

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

DISTRICT 1199P, SERVICE EMPLOYEES :
INTERNATIONAL UNION, AFL-CIO, CLC :
 :
v. : Case No. PERA-C-99-200-E
 :
PENNSYLVANIA STATE UNIVERSITY¹ :

FINAL ORDER

On March 28, 2001, District 1199P, Service Employees International Union (SEIU) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) to the Proposed Decision and Order (PDO), dated March 8, 2001. In the PDO, the Hearing Examiner concluded that the Pennsylvania State University (PSU) did not engage in unfair practices in violation of Section 1201(a)(1), (3) and (5) of the Public Employee Relations Act (PERA) by refusing to arbitrate a grievance, which was initially filed while PSU operated the Milton S. Hershey Medical Center (HMC), where the refusal to arbitrate occurred while HMC was operated by the Penn State Geisinger Health System (PSGHS), a private, non-profit clinical health care provider under the jurisdiction of the National Labor Relations Board (NLRB).

By letter dated April 4, 2001, the Secretary granted SEIU's request for an extension to file its brief in support exceptions. On April 27, 2001, SEIU timely filed its brief. However, SEIU failed to serve a copy of its supporting brief upon counsel for PSU even after repeated attempts from the Board directing the Union to effectuate such service.² As of July 24, 2001, SEIU still had not served counsel for PSU. By letter, dated July 24, 2001, the Board Secretary informed SEIU and PSU that the Board could no longer permit SEIU to further delay the Board and that PSU had twenty (20) days to file a response brief. In the same letter, the Secretary also informed the parties that, as a result of the Union's omission, the Board would not consider SEIU's brief in support of exceptions. On August 1, 2001, PSU timely filed its brief in opposition to the exceptions. After a thorough review of the record and the exceptions, the Board makes the following:

AMENDED AND ADDITIONAL FINDINGS OF FACT

2. The grievance form contained a section entitled "remedy desired". In that section, the grievance specifically provided a request that Ms. Schaeffer receive "[r]einstatement to her position with full seniority and benefits and make whole." (Joint Exhibit 3).

¹ The caption appears as amended by the Hearing Examiner. The previous caption erroneously included the Milton S. Hershey Medical Center as a named respondent.

² Section 95.98(a)(4) of the Board's regulations provides that the party filing exceptions and a supporting brief shall serve a copy of both on all parties to the proceeding. 34 Pa. Code § 95.98(a)(4). Also, pursuant to Section 95.98(c), the due date for a response is determined by reference to the date that the responding party receives the exceptions and the supporting brief of the party filing exceptions. 34 Pa. Code § 95.98(c).

8. By letter dated March 4, 1999, SEIU asked PSU and PSGHS to arbitrate the grievance and alternatively offered to discuss settlement, the terms of which included reinstating Ms. Schaeffer to her former position with full backpay. (Stipulation 30; Joint Exhibit 9).

10. Susan Schaeffer was employed by PSU as a registered nurse in the electrophysiology lab, and she was a member of the bargaining unit represented by PNA. (Joint Stipulation of Facts ¶¶ 1, 2).

11. In late 1995, PSU discovered an accounting discrepancy between the amount of morphine dispensed from the inventory in the PYXIS system³ and the amount of morphine actually given to patients. At or about the time of this discovery, PSU placed Ms. Schaeffer on administrative leave pending an investigation by the police and HMC. On January 18, 1996, after the investigation, PSU terminated Ms. Schaeffer. (Joint Stipulation of Facts ¶¶ 5-9; Joint Exhibits 2-3).

12. As a result of the police investigation, criminal charges were filed against Ms. Schaeffer in the Dauphin County Court of Common Pleas. Consequently, PSU and PNA agreed to hold the grievance in abeyance pending the disposition of the criminal charges. (Joint Stipulation of Facts ¶¶ 10, 13).

13. As of July 1, 1997, and thereafter, PSU was not the employer of any of the registered nurses in the bargaining unit represented by SEIU and formerly represented by PNA. (Joint Stipulation of Facts ¶ 23).

14. On or about February 16, 1999, Ms. Schaeffer was acquitted of all criminal charges against her. (Joint Stipulation of Facts ¶ 29).

DISCUSSION

On March 31, 1994, PSU entered into a three-year collective bargaining agreement (CBA) with the Pennsylvania Nurses Association (PNA). PNA was certified by the Board as the exclusive bargaining representative of a bargaining unit of registered nurses employed by PSU at HMC at that time. Susan Schaeffer was employed by PSU as a registered nurse in the electrophysiology lab, and she was a member of the bargaining unit represented by PNA. In late 1995, PSU discovered an accounting discrepancy between the amount of morphine dispensed from the inventory in the PYXIS system and the amount of morphine actually given to patients. At or about the time of this discovery, PSU placed Ms. Schaeffer on administrative leave pending an investigation by the police and HMC. On January 18, 1996, after the investigation, PSU terminated Ms. Schaeffer. By grievance dated February 1, 1996, PNA grieved PSU's termination of Ms. Schaeffer's employment at HMC. As a result of the police investigation, criminal charges were filed against Ms. Schaeffer in the Dauphin County Court of Common Pleas. Consequently, PSU and PNA agreed to hold the grievance in abeyance pending the disposition of the criminal charges.

On January 17, 1997, PSU and the Geisinger Health System entered into a memorandum of agreement to create PSGHS effective July 1, 1997. On April 11,

³ PYXIS is the name of the automated narcotic dispensing system. Authorized personnel can retrieve narcotics from the PYXIS inventory by entering an authorized PIN number. The machine records the type and quantity of the narcotic dispensed as well as the employee to whom it was dispensed.

1997, the Board certified SEIU as the exclusive representative of the bargaining unit formerly represented by PNA. On July 1, 1997, PSGHS, a private, non-profit clinical health care provider, became the employer of the registered nurses at HMC and recognized SEIU as the exclusive representative of the bargaining unit of clinical nurses. As of July 1, 1997, and thereafter, PSU was not the employer of any of the registered nurses in the bargaining unit represented by SEIU and formerly represented by PNA. On July 25, 1997, PSU informed SEIU in pertinent part as follows:

With respect to Susan Schaeffer, since Ms. Schaeffer's situation is now before the Dauphin County Court, PNA and the University had agreed to put the matter on hold pending the outcome of that action. Nancy said that she had explained that to you when you and she spoke by telephone, and it was her impression you had concurred with that position.

(F.F. 6). Effective June 8, 1998, SEIU and PSGHS entered into a collective bargaining agreement covering the bargaining unit. On or about February 16, 1999, Ms. Schaeffer was acquitted of all criminal charges against her. By letter dated March 4, 1999, SEIU requested that both PSU and PSGHS arbitrate the grievance or alternatively discuss settlement, including reinstatement of Ms. Schaeffer to her former position with full backpay. By letter dated April 9, 1999, PSU refused to arbitrate the grievance.

SEIU's exceptions require the Board to determine whether the predecessor employer and respondent, PSU, or the successor employer, PSGHS, was obligated under PERA to arbitrate the subject grievance, on or about April 9, 1999, when PSU refused to arbitrate the grievance. SEIU argues that the holding of the United States Supreme Court in Howard Johnson Company, Inc. v. Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders Int'l Union, 417 U.S. 249, 94 S.Ct. 2236 (1974) governs the disposition of this case not, as the Hearing examiner concluded, John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 84 S.Ct. 909 (1964). The Hearing Examiner conducted a comprehensive examination of both Howard Johnson and John Wiley, which the Board need not repeat. However, the applicable factors and distinguishing characteristics of these cases are necessary to the analysis here.⁴

The United States Supreme Court, in John Wiley, held that federal policy favoring arbitration requires that the duty to arbitrate a grievance arising under a collective bargaining agreement between a predecessor employer and a union passes to a successor employer, under certain circumstances, even though the successor is not a signatory to the agreement. Wiley, supra. Pennsylvania law favors arbitration of grievances more than its federal counterpart, PLRB v. Bald Eagle Area Sch. Dist., 499 Pa. 62, 451 A.2d 671 (1982), and the Pennsylvania courts have held that the duty to arbitrate a grievance survives the expiration of the agreement under which the grievance arose. Delaware County Prison Employees Indep. Union v. Delaware County, 681 A.2d 843 (Pa. Cmwlth. 1996); PLRB v. Williamsport Area

⁴ PERA was patterned after the National Labor Relations Act and where the policies of the federal act are the same as PERA, the Courts of the Commonwealth and the Board will look to federal authority for guidance and may adopt it. In re Cumberland Valley, 483 Pa. 134, 394 A.2d 946 (Pa. 1978); Borough of Wilkensburg v. Sanitation Dep't, 463 Pa. 521, 345 A.2d 641 (1975); PLRB v. Loose, 402 Pa. 620, 168 A.2d 323 (1961); McKluskey v. Department of Transp., 391 A.2d 45 (Pa. Cmwlth. 1978).

Sch. Dist., 486 Pa. 375, 406 A.2d 329 (1979). Accordingly, under normal circumstances the liability for arbitrating the outstanding grievance in this case survived the expiration of the PSU-PNA CBA. Id. As noted by the Hearing Examiner, the Wiley Court relied upon the following factors for imposing the duty to arbitrate upon the successor employer, whether: (1) the dispute to be arbitrated concerned the action of the successor or occurred during the successor's control of the enterprise; (2) the successor substantially continued the operation or enterprise, as evidenced by the wholesale transfer of employees; (3) the predecessor employer ceased doing business as a separate entity and was thereby unable to effectuate a remedy; (4) the applicable corporation law provided that a successor employer, which purchases a concern by merger, assumes the liabilities of its predecessor, unless the terms of the merger agreement expressly state otherwise. Id.

Contrary to SEIU's argument (that the Supreme Court substantially overruled Wiley in its Howard Johnson decision) the Howard Johnson Court followed Wiley. The Howard Johnson Court held that the facts failed to satisfy the Wiley factors and support the conclusion that the Howard Johnson Company was a successor employer subject to the duty of arbitrating a grievance that arose while its predecessor was in control of the business operations. The Howard Johnson Court relied upon the following factors to distinguish that case from Wiley: (1) the subject of the grievance to be arbitrated, i.e. the termination of employees, was effectuated by the predecessor, not the successor employer; (2) the successor employer purchased only some of the predecessor's assets, rather than assuming and continuing the entire operation; (3) the predecessor continued to operate as a going concern; (4) the successor independently hired its own employees and hired only a small percentage of the predecessor's employees; and, most importantly, (5) an express term of the purchase agreement provided that the Howard Johnson Company "would not recognize and assume any labor agreements between the Sellers . . . and any labor organizations," and that it was further agreed that "[the Howard Johnson Company] does not assume any obligations or liabilities of the Sellers resulting from any labor agreements." Howard Johnson, 417 U.S. at 251-52, 94 S. Ct. at 2238. Accordingly, the Board will weigh the factors from Wiley as well as the distinguishing characteristics from Howard Johnson.

In this case, PSGHS executed a wholesale transfer of all clinical employees in the bargaining unit; recognized SEIU; and continued the clinical operations of HMC, formerly administered and conducted by PSU. Under Wiley, this evidence constitutes "substantial continuity" of the enterprise of providing clinical health care. As in Wiley, the matter complained of here resulted from the actions that occurred after PSGHS, the successor employer, assumed control over the clinical operations at HMC, which is unlike Howard Johnson where the disputed events occurred during the predecessor's ownership and control.

Also, there is no evidence on this record regarding the terms of the agreement between PSU and PSGHS or the nature and type of transaction between PSU and PSGHS. Accordingly, SEIU failed to establish whether an express term of that agreement provided that PSGHS, the successor, expressly refused to assume any obligations or liabilities of PSU resulting from any labor agreements, which was of crucial importance for the Howard Johnson Court when it imposed liability on the predecessor. SEIU, however, cites Golden State Bottling Company, Inc. v. NLRB, 414 U.S. 168, 94 S.Ct. 414 (1973) for the proposition that, absent evidence of the nature and character of the transaction (that is whether the transaction constitutes a merger,

consolidation, purchase of assets or partial purchase of assets) or an express refusal by the purchasing company to assume liabilities arising under labor contracts, "the general rule of corporate liability is that, when a seller sells all of its assets to another, the [purchaser] is not responsible for the seller's debts or liabilities" except under three express conditions, which SEIU argues are not presented here. Id. at 182, n.5, 94 S.Ct. 424, n.5. SEIU, however, has premised its argument on a convenient and favorable excerpt from the Court's language that, in full context, clearly projects the opposite meaning. The Court continued to state the following:

The perimeters of the labor-law doctrine of successorship, however, have not been so narrowly confined. . . . Successorship has been found "where the new employer purchases a part or all of the assets of the predecessor employer [and] where the entire business is purchased by the new employer." The refusal to adopt a mode of analysis requiring the [NLRB] to distinguish among mergers, consolidations, and purchases of assets is attributable to the fact that, so long as there is a continuity in the "employing industry," the public policies underlying the doctrine will be served by its broad application.

Id. (citations omitted)(emphasis added). Accordingly, for purposes of determining whether a purchasing company is a successor that is responsible for the liabilities arising under the predecessor's collective bargaining agreement, the focus is on the extent to which the successor has continued the enterprise rather than the nature or character of the purchase. The Board has already determined herein that PSGHS substantially continued PSU's former enterprise of operating a clinical health care facility.

Accordingly, on this record and absent evidence to the contrary, Ms. Schaeffer's grievance was a liability that survived the expiration of the PSU-PNA CBA, Delaware County, supra, and was assumed by PSGHS, by operation of law. Wiley, supra; Howard Johnson, supra; Golden State Bottling, supra. Therefore, the duty to arbitrate that grievance was also assumed by PSGHS. The fact that PSU did not cease to exist as an independent entity is the only similarity to the facts of Howard Johnson. However, that fact alone was not determinative of the Court's decision in that case. The crucial fact was that the Howard Johnson Company expressly refused to assume any liabilities relating to the collective bargaining relationship between its predecessor and the union. The fact that the predecessor employer in Howard Johnson remained in existence meant that it could provide a limited remedy, i.e., backpay, not reinstatement. In this case, however, the grievance specifically requested that Ms. Schaeffer receive "[r]einstatement to her position with full seniority and benefits and make whole." (F.F. 2). Also, in its March 4, 1999, letter to both PSU and PSGHS requesting arbitration, SEIU stated that it "would be willing to discuss a possible settlement which would include reinstatement into her previous position and full back pay." (F.F. 8). In light of the state of the record and the remedy being pursued by SEIU, i.e., reinstatement with full seniority, benefits and backpay, PSGHS is in a better position to effectuate such a remedy, if so ordered by an arbitrator, whereas PSU would be capable of providing the backpay portion of the remedy only.

Based upon the analysis in both Wiley and Howard Johnson, which the Board adopts herein, the Board concludes that the duty to arbitrate Ms. Schaeffer's grievance was owed by PSGHS at the time of the arbitration request. Having no duty to arbitrate the grievance, the respondent, PSU, did

not commit any unfair practices when it refused to arbitrate the grievance by letter dated April 9, 1999.

SEIU also excepts to the Hearing Examiner's determination that the record reveals no basis for finding that PSU ever agreed to arbitrate the grievance after PSGHS became the employer of the clinical nurses. SEIU argues that the record clearly establishes that PSU agreed to place the grievance on hold pending the disposition of the criminal charges against Ms. Schaeffer. SEIU contends that, because this agreement was made after PSU denied the final step of the grievance procedure, the "logical" inference is that PSU was agreeing that the matter could be arbitrated and it was leading SEIU to that belief.

The function of the hearing examiner, and the Board on exceptions, is to resolve conflicts in evidence, make findings of fact from those conflicts, and draw inferences from those findings. PLRB v. Kaufman Dep't Stores, 345 Pa. 398, 29 A.2d 90 (1942); Joint Bargaining Committee of the Pennsylvania Social Services Union v. PLRB, 449 A.2d 96 (Pa. Cmwlth. 1982); AFSCME District Council 88 v. Warminster Township, 31 PPER ¶ 31156 (Final Order, 2000); PLRB v. Stairways, Inc., 10 PPER ¶ 10098 (Final Order, 1979). Here, SEIU proposes its own "logical" inference from the fact that PSU agreed to hold the grievance in abeyance. However, SEIU's proposed inference, i.e., by agreeing to hold the grievance in abeyance, PSU implicitly agreed that it had a duty to arbitrate, is as speculative as the inference that PSU planned to challenge its duty to arbitrate Ms. Schaeffer's grievance, but decided not to do so until a request to arbitrate was made or until the matter was no longer in abeyance. It is also as speculative as the inference that PSU planned to shift the burden of arbitrating the grievance to PSGHS. Further, the record is devoid of any direct testimonial or documentary evidence showing that PSU expressly agreed that it had a duty to arbitrate this grievance. Therefore, given the multiple possible inferences and the absence of an express agreement, the Hearing Examiner correctly refused to entertain SEIU's speculations in determining that there is "no basis for a finding that PSU ever agreed to arbitrate the grievance after PSGHS became the employer of the registered nurses at the Milton S. Hershey Medical Center." (PDO at 5).

SEIU also argues that the Hearing Examiner erred by stating that there is no support in the record for finding that PSGHS refused to arbitrate the grievance. Whether or not PSGHS refused SEIU's April 9, 1999 request to arbitrate is not relevant to the resolution of any of the issues in this case. PSGHS is not the respondent charged with an unfair practice. The Hearing Examiner recognized the irrelevance of such a finding when he stated that even if the record did show that PSGHS refused to arbitrate, "the fact that PSGHS has refused to arbitrate the grievance does not compel the finding that PSU is obligated to arbitrate it." (PDO at 5). SEIU further argues that SEIU submitted documentation to the Board with its exceptions to the Secretary's decision not to issue a complaint that documents PSGHS's refusal to arbitrate. A review of SEIU's submission to the Board does reveal that SEIU submitted a letter in which PSGHS refused to arbitrate the subject grievance. However, this letter was not introduced with the other joint exhibits, nor was it referenced in the Joint Stipulation of Facts. Findings of fact must be supported by evidence that is not only substantial, but also legally competent. State System of Higher Educ. v. PLRB, 737 A.2d 313, 315, n.6; Teamsters Local 429 v. Lebanon County and Lebanon County Sheriff, 32 PPER ¶ 32006 (Final Order, 2000); Manuel Zavala-Lopez v. Kaolin Mushroom Farms, Inc., 29 PPER ¶ 29025 (Final Order, 1997). Unless a document is offered into evidence either at a hearing, where it is subject to challenge,

or as a joint exhibit, where both parties acknowledge the authenticity and veracity of the document, that document does not constitute legally competent evidence upon which a hearing examiner may rely to support a finding of fact. Therefore, PSGHS's letter of refusal constitutes an allegation, not legally competent evidence, and the Hearing Examiner properly determined that there is "no basis for finding that PSGHS has refused to arbitrate the grievance." (PDO at 5).

In its exceptions, SEIU also contends that the "Hearing Examiner erred in concluding that a refusal by PSGHS to arbitrate the grievance could not compel a finding concerning PSU's obligation to arbitrate." SEIU argues that, given the policy of PERA in favor of arbitration and given the Board's jurisdiction over PSU and the lack of jurisdiction of PSGHS, the refusal of PSGHS should compel a finding that PSU is obligated to arbitrate the grievance. The Board has already concluded herein that the duty to arbitrate this grievance rested with PSGHS. The refusal of PSGHS cannot, as a matter of law, result in the imposition of liability for an unfair practice on PSU. The Board cannot impose liability upon the respondents merely because SEIU is without a remedy against PSGHS before this Board.⁵ In Teamsters Local 771 v. PLRB, 760 A.2d 496 (Pa. Cmwlth. 2000), the union filed a charge against the Lancaster County Commissioners for the unfair labor practices of an agent of the Lancaster County Court of Common Pleas. The Commonwealth Court held that the Lancaster County Commissioners were not the proper respondents for the following three reasons: (1) because the county commissioners did not have the authority to hire, fire, direct or supervise the employees or agents of the Lancaster County Court of Common Pleas, the commissioners were unable to effectuate a Board order; (2) failing to charge the responsible employer violates fundamental due process by depriving the uncharged employer of notice and an opportunity to defend; and (3) there must be a causal relationship between the allegedly unlawful conduct and the party responsible for that conduct. Id.; United Mine Workers of America, Region 1 v. Blair County, 32 PPER ¶ 32048 (Final Order, 2001). Because the duty to arbitrate the grievance in this case rests with PSGHS, PSU's refusal to arbitrate was inconsequential. There was no causal relationship between the alleged unfair practice and the named respondent, PSU. Also, PSU cannot effectuate an arbitration award ordering reinstatement with full seniority and benefits, which was the primary remedy sought by SEIU in the grievance.

SEIU argues in its post-hearing brief that PSGHS ceased to exist as of July 1, 2000, and it is therefore no longer in a position to reinstate Ms. Schaeffer. However, the subsequent status of HMS is not part of the record in this case and thus cannot form the basis for any determinations to be made herein. SEIU made no attempt to reopen the record to introduce evidence regarding the present status of HMS between the filing of its post-hearing brief on February 12, 2001 (when the knowledge of the alleged cessation of PSGHS can, at the latest, be imputed on SEIU) and the present. Also, SEIU failed to preserve this argument (that PSGHS is no longer in a position to reinstate Ms. Schaeffer because it no longer exists) in its exceptions. Section 95.98(a)(3) of the Board's regulations provides that "[a]n exception not specifically raised shall be waived." 34 Pa. Code 95.98(a)(3). Therefore, SEIU has waived any claim that PSGHS is no longer in a position to implement the remedies sought by SEIU in arbitration.

⁵ The Board notes that the SEIU also had the right to pursue a federal claim against PSGHS to compel arbitration and, therefore, was not without a remedy.

In its exceptions, SEIU also claims that the Hearing Examiner erred by dismissing the application of Nolde Brothers, Inc. v. Local No. 358, Bakery and Confectionary Workers Union, AFL-CIO, 430 U.S. 243, 97 S.Ct. 1067 (1977) and Chester Upland School District v. McLaughlin, 655 A.2d 621 (Pa. Cmwlth. 1995), aff'd, per curiam, 544 Pa. 199, 675 A.2d 1211 (1996). SEIU seemingly argues that the facts of Nolde are more like the facts of the instant case than are the facts of Wiley. The Board disagrees.⁶

In Nolde, the United States Supreme Court held that an employer, which closes one of its plants after the expiration of the collective bargaining agreement, has a duty to arbitrate a dispute arising under that agreement and after its expiration. Nolde does not resolve the issue presented in this case, however, of which of two employers, a predecessor or successor, has the duty to arbitrate a dispute arising prior to the expiration of the CBA governing the dispute and during the predecessor's control of the enterprise. There is no successor employer in Nolde. SEIU contends that, because PSGHS is no longer in existence, there is no successor employer and the facts of this case become analogous to Nolde. However, as previously determined herein, the viability of PSGHS is not part of the record and it is not relevant to determining whether the duty to arbitrate the subject grievance rested with PSU or PSGHS in April of 1999. Therefore, the Hearing Examiner correctly determined that Nolde is inapposite. After a review of both Nolde, supra, and Chester Upland, supra, the Board agrees with the Hearing Examiner and concludes that SEIU's reliance upon those cases is misplaced.

After a thorough review of the exceptions and all matters of record, The Board concludes that the respondent, the Pennsylvania State University, did not commit unfair practices in violation of Section 1201(a)(1), (3) and (5) of PERA, by refusing to arbitrate the subject grievance on April 9, 1999.

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 to the Proposed Decision and Order in the above-captioned matter be and the same are hereby dismissed; and that the Proposed Decision and Order is hereby made absolute and final.

SEALED, DATED and MAILED pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, John Markle Jr., Chairman, L. Dennis Martire, Member, and Edward G. Feehan, Member, this twenty-first day of August, 2001. 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.

⁶ The SEIU failed to present an argument supporting its position that Chester Upland, supra, is somehow applicable or controlling.