

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of

BARNARD COLLEGE

and

UAW LOCAL 2110

Case No. 02-CA-200574

RESPONDENT BARNARD COLLEGE'S
ANSWERING BRIEF TO THE GENERAL COUNSEL'S EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE

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**RESPONDENT BARNARD COLLEGE'S
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Respondent Barnard College ("Respondent" or the "College") submits the following Answering Brief to the General Counsel's Exceptions to the Decision of Administrative Law Judge Geoffrey Carter (the "ALJ"), dated September 14, 2018.

I. STATEMENT OF THE CASE

On February 28, 2018, the Regional Director for Region 2 issued the Complaint in the above-captioned matter. The Complaint alleges that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the "Act") by failing and refusing to provide Charging Party UAW Local 2110 (the "Union") the following requested information: "[f]or each individual not reappointed, the reason(s) pursuant to Article 11, Section 6 [of the parties' collective bargaining agreement] and all pertinent facts substantiating the decision not to reappoint." Respondent timely filed an Answer to the Complaint on March 14, 2018 denying any violation of the Act.

The parties tried this case in New York City, New York before 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, issued an Order assigning this case to Administrative Law Judge Geoffrey Carter to issue a decision based on the record made before the late Judge Landow.

On September 14, 2018, Judge Carter issued a Decision and Recommended Order recommending the Complaint be dismissed because Respondent "did provide a substantive response to the Union's information request, and to the extent that Respondent did not provide information that the Union desired, that failure resulted from a misunderstanding between the parties."

On October 12, 2018, Counsel for the General Counsel filed Exceptions to the Decision of the Administrative Law Judge, arguing that:

1. The ALJ erred in accepting Respondent's position regarding "good faith consideration" without finding the Union waived its right to the information. ALJD 12:7-11.
2. 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. ALJD 12:10-21.
3. The ALJ erred in accepting Respondent's narrow reading of the Union's information request. ALJD 12:23-28, 13:1-2.
4. The ALJ ignored the Union's testimony that it had discussions with Respondent that it wanted the reasons why contingent faculty were terminated. Tr. 38.

As shown below, the General Counsel's Exceptions are without merit and should be overruled.

Respondent therefore requests the National Labor Relations Board (the "Board") adopt the Decision of the ALJ in all respects.¹

II. THE BOARD SHOULD OVERRULE THE GENERAL COUNSEL'S EXCEPTIONS BECAUSE THEY ARE WITHOUT MERIT

This case arises out of Respondent's response to a single request for information made by the Union in a May 31, 2017 email to Respondent's Deputy General Counsel Andrea Stagg. In that email the Union requests Respondent provide "[f]or each individual not reappointed, the reason(s) pursuant to Article 11, Section 6 [of the parties' collective bargaining agreement] and all pertinent facts substantiating the decision not to reappoint." (emphasis supplied) This provision of the parties' collective bargaining agreement provides "Good faith consideration means the College may deny, reduce, or cancel an appointment or assignment of a Unit Member

¹ References to the ALJ's decision are noted as (ALJD page:line(s)), to Counsel for the General Counsel's Exceptions to the ALJD as (GC Exception --), to Counsel for the General Counsel's Brief in Support of Exceptions to the ALJD as (GC Brief --), to the transcript of the hearing in this case as (Tr. --), to Joint Exhibits as (Jt. Ex. --), to Counsel for the General Counsel's Exhibits as (GC Ex. --).

in the following circumstances...” The College responded to this information request by informing the Union that it did not apply the Article 11, Section 6 factors when making its decision not to appoint these contingent faculty members to teach in academic year 2017-2018.

Ms. Stagg testified at trial that the College did not apply the Article 11, Section 6 framework to faculty appointment decisions. Her testimony was unrebutted. Thus, the ALJ properly found that Respondent did not violate the Act by responding to the information request with a statement that Article 11, Section 6 did not apply to the decision not to appoint certain faculty members to teach in academic year 2017-2018. The ALJ also found that the overall context of the parties’ communications about the Union’s information request favored Respondent’s contention that it met its good faith bargaining obligations under the Act. The ALJ rejected the General Counsel’s argument that Respondent should have read the information request as a general request for the reasons Respondent did not appoint faculty to teach in academic year 2017-2018 instead of a request limited to the Article 11, Section 6 reasons for these decisions. The plain language of the information request supports this conclusion. Finally, the ALJ properly found that because Respondent and the Union generally were communicating and exchanging information about faculty appointment decisions, any misunderstanding about the scope of the May 31 information request could not form the basis of a violation of the Act.

A. Respondent Met Its Obligations Under the Act When It Answered The Union’s Information Request By Stating It Did Not Apply Article 11, Section 6 to Faculty Appointment Decisions (General Counsel’s Exceptions 1 and 3).

The Complaint alleges Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the “Act”) by, since on or about June 9, 2017, failing and refusing to provide the Union with information it sought in its May 31, 2017 information request. (ALJD 2:1-5) Specifically, the Complaint alleges that Respondent failed and refused to respond to the Union’s

request that Respondent “provide 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.”

(Complaint, ¶8(a)). The ALJ properly recommends dismissal of the Complaint because Respondent provided a substantive response to this request when it stated that it did not apply Article 11, Section 6 to the appointment decisions about which the Union sought information.

1. The ALJ Properly Found Respondent’s Response to the Information Request Was Lawful.

The ALJ correctly found that Respondent did not violate the Act when it answered the information request by “explaining that the Article 11, Section 6 did not play a role in reappointment decisions.” (ALJD 11:40-43). When the ALJ made this finding, he did not endorse Respondent’s interpretation of the contract. This question was not before the ALJ.² (ALJD 11:fn. 6) Rather, he credited the obvious – Respondent cannot provide an Article 11, Section 6 reason if it did not apply that section when making appointment decisions. Ms. Stagg testified that there was no information responsive to the request because Respondent did not apply the Article 11, Section 6 criteria to its decision not to appoint the faculty members about whom the Union inquired. (Tr. 47: 16-25, 48 1:25, 49:1-2). In her testimony, Ms. Stagg recounted three meetings between the parties in June 2017, in addition to the no fewer than nine email exchanges, where the parties discussed the issue of appointments of faculty to teach in academic year 2017-2018. (Tr. 50:18-21, 60:12-25, 61:1-12; Jt. Ex. 3-11) Throughout these communications, Ms. Stagg consistently maintained that Respondent did not apply the Article

² The General Counsel repeatedly notes the parties are operating under a first contract. To the extent this fact is relevant to the Board’s review of the ALJD, it favors the ALJ’s finding that Respondent acted in good faith when it responded to the Union’s information request. The parties have no arbitration decision to provide guidance on the dispute over what role Article 11, Section 6 should play in appointment decisions. Thus, Respondent acted in good faith when it responded to the information request by stating it did not apply the Article 11, Section 6 framework when deciding not to appoint certain contingent faculty members to teach in academic year 2017-2018.

11, Section 6 criteria to these appointment decisions. This testimony was not rebutted by any witness or documentary evidence. As the ALJ noted, Respondent did not contend that the information the Union requested was not relevant, but rather that it did not exist because the Union “incorrectly presumed that Respondent used the framework in Article 11, Section 6 of the collective bargaining agreement when Respondent decided not to reappoint certain contingent faculty members.” (ALJD 12:fn. 7)

In an effort to challenge the ALJ’s common-sense conclusion that Respondent met its obligations under the Act when it informed the Union it did not look to Article 11, Section 6 when making the appointment decisions, the General Counsel argues the ALJ erred by not reading the information request as going beyond Article 11, Section 6. No rule of plain English or legal construction permits an interpretation of the information request as a request for Respondent’s reasons outside the criteria set forth in Article 11, Section 6 for not appointing certain faculty members to teach in the 2017-2018 academic year. The Union requested that Respondent “provide 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.” (emphasis supplied) In this sentence the “decision not to reappoint” for which the Union seeks pertinent facts is a decision made “pursuant to Article 11, Section 6.” The ALJ, like Respondent, correctly read the Union’s request as inextricably linked to Article 11, Section 6.³

³ The General Counsel’s brief states “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 does not apply in cases of reappointment. ALJD 13:3-5.” (GC Brief 12-13) (emphasis supplied) This is not what the ALJ stated in his decision. To the contrary, the ALJ found “Perhaps, as the General Counsel and Union maintain, Respondent could have interpreted the information request more broadly based on the Union’s request for ‘all pertinent facts substantiating the decision not to reappoint,’ but Respondent’s more narrow interpretation was understandable given the references in the information request to Article 11, Section 6. And, as Respondent points out, perhaps the Union could have modified or broadened its information request after Respondent asserted that Article 11, Section 6 did not apply to faculty reappointment decisions, or after the parties completed the process of clarifying the employment status of

2. The ALJ Properly Found the Board's Decision in United-Carr Tennessee Inapposite Because Respondent Never Refused to Provide Any Requested Information.

The ALJ correctly read and found inapposite the Board's decision in United-Carr Tennessee. 202 NLRB 729 (1973). The General Counsel's reliance on this case is even more far-fetched than the efforts to read Article 11, Section 6 out of the Union's information request. In United-Carr Tennessee, the employer refused to provide the requested information – a performance evaluation – because it contended the requested information was not relevant or necessary to the union to carry out its duties. In that case, the employer argued the union had bargained away its right to the requested information because the contract clause at issue left the employer total discretion to determine merit increases.

As the ALJ correctly noted, at no point did Respondent argue the Union requested information that was not relevant or that the Union had waived its right to the information. (ALJD 12:fn7) Rather, Respondent simply informed the Union that no responsive information existed because Respondent did not apply the Article 11, Section 6 criteria when making appointment decisions. This is a far cry from the United-Carr Tennessee case in which the information the union requested existed, but the employer refused to furnish it because the employer considered it irrelevant. The facts in United-Carr Tennessee are in no way analogous to those here. Nor, do the legal underpinnings of that case have any bearing whatsoever on the issues here. In United-Carr Tennessee, the Board affirmed the Administrative Law Judge's holding that “where the employer withholds requested information which is potentially relevant in assisting a union intelligently to evaluate or process a grievance --unless the statutory right to such information is effectively waived in the contract—the Board's Collyer doctrine is not

the 79 faculty members that the Union identified on June 5, 2017. The parties, of course, did not take any of those steps.” (ALJD 12:27-28-13:1-6) (emphasis supplied)

applicable to such an issue” *Id.* at 731. None of these legal principles is at issue here. The ALJ thus was right to find United-Carr Tennessee inapposite.

B. The ALJ Properly Cited Cases in which the Board Found No Violation of the Act Where There Was Miscommunication About an Information Request (General Counsel’s Exception 2).

The General Counsel’s second exception (“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.”) mischaracterizes the basis of the ALJ’s decision and should be overruled. The General Counsel’s briefing on Exception 2 fails because it ignores the fact that the ALJ concluded that Respondent did not apply the Article 11, Section 6 framework when deciding not to appoint certain contingent faculty to teach in academic year 2017-2018. (ALJD 11:fn6) Because Respondent did not apply this framework, its response to the Union’s information request was not a matter of semantics as the General Counsel contends, but a factual assertion explaining why there was no information responsive to the information request. The ALJ expressly agreed with Respondent’s explanation when he recommended the dismissal of the Complaint. (ALJD 12:7-11) After concluding Respondent fully responded to the information request, the ALJ then appropriately relied on Board decisions in LTD Ceramics and Reebie Storage & Moving Co. for the proposition that “in any event,” in light of the context of the overall communications between the parties, there was no violation of the Act. (ALJD 13:7-13)

When reviewing the ALJ’s discussion of the LTD Ceramics and Reebie Storage & Moving Co. decisions, it is important to note the three grounds the ALJ found for dismissing the Complaint:

- (1) Respondent answered the Union’s information request on June 7 and 9, 2017 when it told the Union it did not apply Article 11, Section 6 when deciding not to appoint certain faculty to teach in academic year 2017-2018 (ALJD 12:7-11);

- (2) The overall context of the communications between the Union and Respondent demonstrated that Respondent did not refuse to answer the information request and was generally forthcoming with information about appointments (ALJD 12:-20); and
- (3) The General Counsel failed to persuade the ALJ that Respondent should have interpreted the information as a general request for the reasons why certain contingent faculty members were not appointed instead of a request for the reasons under Article 11, Section 6. (ALJD 12:22-27)

Thus, the ALJ's decision did not turn on a finding that Respondent failed to respond to the information request because of miscommunication between the parties.

After finding Respondent met its obligation to furnish information to the Union, the ALJ noted, "in any event, given that Respondent and the Union generally were communicating and exchanging information about various issues concerning contingent faculty reappointments, it is apparent that the parties had a misunderstanding in their communications about the scope of the Union's May 31 information request." (ALJD 13:7-10) The ALJ then concluded that on the facts before him any such misunderstanding would not support a finding that Respondent violated Section 8(a)(5) and (1) of the Act. (ALJD 13:10-13) The ALJ's conclusion is supported by the Board's decisions in LTD Ceramics and Reebie Storage & Moving Co. 341 NLRB 86, 87 (2004); 313 NLRB 510, 513 (1993). In LTD Ceramics, the Board held "the General Counsel has not demonstrated that the Respondent refused to provide relevant information. At most, the record indicates there was some misunderstanding about the Union's expectations after the Respondent provided the data it had available on May 7." 341 NLRB 86, 87 (2004). This is exactly what the ALJ found here – that Respondent fully responded and that to the extent Respondent misunderstood the scope of the Union's information request, the facts did not provide the basis for finding a violation of the Act. (ALJD 12:7-13, 13:7-13)

Similarly, in Reebie Storage & Moving Co., the employer provided some of the requested information, did not deny the union's request for information, and took no steps to foreclose or discourage the union's efforts to obtain relevant information. 313 NLRB 510, 513 (1993). The Board thus found no violation when the employer failed to provide some information based on a misunderstanding about what information the union was still seeking. Here, as the General Counsel acknowledges, Respondent "provided the Union with much of the information it requested." (GC Brief 12) Moreover, the ALJ expressly found "Respondent was generally forthcoming with information about reappointments, as it (among other things): provided the rationale for CFI not being reappointed when the Union requested it; met with the Union to discuss various issues concerning reappointments and separation payments; and worked with the Union to clarify the employment status of 79 employees that the Union identified." (ALJD 12:17-21) Considering the totality of the circumstances, the ALJ appropriately cited LTD Ceramics and Reebie Storage & Moving Co. for the proposition that given the overall communications between the parties, there was no violation of the Act.

C. The ALJ Did Not Ignore Any Testimony Regarding Discussions Between Charging Party and Respondent (General Counsel's Exception4).

The General Counsel cites one page of the trial transcript as undisputed evidence "that during numerous conversations the Union had with Respondent, [the Union's President Maida] 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." (GC Brief 13) This citation does not accurately convey the substance of the record. Moreover, this single page relied on by the General Counsel falls far short of establishing that the Union asked generally for the reasons Respondent did not appoint certain contingent faculty members to teach in academic year 2017-2018. Furthermore, the fact that

Respondent provided general reasons for the non-appointment of one faculty member when the Union requested that information without reference to Article 11, Section 6 makes it impossible to infer that Respondent understood the May 31 information request to seek similar information for other faculty members, but refused to provide it.

1. The Record Establishes that the Union Did Not Make a General Request for the Reasons Respondent Did Not Appoint Certain Faculty.

The page cited by the General Counsel contains testimony by Ms. Rosenstein in which she acknowledges the Union never altered the scope of the May 31 information request seeking the Article 11, Section 6 reasons Respondent decided not to appoint certain faculty to teach in academic year 2017-2018. This page also contains testimony in which Ms. Rosenstein states she does not recall if she ever asked Ms. Stagg to explain her statements to the Union on the role of good faith consideration in appointments. (Tr. 38) Ms. Rosenstein also admitted that “it never occurred to her” to specify for Respondent that the Union sought the reasons outside of Article 11, Section 6 supporting Respondent’s decision not to appoint certain contingent faculty to teach in academic year 2017-2018. (Tr. 38-39)

The record also establishes that as of June 9, Respondent believed it had fully responded to the Union’s information request and that Ms. Rosenstein had not said anything to make the Respondent believe otherwise. (Tr. 57:3-9, 60:12-25-61:1-12) Similarly, as the ALJ noted, “to the extent that the Union, on June 16, reiterated the same information request after receiving Respondent’s explanation, the Union essentially repeated a question that Respondent answered the week before.” (ALJD 12:12-14) Reading the transcript in its entirety makes clear that the exchange on page 38 of the transcript falls far short of establishing a request by the Union for reasons outside of Article 11, Section 6 for not appointing certain contingent faculty members to teach in academic year 2017-2018.

2. The Record Does Not Support an Inference that the Union Intended the May 31 Information Request to Include a General Request for the Reasons for Non-Appointment Because the Union Later Made a Request Without Reference to Article 11, Section 6 and Received a Full Explanation.

Nothing in the record supports a finding that the Union ever made clear to Respondent that its May 31 information request sought reasons outside of Article 11, Section 6 for Respondent's decision not to appoint certain contingent faculty to teach in academic year 2017-2018. However, the record clearly establishes that in the one instance in which the Union asked why Respondent did not appoint a faculty member without referencing Article 11, Section 6, Respondent timely responded with a description of the reasons leading to that decision. (Tr. 67:19-25-68:1-12; ALJD 4:34-40, 12:17-21)

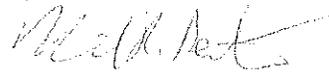
The above-referenced record evidence supports the ALJ's conclusion that Respondent understood the May 31 information request to be limited by its express terms to the reasons under Article 11, Section 6 for Respondent's decision not to appoint certain contingent faculty to teach in academic year 2017-2018. (ALJD 12:27-28-13:1-2) The ALJD also notes Respondent provided the reasons for not appointing one faculty member in response to an information request from the Union that did not refer to Article 11, Section 6. (ALJD 4:34-40, 12:17-21) The ALJ's decision includes ample record citations to support his findings regarding the scope of the May 31 information request and the adequacy of Respondent's response to that request. Moreover, the ALJ began his decision by stating, "Although I have included several citations in this decision to highlight particular testimony or exhibits in the evidentiary record, I emphasize that my findings and conclusions are not based solely on those specific citations, but rather are based on my review and consideration of the entire record for this case." (ALJD 2:fn2) Thus, the Board should overrule Exception 4 because nothing in the record supports the General Counsel's argument that the ALJ ignored any testimony in this proceeding.

III. CONCLUSION

For the foregoing reasons, the Decision of the ALJ should be adopted in all respects.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that on this 26th day of October 2018, a copy of the foregoing *Respondent Barnard College's Answering Brief to the General Counsel's Exceptions to the Decision of the Administrative Law Judge* was served via email and first class mail on:

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