

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

JUDITH AINSWORTH :
 :
 v. : Case No. PERA-C-20-103-E
 :
 TEMPLE UNIVERSITY :

FINAL ORDER

Temple University (Temple or Employer) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on June 22, 2021, challenging a Proposed Decision and Order (PDO) issued on June 2, 2021. Specifically, Temple excepts to the Hearing Examiner's conclusion that it violated Section 1201(a)(1) and (3) of the Public Employee Relations Act (PERA or Act) by choosing not to renew Dr. Judith Ainsworth's non-tenure track faculty position in retaliation for her attempt to enforce the promotion provisions of the collective bargaining agreement (CBA) between Temple and the Temple Association of University Professionals (TAUP or Union). Pursuant to an extension granted by the Secretary of the Board, Temple filed a brief in support of exceptions on July 2, 2021. The Union filed a response thereto on July 9, 2021, and, after an extension of time granted by the Secretary, a brief in opposition to the exceptions on July 29, 2021. Temple filed a reply brief with the Board on August 6, 2021.

The facts of this case are summarized as follows. Dr. Ainsworth was offered a one-year non-tenure track (NTT) faculty appointment to teach business communications in the Marketing and Supply Chain Management Department at Temple's Fox School of Business on July 18, 2016, which she accepted on July 21, 2016. (FF 3, 4). On March 3, 2017, Temple offered Dr. Ainsworth a two-year NTT faculty appointment with an expiration date of June 30, 2019, which she accepted on March 7, 2017. (FF 5, 6). In March of 2017 and 2018, Dr. Ainsworth submitted the annually required Faculty Development Plan (FDP), after which she met with the Chair of the Marketing and Supply Chain Management Department as part of the FDP process. (FF 7, 8, 9, 10). No criticisms of her performance were raised in either FDP conference. (FF 8, 10).

During the Fall of 2018, Dr. Ainsworth asked to be considered for a promotion, which was denied by the new Department Chair, Edward Rosenthal. (FF 11). Shortly thereafter, on December 10, 2018, Dr. Rosenthal emailed the Associate Dean for Faculty, Aubrey Kent, seeking to revise his previous recommendation of another two-year contract offer for Dr. Ainsworth because she had been causing him some problems. (FF 12). On January 14, 2019, Temple offered Dr. Ainsworth a one-year NTT faculty appointment, which she accepted in writing on March 19, 2019. (FF 13).

On April 23, 2019, Dr. Ainsworth met with Dr. Rosenthal regarding the FDP she submitted for the 2018-2019 school year and Dr. Rosenthal did not raise any performance issues at that time. (FF 14). During that meeting, Dr. Ainsworth raised her concerns to Dr. Rosenthal that she believed her 2019-2020 NTT contract was in violation of the CBA in that it required her to perform all three of Temple's missions (teaching, research and service) contrary to the provisions in the CBA that NTT faculty are not responsible

for all three parts of the school's tripartite mission. Dr. Ainsworth was concerned that other NTT professors were being placed in the same situation because she learned several of her colleagues had the same language in their individual contracts. (FF 15).

In May of 2019, Dr. Ainsworth exchanged emails with Dr. Kent concerning the NTT contractual issue and she also raised the issue with the Union President, Dr. Steve Newman. (FF 16, 17). Dr. Newman then had discussions with Temple's Senior Vice Provost Keven Delaney, and Dr. Kent about the disparity between the NTT contracts and the CBA. Contentious bargaining ensued between Temple and the Union when the latter presented a proposal to address the same concerns which had been raised by Dr. Ainsworth, specifically mentioning the employees at the Fox School. An agreement on the issue was eventually reached by the Union and Temple in October of 2019. (FF 17).

On October 3, 2019, Dr. Rosenthal communicated to Dr. Ainsworth that she was the subject of a complaint lodged against the school for her rude and demeaning behavior to customer service employees of an outside Information Technology vendor, Qualtrics. (FF 18). Despite Dr. Rosenthal meeting with Dr. Ainsworth about the complaint and telling her to stop contacting Qualtrics, Dr. Ainsworth attempted to contact Qualtrics in October and November 2019. (FF 19).

In November of 2019, one of Dr. Ainsworth's colleagues, Dr. Thomas Fung, nominated her for a promotion. Dr. Rosenthal initially refused to process the nomination, but later acknowledged that Dr. Ainsworth had the right to be considered for promotion. Temple has a written policy governing the promotional process in the CBA, which requires a candidate to be considered for promotion if that person is nominated by a colleague. (FF 20).

By email dated December 2, 2019, Dr. Kent suggested to Dr. Rosenthal that Dr. Ainsworth's NTT contract not be renewed for another year. (FF 21). Dr. Rosenthal responded to Dr. Kent that he was "fine not renewing [Dr. Ainsworth]" and that "last time we discussed, ... you thought it was safer to renew (for one year?) and then let her visa status disqualify her after June 2020..." (FF 22).

On January 8, 2020, Dr. Ainsworth learned that Dr. Rosenthal had not processed her nomination in violation of the CBA, after which she advised Union President Newman that Temple was not following the CBA guidelines for her promotion process. (FF 25, 26). By email dated January 10, 2020, Union President Newman requested a meeting with Dr. Rosenthal about the promotion issue. (FF 27). Dr. Rosenthal refused to meet with Dr. Newman regarding Dr. Ainsworth's promotion, which was uncommon for a chair to refuse to discuss such an issue with the Union President. (FF 29). However, on that same day, Dr. Rosenthal emailed Dr. Ainsworth to "straighten out [her] nomination process," and advised her that she could submit her supporting materials for evaluation by the Promotion Committee. (FF 30).

On January 31, 2020, the Promotion Committee made a recommendation to Dr. Rosenthal to decline Dr. Ainsworth's promotion and Dr. Rosenthal requested a meeting with Dr. Ainsworth regarding her individual contract. (FF 31, 32). On February 2, 2020, Dr. Ainsworth replied that she was not available to meet during the times suggested by Dr. Rosenthal and asked that a Union representative accompany her to any such meeting. (FF 33). Dr.

Rosenthal replied by email, advising Dr. Ainsworth that her NTT contract would not be renewed such that no meeting was necessary. (FF 34). On February 5, 2020, Dr. Ainsworth emailed Dr. Rosenthal requesting that they meet on February 7, 2020. (FF 35). Dr. Rosenthal agreed to meet with Dr. Ainsworth on February 7, 2020, but advised her that a Union representative was not welcome to attend the meeting. (FF 36). During that meeting, Dr. Ainsworth asked Dr. Rosenthal why her contract was not being renewed, to which he responded that her appointment "wasn't working out." (FF 37). Thereafter, by letter dated March 6, 2020, Dr. Ainsworth received notification that she was receiving a merit salary award for her performance during the 2018-2019 academic year, as she had every year. (FF 39).

On April 20, 2020, Dr. Rosenthal met with Dr. Ainsworth regarding her FDP for the 2019-2020 school year, after which he prepared a report summarizing the meeting. (FF 40, 41). His report referenced Dr. Ainsworth's "interpersonal problems" with IT, and "poor teaching," citing to student complaints, and specifically noting these things were on his mind because he "ha[d] to write a letter evaluating her for promotion to Associate Professor." (FF 41). By letter dated May 28, 2020, Dr. Ainsworth was notified that she had not been approved for promotion. (FF 42).

The Union filed its Charge of Unfair Practices with the Board on May 21, 2020, alleging that Temple violated Section 1201(a)(1) and (3) of PERA by declining to renew Dr. Ainsworth's NTT contract after she voiced her concerns over a discrepancy between her contract and the requirements of the CBA and "caused problems" for Department Chair Rosenthal by insisting that he follow the CBA's guidelines concerning nominations for promotion. On June 30, 2020, the Secretary of the Board issued a Complaint and Notice of Hearing setting forth August 10, 2020, as the date for an in-person hearing. Thereafter, the in-person hearing was cancelled, and a video hearing was scheduled. Hearings took place electronically on October 27, 2020, and January 28, 2021, with both parties being afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Following the filing of post-hearing briefs by both parties, the Hearing Examiner issued a Proposed Decision and Order (PDO) on June 2, 2021.

In the PDO, the Hearing Examiner concluded that Temple violated Section 1201(a)(1) and (3) of PERA in retaliation for Dr. Ainsworth's protected union activity of availing herself of the rights afforded her by the CBA in seeking a promotion in 2018 and again in 2019, and asserting to both Dr. Rosenthal and Dr. Kent that the terms of her NTT contract, and those of other NTT faculty, violated the CBA. The Hearing Examiner further concluded that this protected activity motivated Temple to refuse renewal of Dr. Ainsworth's contract, and that the reasons offered by Temple for this adverse employment action were merely pretextual.

As an initial matter, Dr. Ainsworth and the Union argue that Temple's exceptions should be dismissed because they do not comply with Section 95.98(a)(1)(i)-(iii) of the Board's Rules and Regulations. Section 95.98(a)(1) of the Board's Rules and Regulations provides, in relevant part, as follows:

The statement of exceptions shall:

(i) State the specific issues of procedure, fact or law, or other portion of the proposed decision to which each exception is taken.

(ii) Identify the page or part of the decision to which each exception is taken.

(iii) Where possible, designate by page citation or exhibit number the portions of the record relied upon for each exception.

(iv) State the grounds for each exception.

34 Pa. Code § 95.98(a)(1)(i)-(iv). However, the Board finds that Temple's exceptions were sufficiently specific to permit meaningful review. As such, the cases cited by Dr. Ainsworth and the Union are inapposite to this matter, and the Union's procedural argument is dismissed.

On exceptions, Temple asserts that the Hearing Examiner erred in his credibility determinations as well as in concluding that Dr. Ainsworth met her burden of proving the elements of her discrimination claim. Temple also claims that the Hearing Examiner fashioned an improper remedy which was punitive in nature.

It is well-settled that the Hearing Examiner's function is to resolve conflicts in evidence, make findings of fact from conflicting evidence, and draw inferences from those findings of fact. PLRB v. Kaufmann Department Stores, Inc., 29 A.2d 90 (Pa. 1942). The Hearing Examiner's findings of fact "must be supported by substantial, legally competent evidence." AFSCME District Council 85 v. Erie County, 36 PPER 5 (Final Order, 2005). "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. Finally, "[a]bsent the most compelling of circumstances, the Board defers to the credibility determinations of its hearing examiners." International Association of Firefighters Local 840 v. Larksville Borough, 48 PPER 82 (Final Order, 2017).

A review of the record supports all the Hearing Examiner's factual findings. The Union has failed to cite any compelling circumstances which would warrant reversal of the Hearing Examiner's credibility determinations, and an independent review of the entire record has revealed none. As such, the factual findings resulting from the Hearing Examiner's credibility determinations are supported by substantial evidence, and Temple's exceptions to the Hearing Examiner's factual findings must be dismissed.

Temple also excepts to the Hearing Examiner's legal conclusions derived from his factual findings. In particular, Temple contests the Hearing Examiner's determination that Dr. Ainsworth engaged in protected union activity and met her burden of proving Temple decided not to offer her another contract in retaliation for her protected activity.

To establish a *prima facie* claim of discrimination pursuant to Section 1201(a)(3), the Union bears the burden of showing that the employer knew that its employees were engaged in protected activity and that it took adverse employment action against the employees in retaliation for those activities. St. Joseph's Hospital v. PLRB, 373 A.2d 1069 (Pa. 1977). It is the motive which creates the offense. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). If a *prima facie* showing is established that the protected activity was the motivating factor in the employer's decision, the burden shifts to the employer to show that the action would have occurred even in the absence of that protected activity. Teamsters Local 776 v. Perry County,

23 PPER ¶ 23201 (Final Order, 1992). If the employer offers such evidence, the burden shifts back to the complainant to prove that the reasons proffered by the employer were pretextual. Teamsters Local 429 v. Lebanon County, 32 PPER ¶ 32006 (Final Order, 2000).

In the absence of direct evidence of an employer's unlawful motive, several factors may be considered to draw such an inference. City of Philadelphia, 26 PPER ¶ 26117 (Proposed Decision and Order, 1995). The factors which may be considered by the Board are, as follows: (1) the entire background of the case, including any anti-union activities by the employer; (2) statements of supervisors tending to show their state of mind; (3) the failure of the employer to adequately explain the adverse employment action; (4) the effect of the adverse action on unionization activities - for example, whether leading organizers have been eliminated; (5) the extent to which the adversely affected employees engaged in union activities; and (6) whether the action complained of was "inherently destructive" of employee rights. City of Philadelphia, supra, citing PLRB v. Child Development Council of Centre County, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978). Although close timing alone is insufficient to support a basis for discrimination, Teamsters Local 764 v. Montour County, 35 PPER 12 (Final Order, 2004), the Board has long held that the timing of an adverse action against an employee engaged in protected activity is a legitimate factor to be considered in determining the existence of anti-union animus. Berks Heim County Home, 13 PPER ¶ 13277 (Final Order, 1982).

Temple first claims that Dr. Ainsworth was not engaged in protected activity, and that even if she was, Temple was unaware of it. These claims are specious. It is undisputed that Dr. Ainsworth sought a promotion in the Fall of 2018 and then again in 2019 pursuant to the provisions of the CBA. It is also undisputed that in 2019, when the procedures outlined in the CBA for reviewing her promotion application were not being followed by her Department Chair, Dr. Ainsworth not only contacted him directly to rectify the situation, but she also enlisted the assistance of the Union by contacting President Newman, who then notified Dr. Rosenthal that he was required to follow the CBA's process for promotion nominations. Finally, it is equally undisputed that Dr. Ainsworth pointed out a conflict between the language of her own NTT contract and the requirements of the CBA for non-tenure track faculty, which would also impact other NTT faculty, to Dr. Rosenthal, Dr. Kent, and the Union. These actions are the essence of "protected activity" under PERA. See Brownsville Area School District, 14 PPER ¶ 14210 (Proposed Decision and Order, 1983), 15 PPER ¶ 15146 (Final Order, 1984) (holding that employee seeking to enforce a CBA where it would impact other bargaining unit employees is engaged in protected activity); PLRB v. City of Philadelphia, 13 PPER ¶ 13283 (Proposed Decision and Order, 1982), 14 PPER ¶ 14017 (Final Order, 1982) (same); Teamsters Local Union No. 773 v. Stroud Township, 52 PPER ¶71 (Proposed Decision and Order, 2021) (same).

Furthermore, Temple was clearly aware of both Dr. Ainsworth's attempt to enforce the promotion nomination process outlined in the CBA, and her complaint regarding the conflict in contractual language in her NTT contract and the CBA. The record shows that Dr. Ainsworth emailed both Dr. Rosenthal and Dr. Kent directly regarding her concerns over the discrepancy in the NTT contract and the CBA's language regarding faculty responsibilities, and then, getting no satisfaction, she involved the Union in the issue. (N.T. I 24-30; N.T. II 7, 120-121; Union Exhibits 3, 14). Further, in August of 2019, the Union submitted a contract proposal to Temple specifically to address the NTT contractual language issue Dr. Ainsworth had raised as to all NTT faculty,

and the matter was resolved via a side letter to the new CBA in October of that year. (N.T. I 28-20; N.T. II 115-124; Union Exhibit 14). As such, the Hearing Examiner very aptly stated that "it strains credulity" to assert Temple could have been unaware that Dr. Ainsworth was the individual who complained to the Union about the contractual issue after she specifically raised it with both Dr. Rosenthal and Dr. Kent, and the Union specifically referenced the Fox School during contentious bargaining on the issue. (PDO at 11). Therefore, Temple's exceptions regarding the first two elements of the discrimination test are dismissed.

Temple claims that even if Dr. Ainsworth engaged in protected activity of which Temple was aware, the Hearing Examiner erred by concluding that Temple's decision not to offer her another NTT contract was motivated by anti-union animus, and that the reasons offered for the non-renewal were pretextual. Pretext may be inferred by a hearing examiner if he finds, based on credible evidence and testimony, that the employer would not have taken the same action in the absence of the employee's protected activity. PLRB v. Sand's Restaurant Corp., 240 A.2d 801 (Pa. 1968).

Here, Temple asserts that Dr. Ainsworth had no entitlement to renewal of her one-year NTT contract, and that due to declining student enrollment and Dr. Ainsworth's poor performance, the Fox School simply chose to cut her from the faculty at the conclusion of her 2019-2020 contract without any regard for her protected activity. However, this argument ignores the chain of events that unfolded from the Fall of 2018 through the Spring of 2020 containing a myriad of instances where Temple administrators displayed unabashed displeasure when dealing with Dr. Ainsworth and the Union. The first such event occurred on December 10, 2018, when Dr. Rosenthal emailed Dr. Kent seeking to switch his recommendation for Dr. Ainsworth's contract renewal from two years to one year just a few short weeks after her first request to be considered for a promotion pursuant to the process outlined in the CBA. Dr. Rosenthal's stated reason for this reversal in position was that Dr. Ainsworth "had been causing [him] some problems." (FF 12). At that time, Dr. Ainsworth had received no criticisms of her performance in either of the two FDP conferences she had with the Chair of the Marketing and Supply Chain Management Department.

Moreover, not only did Dr. Rosenthal refuse to process Dr. Fung's promotion nomination of Dr. Ainsworth in the Fall of 2019 in violation of the CBA, but he refused to meet with Dr. Newman to discuss the issue upon the Union's request. Dr. Newman specifically stated that he had never encountered such a response during his tenure as Union President. (N.T. II, 161). Further, when Dr. Ainsworth sought to bring a Union representative to a meeting called by Dr. Rosenthal regarding the issue of her contract renewal, not only was this request denied, but Dr. Rosenthal cancelled the meeting, and advised Dr. Ainsworth that her contract would not be renewed. (Union Exhibit 6). Finally, during the time frame of December 2019 to January 2020, Dr. Rosenthal and Dr. Kent had discussions regarding a "safe way" to get rid of Dr. Ainsworth, as evidenced by an email between the two administrators dated December 2, 2019, in which Dr. Rosenthal stated to Dr. Kent that he thought it was better to renew her contract for one year and then let her visa status disqualify her thereafter. (N.T. I 107; Union Exhibit 10). Clearly, Temple was motivated by anti-union animus in refusing to renew Dr. Ainsworth's NTT contract after its expiration on June 30, 2020, as evidenced by Dr. Kent and Dr. Rosenthal attempting to hide their true motivations towards Dr. Ainsworth.

On exceptions, Temple asserts that the Hearing Examiner ignored Dr. Kent's role as the final decision maker on renewal of Dr. Ainsworth's contract. However, this argument is wholly without merit as there is substantial evidence of record showing that the decision not to renew Dr. Ainsworth's contract was a joint one. In fact, Dr. Rosenthal testified that he and Dr. Kent would "come together, and you know, make a final decision," (N.T. I 105-106, 108), and Dr. Kent testified that the renewal decision was not "a singular decision," because "[t]he chair needs to consult with others." (N.T. II 78). Dr. Kent testified that he relied "heavily" on Dr. Rosenthal's input and recommendations, stating that he "confirmed what [Dr. Rosenthal] thought and how he had come to his conclusions." (N.T. II 24). It is well-settled that where one with anti-union animus makes a recommendation to another who then implements an adverse employment action, the animus can be imputed to the decision maker. Perry County v. PLRB, 634 A.2d 808 (Pa. Cmwlth. 1993). As such, the Hearing Examiner properly found that Temple's decision not to renew Dr. Ainsworth's contract was motivated by her protected activity.

In support of its claim that it had a legitimate business reason for refusing to renew Dr. Ainsworth's contract, Temple cites to Central York Education Association, PSEA/NEA v. Central York School District, 40 PPER 29 (Final Order, 2009), as being factually applicable to the instant case. However, Central York is factually distinguishable. In Central York, the son of a prominent Union figure, Mr. Wycko, was hired for an IT position but was later fired. The termination came shortly after he created a new website for the Union to utilize during collective bargaining negotiations. The Union filed a discrimination charge with the Board, alleging that he was terminated due to protected activity. The Hearing Examiner acknowledged that close timing alone is not enough to infer anti-union animus, but when combined with other factors, can give rise to such an inference. In Central York, however, the record was devoid of such factors. Indeed, the record there showed that not only had Mr. Wycko sent many "emails to coworkers [that] were derogatory, sarcastic, humiliating and threatening," but he had also stolen school property and sold it on Ebay, after which he lied about it when questioned. Therefore, the Hearing Examiner found that the Union had not established a *prima facie* case of discrimination.

In contrast, here, Temple has not pointed to any conduct on the part of Dr. Ainsworth which was similar to that displayed by Mr. Wycko in Central York. In fact, when Dr. Ainsworth directly asked Dr. Rosenthal in person on February 7, 2020, why Temple was not renewing her contract, he replied only that her appointment "wasn't working out." (N.T. I 45-46). Importantly, Dr. Rosenthal did not tell Dr. Ainsworth that her contract would not be renewed because enrollment at the Fox School was declining, nor did he cite to her alleged "interpersonal problems" with Qualtrics. Further, Dr. Rosenthal did not mention any other performance-based issues nor even Temple's belief that Dr. Ainsworth's visa was set to expire. Although Temple's witnesses did proffer these "shifting reasons" for terminating Dr. Ainsworth at the hearing, they were not credited by the Hearing Examiner. Therefore, on this record, the Hearing Examiner's conclusion that Temple did not have a legitimate business reason for refusing to renew Dr. Ainsworth's contract is supported, and the exceptions thereto are dismissed.

Finally, Temple claims that the Hearing Examiner crafted an improper remedy because it does not restore the *status quo ante*, but rather, provides Dr. Ainsworth with a "new term of employment" because her previous contract expired on June 30, 2020. It is well-established that the Board has broad

discretion to fashion make whole remedies to effectuate the purpose of PERA. 43 P.S. §1303; North Schuylkill Education Support Personnel Association. ESPA/PSEA/NEA v. North Schuylkill School District, 36 PPER 1 (Final Order, 2005). Here, the Hearing Examiner ordered Temple to pay Dr. Ainsworth one year's salary as compensation for its discriminatory action based on the well-supported factual finding that she would have been offered a one-year NTT contract for the 2020-2021 academic year at Temple absent her protected union activity. As such, the award was not a "windfall" but an appropriate make-whole remedy under PERA.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in concluding that Temple violated Section 1201(a)(1) and (3) of PERA by declining to renew Dr. Ainsworth's contract in retaliation for her protected union activity. Accordingly, the Board shall dismiss the exceptions and make the Proposed Decision and Order final.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed by Temple University are hereby dismissed, and the Proposed Decision and Order issued on June 2, 2021 shall be, and the same is, hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, James M. Darby, Chairman, Albert Mezzaroba, Member, and Gary Masino, Member this sixteenth day of November, 2021. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

JUDITH AINSWORTH	:	
	:	
v.	:	Case No. PERA-C-20-103-E
	:	
TEMPLE UNIVERSITY	:	

AFFIDAVIT OF COMPLIANCE

Temple University hereby certifies that it has ceased and desisted from its violations of Section 1201(a) (1) and (3) of the Public Employe Relations Act; that it has made Judith Ainsworth whole by tendering full back pay for the wages she would have earned had she been offered a one-year employment contract for the period of July 1, 2020 through June 30, 2021, together with six (6%) percent per annum interest, along with all other benefits or emoluments of employment she would have been entitled to for the back pay period, including but not limited to out of pocket medical expenses and pension contributions; that it has posted a copy of the Proposed Decision and Order and Final Order in the manner prescribed therein; 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