

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 2**

Barnard College,  
Respondent

and

Case No. 02-CA-200574

Local 2110, United Auto Workers,  
Charging Party

**GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Tanya W. Khan, Esq.  
Counsel for the General Counsel  
National Labor Relations Board  
Region 2  
26 Federal Plaza, Room 3614  
New York, NY 10278

Dated at New York, NY  
October 12, 2018

## **I. PROCEDURAL HISTORY**

On June 13, 2017, Local 2110 of the United Auto Workers Union, (“the Union”) filed a charge against Barnard College (“Respondent”). GC Ex. 1A.<sup>1</sup> On August 17, 2017, the Union amended its charge alleging Respondent violated Sections 8(a)(1) and (5) of the National Labor Relations Act (“the Act”) by failing and refusing to provide the Union with requested information that is relevant and necessary to enforce its contract and in order to assess possible grievances the Union would file on behalf of its bargaining unit members. GC Ex. 1C. On February 28, 2018, following an investigation into the charge’s allegations, the Regional Director for the National Labor Relations Board, Region 2, issued a complaint in this matter alleging that Respondent had violated Sections 8(a)(1) and (5) of the Act by, since on or about June 9, 2017, failing and refusing to provide the Union with information it sought in a May 31, 2017 information request. GC Ex. 1E.

Respondent, by its Counsel, filed an Answer to the Complaint on March 14, 2018. GC Ex. 1G.

The case was litigated before the late Associate Chief Administrative Law Judge Mindy Landow on May 22, 2018.

On August 23, 2018, Deputy Chief Administrative Law Judge Arthur Amchan, with the consent of all parties, assigned the matter to Administrative Law Judge Geoffrey Carter to issue a decision based upon the record made before the late Judge Landow.

---

<sup>1</sup> Citations to the transcript will appear as “Tr.” followed by the corresponding page and line number(s). Citations to the General Counsel and Joint exhibits will appear as “GC Ex.” and “Jt. Ex.,” respectively, followed by the exhibit number.

On September 14, 2018, Judge Carter issued a Decision and Recommended Order (“ALJD”)<sup>2</sup> dismissing the Complaint and finding that Respondent did not violate Section 8(a)(1) and (5) by failing and refusing to provide the Union with requested information that is relevant and necessary to enforce its contract and in order to assess possible grievances the Union would file on behalf of its bargaining unit members.

## **II. ISSUE PRESENTED**

Did the ALJ err in failing to find that Respondent violated Sections 8(a)(1) and (5) of the Act by failing and refusing to provide the information requested by the Union in its email dated May 31, 2017?

## **III. FACTS**

### ***A. Background: The Parties and the Contract***

The case arises in the context of an initial bargaining contract between Respondent and the Union. Respondent is a nonprofit educational institution incorporated in the state of New York, with a campus in New York City. ALJD 2:15-21, GC Ex. 1E, G. The Union has represented a unit of Respondent’s contingent faculty since October 13, 2015. ALJD 2:27-37, Jt. Ex. 1. The Union and Respondent are party to their initial collective bargaining agreement effective by its terms from April 7, 2017 to June 30, 2022. ALJD 3:1-4, Jt. Ex. 2.

### ***B. The Union’s Request for Information by e-mail on May 31, 2017***

In late May 2017, the Union learned that Respondent would offer separation payment and not reappoint approximately seven faculty members. ALJD 5:1-4. On May 31, 2017, the Union, by its president, Maida Rosenstein (“Rosenstein”) sent Respondent the initial request for

---

<sup>2</sup> Citations to Judge Carter’s decision will appear as “ALJD” followed by the corresponding page and line number(s).

information regarding bargaining unit member non-reappointments for the following academic year. ALJD 5:4-7, Jt. Ex. 3. In her e-mail, Rosenstein requested “the reasons(s) pursuant to Article 11, Section 6 and all pertinent facts substantiating the decisions to not reappoint.” ALJD 5:23-30, Jt. Ex. 3. Union President Rosenstein explained that the information was being sought in order to enable the Union to evaluate whether the decisions not to reappoint were compliant with the “good faith consideration” requirement of Article 11, Section 6 of the collective bargaining agreement which states:

“Good faith consideration means the College may deny, reduce, or cancel an appointment or assignment of a Unit Member in the following circumstances:

- (a) Elimination or downsizing of an academic unit or program and/or merging of an academic unit or program within another academic unit or program which results in the elimination of a course taught by the Unit Member;
- (b) Creating of a full-time faculty position that absorbs an existing course taught by Unit Members or any other circumstance in which a course previously taught by a Unit Member will be taught by a full-time faculty member or non-bargaining unit member;
- (c) A reduction in the number of courses or sections offered in an academic term or the cancellation of a course or section as determined by the College in accordance with applicable policies and procedures as they may be amended by the College from time to time, which results in the elimination of a course taught by the Unit Member;
- (d) Elimination, decrease or modifications in course offerings due to changes in core curriculum requirements, or major or minor program requirements, which impacts the course taught by the Unit Member;
- (e) Availability of another individual(s) with significantly more relevant credentials and experience;
- (f) Non-reappointment based on:
  1. Unsatisfactory performance or conduct of a Unit Member;
  2. The Unit Member's failure to meet any of the responsibilities set forth in Article 9-Academic Freedom and Responsibility; and
  3. Misconduct of a Unit Member that is outside the scope of their employment with the College which would adversely affect the Unit Member's ability to teach or be a member of the College community.

Each appointment ceases at the end of the designated appointment period. Denials, reductions, or cancellations of appointments or assignments based on Article 11, Section 6. shall be subject to grievance and arbitration under Article 22. The sole issue subject to grievance or arbitration over the denial, reduction or

cancellation of an appointment or assignment under Article 11, Section 6, 11(a)-(d) shall be whether the College established that the conditions set forth therein existed or occurred, and if they did not, the applicable remedy. The standard of review for a grievance or arbitration alleging a violation of Article 11, Section 6, 11(e)-(f) shall be whether the College established by clear and convincing evidence that one of the conditions set forth in those sections has been met.” ALJD 3:29-45, 4:1-29, Jt. Ex. 2, pg. 22-23, Jt. Ex. 3.

In its email, the Union further explained that the information sought was critical in assessing the validity of Respondent’s separation packages offered to certain non-reappointed faculty. ALJD 6:1-5, Jt. Ex. 3. The packages offered to faculty contained waivers and releases of claims which would waive an individual’s right to grieve or sue Respondent. Tr. 20. The faculty had a 21-day deadline to sign the separation packages. Tr. 21. In its May 31 email, the Union requested Respondent hold in abeyance the deadline for signing those separation packages and release of claims or filing a grievance regarding non-reappointment. ALJD 6:7-10, Jt. Ex. 3. The Union’s request sought information for all the unit members who were given the separation package and release of claims who numbered approximately seven. Tr. 19, 47.

***C. Respondent’s Refusal to Provide Information Requested on May 31, 2017***

On June 2, 2017, Respondent, by its Deputy General Counsel Andrea Staff (Stagg), responded to the Union’s May 31<sup>st</sup> e-mail agreeing to meet and discuss non-reappointments and other non-related matters. ALJD 6:21-27, Jt. Ex. 4. Respondent, in its e-mail response to the Union did not respond to the Union’s request that the 21-day deadline to sign the separation packages or the deadline to file grievances be held in abeyance. Tr. 20.

On June 5, 2017, the Union e-mailed Respondent a list of individuals for whom it requested the status of their reappointment for the following year. ALJD 6:31-42, Jt. Ex. 5., Tr. 41.

On June 7, 2017, the Union e-mailed Respondent regarding its May 31 request for information and repeated its request that Respondent hold its 21-day deadline on signing separation packages in abeyance pending the parties' opportunity to meet and bargain over the releases and related issues. ALJD 7:8-14, Jt. Ex. 6. The Union also requested the date of birth for those individuals who taught in unit positions for the 2016 – 17 academic year. Tr. 20.

On June 7, 2017, Respondent responded by email and agreed to hold the 21-day deadline for the separation package in abeyance. ALJD 7:16, Jt. Ex. 7, Tr. 21. Respondent attached the birth date information the Union requested in its June 5 e-mail. Tr.21. Respondent, in its email, stated that it did not agree that good-faith consideration applies when there are offers of separation pay and offered three dates to meet and discuss the issue. ALJD 7:21, Jt. Ex. 7; Tr. 21.

On June 9, 2017, the Union and Respondent met to discuss an unrelated grievance and during that meeting discussed the Union's May 31 information request. Tr. 55. Present for the meeting for the Employer were Robin Beltzer, Human Resources Generalist, Virginia Ryan, Associate General Counsel, and Stagg. Tr. 55. Present for the Union were Sonam Singh, Rosenstein, Todd Rouhe and either Patrick Gallagher or Patrick Shepherd. Tr. 54-55. During the meeting, the parties reviewed a list of employees the Union sent to Respondent on June 5. The parties agreed to compare lists to ensure the parties were on the same page as to who was in the bargaining unit. ALJD 7:40-47.

Later in the meeting, Rosenstein discussed "good faith consideration" in the non-reappointment of faculty in the urban studies department. ALJD 8:1. Respondent, by Stagg, testified that during this meeting she explained to the Union that the parties have a fundamental misunderstanding of the role of good faith consideration and that it only applies to actual course

assignments and a faculty member's appointment is the final decision of the chair of the department and not subject to the good faith consideration requirement of Article 11. ALJD 8:5-11, Tr. 56.

Rosenstein asserts that she had explained to Respondent that the Union simply wanted credible reasons as to why a faculty member was terminated. Tr. 38. The Union did not believe it needed to revise its information request to separate the request for why members were not reappointed outside of the Article 11, Section 6 requirement as the May 31 request was clear that the Union wanted the reasons why the faculty were terminated. ALJD 13-15, Tr. 39. Respondent asserts that it left the June 9 meeting believing that it had responded to the Union's May 31 information request. ALJD 16-17, Tr. 57, 69.

On June 16, 2017, the Union e-mailed Respondent reiterating its May 31 request for information and requesting certain additional information. ALJD 8:23, Jt. Ex 8. Respondent replied by email requesting additional time to respond in order to consult with other offices regarding the existence and scope of responsive documents. ALJD 8:7-9, Jt. Ex. 9; Tr. 23.

On the same date, Staff responded to the Union's June 5 e-mail concerning faculty reappointments along with a list. ALJD 9:14-29. Thereafter, Respondent and the Union exchanged e-mails regarding the list. ALJD 9:29-35.

On June 22 and 23, 2017, the Union and Respondent met and bargained regarding the deadline for signing the separation package and release of claims and ultimately came to an agreement on a deadline. Tr. 60. Present for the Union were Singh and Rosenstein and present for the Employer were Kathleen Viterie, Beltzer and Stagg. Tr. 60.

Prior to new deadline bargained for regarding the signing of separation packages, the Union did not receive any documents responsive to the May 31 information request. Tr. 42.

***D. Respondent Provided Information to the Union regarding only one member after the Union filed a grievance regarding non-reappointment***

On May 23, 2017, the Union e-mailed Respondent requesting the reason why Georgette Fleischer (Fleischer), a bargaining unit member, was not offered reappointment for the following academic year. C.P. Ex. 1, pg. 3. Fleischer was offered a separation package and release of claims as a result of her non-reappointment. C.P. Ex. 1, pg. 4.

On May 24, 2017, Respondent replied providing an explanation as to why Fleischer was not reappointed. C.P. Ex. 1, pg. 2.<sup>3</sup>

On June 5, 2017, the Union filed a grievance on behalf of Fleischer. G.C. Ex. 2, pg. 26.

On June 6, 2017, the Union sent an information request to Respondent related to Fleischer's grievance. G.C. Ex. 2, pg. 24-26.

On June 12, 2017, Respondent replied to the Union's request for information by providing the Union with some information it requested pertaining to Fleischer. Tr. 24, G.C. Ex. 2, pg. 24. Respondent also requesting additional time through June 30 to respond to the remaining information. G.C. Ex. 2, pg. 24. Respondent eventually provided the remaining information the Union requested regarding Fleischer sometime in August and September 2017.

---

<sup>3</sup> In its response to the Union, Respondent asserted "in determining which adjuncts would be assigned sections in [First Year Writing], Wendy Schor-Haim took into account student evaluations and feedback... This combination of a reduced number of [First Year Writing] sections available to adjuncts and Georgette's poor performance in relation to other adjuncts teaching [First Year Writing] led the College to decide not to appoint her to teach in the Fall 2017 semester."

Tr. 73. The grievance is currently pending before an arbitrator. Tr. 26. Other than Fleisher, no other bargaining unit member has filed a grievance regarding their non-reappointment. Tr. 33.

#### **IV. ARGUMENT**

##### ***THE ALJ ERRED IN FAILING TO FIND THAT RESPONDENT VIOLATED SECTIONS 8(A)(1) AND (5) OF THE ACT BY FAILING AND REFUSING TO PROVIDE THE UNION WITH INFORMATION IT REQUESTED ON MAY 31, 2017***

In his Decision, the ALJ improperly found that Respondent did not violate the Act because it did provide the Union with a substantive response to the Union's information request when on June 7 and 9, Respondent explained its position that Article 11, Section 6 did not apply to faculty reappointment decisions. ALJD 12:7-10. The ALJ also found that to the extent that Respondent did not provide information that the Union requested, the failure to do so resulted from a misunderstanding in communications between the parties. ALJD 13:7-13.

##### ***A. The ALJ erred in accepting Respondent's position regarding "good faith consideration" without finding the Union waived its right to the information***

In his decision, the ALJ found that Respondent had adequately responded to the Union's request for information on June 7 and 9 by explaining its position that Article 11, Section 6 did not apply to faculty reappointment decisions. ALJD 12:7-11. The ALJ found that on June 16, the Union reiterated the same information request after receiving Respondent's explanation; it repeated the same question Respondent had already answered. ALJD 12:11-13. General Counsel contends the ALJ erred in finding that Respondent's statement of position regarding its contractual interpretation of Article 11, Section 6 was not a failure and refusal to provide information to the Union.

It is important to note that the parties were operating under an initial collective bargaining agreement in this matter. ALJD 3:1-4, Jt. Ex. 2. The undisputed evidence shows that on May 31 the Union requested “for each individual not re-appointed, the reason(s) pursuant to Article 11, Section 6 and all pertinent facts substantiating the decision not to reappoint.” ALJD 5:25-27. The Union’s request sought information for all the unit members who were given the separation package and release of claims who numbered approximately seven. Tr. 19, 47. The evidence shows that on June 7 Respondent emailed the Union and advised the Union that it did not agree with the Union’s assertion that good faith consideration had a role in its decision to offer separation pay. ALJD 11:16-20. Then on June 9, in an in-person meeting, Respondent again informed the Union that good faith consideration only applied to whether a faculty member is assigned to a particular course but not reappointments, and that department chairs have final say on reappointment for contingent faculty members. ALJD 11:22-26.

The Board has repeatedly held that a union has a statutory right to relevant information to allow it to decide if the underlying grievances have merit and whether they should be pursued at all. *Safeway Stores*, 236 NLRB 1126 at fn. 1 (1978). The requirement that the information be supplied does not require Respondent to abandon its contractual interpretation. *United-Carr Tennessee*, 202 NLRB 729, 731 (1973). A union may contractually relinquish or waive a statutory bargaining right as long as such waiver is “clear and unmistakable.” *United Technologies Corp.*, 274 NLRB 504, 505 (1985); *American Broadcasting Co.*, 290 NLRB 86, 88 (1988)(citing *Chesapeake & Potomac Telephone Co. v NLRB*, 687 F.2d 633, 636 (2d Cir. 1982).

The ALJ incorrectly found that *United-Carr Tennessee* was inapposite to the instant case. ALJD 12:fn7. Here, the Union requested information regarding Respondent’s decision not to reappoint contingent faculty members and framed part of the request around the contractual

requirements of Article 11, Section 6. Reading the information request as a whole, it is clear the Union was seeking the information as to why Respondent decided not to reappoint certain faculty members and whether those reasons fit into the “good faith requirement” of Article 11, Section 6. Respondent replied to the Union’s request, not with any relevant information responsive to its request, but as in *United-Carr Tennessee*, with its own interpretation of the contract; that that Article 11, Section 6 does not apply in offers of separation pay.<sup>4</sup> However, it is clear that it is the Union’s position that Article 11, Section 6 does apply in instances of reappointment. The question of whether or not Article 11, Section 6 applies here is strictly a question of contract interpretation and one that is currently before an arbitrator. ALJD 11:fn 6. The ALJ improperly chose Respondent’s interpretation of the contract over the Union’s even though he asserts that the question of interpretation is not before him.

Furthermore, the ALJ erred in accepting Respondent’s interpretation of Article 11, Section 6 without first discussing and finding a waiver by the Union. The ALJ inexplicably held, without citing to any relevant Board law, that Respondent’s view that the provision did not apply was an acceptable response to the Union’s request for information. Accordingly, the Board should find that the Respondent’s response that Article 11, Section 6 did not apply was not an adequate response to the Union’s information request, but instead, merely a statement of position. Thus, the Respondent should be required to provide the Union with the information requested.

---

<sup>4</sup> Stagg testified “we have fundamental different understandings of the role of good-faith considerations and offers of separation pay because we don’t believe that it has anything to do with offers of separation pay.” (Tr. 53).

***B. The ALJ erred in relying on case law that is inapposite to the case at bar, for the proposition that Respondent's refusal to provide information was merely a miscommunication***

The cases relied on by the ALJ in finding that the Respondent's refusal to provide information was merely a miscommunication between the parties are inapposite to the case at bar. ALJD 12:10-21. In *LTD Ceramics*, 341 NLRB 86, 87 (2004), the Board found a miscommunication among the parties and not a violation of the Act, as the employer thought it would be providing information to the union on a rolling basis, whereas the union thought they would receive the documents "in one lump" and excluded certain employees from the information request, as the employer believed they had an agreement with the union to do so. The Board found the Union did not raise any issues regarding missing information after it received its initial information request. *Id.* In contrast, here, the evidence shows that Respondent flatly refused to provide the Union with the information it had requested because under its interpretation of contract, the section of the contract the Union cited to in the initial May 31, information request does not apply to reappointment decisions. However, the evidence clearly establishes the union was seeking "all facts substantiating the reasons not to reappoint" to which Respondent does not reply to. The evidence also establishes that after Respondent informed the Union that it did not believe "good faith consideration" applies to reappointments, the Union informed Respondent that it had not provided the Union with any reasons why the bargaining unit members were not reappointed, therein expressing the view that an outstanding information request remained. Tr. 38.

In *Reebie Storage & Moving Co.*, 313 NLRB 510, 513 (1993), the Board also found a miscommunication among the parties, as the union requested certain information and the employer responded affirmatively that it would provide the union with the information it

requested, but also requested information from the union as well. The union did not respond to the employer's information request. *Id.* The union then renewed its request to the employer, over a month later, and after the parties had reached impasse, the employer replied that the information requested by both parties previously was of no assistance and should be dropped. *Id.* The union did not follow up with the employer's good faith response. *Id.* Here, while the record does establish that Respondent provided the Union with much of the information it requested regarding reappointment and bargaining unit members, contrary to *Reebie Storage*, after Respondent stated that it did not believe Article 11, Section 6 applied in reappointment decisions, the Union followed up on the request by discussing the issue in person on June 9, 2017 with Respondent and requested the information again in writing on June 16, 2017.

Significantly, the cases discussed above which were cited by the ALJ to support his decision do not involve a scenario where the parties are operating under an initial contract and the refusal to provide information is based on contractual interpretation. General Counsel submits that the undisputed evidence shows that Respondent understood the information the Union was requesting but simply wanted to play semantics with the Union regarding its information request in order to control the interpretation of the collective bargaining agreement.

***C. The ALJ erred in accepting Respondent's narrow reading of the Union's information request***

In his decision, the ALJ found that even though the Union requested "all pertinent facts substantiating the decision not to reappoint", Respondent's narrow reading of the information request, only as it related to Article 11, Section 6 was understandable given the references to it in the information request. ALJD 12:23-28, 13:1-2. The ALJ inexplicably agrees with Respondent that the Union should have modified or broadened its request after Respondent provided its

position that Article 11, Section 6 did not apply in cases of reappointment. ALJD 13:3-5. Surprisingly, the ALJ reads the Union's information request narrowly, even though the request itself encompasses a broader request "for all pertinent facts substantiating the decision to not reappoint."

Furthermore, the ALJ's conclusion in narrowly reading the Union's request is contrary to Board law. An employer may not simply refuse to provide information if they find the request to be ambiguous or overbroad, but must request clarification and/or comply with the request to the extent it encompasses necessary and relevant information. *United States Postal Service*, 337 NLRB 820, 824 (2002). The Board should find that the Union's request clearly stated the information the Union was looking for and Respondent violated Sections 8(a)(1) and (5) by not responding to the Union's request for information "for all pertinent facts substantiating the decision to not reappoint." Respondent's response that Article 11, Section 6 did not apply does not fulfill any obligation under the Act. If Respondent was confused by the Union's request, they should have asked for clarification. The ALJ erred in putting the onus on the Union to change its request, when it was clear as to what information the Union was seeking.

***D. The ALJ ignored the Union's testimony that it had discussions with Respondent that it wanted the reasons why contingent faculty were terminated***

The undisputed evidence shows that during the numerous conversations the Union had with Respondent, Rosenstein informed the Employer, with particularity to the urban studies department, that Respondent had not given the Union any credible reason for why faculty members were not reappointed. Tr. 38. Rosenstein testified that the Union did not alter its request because the request clearly stated that they were looking for all facts substantiating the

reason to not reappoint, and because the Union had informed Respondent that they had not received any information regarding Respondent's decision not to reappoint. Tr. 38.

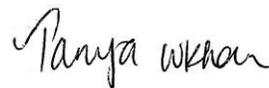
In his decision, the ALJ does not address this particular communication and asserts that the Union and Respondent likely miscommunicated with one another regarding the request for information and that the Union should have broadened the scope of the request. ALJD 13:3-6. The Union clearly communicated what information was sought. The Board should find the ALJ improperly ignored the Union's testimony.

## **V. CONCLUSION AND REMEDY**

For the foregoing reasons, General Counsel respectfully requests that the Board uphold its Exceptions and modify the Administrative Law Judge's decision and order and find that the ALJ erred in his decision, and find that Respondent violated Section 8(a)(1) and (5) of the Act. The General Counsel requests that the Board issue a recommended Order providing for any and all relief that may be deemed appropriate herein.

Dated: October 12, 2018  
New York, New York

Respectfully submitted,



---

Tanya W. Khan  
Counsel for the General Counsel  
National Labor Relations Board  
Region 2  
26 Federal Plaza, Room 3614  
New York, NY 10278  
212-776-8620