

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

LONGY SCHOOL OF MUSIC OF BARD COLLEGE

and

**Case Nos. 1-CA-127267
1-CA-130489**

**LONGY FACULTY UNION, AMERICAN FEDERATION
OF TEACHERS MASSACHUSETTS, LOCAL 6484**

Laura Pawle, Esq., Counsel for the General Counsel.

Haidee Morris, Esq., Counsel for the Charging Party.

Donald Schroeder, Esq. and Erin Horton, Esq., (Mintz Levin), Counsel for Respondent.

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me in Boston, Massachusetts on November 18, 2014. The Consolidated Complaint herein, which issued on August 28, 2014, was based upon unfair labor practice charges and an amended charge that were filed on April 24, 2014¹, June 10, and July 28 by Longy Faculty Union, American Federation of Teachers Massachusetts, Local 6484, herein called the Union. Since 2010, the Union has been the exclusive collective bargaining representative of certain faculty members employed by Longy School of Music of Bard College, herein called Respondent and/or the School. There are two distinct violations alleged in the Consolidated Complaint: it is initially alleged that since about 2011 the Respondent notified prospective employees, in employment offer letters, that their employment would be “at will” and that they could be terminated by the Respondent at any time. However, the collective bargaining agreement between the parties states that “Discipline will be for just cause,” and it is alleged that the Respondent engaged in this conduct without prior notice to the Union and without affording the Union an opportunity to bargain with respect to this conduct, therefore violating Section 8(a)(5)(1) of the Act. It is further alleged that on about May 29, the Union requested that the Respondent furnish it with the following information: each time a faculty member is hired by the Respondent, the names, position titles, and dates of hire of each faculty member hired. It is alleged that this information is necessary for, and relevant to the Union as the collective bargaining representative of the unit, and that as the Respondent failed and refused to provide this information to the Union it therefore violated Section 8(a)(5)(1) of the Act.

The Respondent defends that while employment letters sent out in the past mistakenly stated that employment would be “at will,” very few of such letters were sent during the 10(b) period and, more importantly, the Respondent subsequently corrected this situation by notifying all employees that if they were covered by the collective bargaining agreement between the Respondent and the Union they could only be discharged for just cause. As for the latter allegation, Respondent defends that while it has provided the Union with all the other information that it requested, it is not required to provide the Union with information pursuant to an “open ended request,” such as the one involved herein.

¹ Unless indicated otherwise, all dates referred to herein relate to the year 2014.

I. Jurisdiction and Labor Organization Status

Respondent admits, and I find, that it has been an employer engaged in commerce
 5 within the meaning of Section 2(2), (6) and (7) of the Act and that the Union has been a labor
 organization within the meaning of Section 2(5) of the Act.

II. The Facts

10 A. Background Information

Pursuant to a Board certification on February 1, 2010, the Union has been the collective
 bargaining representative of the following unit of Respondent's employees: "All faculty currently
 15 teaching, and who have a weekly average of at least three benefit units in one of the last two
 fiscal years, excluding all other employees, visiting faculty, administrators, confidential
 employees, office clerical employees, managers, guards, and supervisors as defined in the Act."
 The contract between the parties is effective for the period February 1, 2011 through June 30,
 20 2014, and by agreement of the parties, was extended for a year. The School, which offers
 graduate and undergraduate degrees in music, as well as non-degree programs during the
 summer, employs approximately one hundred faculty members, very few of whom work a full
 forty hour week. All faculty members are paid on an hourly basis as set forth in employment
 offer letters between the faculty members and the School and many work between five and
 fifteen hours weekly. Eligibility to become a member of the Union is determined by "benefit
 25 units," which Kalen Ratzlaff, the Respondent's Chief of Staff, testified was an approximation of
 the employee's teaching activities weighted toward heavier activities rather than lighter
 activities, together with an estimate of the average number of hours worked weekly by the
 employees. Approximately sixty five of the one hundred faculty members are Union members.

30 B. "At Will" Employment v. "Just Cause" Discharge

Article 4 of the contract between the parties states that: "Discipline shall be for just
 cause", while Article 12.01 states that initial hires "will receive one year appointments." In
 addition, Article 12.02 states:

35 After an initial three (3) year probationary period, all Faculty appointments will be on a
 three (3) year appointment basis during which removal from the Faculty shall only be
 done for just cause during the appointment period. The decision by Longy to appoint or
 re-appoint Faculty to three (3) year appointments will not be subject to Article 8,
 Grievance Procedure.

40 From about April 20, 2011 through October 28, 2013, the school sent out faculty employment
 offer letters that stated the salary being offered (almost always on an hourly basis), the period of
 employment being offered as well as the following statement:

45 Also, please be advised that, unless otherwise provided for in a separate agreement, all
 Longy employees are employed at will, which means that either they or the school may
 discontinue the employment relationship at any time.

In about July 2011, this language was changed somewhat to state:

50 Also be advised that Longy considers all of its employees to be employees at will.
 Employment at Longy is entered into voluntarily and all employees are free to resign at

any time. Similarly, Longy is free to terminate an employment relationship at any time.

In addition to the employment offer letters that were sent by the Respondent to the faculty members, the School also sent Compensation Agreements to faculty members who had been
5 offered employment for the next school year. These agreements also contained the “at will” language.

On March 3, Yura Lee, who had been a faculty member at the school from 2012 to 2014, sent Union President Jane Hershey her employment offer letter dated March 27, 2012
10 containing the “at will” language, stating: “Here is the information you asked for.” Hershey testified that she had not seen any of these “at will” employment letters prior to this one received from Lee and on March 30, she sent the following email to Ratzlaff:

I am writing on behalf of the Longy Faculty Union regarding employment offer letters to
15 new faculty members. Please provide me with copies of all employment letters sent by the School to new faculty members since February 1, 2011 up until the present date.

It has come to our attention that some terms and conditions of employment have been
20 misrepresented to our bargaining unit members and this information is necessary and relevant to our statutory obligation to monitor the mutual obligations of our Collective Bargaining Agreement.

On April 24 Ratzlaff sent Hershey copies of all employment offer letters sent to new faculty since February 1, 2011, as well as the following email:

25 Just to let you know that I will be sending you the faculty appointment letters you requested this week. In reviewing them for issues, I realized I have been using the following old template language:

30 *Also be advised that Longy considers all of its employees to be employees at will. Employment at Longy is entered into voluntarily and all employees are free to resign at any time. Similarly, Longy is free to terminate an employment relationship at any time.*

I think initially I was thinking that everyone is employed at will until after the three-year
35 probationary period is over, but that is obviously incorrect. Since the initial appointment letter is outlined in the contract, employees are not at will- this mistake carried through to all of the letters I’ve issued since the contract was implemented. My guess is that this is the issue you want to raise- and I’d be happy to discuss this with you. If you are actually talking about something else, I of course look forward to discussing that with you as well-
40 I would still want to address the incorrect “at will” language regardless.

Ratzlaff testified that after she realized the mistake she made in using the “at will”
45 language in the employment offers and Compensation Agreements, she sent a letter dated July 1 to all faculty members who had previously received her employment offers or Compensation Agreements stating:

I am writing to clear up any confusion that may exist concerning the nature of the
50 employment relationship between Longy and its employees. Unless covered by a separate contract- such as Longy’s collective bargaining agreement with the faculty union- all Longy employees are employed “at will.” “At will” employment can be terminated by either the employee or Longy at any time.

Most of you have already seen the following language:

From the 2009-2010 Longy Employee Handbook and every handbook thereafter (page 11):

Unless otherwise stated in a written contract or individual employment agreement, all employees at the school are employees at will. In the event of a conflict between the Handbook and any written contract, the terms of the contract will apply. Finally, the policies contained in this Handbook shall not apply to such employees of the School who have written contracts insofar as such contract would be in conflict with a policy set forth in this Handbook.

From the 2011-2012 Faculty Compensation Agreements received by all faculty- and from the 2012-2013 and 2013-2014 Faculty Compensation Agreements received by non-Collective Bargaining Unit faculty:

Unless otherwise provided for in a separate agreement, all Longy employees are employed “at will,” which means that either they or the School may discontinue the relationship at any time.

To clarify, the above references to “a written contract or individual employment agreement” and “a separate agreement” refer in part to Longy’s collective bargaining agreement with the faculty union. Accordingly, any faculty who are members of the bargaining unit are not “at will” employees and may be terminated only in accordance with the provisions of the collective bargaining agreement.

If you have any questions about the nature of your employment with Longy, please contact me...

The School’s employment offer letters in 2014 do not include the “at will” language contained in the letters previously issued. In addition, on November 17, one day prior to the hearing herein, Ratzlaff sent a Memorandum to all faculty and staff stating:

From about February 2011 to April 2014, Longy inadvertently included incorrect information concerning the nature of the employment relationship between Longy and its employees in its faculty employment letters. Several of you have received this incorrect language. Specifically, we stated that all Longy employees are employed “at will” and may, therefore, be terminated at any time. In fact, some Longy employees are not “at will” employees.

I am writing to clear up any remaining confusion that may exist concerning the nature of employment at Longy. To be clear, Longy employees are employed “at will” unless they are covered by a separate contract- such as Longy’s collective bargaining agreement with the faculty union.

Any faculty who are members of the bargaining unit are not “at will” employees and may be terminated only in accordance with the provisions of the collective bargaining agreement.

C. Information Request

As stated above, on April 24, the Respondent provided the Union with the employment offer letters that it requested on March 30. On May 29 Jonathan Cohler, Union Treasurer and a member of its executive board, wrote to Ratzlaff:

The Union hereby requests the following information regarding faculty hires that is relevant and necessary to our representational duties. This information is needed because it is relevant to our statutory obligation to “police” and monitor terms and conditions of our Collective Bargaining Agreement. In particular, Article 10, Layoffs and Recall and Article 11, Hiring Procedures impose certain terms and conditions on the School regarding the hiring of new faculty members that impact upon our obligations to our bargaining unit members.

Furthermore, the information is necessary and relevant to our duty of fair representation as required by the National Labor Relations Act.

Please provide a list of all faculty hired by Longy since February 21, up to the present including the following information for each hire:

Name of person hired
Position Title
Date of hire

Additionally, the Union needs to make sure that the School is appropriately including newly hired faculty in the bargaining unit list that should be in the bargaining unit, and we have no way of independently verifying that at present.

As the Union has no way of knowing, on a timely basis, that a new faculty has been hired, the Union further requests that going forward the School provide the Union with the information listed above each time a faculty member is hired by the School, and within 10 business days of that hiring, so that the Union can keep its records up to date and fulfill its obligations as outlined above.

Ratzlaff responded on June 8, stating:

I am writing to respond to your information request of May 29, 2014.

There have been no faculty hires since February 21, 2014. As we stated in our response to your nearly identical information request from February 14, 2014, the School will not accede to the Union’s request for the School to provide this information every time a faculty member is hired. The request is overly broad and unduly burdensome, and is an unnegotiated addition to the requirements of Article 5.05 and Article 18 which already require the School to communicate faculty lists to the Union.

Cohler testified why the Union needed the information going forward. Article 7 of the contract provides that employees have thirty days from the date of execution of his/her Agreement to notify the Union if he/she wishes to become a Union member. It is therefore necessary for the Union to know when faculty are hired in order to inform them of this thirty day requirement. Further, the recall provision of Article 10 provides that laid off faculty members will be recalled to their same or a similar position before additional faculty are hired and Article 11 of the contract states that not less than three quarters of vacancies during the term must be posted and that

5 faculty members will be given an opportunity to be considered for positions for which they are qualified. In order to properly police these requirements, the Union must know when faculty are hired. In October 2013, the Union learned by chance that the Alvarez sisters, who had been in the bargaining unit from about July 2012 through August 2013, were rehired. As they had the required benefit units, they should have returned immediately into the unit with an obligation to pay dues to the Union and the Union had an obligation to represent them. However, the Union was not immediately aware of their hire because the School did not notify the Union when they were rehired.

10 James Moylan, Associate Dean of Academic Affairs and Special Assistant to the Office of the President of the School, testified that he responded fully to the Union's May 29 information request, except for the "going forward" portion of the request. The contract in existence between the parties does not require the School to give the Union information about new hires. As part of the negotiations for a new agreement, on the day prior to the hearing, he proposed (on behalf of the School) a provision requiring the School to notify the Union, within
15 ten days of hiring a new employee, of the name, date of hire and position title of the new faculty member.

20 III. Analysis

It is alleged that the Respondent violated Section 8(a)(5)(1) of the Act by sending employment offer letters to faculty stating that their employment was "at will" and that they could leave, or be terminated at any time. The basis of this allegation is that the contract between the parties states that employees can be terminated only for "just cause," and that by making this
25 statement in the employment offer letter the School changed a mandatory subject of bargaining, terminations, without prior notice to, or bargaining with, the Union. This is an unusual factual situation: while the letters clearly misstated the terms of employment by stating that their employment was "at will," there was no actual change in the discipline provision of the contract and there is no evidence that anybody was terminated pursuant to this misstatement. Further,
30 while the School was clearly mistaken in placing this statement in the employment offer letters, when it was made aware of the error it notified all employees who had received an employment letter with the "at will" language, of the error and correctly notified them of the rules governing terminations.

35 In *Kurdziel Iron of Wauseon, Inc.*, 327 NLRB 155 (1998), although the employees had been allowed a thirty minute lunch period, their supervisor told them that their lunch period was limited to twenty minutes. The General Counsel alleged, and the administrative law judge and the Board agreed, that this amounted to a unilateral change in terms and conditions of employment in violation of Section 8(a)(5)(1) of the Act. The Board stated:

40 Even if the announced reduction did not finally result in the actual curtailment of employees' breaks, the damage to the bargaining relationship was accomplished. This occurred "simply by the message to the employees that the Respondent was taking it on
45 itself" to set an important term and condition of employment, thereby suggesting the irrelevance of the employees' collective-bargaining representative.

The situation in the instant matter is similar, except that the issue is discipline, rather than lunch breaks. Based upon *Kurdziel, supra*, I find that these letters violate Section 8(a)(5)(1) of the Act.

50 The other allegation is that the Respondent violated Section 8(a)(5)(1) of the Act by refusing to provide the Union with the names, position titles and dates of hire of all future employees, at the time that they are hired. While the Respondent has provided the Union with

the names of employees that *have been* hired, they have refused to provide the Union with this information *going forward*.

5 An employer's duty to bargain collectively under the Act includes an obligation to provide the union representing its employees with relevant information that it requests in order for the Union to properly represent the unit employees, and the standard for relevancy is a liberal "discovery-type standard." *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Information must be produced if it is "potentially relevant and will be of use to the union in fulfilling its responsibilities as the employees' exclusive bargaining representative," *Pennsylvania Power Co.*, 301 NLRB 1104-1105 (1991), and information pertaining to bargaining unit employees is presumptively relevant. *Postal Service*, 332 NLRB 635 (2000).

15 Cohler's testimony establishes that that the information that he requested on May 29 is clearly relevant to the Union in policing its agreement with the Respondent. Although not all newly hired employees are eligible to join the Union, the Union needs to know when employees are hired to measure the thirty day period that employees have to notify the Union whether or not they wish to join the Union. In addition, in order to properly enforce Article 10 (recall rights of laid off employees) and Article 11 (posting job vacancies) the Union must know when employees are hired. Respondent does not appear to contest the relevance of this requested information, only the *going forward* nature of the request. However, I can see no reason to carve out an exception to the rule that an employer must provide the union representing its employees with information that is relevant to it as the bargaining representative of these employees when the request calls for an ongoing response whenever new employees are hired. As the Union has no way of independently learning when new employees are hired, or former employees are rehired, the only way that it can learn of this information is if the Respondent notifies it of hirings on an ongoing basis as it would be impractical and burdensome to require the Union to make this information request every week or every pay period in order to learn when new employees are hired. I therefore find that the Respondent violated Section 8(a)(5)(1) of the Act by failing to agree to provide the Union with the name, job title and dates of hire of all employees at the time that they are hired.

Conclusions of Law

35 1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union has been a labor organization within the meaning of 2(5) of the Act.

40 3. By stating in employment offer letters to employees until about July 1 that their employment was "at will," and that the Respondent was free to terminate it at any time, the Respondent violated Section 8(a)(5)(1) of the Act.

45 4. By refusing to agree to provide the Union with the names, position titles and date of hire for all employees hired in the future, when they are hired, the Respondent violated Section 8(a)(5)(1) of the Act.

The Remedy

50 Having found that the Respondent violated the Act by refusing to give the Union the names, position titles and dates of hire of all employees at the time that they are hired, I recommend that the Respondent be ordered to give this information to the Union within ten days of an employee being hired by the school. I have also found that the Respondent violated the

Act by notifying employees prior to about July 1, that their employment was “at will” and could be terminated by the Respondent at any time, while its contract with the Union stated that discharge could only be for just cause. While this would normally require an affirmative remedy, the credible uncontradicted evidence establishes that on July 1 and November 17 the Respondent sent letters to all employees properly correcting this misinformation. I therefore find that no affirmative remedy is required for this violation.

Upon these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, Longy School of Music of Bard College, its officers, agents, successors and assigns, shall:

1. Cease and desist from

(a) Telling its employees that their employment is “at will,” and that they can be terminated at any time by the School while its contract with the Union states that employees can only be disciplined or discharged for “just cause.”

(b) Failing and refusing to agree to provide the Union with the names, job titles and dates of employment upon the hiring of new unit employees.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify the Union within ten days of the hiring of new faculty members, of the names, job titles and dates of hire of each of the employees hired.

(b) Within 14 days after service by the Region, post at its facility in Cambridge, Massachusetts, copies of the attached notice marked “Appendix.”³ Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent

² If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

at any time since October 24, 2013.

5 (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 7, 2015

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Joel P. Biblowitz
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT refuse to notify Longy Faculty Union, American Federation of Teachers Massachusetts, Local 6484 (“the Union”) each time we employ a faculty member, and **WE WILL** tell the Union the name, job title and date of hire of each newly hired employee within 10 days of the date of hire.

WE WILL NOT tell faculty employees that their employment is “at will” and can be terminated at any time when our contract with the Union provides that discharge shall only be for “just cause.”

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

LONGY SCHOOL OF MUSIC OF BARD COLLEGE
(Employer)

Dated _____ By _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board’s Regional Office set forth below. You may also obtain information from the Board’s website: www.nlr.gov.

10 Causeway Street, Boston Federal Building, 6th Floor, Room 601

Boston, Massachusetts 02222-1072

Hours of Operation: 8:30 a.m. to 5 p.m.

617-565-6700.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/01-CA-127267 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 617-565-6701.