

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

<p>In the Matter of:</p> <p>TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA,</p> <p style="text-align: center;">Employer,</p> <p>And</p> <p>GRADUATE EMPLOYEES TOGETHER-UNIVERSITY OF PENNSYLVANIA (GET-UP), a/w AMERICAN FEDERATION OF TEACHERS,</p> <p style="text-align: center;">Petitioner.</p>	<p>Case No. 04-RC-199609</p>
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The above-entitled matter came on for subpoena hearing pursuant to Notice before MARY R. LEACH, Hearing Officer, at the National Labor Relations Board, Region 4, 615 Chestnut Street, Philadelphia, Pennsylvania, 19106, in Hearing Room 3, on Wednesday, June 21, 2017, at 9:00 a.m.

A P P E A R A N C E S

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On Behalf of the Employer:

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	<u>E X H I B I T S</u>		
	<u>EXHIBITS</u>	<u>IDENTIFIED</u>	<u>RECEIVED</u>
1			
2			
3	Subpoena Exhibit 1	5	6
4	Subpoena Exhibit 2	6	6
5	Subpoena Exhibit 3	6	7
6	Subpoena Exhibit 4	7	7
7	Subpoena Exhibit 5	7	7
8			

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P R O C E E D I N G S

(Time Noted: 10:32 a.m.)

1 HEARING OFFICER LEACH: On the record.

2 Pursuant to these proceedings, the Employer presented a
3 subpoena to the Union and the Union filed a petition to revoke.
4 I am going to grant the petition to revoke. We are going to
5 open the hearing regarding the subpoena issue only to receive
6 documents and allow the parties to state their positions if
7 they wish.
8

9 So the hearing will be in order. This is a formal hearing
10 in the matter of 04-RC-199609, University of Pennsylvania and
11 Get-Up UPENN Union. The hearing officer appearing before the
12 Board is Mary R. Leach, L-E-A-C-H. We are creating a separate
13 record regarding the subpoena.
14

15 At this point, there are some documents that I need to put
16 in before we take the parties' positions. The first document
17 will be -- and these will be all Subpoena 1 through and
18 continuing. The formal papers -- the formal papers will be
19 Subpoena Exhibit 1 and they are the exact same formal papers
20 that are in the original record.

21 (Subpoena Exhibit 1 identified.)

22 HEARING OFFICER LEACH: Does the Union object to Subpoena
23 Exhibit 1?

24 MS. ROSENBERGER: No.

25 HEARING OFFICER LEACH: Employer?

1 MR. JOHNS: No.

2 (Subpoena Exhibit 1 received.)

3 HEARING OFFICER LEACH: And Subpoena Exhibit 2 is a copy
4 of the actual subpoena submitted by the Employer to the Union.

5 (Subpoena Exhibit 2 identified.)

6 HEARING OFFICER LEACH: Can the Union confirm that it
7 received the subpoena?

8 MS. ROSENBERGER: Yes.

9 HEARING OFFICER LEACH: Okay. Any objection to Subpoena
10 Exhibit 2 from the Union?

11 MS. ROSENBERGER: No.

12 HEARING OFFICER LEACH: From the Employer?

13 MR. JOHNS: No.

14 (Subpoena Exhibit 2 received.)

15 HEARING OFFICER LEACH: Okay, I'll move on. Subpoena
16 Exhibit 3 is the petition to revoke the subpoena, which I
17 believe everybody has a copy of this packet of information. I
18 provided it to the parties at the beginning of the hearing.
19 This will be Subpoena Exhibit 3.

20 (Subpoena Exhibit 3 identified.)

21 HEARING OFFICER LEACH: Any objection from the Union?

22 MS. ROSENBERGER: No.

23 HEARING OFFICER LEACH: From the Employer?

24 MR. JOHNS: No objection.

25 HEARING OFFICER LEACH: Okay.

1 (Subpoena Exhibit 3 received.)

2 HEARING OFFICER LEACH: Subpoena Exhibit 4 is the order
3 referring petition to revoke subpoena to the hearing officer.

4 (Subpoena Exhibit 4 identified.)

5 HEARING OFFICER LEACH: Does the Union object to this
6 document?

7 MS. ROSENBERGER: No.

8 HEARING OFFICER LEACH: The Employer?

9 MR. JOHNS: No objection.

10 (Subpoena Exhibit 4 received.)

11 HEARING OFFICER LEACH: And Subpoena Exhibit 5 is the
12 Employer's response to the Union's petition to revoke.

13 (Subpoena Exhibit 5 identified.)

14 HEARING OFFICER LEACH: Any objection by the Union?

15 MS. ROSENBERGER: No.

16 HEARING OFFICER LEACH: Employer?

17 MR. JOHNS: No.

18 HEARING OFFICER LEACH: Okay.

19 (Subpoena Exhibit 5 received.)

20 HEARING OFFICER LEACH: And I have a copy -- I don't know
21 that the Union received this?

22 MR. JOHNS: I believe we did cc them last night, yes.

23 MS. ROSENBERGER: I did, yes.

24 HEARING OFFICER LEACH: So everybody should have a copy of
25 the exhibits. And so I'll ask the Employer to go first to

1 state their position on the record.

2 MR. JOHNS: Yes, thank you, Madam Hearing Officer. I'll
3 try to be brief with respect to it. I think the issue before
4 the Region right now is whether to grant the Union's petition
5 to revoke the subpoena issued by the Board and served by the
6 University of Pennsylvania on the Union with respect to this
7 proceeding.

8 That subpoena which is in evidence so I will not read the
9 whole thing, but essentially it seeks documents in the Union's
10 possession related to issues that are being litigated in this
11 proceeding. Specifically, documents for example related to
12 instructional or research services rendered to the University
13 by petitioned-for students which reflect the payment of
14 tangible and/or material compensation for such services or the
15 exercise of control by the University over the performance of
16 such services. It goes on to request other documents relating
17 to one of the primary issues that has been litigated in this
18 case which is the status of the petitioned-for unit as students
19 or employees.

20 The Union's petition to revoke, however, raises several
21 grounds to object. I will note that the Union's petition to
22 revoke does not object on the basis that what is being sought
23 in the subpoena is relevant or irrelevant to the proceedings.
24 It is my understanding that despite that, that the Board has
25 made a ruling to grant the petition on the basis of relevance

1 and essentially states as follows with respect to what I
2 understand the position to be.

3 Number one, they say essentially these aren't relevant
4 because this is not a discovery proceeding and we're not going
5 to consider -- the only things we're going to consider is
6 what's put into evidence. Frankly, Madam Hearing Officer, that
7 is a complete perversion of the understanding of a subpoena.

8 A subpoena seeks documents that are relevant to a
9 proceeding. The party who produces those documents gives them
10 to their adversary. The adversary then would make a decision
11 as to whether or not those documents should be put into
12 evidence, at which point in time by the way the Board could
13 make a ruling as to relevance to the proceeding.

14 Again noting in this matter that the Union, themselves,
15 has not even made an objection on the basis of relevance, the
16 Board essentially says, well, you'll get it if they decide to
17 put it into evidence; if not, then it's not really relevant to
18 this proceeding. That, Madam Hearing Officer, is wrong. It is
19 wrong legally with respect to discovery standards and it is
20 wrong legally with respect to what would be produced by a
21 subpoena.

22 The Employer is entitled to submit a subpoena to the Union
23 that would require them to turn over documents that are related
24 to this proceeding. The Board, the Region in this instance, is
25 denying us this right. Not a single person has articulated

1 that these documents have no relevance to this proceeding.
2 They basically have said, well, if the Union doesn't submit
3 them then we're not going to hold it against you. But that
4 ignores the fact that we have the right to ask for documents
5 that we may want to put in, in our case.

6 We have the right to subpoena those documents. By the
7 way, understanding that the Union, themselves, has submitted a
8 subpoena to the Employer in this matter in which we have
9 produced more than 2,000 pages of documents, many of which are
10 largely publicly available and yet we put the time, and the
11 money, and the energy into gathering those documents and
12 producing them to the Union as part of this proceeding. And
13 what does the Employer get? Well, you get whatever they want
14 to give you and what they put into evidence. That, Madam
15 Hearing Officer, is not right.

16 The Board issues subpoenas. A subpoena is a discovery
17 type document. And there is no argument whatsoever that the
18 documents being sought here are irrelevant to this proceeding.
19 We have the right to get those documents based on that.

20 The second argument that we've heard as part of this
21 proceeding is basically, well, what do you care; you probably
22 have all of them, yourselves. We submitted last night as part
23 of that evidence -- not evidence. We submitted case law
24 support which says that is not a legitimate objection to the
25 production of documents pursuant to a subpoena.

1 Respectfully, Madam Hearing Officer, none of us has any
2 idea what the Union has except for the Union. The Board can't
3 make a ruling that everything the Union has we have. There is
4 no record to support that, no record whatsoever to sustain that
5 on any legal basis. We are entitled to see what they have
6 pursuant to that subpoena, a properly issued subpoena. There
7 is literally no legal support whatsoever for that argument.

8 The other argument by the way raised by the Union with
9 respect to the petition is that it would seek the identities of
10 individuals. The instructions in the subpoena specifically say
11 that that is not the case. And I want to put on the record
12 again that we have stated in this proceeding that the Union can
13 redact any identifying information related to specific student
14 identities. We are not seeking the showing of interest. We
15 are not seeking student identities. We are seeking documents
16 that may or may not be relevant to this proceeding and no one
17 can sit here and say you already have them because none of them
18 knows what they are. None of us knows what they are and yet
19 the Board has made a ruling on that basis.

20 I should also note that there is still pending a subpoena
21 from the Union to the Employer seeking certain information in
22 this proceeding, essentially asking us if possible to create a
23 statistical analysis of certain information. Under the Board's
24 standard, the Region's stated standard for this, we may very
25 well be reconsidering whether we respond to that subpoena. We

1 may very well petition to revoke because you know what, the
2 Union is going to get what we decide to put into evidence so
3 that's the only thing the Board is going to consider, so that
4 doesn't mean they can get those records, right? That's the new
5 standard that the Board has articulated in this case.

6 Madam Hearing Officer, it makes no sense whatsoever. This
7 is a valid subpoena seeking documents related to this
8 proceeding. We are entitled to a production of those documents
9 in this proceeding. That's the Employer's position.

10 HEARING OFFICER LEACH: Okay. Does the Union wish to
11 speak on this issue?

12 MS. ROSENBERGER: Just briefly. As we noted in our
13 petition to revoke, we're basically talking about documents
14 that the Employer has here. And as Mr. Johns noted on the
15 record one of the hearing days last week, it's the Employer's
16 position as articulated on that date that they are entitled to
17 know what the Union has. In other words, what the Employer
18 appears to be seeking here is to know of the stuff that the
19 Employer has what does the Union have through sources other
20 than the Employer.

21 We would submit to you that that goes to our argument that
22 what they are seeking is knowledge about who is providing
23 information to the Union, not simply knowledge about what is
24 relevant or information about what is relevant to this hearing.

25 With regard to other subpoenas, I think that what we're

1 talking about here is merely what's going on with regard to
2 this subpoena. We can argue about the other subpoenas at
3 another time. I would note for the record that the Employer
4 did make a number of objections in its response to our other
5 subpoena and we haven't fought them on that particularly. But
6 just to the extent that the Region believes that it's relevant
7 to a discussion about this subpoena, that's a more full
8 statement of what's going on with the Union's first subpoena.

9 As to the Union's second subpoena, yes, it is asking for
10 information and we gave the Employer an option of a different
11 -- rather than producing voluminous documents, to produce a
12 summary that is relevant to issues that both parties have
13 sought to litigate here that relates to who is eligible to vote
14 in the election, to help inform the regional director's
15 decision with regard to that. I guess we'll see whether there
16 is going to be a petition to revoke on that, although we think
17 that information is in both parties' interest.

18 To the extent that what the Employer is seeking here is
19 simply to know what of its documents the Union has, as Mr.
20 Johns had stated the other day that's a kind of broad discovery
21 type request. That's not what subpoenas are about. Subpoenas
22 are about gathering information for the case. They are not
23 about finding out what of my information the other side has
24 gotten their hands on. And for that reason we think and the
25 reason stated in our petition to revoke that the petition to

1 revoke was properly granted.

2 MR. JOHNS: I feel constrained to respond to two things.
3 Number one, I think that what Ms. Rosenberger is saying is not
4 an accurate statement of our position whether articulated
5 before or here. Number one, there is no evidence whatsoever in
6 the record to suggest that everything that the Union might
7 produce in response to the subpoena the Employer has in its
8 possession. I believe that Ms. Rosenberger is conceding based
9 on that response that if there were documents that were
10 potentially relevant to the subpoena, if we didn't have them I
11 don't see why they wouldn't be subject to a subpoena. But how
12 would we know because the Board hasn't allowed the production
13 of any information.

14 I would note that there very well could be documents that
15 the Employer does not have in its possession. The Union may
16 very well have documents relating to teaching or research
17 appointments by individual students, themselves. They very
18 well might have documents that the Employer would not have
19 access to, their own training plan with respect to teaching
20 that the Employer would not have access to.

21 There is no basis whatsoever for saying we're not entitled
22 to subpoenaed documents that are relevant to this proceeding.
23 I don't see it at all. And we're not saying, hey, we have
24 everything but we just want to see what you have. We're saying
25 give us what's relevant. We don't know, you don't know, nor

1 does Ms. Rosenberger know that everything that the Union might
2 potentially have is in our possession. Nor as we've stated is
3 that a legitimate objection to begin with under the law.

4 So, again, I agree that another subpoena would be a
5 different argument, but I would hope that the Region would
6 apply consistent standards. And I would note that with respect
7 to the eligibility formula where a party does not seek a
8 standard eligibility formula, which it is my understanding
9 based on the Union's statement on the record they are not
10 seeking a standard eligibility formula in this case, the burden
11 is on them. That's an issue essentially that they have put
12 into play in this proceeding. And based on what the Board has
13 stated to me, whatever the Union gets is whatever we decide to
14 put into evidence. You've got to build your case, however.
15 They're not entitled to just see what we have to see what they
16 can build their case. They get what we put into play as
17 exhibits in that. I don't think that's appropriate. It's not
18 the right standard and consistent rules should apply across
19 these proceedings.

20 HEARING OFFICER LEACH: Okay. Thank you to both parties
21 for putting on your position here. I just want to clarify a
22 couple of things. Number one, anything -- discussions that
23 don't have to do with the particular subpoena that is in the
24 record, I am not going to make any ruling on that. I haven't
25 seen the -- the only subpoena I've seen is the one that's

1 before me. So if there becomes an issue with a subpoena that
2 the Union has presented and the Employer decides to file a
3 petition to revoke then I will deal with that at that point.

4 With regard to the subpoena that's before us, I just want
5 to clarify we are only talking about Numbers 1 through 5. That
6 the Union has said that it does not have any documents
7 concerning Number 6. Is that true, for the Union?

8 MS. ROSENBERGER: Number 6 is the one about what's
9 submitted with the petition?

10 HEARING OFFICER LEACH: Yes. Documents including
11 affidavits or witness statements Petitioner provided to the
12 Board in support or as part of the Board's investigation.

13 MS. ROSENBERGER: What I said is that the only thing that
14 we have that's responsive to that is the showing of interest
15 and that that would be inappropriate to be produced in
16 response. And I believe Mr. Johns said they are not seeking
17 that.

18 MR. JOHNS: That is correct.

19 HEARING OFFICER LEACH: Okay. I think you also said you
20 didn't submit -- you didn't provide any affidavits or witnesses
21 statements. Correct?

22 MS. ROSENBERGER: No affidavits or witness statements,
23 right.

24 HEARING OFFICER LEACH: Okay.

25 MS. ROSENBERGER: The only thing that was submitted with

1 the petition was the normal forms and the showing of interest.

2 HEARING OFFICER LEACH: Okay. So just so we're clear that
3 we are talking about Numbers 1 through 5 here. And I -- the
4 purpose of creating the separate record is to preserve the
5 parties' positions here and the regional director will make a
6 ruling on that about whether or not his ruling is correct.

7 But right now I am going to grant the petition to revoke.
8 I understand the Employer's position is still that this is not
9 a broad discovery type of proceeding and we believe that the
10 documents that the Employer is seeking are in their possession,
11 even though I understand that you cited a case in your response
12 but that is what I'm responding. That's my response at this
13 time.

14 At this point, I do not think that it's relevant what the
15 Union has collected. You've kind of stated my position in
16 different ways, but that's my ruling. I don't believe just
17 because the Union collected something does not necessarily make
18 it relevant. And I do believe that typically this is a fact
19 finding investigation. We all understand what each party's
20 position is and each party understands their respective burden
21 so I don't have to go into that. But just because a party has
22 something does not necessarily mean that another party has a
23 right out have it. So that's my ruling at this point.

24 Does either party wish to present anything else?

25 MR. JOHNS: No.

1 HEARING OFFICER LEACH: Okay, so we are going to close the
2 subpoena record.

3 (Whereupon, at 10:49 a.m., the subpoena hearing in the
4 above-entitled matter adjourned.)

1

C E R T I F I C A T E

This is to certify that the attached proceedings done before
the NATIONAL LABOR RELATIONS BOARD REGION FOUR

In the Matter of:

TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA,

Employer,

And

GRADUATE EMPLOYEES TOGETHER-UNIVERSITY OF PENNSYLVANIA
(GET-UP), a/w AMERICAN FEDERATION OF TEACHERS,

Petitioner.

Case No.: 04-RC-199609

Date: June 14, 2017

Place: Philadelphia, Pennsylvania

Were held as therein appears, and that this is the original
transcript thereof for the files of the Board

Official Reporter

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