COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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

PROPOSED DECISION AND ORDER

On June 15, 2006, as amended on July 3, 2006, the Temple Association of University Professionals Local 4531 AFT (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that Temple University (University) violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (Act). On July 12, 2006 and July 18, 2006, respectively, the Secretary of the Board issued a complaint and notice of hearing directing a hearing on August 30, 2006, in Philadelphia, Pennsylvania. After a series of continuance requests were granted, the hearing occurred on November 9, 2006, at which time all parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

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

FINDINGS OF FACT

1. The University is a public employer.

2. The Union is an employe organization and is the certified bargaining agent for a unit of certain faculty and academic professionals employed by Temple.

3. The Union and the University are parties to a collective bargaining agreement that, by its terms, covers the period from October 15, 2004 to October 15, 2008. Article 22, Section O of the collective bargaining agreement requires the University to "maintain coverage to insure bargaining unit members against liability claims or suits (including coverage against libel and slander) in connection with their responsibilities to Temple or at Temple." (Union Exhibit 4 at p. 76).

4. Allen Hornblum became a member of the Union's bargaining unit in 2003, when he was hired as a full time instructor at Temple, after years of working as a part time faculty member. Hornblum currently teaches in the Department of Geography and Urban Studies. In 2004, Hornblum entered into an agreement with Temple University Press, a subdivision of Temple, to publish his book, *Confessions of a Second Story Man: Junior Kripplebauer and the K&A Gang*, chronicling organized crime rings. The Union was not party to the negotiation of this agreement. In the summer of 2005, Temple indicated that it no longer intended to move forward with the publication, after it received a letter indicating that John Berkery, an individual named in the book, intended to sue both Hornblum and Temple for defamation if the book were published. (N.T. 10-14, 33-35, 111, 112; Temple Exhibit 1).

5. Hornblum sought independent counsel to, *inter alia*, arrange for Temple to either publish his book or to regain his copyright in order to publish the book through another publishing house. (N.T. 35-36).

6. Temple was adamant in its position that it would not publish the book so Hornblum's private counsel negotiated with George Moore, Temple's in-house counsel, and others from the University, for the transfer back to Hornblum of the copyright. To that end, in October of 2005, Hornblum and Temple entered into an agreement that terminated the original publishing agreement and transferred the copyright back to Hornblum. The Union was not party to either those negotiations or the resulting written agreement. N.T. 15, 35-36,

103. The agreement required Hornblum to defend, indemnify, and hold harmless Temple from all claims relating to the book and to release any claims or demands he might have against Temple that pertain to the book. The agreement also included a confidentiality clause, barring disclosure of its terms "to any third party without the prior written consent of the non-disclosing party, or as required by law". (N.T. 13-15, 35, 36, 103; Union Exhibit 1).

7. After Hornblum published his book with another publisher, Berkery made good on his threat and filed a defamation suit against Hornblum in February of 2006. Around March 3, 2006, Hornblum notified the Union of the lawsuit. The Union then informed Hornblum that the collective bargaining agreement provided for liability insurance coverage under Article 22, Section O. Hornblum's privately retained attorney then notified Temple of Berkery's suit, requesting that Temple arrange for coverage under Article 22, Section O. (N.T. 14-16, 38, 53-54; Union Exhibit 2, Temple Exhibit 2).

8. Early in March of 2006, Hornblum's private attorney asked Temple's in-house counsel for permission to provide the Union with a copy of the confidential agreement. Temple did not respond to that request. (N.T. 61-63, 142, 143; Union Exhibits 5, 6).

9. Temple refused to provide liability coverage to Hornblum under Article 22, Section O of the parties' collective bargaining agreement. In response, the Union filed a Step 1 grievance, dated March 6, 2006, challenging Temple's denial of coverage. As a part of its grievance, the Union requested the following information: (1) the names of bargaining unit members who have requested liability coverage under Article 22, Section O, with record of Temple's responses; (2) any and all documents on 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 of the collective bargaining agreement. (N.T. 50, 55-57; Union Exhibits 2, 3, 4).

10. On or about April 6, 2006, Temple denied the Union's grievance, *inter alia*, on the grounds that the confidential agreement between Hornblum and Temple superceded any duty that Temple might have otherwise owed Hornblum pursuant to the collective bargaining agreement. At the time of this denial, Temple had yet to provide the Union with any of the information requested in its grievance, including the confidential agreement between Hornblum and Temple, on which it relied when it denied coverage to Hornblum. (N.T. 70, 177-179; Union Exhibit 10).

11. The Union then proceeded to Step 2 of the grievance procedure, challenging the University's denial of insurance coverage for Hornblum. When it submitted the Step 2 grievance, the Union again requested the information it sought at Step 1 of the process and added a specific request for the confidential agreement between Hornblum and Temple. (N.T. 70, 71; Union Exhibit 11).

12. 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 O. Further, Temple maintained that even if the terms of the collective bargaining agreement did apply, the confidential agreement constituted a separate, independent, and wholly sufficient ground for denying coverage under the collective bargaining agreement. Attached to Temple's denial of the grievance were the following documents: (1) letters, dated February 27, 2001, from Berkery threatening to sue Hornblum for defamation and (2) at least one page of the 2004 publishing contract between Hornblum and Temple. (N.T. 72-73, 136, 137, 155-158; Union Exhibit 12).

13. In her cover memorandum to the May 4, 2006, grievance denial, Deborah Hartnett, Temple's Associate Vice President for Human Resources, informed the Union that only a written authorization from Hornblum would permit Temple to provide to the Union a copy of the confidential agreement. Hartnett imposed this condition at Moore's direction, and Moore received a copy of that cover memorandum. On May 18, 2006, Terry Kilpatrick, the Union's Member Services Coordinator, delivered the requested authorization to Moore. Moore, however, did not advise Hartnett that he had received the authorization. (N.T. 74-75, 179, 182, 183; Union Exhibit 5-7, 12, 13).

14. Under the collective bargaining agreement, the Union is allowed 20 working days from the completion of the final step of the grievance process to file a demand for arbitration. In order to avoid missing this deadline, on May 31, 2006, the Union filed its demand for arbitration even though it had yet to receive a substantial portion of the documents and information it had requested. (N.T. 75-77; Union Exhibit 4, 14).

15. During the week of June 5, 2006, upon learning that Temple had yet to provide the confidential agreement, William Cutler, the Union's President, contacted Hartnett on two occasions to expedite the delivery of the requested information. Hartnett was evidently not aware that the Union had sent the authorization form to Moore, so on June 6, 2006, Kilpatrick faxed Hartnett a copy of the authorization, the second one sent to Temple. Hartnett assured the Union that she would deliver the confidential agreement "as soon as possible." Hartnett then asked Moore, who was in possession of the confidential agreement, "to send it." The following week, while Hartnett was on vacation, Moore sent the agreement to her office, rather than to the Union's office. When Hartnett returned from vacation on June 19, 2006, she discovered the undelivered copy of the agreement and sent it to the Union. (N.T. 94-96, 172-174; Union Exhibit 1, 14).

16. On or about July 14, 2006, Hartnett received from Moore a redacted copy of Temple's Insurance Policy that it purchased pursuant to Article 22 Section O of the collective bargaining agreement. Moore did not provide this document sooner because doing so was not the "highest thing on [his] plate." Hartnett testified that she arranged for someone to hand deliver the insurance policy to the Union on July 14, 2006. (N.T. 79-80, 148, 149, 170-171; Temple Exhibit 3).

17. It was not until the hearing on November 9, 2006 that Temple provided some of the requested names of other bargaining unit members who had sought liability coverage under Article 22 Section O of the collective bargaining agreement, and Temple's response to such requests. (N.T. 80, 81, 150-153).

DISCUSSION

The Union charges Temple with violating the above-referenced sections of the Act when it allegedly refused to tender requested information to the Union in a timely manner, and allegedly engaged in direct dealing with a faculty member. Temple parries these allegations by stating that "Temple provided all the relevant information requested by the Union as it became available...." Temple also asserts that "it is impossible to resolve [the direct dealing charge] without first resolving the underlying contractual grievance..." and therefore, according to Temple, this charge should be deferred to grievance arbitration. Temple further states that the Union's direct dealing charge "is without merit and should be dismissed." (Temple's brief at 1, 2).

Because Temple did not timely turn over the requested relevant information asked for by the Union, because the underlying grievance is not determinative of this charge's outcome, and because Temple did engage in direct dealing, it has violated Section 1201(a)(1) and (5) of the Act. We first examine why Temple violated the Act when it refused to turn over relevant, requested information to the Union in a timely fashion.

As the Board opined in AFSCME v. Berks County (Coroner), 36 PPER 36 (Final Order, 2005):

> Generally, a union is entitled to any information reasonably necessary for it to carry out its collective bargaining duty, or to police the contract. Commonwealth of Pennsylvania v. Pennsylvania Labor Relations Board, 527 A.2d 1097 (Pa. Cmwlth. 1987).... An unreasonably delayed response to a request for information, even if complete, is nevertheless an unfair practice under Section 1201(a)(1) and (5) of PERA. North Hills Education Association v. North Hills School District, 29 PPER P. 29,063 (Final Order, 1998).

36 PPER at 110.

The Union's grievance was filed on March 6, 2006, challenging Temple's refusal to cover Hornblum under Article 22, Section O of the parties' collective bargaining agreement. As part of that grievance the Union also requested the names of other bargaining unit members who had requested coverage under Section O of Article 22, and Temple's response thereto; any and all documents Temple relied upon in denying Hornblum coverage under that section; and a copy of Temple's insurance policy purchased pursuant to Article 22.

At the November 9, 2006 hearing, Temple's in-house counsel, who testified that his office is involved in all requests for coverage under Article 22, Section O, finally revealed to the Union some names of other bargaining unit employes who requested coverage under that contractual section. In the face of the Union's simple request for the names of those employes, Temple's in-house counsel responded, "We don't have such a list." (N.T. 151). In-house counsel for Temple also stated, "I don't think I have any obligation to compile or make up any document that doesn't exist to provide to [the Union]." (N.T. 151). Conspicuously absent from both in-house counsel's assertion, and Temple's post-hearing brief, is any legal authority supporting the "we don't have to make up any lists" theory.

Perhaps that absence is because our Commonwealth Court has ruled that employers do have a statutory duty to supply relevant information pursuant to a union's request, *even when that entails creating a written document to supply the requested information*. *See* Pennsylvania Department of Public Welfare, 527 A.2d 1096 (Pa. Cmwlth. 1987) (employer has affirmative duty to reduce to writing relevant information requested by union).

So even in the face of case law that required Temple to write down and turn over the requested information, it simply refused to do so. Moreover, the obvious *reductio ad absurdum* of Temple's assertion is that an employer simply need not turn over any relevant information to a requesting union if it isn't written down already or is written down in more than one location.

As of the November 9, 2006 hearing, over eight months after the Union requested the names, Temple had still not released any names to the Union of other employes who requested coverage under Article 22. At the hearing, Temple's in-house counsel, flippantly informed the Union's counsel, "And to this date I don't have a list. Although I remember some cases, if you want to ask me." (N.T. 150). The obvious question then becomes why Temple, in the preceding eight months, had not, at the very least, informed the Union of the names its in-house counsel could simply rattle off the top of his head. Temple offers no legally sufficient reason why, in the preceding eight months, the very office that deals with all requests for coverage under Article 22 by bargaining unit members could not simply marshal those names and submit them to the Union.

In its post-hearing brief, Temple asserts, "At the hearing, however, Moore [Temple's in-house counsel] did share a list of the cases he was able to recall from his memory. As a result, [the Union] is now in possession of all the information it had requested." (Temple's brief at 14). How Temple comes to that conclusion is a mystery since its in-house counsel testified that he only remembered "some cases", not all cases, and there is nothing of record to indicate that Temple ever informed the Union that in-house counsel's memorized list was comprehensive, as opposed to merely anecdotal. An employer's failure to tell the requesting party that its reason for noncompliance is that there is no further information in the employer's possession to produce also constitutes a failure to respond. AFSCME v. Berks County (Coroner), 36 PPER at 112, n 20.

In defense of its failure to timely tender to the Union a copy of the liability policy and a copy of Hornblum's confidential agreement, Temple offers a mélange of excuses. Evidently, no one in all of Temple had a copy of the liability policy, and it had to be gotten from the insurer. Even after that delay, Temple's in-house counsel was in no hurry to redact those portions of the policy he concluded were "none of [the Union's] business" because, as he so cavalierly put it, answering the information request "wasn't the highest thing on my plate." (N.T. 149). Even if Temple's assertion is accepted that the Union finally received a copy of the policy on July 14, 2006, over four

months after the March 6, 2006 request, it was still woefully late,[1] and evidently very near the bottom of things on in-house counsel's plate.

The Union did not fare much better in getting Temple to surrender the confidential agreement between Hornblum and Temple. In its brief, Temple asserts that the Union's first request for the confidential agreement was made in the April 7, 2006, information request. That is not, however, what the record shows. What the record shows is that the Union, without even knowing it existed, asked for the confidential agreement on March 6, 2006. And here's why: the Union's information request accompanying the March 6 grievance asked for "any and all documents on which Temple bases its decision to deny Mr. Hornblum coverage for his lawsuit." (Union Exhibit 3). Further, it is clear from Temple's answer to the grievance that one independent basis for Temple's denial of coverage under Article 22 was Hornblum's confidential agreement with Temple. Temple's own witnesses, and its grievance response, clearly establish that the confidential agreement was a document on which Temple based the decision not to cover Hornblum. (N.T. 157, 158, 177-179; Union Exhibit 10). Nevertheless, it would be months before the Union ever saw that confidential agreement.

The Union finally received the confidential agreement on June 19, 2006, almost five months after it was originally requested, and four weeks after the Union provided Temple with Hornblum's written release.[2] Moreover, even though Temple mentioned the confidential agreement in its first step response on April 6, 2006, it failed to tell the Union, until May 4, 2006, that it would not release that agreement without written consent from Hornblum.

Temple has recited a series of unfortunate events to explain why it took a month after it received Hornblum's written release to simply hand the confidential agreement to the Union. Temple's excuses included a serpentine recital of vague directions, people on vacation, assumptions made, and Temple employes simply not informing each other of what was going on. These sundry internal laxities are no legal defense to Temple's taking a month merely to hand a two-page document to the Union.

One also wonders why Temple did not inform the Union, in the grievance response on April 6, 2006, when it first revealed the confidential agreement as a basis for its decision, that the Union would need a written release from Hornblum in order to have a copy of that agreement. This omission is especially nettlesome since the Union had requested all documents that Temple had relied upon, and Temple's own grievance response clearly put the confidential agreement in that category. Moreover, since the agreement was confidential, the Union could not have known of the supposed need for Hornblum's written release.[3]

Having found that Temple violated the Act by not timely turning over the information in any of the three categories requested by the Union, we now examine why Temple violated the Act by dealing directly with Hornblum. Board law is clear that an employer violates Section 1201(a)(1) and (5) of the Act when it bypasses the collective bargaining representative and negotiates directly with bargaining unit members about wages, hours, and terms and conditions of employment, regardless of whether the results of the direct dealing are beneficial or harmful to individual employes, even if the act was unintentional. Warminster Township, 31 PPER ¶ 31156 (Final Order, 2000); Mifflin County School District, 22 PPER ¶ 22065 (Final Order, 1991); Millcreek Township School District v. PLRB, 631 A.2d 734 (Pa. Cmwlth. 1993).

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[1] The Union's testimony was that the policy was not given to the Union until it was introduced into evidence by Temple at the hearing on November 9, 2006. (N.T.79-80). I need not decide which date is the actual date of tender, since even the July date is late enough to violate the Act.

[2] On March 23, 2006, Hornblum's privately retained attorney requested of Temple the authority to release the confidential agreement to the Union. (Union Exhibit 6). There is no record evidence concerning any reply by Temple to this request. On May 12, 2006, Temple demanded that Hornblum tender a written release to Temple before it would give the agreement to the Union. (Union Exhibit 12). The Union gave Temple a written release from Hornblum six days later, on May 18, 2006. (N.T. 74-75; Union Exhibit 13).

[3] The confidential agreement allows the release of its contents either with the written consent of the non-disclosing party "or as required by law[.]" I need not reach the question of whether or not the Union's statutory right to receive timely requested, relevant information constitutes "as required by law[,]" because Temple violated the Act by its extravagant delay in giving the confidential agreement to the Union even after it received Hornblum's written consent. (Union Exhibit 1).

Temple's own documents and witnesses establish the direct dealing violation in this case. Both Temple's answer to the Union's grievance, and in-house counsel's *viva voce* evidence acknowledge that an independent basis for Temple's denial of coverage under Article 22 was the confidential agreement between Hornblum and Temple. The confidential agreement, then, removed Hornblum from any possible protection under Article 22, which is a term and condition of employment for bargaining unit members. To state the obvious, the confidential agreement Temple negotiated directly with Hornblum, according to Temple, superceded the collective bargaining agreement Temple negotiated with the Union. After Temple negotiated Article 22 with the Union, it was not free to negotiate with an individual bargaining unit member that member's relinquishment of whatever his Article 22 rights might be. Temple's actions establish quintessential direct dealing.

Temple adamantly argues that this charge should be deferred to grievance arbitration, under the Board's policy first set forth in Pine Grove School District, 10 PPER ¶ 10167 (Order Deferring Unfair Practice Charge Until Further Order of the Board, 1979). Temple asserts that if Hornblum is not covered by Article 22 then there is no direct dealing. Nevertheless, whether or not a grievance arbitrator finds that Hornblum was protected by Article 22 is simply of no moment to this charge because it was, and is, Temple's position that Hornblum gave up any protections he might have under Article 22 in the confidential agreement.[4]

In New Castle Area School District, 21 PPER ¶ 21062 (Proposed Decision and Order, 1990), deferral of the direct dealing portion of an unfair practice charge was denied even though the hearing examiner deferred the remaining portion of the charge. It is the employer's direct dealing, a statutory violation, which is the offense, regardless of the outcome. Mifflin County School District, *supra*. Whether or not the outcome of direct dealing constitutes a contractual violation does not vitiate the fact that Temple dealt directly with Hornblum, bypassing the collective bargaining representative.

Temple further argues that because the National Labor Relations Board (NLRB) has ruled that indemnity agreements are "generally not considered mandatory subjects of bargaining under the [National Labor Relations Act]" that there can be no direct dealing here. (Temple's brief at 17). The violation here, however, is that Temple dealt directly with a bargaining unit member about relinquishing rights that, at least from Temple's perspective, the bargaining unit member might enjoy under the parties' collective bargaining agreement. The fact that the bargained-for rights Temple sought to have only Hornblum relinquish dealt with indemnity does not excuse the direct dealing.

Because Temple failed to timely tender to the Union the relevant information requested, and because Temple engaged in direct dealing with Hornblum it has violated Section 1201(a)(1) and (5) of the Act.

CONCLUSIONS

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

1. That Temple is an employer within the meaning of section 301(1) of the Act.

2. That the Union is an employe organization within the meaning of section 301(3) of the Act.

3. That the Board has jurisdiction over the parties hereto.

4. That Temple has committed unfair practices within the meaning of Section 1201(a)(1) and (5) of the Act.

ORDER

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

[4] If Temple were so convinced that Hornblum is not covered under Article 22, one wonders why it had him give up those nonexistent rights in the confidential agreement, and why it argues that the confidential agreement supercedes Article 22.

HEREBY ORDERS AND DIRECTS

that Temple shall:

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed under Article IV of the Act.

2. 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 hearing examiner finds necessary to effectuate the policies of the Act:

(a). Immediately provide to the Union the remainder, if any, of the requested list of Temple employes who requested coverage under Article 22, Section O, and Temple's responses thereto;

(b) Post a copy of this decision and order within five (5) days of the date hereof 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.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

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

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this second day of August 2007.

PENNSYLVANIA LABOR RELATIONS BOARD

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TIMOTHY TIETZE, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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

AFFIDAVIT OF COMPLIANCE

Temple 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 O of the collective bargaining agreement, and Temple's responses thereto; that it has posted the proposed decision and order as directed and that it has served a copy of this affidavit on the Union at its principal place of business.

_____
Signature/Date

_____
Title

SWORN AND SUBSCRIBED to before me
The day and year first aforesaid

_____
Signature of Notary Public

August 2, 2007

Amy L. Rosenberger, Esquire
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TEMPLE UNIVERSITY
Case No. PERA-C-06-274-E

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

Sincerely,

TIMOTHY TIETZE
Hearing Examiner

tlc

Enclosure

cc: Deborah Hartnett
Joy F. Grese, Esquire