) that the information will be useful to the employe representative. Id. Moreover, the Board has held that an unreasonable or inexcusable delay in providing relevant information is a violation of an employer's statutory obligation to bargain in good faith. United Steelworkers of America v. Ford City Borough, 37 PPER ¶ 11 (Final Order, 2006) (citing North Hills Education Association, PSEA/NEA v. North Hills School District, 29 PPER ¶ 29063 (Final Order, 1998)).

Here, the Union filed a grievance alleging that Temple violated Article 22, Section 0 of the CBA by denying liability coverage for a bargaining unit member. The Union

requested that Temple provide it with information regarding Temple's treatment of other employees who sought coverage under Article 22, Section O, its reasons for denying coverage to Hornblum, and the terms of its insurance policy purchased pursuant to Article 22, Section O. Thus, the Union was advancing a grievance which on its face was governed by the CBA, and was seeking information that would be useful to the Union in processing the grievance. Accordingly, the information was relevant and Temple was obligated to provide this information to the Union in a timely fashion.

The Union made its initial information request on March 6, 2006. However, it was not until the November 9, 2006 hearing in this matter that Temple provided the Union with some of the names of bargaining unit members who had requested coverage under Article 22, Section O of the CBA. Furthermore, there is no indication in the record that Temple has provided a comprehensive list of names to the Union. Therefore, Temple clearly failed to provide this relevant information in a timely fashion.

With regard to the 2005 Agreement between Hornblum and Temple, Temple did not provide the Union with a copy of the 2005 Agreement until more than three months<sup>2</sup> after the Union requested copies of any and all documents on which Temple based its decision to deny liability coverage to Hornblum. After the Union forwarded Hornblum's authorization to release the 2005 Agreement to Moore, it took Temple a month to provide the two page Agreement. Temple's claimed reasons for the delay in providing the 2005 Agreement after receiving Hornblum's authorization were that Hartnett was on vacation when Moore sent the Agreement to her and that the Union had sent the authorization to Moore instead of Hartnett. Temple gives no legally sufficient reason why it took Moore a month to forward a copy of the 2005 Agreement to Hartnett.

Concerning the final document requested by the Union, Temple did not provide a copy of the liability insurance policy until July 14, 2006. Temple's explanation for this four-month delay was that it needed to obtain a copy of the insurance agreement and redact any confidential information before providing it to the Union. However, Moore conceded in his testimony that redacting the confidential information from the insurance policy was not "the highest thing on [his] plate" of things to do. (N.T. 149). Moreover, a review of the insurance policy reveals that only two items were redacted. (Temple Exhibit 3). Accordingly, the Hearing Examiner did not err in concluding that Temple failed to timely provide the requested information in violation of Section 1201(a)(1) and (5) of PERA.

With regard to the Hearing Examiner's determination that Temple engaged in direct dealing, Temple first argues that the Hearing Examiner erred by not concluding that the direct dealing charge was barred by the statute of limitations. Temple notes that its 2005 Agreement with Hornblum was executed in October 2005, but the Union did not file its Charge until June 15, 2006.

Section 1505 of PERA provides that no charge shall be entertained which relates to acts occurring or statements made more than four months prior to the filing of the charge. 43 P.S. § 1101.1505. A charge will be considered timely if it is filed within four months of when the charging party knew or should have known that an unfair practice was committed. Community College of Beaver County Society of Faculty, PSEA/NEA v. Beaver County Community College, 35 PPER ¶ 24 (Final Order, 2004).

The Hearing Examiner found that the Union was not involved in negotiating the 2005 Agreement between Hornblum and Temple and was not a party to the 2005 Agreement. (FF 6). The record indicates that the Union became aware of the 2005 Agreement, at the earliest, in late March 2006 through Temple in-house counsel Moore's letter dated March 22, 2006, which indicated that the 2005 Agreement was one of the principal bases for denying Hornblum coverage under Article 22, Section O. (Union Exhibit 6). The Union further became aware that Temple was relying upon the 2005 Agreement as Hornblum's waiver of his rights under the CBA in Temple's April 6, 2006 Step 1 response to the grievance. (Union Exhibit 10). The Union's Charge was filed on June 15, 2006, which is well within four

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<sup>2</sup> Temple notes that the PDO incorrectly states that there was a delay of almost five months in Temple's provision of the information. However, this does not change the result because the delay of more than three months in providing the information was unreasonable.

months of when the Union became aware that Temple was claiming that the 2005 Agreement waived Hornblum's rights under the CBA. Thus, the direct dealing charge is timely.

Temple next argues that the Hearing Examiner erred by failing to defer the direct dealing charge to arbitration. The Board will defer to the parties' grievance arbitration procedure where (1) a grievance has been filed; (2) the charge of unfair practices is rooted in the parties' contract; and (3) the conduct that is the subject of the grievance does not allege any enmity or discrimination against the exercise of employe rights. PLRB v. Pine Grove Area School District, 10 PPER ¶ 10167 (Deferral Order, 1979). The Board, within its discretion, will make a determination of whether a charge should be deferred to arbitration. Northwestern Education Association v. Northwestern School District, 24 PPER ¶ 24141 (Final Order, 1993).

The Union's charge in the present case is not rooted within the parties' CBA. The Union is alleging that Temple violated its statutory duty to bargain in good faith with the Union by directly dealing with Hornblum. An arbitrator's determination of whether Article 22, Section O of the CBA applies to Hornblum will not resolve the separate issue presented here of whether Temple's negotiation of the 2005 Agreement with Hornblum was in derogation of its statutory duty to collectively bargain exclusively with the Union. Therefore, the Hearing Examiner properly declined to defer the direct dealing charge to arbitration.

Alternatively, Temple contends that the Hearing Examiner erred by concluding that Temple engaged in direct dealing.<sup>3</sup> Temple asserts that it did not engage in direct dealing because its 2005 Agreement with Hornblum is not inconsistent with Article 22, Section O of the CBA and does not involve a mandatory subject of bargaining.<sup>4</sup> A public employer will be found to have engaged in direct dealing if the employer bypasses the exclusive employe representative and negotiates directly with an employe. AFSCME District Council 86 v. Department of Public Welfare, 37 PPER ¶ 36 (Proposed Decision and Order, 2006)(citations omitted). Temple's denial of the Union's Step 1 grievance stated that its confidential 2005 Agreement with Hornblum "supercedes any obligation that Temple may otherwise have had under the collective bargaining agreement between Temple University and [the Union]." (Union Exhibit 10). Also, Moore testified that Temple's 2005 Agreement with Hornblum was a separate and wholly sufficient ground to deny coverage and that the 2005 Agreement waived Hornblum's right to be covered under Article 22, Section O of the CBA. (N.T. 137 and 158).

Contracts with individual employes may not be availed of to forestall bargaining with the employe representative or to limit or condition the terms of the CBA. J.I. Case Co. v. NLRB, 321 U.S. 332 (1944). As the Board stated in PLRB v. Northern Bedford School District, 7 PPER ¶ 194 (Nisi Decision and Order, 1976):

To afford public employes the full benefit and protection of the collective bargaining rights guaranteed to them by the Act, it is necessary to insulate them from any efforts by the public employer, direct or indirect, to undercut the authority of the

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<sup>3</sup> In its exceptions, Temple challenged the Hearing Examiner's statement that "according to Temple" the 2005 Agreement superceded the CBA. Temple alleges that this statement is not supported by the record. However, the record reveals that in Temple's April 6, 2006 response at Step 1 of the grievance procedure, Temple claimed that the 2005 Agreement "supercedes any obligation that Temple may otherwise have had under the [CBA]..." (Union Exhibit 10).

<sup>4</sup> Temple also argues that the Hearing Examiner erred by failing to follow National Labor Relations Board precedent which holds that indemnity agreements between employers and unions or employer proposals for general releases of liability are ordinarily not considered mandatory subjects of bargaining, citing NLRB v. Davison, 318 F.2d 550 (4th Cir. 1963), Phillips Pipe Line Company, 302 NLRB 732 (1991), Borden, Inc., 279 NLRB 396 (1986), C-E Natco/C-E Invalco, 272 NLRB 502 (1984) and Covington Furniture Manufacturing Corporation, 212 NLRB 214 (1974). The indemnity agreement cases are inapplicable because they involved employer proposals to be indemnified by the union, and thus did not involve employe terms and conditions of employment. The general release cases are also inapplicable because the release here is a specific release from claims related to the book written by Hornblum, and the NLRB has held that a specific release is a mandatory subject of bargaining. Regal Cinemas, Inc., 334 NLRB 304 (2001), enforced, 317 F.3d 300 (D.C. Cir. 2003). Moreover, it is within the Board's discretion to accept or reject as persuasive proffered federal authority. Temple Association of University Professionals, Local 4531, AFT v. Temple University, 37 PPER 169 (Final Order, 2006). Accordingly, the Hearing Examiner did not err in declining to apply federal precedent that is not directly on point.

employees' duly selected representative, or fragment the unity of the bargaining unit. Any such action by the public employer is considered to be an unfair practice.

7 PPER at 195.

As discussed above, Temple itself has taken the position that its 2005 Agreement with Hornblum waives any claim that he may have under Article 22, Section O of its CBA with the Union. Temple cannot credibly argue that in the 2005 Agreement, Hornblum waived rights he may have had under the CBA, but that those negotiations with Hornblum did not involve an issue over which Temple must deal exclusively with the Union. An employer cannot negotiate a waiver of potential rights under the CBA directly with an employee, but rather must raise such an issue in collective bargaining with the Union. See AFSCME, District Council 47, AFL-CIO v. City of Philadelphia, 19 PPER ¶ 19186 (Proposed Decision and Order, 1988). Accordingly, the Hearing Examiner did not err in concluding that Temple engaged in direct dealing.

After a thorough review of the exceptions, the briefs in support of and in opposition to the exceptions, and all matters of record, the Board shall dismiss the exceptions and affirm the Hearing Examiner's conclusion that Temple committed unfair practices in violation of Section 1201(a)(1) and (5) of PERA.

In view of the foregoing and in order to effectuate the policies of the Public Employee Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by Temple University are hereby dismissed, and the August 2, 2007 Proposed Decision and Order be and the same is hereby made absolute and final.

SEALED, DATED and MAILED pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member, and James M. Darby, Member, this twentieth day of November, 2007. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.

COMMONWEALTH OF PENNSYLVANIA  
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TEMPLE UNIVERSITY :

**AFFIDAVIT OF COMPLIANCE**

Temple University hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1) and (5) of the Act; that it has provided to the Union the remainder of the names, if any, of those employes who requested coverage under Article 22, Section 0 of the collective bargaining agreement, and Temple's responses thereto; that it has posted the Proposed Decision and Order and Final Order as directed and that it has served a copy of this affidavit on the Union at its principal place of business.

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Signature/Date

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Title

SWORN AND SUBSCRIBED TO before me  
the day and year first aforesaid.

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Signature of Notary Public