COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

TEMPLE UNIVERSITY HOSPITAL NURSES
ASSOCIATION, ET AL.

:

v. : Case No. PERA-C-10-188-E

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TEMPLE UNIVERSITY HEALTH SYSTEM, TEMPLE UNIVERSITY HOSPITAL $^{\mathrm{1}}$

PROPOSED DECISION AND ORDER

A charge of unfair practices was filed with the Pennsylvania Labor Relations Board (Board) on May 27, 2010, as amended on June 14, 2010, by the Temple University Hospital Nurses Association and the Temple University Hospital Allied Health Professionals, both affiliated with the Pennsylvania Association of Staff Nurses and Allied Professionals (collectively, PASNAP²), alleging that Temple University Health System and Temple University Hospital, (collectively, Temple) violated Section 1201(a)(1), (3), and (5) of the Public Employe Relations Act (PERA).³

On June 28, 2010, the Secretary of the Board issued a complaint and notice of hearing on the amended charge, wherein this case was scheduled for hearing on September 16, 2010, in Philadelphia, Pennsylvania. The hearing was rescheduled for October 6, 2010, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Each party filed a post-hearing brief.

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

FINDINGS OF FACT

- 1. Temple is a public employer.
- 2. The Unions designated herein as PASNAP are employe organizations.
- 3. On July 16, 2009, the parties started bargaining a successor collective bargaining agreement. On March 15, 2010, Temple presented PASNAP with its last, best and final offer, which PASNAP rejected. By letter dated March 18, 2010, PASNAP told Temple of its intent to institute a work stoppage at 7:00 A.M. on March 31, 2010. PASNAP instituted a work stoppage on March 31, 2010. By letter dated that same day, Temple informed PASNAP that it was implementing its last, best and final offer, as supplemented by the provisions of its letter of March 26, 2010. (N.T. 35, 36, 37; Temple Exhibit 1, 2).
- 4. By letter dated March 26, 2010, Temple told PASNAP that, at the commencement of any work stoppage, aside from implementing those items enumerated in its last, beat and final offer, it would no longer implement, *inter alia*, Article 3 of the parties' prior collective bargaining agreement. Article 3, titled "CHECK-OFF," required Temple to deduct PASNAP's dues assessment from union members who had signed the proper authorizations, and forward those amounts to PASNAP. (Joint Exhibit 1, 2, PASNAP Exhibit 3).

¹ The caption appears as amended by the Secretary.

² Part of the Secretary's caption amendment was to remove "PASNAP" after the name for each Complainant union. "PASNAP" is the acronym for Pennsylvania Association of Staff Nurses and Allied Professionals. For the sake of simplicity I will use PASNAP to refer to the Complainants, collectively, in this proposed decision and order.

 $^{^{3}}$ At the hearing, PASNAP withdrew all allegations in the charge, but for the issue discussed herein. (N.T. 30).

DISCUSSION

PASNAP filed this charge when Temple implemented its last, best and final offer, after a bargaining impasse and after PASNAP instituted a work stoppage. To put a finer point on it, PASNAP asserts that Temple violated PERA when it stopped withholding dues for PASNAP members who continued to work during the stoppage, because there was no impasse over the dues deduction section of the parties' collective bargaining agreement.

The contrariety is not over whether Temple could unilaterally implement its last, best and final offer after PASNAP's work stoppage. Rather, the dispute is whether Temple violated PERA when it unilaterally ceased automatically deducting union dues from those PASNAP members who worked during the stoppage.

Temple argues that it was bound by both Board law and Federal precedent to stop the automatic withholding of union dues at the expiration of the contract and in the face of a work stoppage, regardless of whether dues withholding was a matter of impasse in the negotiations for a successor agreement.

PASNAP, of course, takes the adversative view. It asseverates that only those issues in the employer's last, best and final offer, upon which the parties have reached impasse, may be unilaterally implemented after a work stoppage. And, notes PASNAP, automatic dues deduction was not a subject for which these parties had reached impasse.

Because PASNAP's interpretation of the law is correct, Temple has violated PERA. An examination of the applicable law shows why.

In Philadelphia Housing Authority, 22 PPER \P 22227 (Final Order, 1991), aff'd, Philadelphia Housing Authority v. PLRB, 620 A.2d 594 (Pa. Cmwlth. 1993), the Board again fleshed out its policy that under the statutory scheme of PERA, an employer was free unilaterally to implement its last, best and final offer, but only in situations where the parties had reached impasse over the subjects to be implemented and the employes had engaged in a work stoppage. 5

In Pittsburgh City Housing Authority, 21 PPER \P 21076 (Final Order, 1990), the Board found "a public employer commits an unfair practice by refusing to make dues deductions in accordance with the provisions of the expired collective bargaining agreement where the employes are still working and there is no proof of impasse over this issue." 21 PPER at 195. (emphasis added).

Clearly then, to pass muster, an employer may only unilaterally implement its last, best and final offer when the employes engage in a work stoppage, and there has been bargaining to impasse on the issues implemented.

Albeit, there are, in Temple's last, best and final offer, changes to the Article 3, "Dues Check Off" section. However, even with the changes to Article 3 in Temple's last, best and final offer, the provisions under which Temple must deduct dues are left intact. (Joint Exhibit 1, 2, PASNAP Exhibit 1, 2). Further, none of the changes in Temple's last, best and final offer to Article 3 alter the limited circumstances under which Temple is relieved from dues deductions.

There is no evidence that PASNAP and Temple reached impasse over whether Temple should continue dues deductions for PASNAP members. And, there is nothing in Temple's

⁴ Temple considers this work stoppage to be a strike, while PASNAP asserts it to be a lockout. For my purposes in this Proposed Order, PASNAP's work stoppage is sufficient to satisfy the second prong of the Board's test for when an employer may unilaterally implement its last, best and final offer, adopted by Commonwealth Court in Philadelphia Housing Authority v. PLRB, 620 A.2d 594 (Pa. Cmwlth. 1993).

⁵ As early as 1979, the Board was opining over the consequences of an employer's unilateral changes in mandatory subjects of bargaining absent a work stoppage and impasse between the parties. PLRB v. Williamsport Area School District, 486 Pa. 375, 406 A.2d 329 (1979). See also, St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977) (unilateral action by employer during no contract period while employes continue to work only serves to polarize process and would encourage strikes).

last, best and final offer to indicate that Temple was proposing to stop the practice of deducting dues from PASNAP members. 6

In its post-hearing brief, Temple calls my attention to Philadelphia Federation of Philadelphia, 438 Pa. 342, 327 A.2d 47 (1974).

According to Temple, this case makes it "clear that maintenance of membership provisions of collective bargaining agreements, such as dues deduction requirements, are restrictions upon the rights of employes and, thus, may only be enforced during the term of a valid agreement." (Temple's post-hearing brief at 10). What is clear is that the Philadelphia case case involved a totally different legal principal than does this case.

In the <u>Philadelphia</u> case our Supreme Court held that the retroactive application of a successor collective bargaining agreement, containing maintenance of membership and dues deduction provisions, could not nullify otherwise valid resignations of employes from union membership which occurred after the old collective bargaining agreement expired but before the new one was signed.

More simply stated, in the <u>Philadelphia</u> case the union sued because the employer refused to continue dues deductions under the new agreement for employes who properly resigned union membership after the old agreement expired, but before the new agreement was signed, and made retroactive. The Court concluded that the employes had validly resigned from union membership during the hiatus, when there was no valid contract, and that the retroactivity of the new agreement did not negate those resignations. How that case helps Temple, here, remains a mystery.

Likewise, the Federal authorities cited by Temple offer paltry precedent for its position. Temple calls my attention to <u>Bethlehem Steel Co.</u>, 136 NLRB No. 135, 50 LRRM 1013 (1962), ⁷ for the holding that dues check-off provisions don't outlive the collective bargaining agreement. However, since 1990, the Board has specifically refused to follow Bethlehem. See, Pittsburgh City Housing Authority, supra.

Moreover, the <u>Bethlehem</u> case involved a union shop situation where the collective bargaining agreement expressly provided that the dues check-off provision was in effect only so long as the then-current agreement was extant. So, the <u>Bethlehem</u> case doesn't help Temple, either.

The remaining federal cases cited by Temple either base their decisions on the $\underline{\text{Bethlehem}}$ precedent, or have language that states the dues check-off provision will not survive the contract's expiration.

Based upon this record, Temple violated Section 1202(a)(1) and (5) of PERA.

There remains the issue of the condign remedy. PASNAP asks me to find Temple solely liable for the uncollected dues. Temple, it goes without saying, calls that remedy punitive.

PASNAP refers me to two National Labor Relations Board (NLRB) decisions in which the NLRB ordered employers to be solely responsible for reimbursing the union for dues the employers did not deduct from employes. <u>Southland Dodge, Inc.</u>, 205 NLRB No. 54 (1973), Georgia Kraft Company, Woodkraft Division, 288 NLRB No. 9 (1988).

The remedies in both those Federal cases cited by PASNAP stem from the employers' brazen refusal to sign bargained-for labor agreements. Such is not the case, here, however. And, while I find Temple's legal arguments far from convincing, I am loath to

 $^{^6}$ In its last, best and final offer, Temple did propose the following alteration to Article 3 in the dues deduction section, "Change the word "month" to read pay." (Joint Exhibit 1, 2, PASNAP Exhibit 1, 2). That proposed alteration went to the frequency of deductions, not whether Temple would continue them.

⁷ Enf'd in relevant part sub nom. <u>Industrial Union of Marine and Shipbuilding Workers of America v. NLRB</u>, 320 F.2d 615, 53 LRRM 2878 (3d Cir. 1963), cert. den., 375 U.S. 984, 84 S. Ct. 516 (1964), on remand, 147 NLRB No. 151, 1964 CCH NLRB ¶ 13,237 (1964).

⁸ A union shop is generally recognized as one in which new employes must join the union within 30 days of their hire. <u>The Developing Labor Law</u>, vol. II, p.1492 (third edition, BNA, 1998).

call their actions brazen to the extent that I would make Temple individually liable for all unpaid dues. Still, it was Temple that violated PERA, not PASNAP, and certainly not the nurses who returned to work during the strike.

Therefore, the *comme il faut* remedy is that Temple will reimburse PASNAP an amount equal to the dues it should have paid for those employes who returned to work during the strike, plus 6% per annum on that amount. To the extent that Temple is unable to recoup those dues from employes who worked during the strike but who are now covered by Article 3, Section A3-2 or A3-3 of Joint Exhibit 1 and 2, Temple shall be solely responsible for the payment of those amounts, plus 6% interest, to PASNAP.

CONCLUSIONS

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

- 1. Temple is an employer within the meaning of Section 301(1) of PERA.
- 2. PASNAP are employe organizations within the meaning of Section 301(3) of PERA.
- 3. The Board has jurisdiction over the parties hereto.
- 4. Temple has committed unfair practices within the meaning of Section 1201(a)(1) and (5) of PERA.
- 5. Temple has not committed unfair practices within the meaning of Section 1201(a)(3) of PERA. 9

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the ${\tt Examiner}$

HEREBY ORDERS AND DIRECTS

that Temple shall:

- 1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed under Article IV of PERA.
- 2. Cease and desist from refusing to bargain collectively in good faith with an employe organization which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.
- 3. Take the following affirmative action which the Hearing Examiner finds necessary to effectuate the policies of PERA:
 - (a) Immediately reimburse PASNAP an amount equal to the dues it should have paid for those employes who returned to work during the strike, plus 6% per annum on that amount. To the extent that Temple is unable to recoup those dues from employes who worked during the strike but who are now covered by Article 3, Section A3-2 or A3-3 of Joint Exhibit 1 and 2, Temple shall be solely responsible for the payment of those amounts, plus 6% interest, to PASNAP.
 - (b) Post a copy of this decision and order within five (5) days of the date hereof and have the same remain so posted for a period of ten (10) consecutive days; and

 $^{^{9}}$ Nothing, other than the charge form, even mentions the alleged Section 1201(a)(3) violation. Therefore, that portion of the charge is dismissed, as abandoned.

(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.

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 (20) days of the date hereof, this decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this Seventeenth day of December 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

TIMOTHY TIETZE, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

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UNIVERSITY HOSPITAL

AFFIDAVIT OF COMPLIANCE

The Temple hereby certifies that it has ceased and desisted from violations of Section 1201(a)(1) and (5) of PERA; that it has reimbursed PASNAP an amount equal to the dues it should have paid for those employes who returned to work during the strike, plus 6% per annum on that amount. To the extent that Temple was unable to recoup those dues from employes who worked during the strike but who are now covered by Article 3, Section A3-2 or A3-3 of Joint Exhibit 1 and 2, Temple has paid those amounts, plus 6% interest, to PASNAP; and that it has served a copy of this affidavit on PASNAP at its principal places of business.

Signature/Date
Title

SWORN AND SUBSCRIBED to before me The day and year first aforesaid $% \left\{ 1,2,\ldots ,2,\ldots \right\} =0$

Signature of Notary Public