

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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

PROPOSED DECISION AND ORDER

On May 21, 2020, Judith Ainsworth filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against Temple University (Temple or Employer), alleging that Temple violated Section 1201(a)(1) and (3) of the Public Employe Relations Act (PERA or Act) by scheduling her employment contract for termination at the conclusion of the 2019-2020 academic year in retaliation for her protected activity.

On June 30, 2020, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the matter to conciliation, and directing a hearing on August 10, 2020, if necessary. The hearing was continued without objection, and the parties ultimately agreed to appear in a virtual capacity, in light of the ongoing Covid-19 pandemic.

Hearings ensued on October 27, 2020 and January 28, 2021, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The parties each filed post-hearing briefs in support of their respective positions on April 22, 2021.

The Hearing Examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. Temple University is a public employer within the meaning of Section 301(1) of PERA. (N.T. I 7-8)¹
2. Judith Ainsworth was a public employe within the meaning of Section 301(2) of PERA prior to her separation from Temple. (N.T. I 8)
3. On July 18, 2016, Temple offered Ainsworth a non-tenure track (NTT) faculty appointment as an Assistant Professor of Instruction in the Marketing and Supply Chain Management Department in the Fox School of Business and Management. The offer specifically indicated, in relevant part, as follows:

This is a non-tenure track academic year position that will begin on August 29, 2016 and, unless renewed, will end on June 30, 2017. This offer carries no presumption of reappointment or tenure.

¹ The transcript for the October 27, 2020 hearing is designated as N.T. I, while N.T. II is the designation for the January 28, 2021 hearing.

(N.T. I 12-13; Employer Exhibit 1)

4. On July 21, 2016, Ainsworth accepted the offer and signed the one-year contract. (Employer Exhibit 1)

5. Ainsworth taught business communications courses for the 2016-2017 academic year, and on March 3, 2017, she received an offer to continue the same appointment for a two-year contract. Specifically, the offer stated, in relevant part, as follows:

This is a non-tenure track academic year position that will begin on July 1, 2017 and, unless renewed, will end on June 30, 2019. This offer carries no presumption of reappointment or tenure.

(N.T. I 13; Employer Exhibit 2)

6. On March 7, 2017, Ainsworth accepted the offer and signed the two-year contract. (Employer Exhibit 2)

7. On March 27, 2017, Ainsworth submitted her Faculty Development Plan (FDP) for 2016-2017, summarizing her teaching, research, and service progress during the prior year and outlining goals for each of those respective topics. (Union Exhibit 1)

8. On April 20, 2017, Ainsworth met with Michael Smith, who was the Chair of the Marketing and Supply Chain Management Department, as part of the FDP process. Smith reviewed her overall performance, which he described as outstanding. (N.T. I 16-17; Union Exhibit 1)

9. On March 31, 2018, Ainsworth submitted her annual FDP for the 2017-2018 academic year, once again summarizing her teaching, research, and service progress during the prior year and outlining goals for those topics. (Union Exhibit 1)

10. On May 14, 2018, Ainsworth met with Edward Rosenthal, who was in the process of taking over as the new Chair of the Marketing and Supply Chain Management Department, as part of the FDP process. Rosenthal noted that Ainsworth was making good progress and that her teaching was going well. He did not raise any criticism of her performance at that time. (N.T. I 16-18, 123-124; Union Exhibit 1)

11. During the fall of 2018, Ainsworth requested that Rosenthal consider her for a promotion. She did so with two other employes. Rosenthal refused to consider the request. (N.T. I 71-72)

12. By email dated December 10, 2018, Rosenthal indicated to Senior Associate Dean for Faculty at the Fox School Aubrey Kent the following, in relevant part:

I don't know if it is too late, but I wanted to revise a recent recommendation that I made to you regarding Judith Ainsworth. In a previous email, I had recommended a two-year contract renewal. Now I recommend to [sic] reduce that to one year only.

In the past couple of weeks, Judith has caused me some problems, and independently of that, I have had negative feedback from her

colleagues regarding Judith's combative and sometimes rude behavior on a curriculum committee and beyond.

I told Judith in person that I would not support her for promotion but she said she would put herself up anyway. After that, I sent her an e-mail making it even clearer (and in writing) that I would not support her. She did not bother to respond to that email.

Anyway, I'd be happy to discuss further with you, but if it is not too late, I strongly recommend to just do one year. Finally, and importantly, related to that, by my count, in mid-2020 Judith will have hit a total of 6 years in the US. I believe she is on an H1-B visa that has a max of 6 years. As you and I discussed, we (Fox/Temple) will not sponsor her for a green card. So, after the one additional year (2019-2020), she will have reached the end of her time here in Biz Com.

Please let me know if you want/need to discuss...

(N.T. I 146; Employer Exhibit 11)

13. On January 14, 2019, Temple offered Ainsworth another NTT faculty appointment for a one-year contract with a specific term of July 1, 2019 to June 30, 2020. Once again, the offer indicated that it "carries no presumption of reappointment or tenure." Ainsworth accepted the offer and signed the one-year contract on March 19, 2019. (Employer Exhibit 5)

14. On April 23, 2019, Ainsworth met with Rosenthal, as part of the FDP process that she submitted for the 2018-2019 academic year. Rosenthal noted that her teaching was going well and did not raise any criticism of her performance at that time. (N.T. I 19; Union Exhibit 1)

15. During the FDP meeting with Rosenthal on April 23, 2019, Ainsworth raised concerns that her individual NTT contract might be in violation of the collective bargaining agreement (CBA) between Temple and the Temple Association of University Professionals (TAUP or Union), who represents a unit of professional employees at Temple, including the NTT faculty. Specifically, Ainsworth testified that her 2019-2020 NTT contract required her to perform all three of Temple's missions, i.e., teaching, research, and service, while the CBA allegedly indicated that NTTs are not responsible for all three parts of the tripartite mission. Ainsworth testified that she was concerned that other NTTs were being placed in the same situation, as she learned that several colleagues had the same language added to their individual contracts. Ainsworth testified that Rosenthal's response was not satisfactory. (N.T. I 24-26, N.T. II 120-121; Union Exhibit 14)

16. In May 2019, Ainsworth had an email exchange with Kent about the NTT contractual issue, in which Kent confirmed that, as an NTT, Ainsworth was primarily responsible for teaching and minimal service duties. Kent also indicated that "[t]he language in the contract is boiler-plate [sic], and in the future perhaps we should eliminate it from the contracts for Business Communications to avoid confusion..." (N.T. I 28; N.T. II 7; Union Exhibit 3)

17. Ainsworth also raised the issue with the Union President, Steve Newman around the same time, and provided him with a copy of her individual NTT contract, after which Newman had discussions with Temple Senior Vice Provost Kevin Delaney, as well as Kent, in May 2019. At that point, the Union was in negotiations with Temple for a successor agreement and presented a proposal to address Ainsworth's concerns, which then led to contentious bargaining between the parties on that issue. The Union specifically mentioned the employees at the Fox School and provided a copy of Ainsworth's individual contract to Temple with her name redacted. Temple's lead negotiator, Associate Vice President of Human Resources Sharon Boyle, indicated that Temple would look into the matter. Temple and the Union eventually reached an agreement on the issue in October 2019, which is memorialized in a side letter to the new CBA. Ainsworth attended negotiations at least once and provided her name when management's bargaining committee requested that everyone do so. (N.T. I 28-30, N.T. II 115-124; Union Exhibit 14)

18. By email dated October 3, 2019, Rosenthal indicated to Ainsworth the following, in relevant part:

Dear Judith,

I'm not sure whether you are aware of the following, but Qualtrics has issued a formal complaint against you to the Fox School.² I am in receipt of transcripts that show you were rude and demeaning to Qualtrics customer service employees on multiple occasions. From this point on they will refuse to support your work.

There are records of your treating IT personnel here at Temple similarly on multiple occasions.

We need to talk about this. Please forward me your availability for a 1/2 hour conversation next week...

(Union Exhibit 15; Employer Exhibit 6)

19. By email dated October 7, 2019, Kent learned that Ainsworth was still contacting Qualtrics, despite Rosenthal meeting with her and telling her to stop. Ainsworth attempted to contact Qualtrics again in November 2019. (N.T. II 42-47; Employer Exhibit 14, 15)

20. In November 2019, Thomas Fung, one of Ainsworth's colleagues in the Marketing and Supply Chain Management Department, nominated her for a promotion. The next step in the promotions process permits the candidate to submit a dossier of supporting materials by a certain deadline. Ainsworth did not hear anything about where or when to submit her dossier for several weeks because Rosenthal initially refused to process the nomination. Rosenthal later acknowledged that he improperly refused to process the nomination and that Ainsworth had the right to be considered for promotion. Temple has a written policy governing the promotional process, which was promulgated pursuant to the CBA and which requires a candidate to be

² The record shows that Qualtrics is an outside vendor that apparently works with the faculty at Fox to support their research and survey needs. (N.T. I 50, 83, 151).

considered if that person is nominated by a colleague. (N.T. I 30-31, 156-157, 176, N.T. II 25-26; Union Exhibit 4, 5, 14)

21. By email dated December 2, 2019, Kent indicated to Rosenthal the following, in relevant part:

I want to send out NTT renewal/non-renewal letters in January.

We should meet soon to talk about these, as well as the long-term NTT situation in the department.

As you are aware, the financial situation in the school means being very diligent with these (especially with the new TAUP agreement increasing comp every year, including this one).

Here is what I'm thinking for 2020 renewals:

Ainsworth - no renewal...

[redacted] - no renewal

We should meet to talk about the total number of full-time faculty needed to deliver BizComm class...

(N.T.I 105-108; Union Exhibit 10)

22. By email dated December 2, 2019, Rosenthal replied to Kent and indicated the following, in relevant part:

Thanks for your message. Some of these are involved, so we should meet and discuss. I will try to catch you tomorrow afternoon or Thursday morning, if that sounds OK. My preliminary thoughts:

Ainsworth: I am fine not renewing, but last time we discussed, I believe you thought it was safer to renew (for one year?) and then let her visa status disqualify her after June 2020...³

(Union Exhibit 10)

23. Rosenthal testified that he did meet with Kent thereafter during the week of December 2, 2019 and that the decision to not renew Ainsworth's contract was "almost certain" at that time. Kent testified that, at that time, Temple was faced with declining enrollment numbers at the Fox School for the previous year, along with a decline in the projections for the following year, and he had already made a decision to reduce the number of NTTs who were teaching the business communications course for the following academic year. (N.T. I 114-116, 154, N.T. II 9-12, 48-49)

24. By email dated January 8, 2020, Ainsworth indicated to Rosenthal, in relevant part, as follows:

I understand that I was nominated for promotion, but it appears that the nomination may have slipped through the cracks and never reached the Dean's office. I have not had access to Owlbox to

³ The record shows that Ainsworth is a Canadian citizen who has been working in the United States on a visa. (N.T. I 18; Union Exhibit 1).

submit my portfolio and would like to get it set up so I can get my portfolio in. Could you please let me know if you passed along the nomination?

(N.T. I 31-34; Union Exhibit 4, 5)

25. By email dated January 8, 2020, Rosenthal replied to Ainsworth, in relevant part, as follows:

After giving the issue a lot of thought, I felt I could not support your nomination to be promoted, so it did not go any further. To be honest, the two primary reasons were one, that you have not been here long enough, in my opinion, to be promoted (because it takes time to accumulate exceptional accomplishments), and two, there have been a number of incidents such as the one with Qualtrics, or Temple IT, where your behavior toward support staff has been questionable. I know that this is disappointing, but promotion is not automatic and depends on a multidimensional assessment.

(N.T. I 31-34; Union Exhibit 4, 5)

26. Following receipt of Rosenthal's January 8, 2020 email response, Ainsworth went to Newman, the Union President, to advise him that Temple had not followed the guidelines for the promotions process. In doing so, she authorized Newman to contact Rosenthal on her behalf, which he did. She explained that she did so because she also applied the previous year with other colleagues, and Rosenthal had discouraged them. She testified that she wanted to make sure Temple was following the correct procedure. (N.T. I 36-38, 89; N.T. II 128)

27. By email dated January 10, 2020, Newman advised Rosenthal that Ainsworth had contacted him and raised concerns that the procedures set forth in the CBA were allegedly not followed in her application for promotion. Newman requested to meet with Rosenthal to resolve the potential grievance informally. (N.T. II 128-130; Union Exhibit 11)

28. By email dated January 10, 2020, Rosenthal replied to Newman, indicating: "[a]s I understand it, I am not required to meet with you at this time." (N.T. 128-130; Union Exhibit 11)

29. Newman testified that it is uncommon for a chair or another member of the administration to refuse to discuss such an issue. Newman could not recall even one case where that has happened since his tenure as president began in 2017. (N.T. II 130-131)

30. By email dated January 10, 2020, Rosenthal indicated to Ainsworth, in relevant part, the following:

I am in the process of straightening out your nomination process. Indeed, some weeks ago, Tom Fung sent me an email to nominate you for promotion. What he needs to do - and I have already informed him - is to send his nomination to me and Aubrey Kent and Evelyn Rush in our Dean's office. When this is done, Evelyn will be prepared to work with you to get your supporting materials up on Owlbox.

So, provided that you can send your supporting materials to us as soon as possible, we will see to it that you get evaluated by our department committee, chair, and Dean.

Please confirm receipt of this message and let me know when you will be able to furnish your supporting material to Evelyn Rush.

(N.T. I 35-36; Union Exhibit 5)

31. By memo dated January 31, 2020, the Promotion Committee made a recommendation to Rosenthal to decline Ainsworth's promotion application. (N.T. I 157-158; Employer Exhibit 12)

32. By email dated January 31, 2020, Rosenthal requested a meeting with Ainsworth regarding her individual contract. (N.T. I 41; Union Exhibit 6)

33. By email dated February 2, 2020, Ainsworth replied that she was not available during the suggested times and asked for a Union representative to accompany her. (N.T. I 41-42; Union Exhibit 6)

34. By email dated February 3, 2020, Rosenthal responded, in relevant part, as follows:

Judith, the purpose of the meeting was to give you the courtesy of letting you know in person that your NTT contract will not be renewed. We do not have to meet. Written notice of our intention not to renew will follow.

(N.T. I 42; Union Exhibit 6)

35. By email dated February 5, 2020, Ainsworth requested a meeting with Rosenthal on February 7, 2020. (N.T. I 42-45; Union Exhibit 6)

36. By email dated February 6, 2020, Rosenthal agreed to meet with Ainsworth on February 7, 2020. He also indicated, in relevant part, as follows:

Regarding a previous attempt to meet, you mentioned inviting a representative from the [U]nion. The nature of our meeting tomorrow is not disciplinary and therefore it would not be appropriate for a [U]nion representative to be present. In fact, if a representative from the [U]nion appears for the meeting, I will ask that person to leave...

(N.T. I 43-45; Union Exhibit 6)

37. On February 7, 2020, Ainsworth met with Rosenthal without a Union representative. During the meeting, Ainsworth asked for an explanation for why her contract was not being renewed. Rosenthal provided no substantive response and only stated that the appointment "wasn't working out." (N.T. I 45-46)

38. By letter dated February 5, 2020 from Dean Ronald Anderson, Temple indicated to Ainsworth, in relevant part, the following:

As you know, your current non-tenure track appointment in the Marketing and Supply Chain Management Department will expire on June 30, 2020. Pursuant to Article 15.C.1 of the TAUP contract, this will serve as notice that your contract will not be renewed...

(N.T. I 48-49; Union Exhibit 8)

39. By letter dated March 6, 2020, Kent notified Ainsworth that she was receiving a merit salary award for her performance during the 2018-2019 academic year. Ainsworth testified that she received a merit award for every year she was eligible during her time at Temple. Her award for 2018-2019 was more merit units than those received by a majority of the other people in the business communications program for the same year. (N.T. I 20-23, N.T. II 132-133; Union Exhibit 2)

40. Despite not being renewed, Ainsworth was directed to submit another FDP for the 2019-2020 year, which she did. She met with Rosenthal to discuss the FDP on April 20, 2020. (N.T. I 94-95; Employer Exhibit 9)

41. Rosenthal prepared a report, which allegedly summarized the April 20, 2020 meeting, and which provides, in relevant part, as follows:

...In teaching for 2019-2020, Dr. Ainsworth taught a total of 9 classes in the academic year (Fall 2019 and Spring 2020); all of them were sections of BA 2196 (Business Communications). In her FDP report, Dr. Ainsworth mentions applying innovative techniques to the class, some based on Team Based Learning (TBL), and others involving Peer Assess Prov for students to provide feedback about their teams. She has also completed the Fox Online Training Certificate. However, Dr. Ainsworth, in her FDP report, did not include any information at all about her Student Feedback Forms (SFF). Such information is expected to be submitted and discussed. When I pointed out this omission, Dr. Ainsworth told me that she had not expected to have to provide an FDP report, and that the time pressure to produce a report was the cause of the omission.

I mentioned that SFF data was important and had been on my mind because of my having to write a letter evaluating her for promotion to Associate Professor. In that evaluation letter from February 7, I had noted a recent downward trend in Dr. Ainsworth's SFFs in 2019...

In terms of research, I note that Dr. Ainsworth published on [sic] article in *Global Advances in Business Communication* (2019) and has a forthcoming book chapter for 2020. She is involved in additional research projects and has been active in attending and presenting at conferences.

Finally, in terms of her service activity, Dr. Ainsworth has been active in service but most of that service has been to the profession. At Temple, for 2019-2020, she has served on the Faculty Senate and two Faculty Senate subcommittees.

Part of the conversation regarding the FDP involved other events that unfolded after the Fall 2019 semester began. In Fall 2019,

Senior Associate Dean Aubrey Kent notified me that he had received some troubling communications from Qualtrics organization - that Dr. Ainsworth was heretofore not going to be supported by Qualtrics customer service on account of the way she treated their staff members. This behavior on her part was detrimental to the mission and the reputation of Temple University and the Fox School of Business. Dr. Ainsworth has had similar issues with Temple University's own tech support staff. Interpersonal problems, along with poor teaching, also played a role in her being dropped from teaching in our Accounting Department's MAcc program.

I reviewed all of these points with Dr. Ainsworth. The previous action by the Accounting department was also relevant to other discoveries this year about Dr. Ainsworth, namely, that in the dossier she submitted to be considered for promotion, there is no mention of the SFF reports from the MAcc classes. Furthermore, Dr. Ainsworth, in the promotion dossier, did not include the original pdf files that Temple University produces for the SFF reports. Instead, in the promotion dossier, Dr. Ainsworth produced bullet points that appeared to be student comments that she copy-pasted into the dossier. I pointed out to her that this practice would lead a reader to wonder whether the list of bullet points was the complete list of comments, or whether there might have been other comments that were not copied as bullet points in the dossier.

While the purpose of the FDP report is not to evaluate promotion or to consider activities outside of the relevant academic year (2019-2020), the reporting inconsistencies and omissions in Dr. Ainsworth's 2019-2020 FDP report are directly related to her other pattern of inconsistencies and omissions from other years.

Dr. Ainsworth was given the chance to rebut my claims and to make any other statements or furnish any other information. The substantive points that she contributed were the ones mentioned above...

(Employer Exhibit 9) (Emphasis in original)

42. By letter dated May 28, 2020, Dean Ron Anderson notified Ainsworth that she was not approved for a promotion in the Department of Marketing and Supply Chain Management. (N.T. II 64; Employer Exhibit 21)

43. Ainsworth did not receive any discipline from Temple for the alleged IT and student complaints in 2018, nor the alleged Qualtrics issues in 2019. (N.T. I 98; N.T. II 30-31; Union Exhibit 15)

DISCUSSION

In her charge, Ainsworth alleged that Temple violated Section 1201(a)(1) and (3) of the Act⁴ by scheduling her individual contract for

⁴ Section 1201(a) of PERA provides that "[p]ublic employers, their agents or representatives are prohibited from: (1) Interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this act... (3) Discriminating in regard to hire or tenure of employment or

termination on February 3, 2020 in retaliation for her protected activity. Temple, on the other hand, contends that the charge should be dismissed because Ainsworth failed to sustain her burden of proving all three elements of unlawful discrimination under the Act, and because Temple had legitimate nondiscriminatory reasons for the nonrenewal.

In a Section 1201(a)(3) discrimination claim, the Complainant has the burden of establishing the following three-part conjunctive standard: (1) that the employe engaged in activity protected by PERA; (2) that the employer knew the employe engaged in protected activity; and (3) the employer engaged in conduct that was motivated by the employe's involvement in protected activity. Audie Davis v. Mercer County Regional Council of Government, 45 PPER 108 (Proposed Decision and Order, 2014) citing St. Joseph's Hospital v. PLRB, 373 A.2d 1069 (Pa. 1977). Motive creates the offense. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). Once a prima facie showing is established that the protected activity was a motivating factor in the employer's decision, the burden shifts to the employer to demonstrate 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, on rebuttal, that the reasons proffered by the employer were pretextual. Teamsters Local 429 v. Lebanon County, 32 PPER ¶ 32006 (Final Order, 2000). The employer need only show by a preponderance of the evidence that it would have taken the same actions sans the protected conduct. Mercer County Regional COG, supra, citing Pennsylvania Federation of Teachers v. Temple University, 23 PPER ¶ 23033 (Final Order, 1992).

In addition, the Board has recognized that, in the absence of direct evidence, it will give weight to several factors upon which an inference of unlawful motive may be drawn. City of Philadelphia, 26 PPER ¶ 26117 (Proposed Decision and Order, 1995). The factors which the Board considers are: the entire background of the case, including any anti-union activities by the employer; statements of supervisors tending to show their state of mind; the failure of the employer to adequately explain the adverse employment action; the effect of the adverse action on unionization activities—for example, whether leading organizers have been eliminated; the extent to which the adversely affected employes engaged in union activities; and whether the action complained of was "inherently destructive" of employe 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 employe engaged in protected activity is a legitimate factor to be considered in determining anti-union animus. Berks Heim County Home, 13 PPER ¶ 13277 (Final Order, 1982).

Ainsworth has sustained her burden of proving the first two elements of a Section 1201(a)(3) discrimination claim. Indeed, the record shows that Ainsworth availed herself of the rights afforded her by the CBA and applied for a promotion in 2019. She even pursued a promotion in 2018 before Rosenthal essentially quashed it as the Department Chair. The record shows that the CBA between the Union and Temple specifically requires Temple to

any term or condition of employment to encourage or discourage membership in any employe organization...43 P.S. § 1101.1201.

issue guidelines for promotion at the university and at the college/school level. (Union Exhibit 14). Temple did, in fact, issue guidelines consistent with this obligation for the Fox School, which require a nomination by a full-time faculty member to be processed. (Union Exhibit 12). Ainsworth obtained a nomination by a full-time faculty member in November 2019. To the extent that Temple argues that Ainsworth's conduct in this regard is not protected, the Board has recognized that where an individual employe was attempting to enforce a collective bargaining agreement, seeking to induce group action, or acting on behalf of a group, when she protested alleged conduct by the employer, the activity is protected under Article IV of PERA.⁵ Teamsters Local Union No. 773 v. Stroud Township, 52 PPER 71 (Proposed Decision and Order, 2021) (citing Black-Knox Foundry & Mill Machinery, Inc. v. NLRB, 646 F.2d 113 (4th Cir. 1981)).

In this case, Ainsworth was trying to enforce the provisions of the CBA in late 2019 and early 2020 when she obtained a nomination for promotion and insisted that her application be processed. Likewise, the simple act of two employes, Ainsworth and Fung, attempting to obtain a promotion for one of them, is clearly lawful concerted activity for the purposes of mutual aid and protection. And, Ainsworth testified credibly that she wanted to make sure Temple was following the correct procedure. In any case, Ainsworth's conduct undoubtedly became protected when she enlisted the help of the Union in January 2020 to ensure that the promotions process was followed. Similarly, Ainsworth engaged in protected conduct in April and May 2019 when she raised the NTT contractual issue individually with both Rosenthal and Kent, arguing that her NTT contract violated the CBA. Ainsworth also enlisted the Union's help with the NTT contractual issue and attended negotiations. Once again, Ainsworth was attempting to enforce the provisions of the CBA and looking out for other NTTs who were placed in the same situation.

The record also shows that Temple had knowledge of Ainsworth's protected conduct given that she had specific interactions with Rosenthal and Kent on these issues repeatedly. Temple contends that Ainsworth failed to demonstrate knowledge of her enlisting the Union's help with her NTT contract, claiming that there were many NTT faculty concerned about the alleged contractual issue during negotiations and pointing to the Union's redaction of Ainsworth's name on the specific contract produced during bargaining. However, it strains credulity to think that Temple would have been unaware that Ainsworth was the individual who complained to the Union about this issue after she specifically raised it with both Rosenthal and Kent, the Union specifically referencing the Fox School during contentious bargaining on the issue, and Boyle's statement during bargaining that Temple would look into the matter. Ainsworth even attended negotiations and provided her name to management. Therefore, Ainsworth has established Temple's knowledge of her protected conduct. The only remaining issue then is whether Temple was motivated by Ainsworth's protected activity when it decided to not renew her contract after the 2019-2020 academic year.

Ainsworth has also sustained her burden of proving that Temple was unlawfully motivated when it refused to renew her 2019-2020 contract. Indeed, the record is replete with statements by Rosenthal reflecting his

⁵ Section 401 of Article IV provides that "[i]t shall be lawful for public employes to organize, form, join or assist in employe organizations or to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection or to bargain collectively through representatives of their own free choice...43 P.S. § 1101.401.

animus. To begin, Rosenthal expressly tied his recommendation to renew Ainsworth for only a one-year contract in December 2018, at least in part, to her attempts to seek a promotion through the contractual procedure, specifically indicating to Kent:

...I told Judith in person that I would not support her for promotion but she said she would put herself up anyway. After that, I sent her an e-mail making it even clearer (and in writing) that I would not support her. She did not bother to respond to that email.

(Employer Exhibit 11). This is rank evidence of Rosenthal's propensity to retaliate for Ainsworth's protected conduct, which he would exhibit again soon enough. Then, in November 2019, when Ainsworth formally obtained a nomination for promotion from one of her colleagues, Rosenthal initially refused to process the nomination and later acknowledged that he improperly did so after Kent rebuked him for it. (N.T. II 25). However, Rosenthal nevertheless refused to meet with the Union president in his January 10, 2020 email to even discuss the potential grievance informally. While Rosenthal and Temple claim that he declined to meet with the Union president simply because he had already reversed course and decided to process Ainsworth's nomination, he made no mention of such a notion in his actual January 10, 2020 response to Newman. This is especially problematic here given that Rosenthal also refused to allow Ainsworth to bring any Union representation with her for the meeting in early February 2020 when he notified her of the actual nonrenewal. But perhaps most tellingly, Rosenthal revealed his true motivation in his April 2020 FDP report which he directed Ainsworth to submit, despite the decision to not renew her contract. In that report, Rosenthal once again expressly complained about "having to write a letter evaluating her for promotion to Associate Professor." Even Kent testified that Rosenthal bemoaned the fact that Ainsworth availed herself of the promotions process. (N.T. II 24-25). This shows that Rosenthal had become fixated and obsessed with Ainsworth's protected conduct here. What is more, the December 2, 2019 email thread between Rosenthal and Kent, wherein they initially indicated their potential decision to not renew, was less than a month after Ainsworth obtained Fung's November 2019 formal nomination for promotion.⁶ Likewise, the December 2, 2019 email was also close in time to the eventual agreement on a successor CBA and side letter between the Union and Temple after contentious bargaining over the NTT contractual issue.

Furthermore, Ainsworth has also demonstrated that Temple's proffered reasons for the nonrenewal are pretextual in nature. In its post-hearing brief, Temple contends that it did not renew Ainsworth's contract primarily because of declining enrollment. In addition, Temple maintains that "Ainsworth's contract was not renewed because she could not have accepted another appointment [due to her visa status] and because of her escalating pattern of performance and collegiality issues." See Temple brief at p. 20. Temple points to Kent's testimony as support for these contentions. However,

⁶ While the December 2, 2019 email certainly predates the Union's involvement on the promotional issue, which came in January 2020, Rosenthal's statements and conduct in connection with the Union's involvement are nevertheless indicative of his true state of mind. In any case, the record shows that Temple did not make a final decision on the nonrenewal until at least January or February 2020. The Union's involvement, then, would have only fueled the already existing and plain animus.

I am unable to credit the testimony of Kent on these issues based on the facts of record here.

First of all, Kent's testimony is inconsistent with Rosenthal's testimony regarding Ainsworth's visa status. Rosenthal asserted that, as a Department Chair, he was not concerned with factors such as visa status, and that if a faculty member was someone he supported, then he would recommend that person for a longer contract and simply work out the visa issue. (N.T. I 121).⁷ ⁸ What is more, the record shows that, while Ainsworth may have been something less than a model employe at times, she did not receive any discipline whatsoever for these alleged performance and collegiality issues. In fact, her FDPs were always positive and contained virtually no criticisms of her performance or conduct, until of course, after the February 2020 decision to not renew her contract, at which point her 2019-2020 FDP became riddled with alleged deficiencies. As Ainsworth notes in her post-hearing brief though, the 2019-2020 FDP is nothing more than a thinly veiled post hoc justification for the nonrenewal. (See Complainant's brief at p. 17).⁹ Why Ainsworth even had to submit an FDP at all for the 2019-2020 academic year is a mystery. And, while the record does at least partially support Kent's testimony that enrollment was declining, based on his December 2, 2019 email exchange with Rosenthal, the record also shows that Kent and Rosenthal had discussions prior to the December 2, 2019 email exchange and that they were essentially plotting the "safer" way to get rid of her. (N.T. I 107; Union Exhibit 10). However, the record shows that Temple awarded Ainsworth more merit units than those received by a majority of the other people in the business communications program for the 2018-2019 year. As a result, Temple's proffered reasons for the nonrenewal cannot be accepted as credible or worthy of belief. To the contrary, the overwhelming evidence of record

⁷ Despite this acknowledgement, Rosenthal's testimony has not been accepted as credible in any significant regard. His disdain for the Union and Ainsworth's protected conduct was evident in his demeanor as a witness, along with his written statements in numerous documents of record. Moreover, his testimony at times bordered on the absurd, as he even suggested that Temple has no mechanism to discipline faculty, (N.T. I 124-125), which was directly refuted by the testimony of Kent, (N.T. II 30-31), along with the CBA, which expressly provides for the imposition of a written reprimand all the way to up termination, for just cause. (Union Exhibit 14). Even his testimony set forth directly above, relative to the visa status of employes, appears to conflict with the statements contained in his December 2018 email to Kent. As such, the testimony of Rosenthal is rejected as not credible and not persuasive.

⁸ The opinions of Rosenthal and Kent regarding Ainsworth's visa status are of no consequence anyway, given the conclusion that Temple was unlawfully motivated. In any event, Ainsworth testified that her understanding was that she could potentially work in the U.S. for at least another year given that she could recapture time spent abroad during her visa. In order to do so, however, she needed to receive a contract from Fox first. (N.T. I 54-55). The visa explanation was just one of several shifting reasons that Temple offered for the nonrenewal.

⁹ Rosenthal testified that the FDP process is not supposed to be disciplinary in nature, (N.T. I 123-125), as a way to explain why he did not note any alleged deficiencies with Ainsworth's performance or conduct in his 2017-2018 and 2018-2019 reports. However, Rosenthal went out of his way to include such complaints during the 2019-2020 FDP process, even when those complaints dated back to the previous academic years. (Employer Exhibit 9). This is plain evidence of pretext.

shows that Temple chose not to renew Ainsworth's employment contract in retaliation for her protected activity in direct violation of Section 1201(a)(3) of PERA.¹⁰

Finally, with regard to the remedy, Ainsworth argues in her post-hearing brief that, "[s]ince the standard minimum contract length for NTT faculty is one year, the [complainant] respectfully requests that [Ainsworth] be placed in the same economic position she would have been in had her employment contract been renewed for one additional year, and that she be made whole for all economic losses caused by [Temple] in not issuing her an additional one year employment contract." See Ainsworth's Brief at p. 19. This is consistent with the Board's policy of remedial relief. As such, Temple will be directed to make Ainsworth whole for all losses sustained due to the unlawful nonrenewal of her one-year contract, along with the Board's usual cease and desist and posting requirements.

CONCLUSIONS

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

1. Temple University is a public employer within the meaning of Section 301(1) of PERA.
2. Judith Ainsworth was a public employe within the meaning of Section 301(2) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. Temple University has committed unfair practices in violation of Section 1201(a)(1) and (3) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that Temple University shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of PERA;
2. Cease and desist from discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employe organization;
3. Take the following affirmative action which the examiner finds necessary to effectuate the policies of PERA:

¹⁰ Ainsworth also argues in her post-hearing brief that Temple committed an independent violation of Section 1201(a)(1) of PERA. However, the charge does not include such an allegation. Therefore, the only violation of Section 1201(a)(1) supported by this record is derivative, based on the violation of Section 1201(a)(3).

(a) Immediately make whole Judith Ainsworth 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;

(b) Post a copy of this Decision and Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to the bargaining unit employees and have the same remain so posted for a period of ten (10) consecutive days;

(c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Decision and Order by completion and filing of the attached Affidavit of Compliance; and

(d) Serve a copy of the attached Affidavit of Compliance upon the Union.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

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

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this 2nd day of June, 2021.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ John Pozniak
John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

JUDITH AINSWORTH :
 :
 : Case No. PERA-C-20-103-E
 v. :
 :
 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 complied with the Proposed Decision and Order as directed therein by immediately making whole Judith Ainsworth and 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 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

