

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

SERVICE EMPLOYES INTERNATIONAL UNION :  
: :  
v. : Case No. PERA-C-97-265-E  
: :  
PENNSYLVANIA STATE UNIVERSITY :  
MILTON S. HERSHEY MEDICAL CENTER :

**FINAL ORDER**

On September 2, 1998, the Service Employes International Union (SEIU) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) to the proposed decision and order (PDO) entered on August 14, 1998. In the PDO, the hearing examiner concluded that the Pennsylvania State University, Milton S. Hershey Medical Center (PSU) did not engage in unfair practices in violation of Section 1201(a)(1), (2), (3), (5) or (9) of the Public Employee Relations Act (PERA) by failing to bargain with SEIU over PSU's merger or affiliation with the Geisinger Foundation (Geisinger) to form the Penn State Geisinger Health System Foundation (PSGHSF) and the transfer of bargaining unit employes who provided patient care at the Hershey Medical Center to the PSGHSF. Pursuant to extensions of time granted by the Secretary of the Board, SEIU filed a brief in support of its exceptions on October 19, 1998. PSU filed a response to SEIU's exceptions and a supporting brief on November 6, 1998. After a thorough review of the exceptions and all matters of record, the Board makes the following:

AMENDED FINDING OF FACT

29. That PSU continues to operate the college of medicine with approximately 1000 employes, including "research assistants" who are not registered nurses and do not administer drugs to patients. (N.T. 72, 75, 89-91, 101-102, 184, 190, 239, 241-242, 262, 303)

DISCUSSION

The essential facts of this case are as follows. Prior to 1997, PSU administered the Hershey Medical Center as the successor trustee of the Milton S. Hershey trust. The medical center includes a college of medicine, a hospital, a children's hospital and outpatient clinics. The college of medicine is engaged in research and teaching. The hospital and clinics provide patient care.

In July 1996, PSU and Geisinger began discussing a merger of PSU's hospitals and outpatient clinics with Geisinger's health care system. PSU's primary motive for engaging in such discussions was economics. Indeed, PSU had concluded that this type of merger was necessary to ensure that its college of medicine would remain financially viable because appropriations by the Commonwealth of Pennsylvania were not keeping pace with inflation and other sources of funding (hospital and clinic fees, including physician billings) were declining.

On January 17, 1997, PSU and Geisinger entered into a memorandum of agreement to form the Penn State Geisinger Health System (PSGHS). Transition teams were formed to implement the terms of the agreement, and they targeted positions which involved patient care for transfer to the PSGHS.

On January 28, 1997, SEIU filed a petition for representation with the Board, by which it sought to supplant the Pennsylvania Nurses Association as the exclusive representative of a bargaining unit of nurses who were employed at the Hershey Medical Center. On April 10, 1997, PSU informed the members of the bargaining unit, including research nurses,<sup>1</sup> that they would be transferred to the PSGHS.

On April 11, 1997, the Board certified SEIU as the exclusive representative of the bargaining unit. Subsequently, on April 21, 1997, SEIU requested that PSU bargain "over the merger between Penn State and Geisinger Medical Center, the transitioning of employees from Penn State to the Penn State Geisinger Health System and the effects and impact of those decisions on the RNs at HMC."<sup>2</sup> On April 30, 1997, PSU informed SEIU that it was prepared to negotiate in good faith over the effects and impact of the merger and transitioning of registered nurses at the Hershey Medical Center to the PSGHS. On May 8, 1997, SEIU advised PSU that it was prepared to bargain over the matters referenced by PSU, as well as the merger itself. SEIU reiterated its request to bargain over the merger at a negotiation session held on May 22, 1997, but PSU did not respond to that request.

On June 23, 1997, the Court of Common Pleas of Montour County appointed PSU as the successor trustee of the Geisinger trust effective upon its affiliation with Geisinger. On July 1, 1997, PSU and Geisinger entered into a master affiliation agreement forming a nonprofit corporation which was identified as the Penn State Geisinger Health System Foundation (PSGHSF). The master affiliation agreement provided that PSU would remain solely responsible for the operation of the college of medicine pursuant to its obligations under the Hershey trust, and that "[e]xcept as specifically provided herein, PSU shall have no obligation to support the missions and purposes of the PSG Health System or its affiliated entities." The agreement also contained a non-compete clause stating that "[w]ith the exception of direct health care services offered to students and employees, the Pennsylvania State University shall not engage in the direct provision of health care or related services, in any manner, without the express consent of PSG Health System." The articles of incorporation of the PSGHSF require it to provide financial support to PSU's college of medicine, to maintain a teaching hospital, and to provide opportunities for PSU medical students to engage in research and educational and clinical activities at the teaching hospital or related health care facilities.

PSU and Geisinger both appointed eight members of the board of directors of the PSGHSF and two members of its executive leadership team. Under the bylaws of the PSGHSF, tie votes of the board of directors are broken by the vote of the board chair, who was appointed by Geisinger. Moreover, the bylaws provide that six of the eight directors appointed by PSU may be replaced by the Geisinger-appointed directors as of the fourth annual organizational meeting of the PSGHSF.

PSU sold the equipment and inventory of the hospitals and clinics at the Hershey Medical Center to the PSGHSF, and also assigned its license to operate a hospital to the PSGHSF. The PSGHSF then began operating the hospitals and outpatient clinics without interruption through a number of subsidiary corporations, including the Hershey Medical Center and the Penn State Geisinger Clinic. Approximately 4500 employees who had been

---

<sup>1</sup>Research nurses are registered nurses who work as "research coordinators" and ensure that research protocols are followed. As part of their duties, the research nurses administer drugs to patients.

<sup>2</sup> Although SEIU's unfair practice charge alleged that PSU had refused to bargain over the impact or effects of the merger on the bargaining unit employees, SEIU withdrew that portion of its charge when this matter was before the hearing examiner.

working for PSU, including managers, rank and file employees and the bargaining unit research nurses began working for the PSGHSF's Hershey Medical Center subsidiary. Approximately 400 physicians who had been working for PSU began holding dual appointments with PSU at the College of Medicine and with the PSGHSF at the hospitals and outpatient clinics. PSGHSF began collecting physician billings and revenues from the hospitals and clinics. PSU continued to operate the college of medicine with approximately 1000 employees including "research assistants" who are not registered nurses and do not administer drugs to patients.

PSU still owns the land and the buildings which comprise the Hershey Medical Center and leases the hospitals and clinics to the PSGHSF. PSU contracts with the PSGHSF for support services (e.g., housekeeping, maintenance and utilities) for its college of medicine. PSU also receives funding from the PSGHSF to support the college. PSU distributes financial aid which it receives from the Commonwealth of Pennsylvania (for the children's hospital) or from drug companies (for research) to the PSGHSF. For the 1997 tax year, employees who were transferred from PSU to the PSGHSF received W-2 forms from PSU for the first six months of the year, and W-2 forms from the Hershey Medical Center for the last six months of the year.

In dismissing SEIU'S unfair practice charge, the hearing examiner noted that an employer has no duty to bargain over its decision to completely and permanently cease providing a service, citing County of Bucks v. PLRB, 77 Pa. Commonwealth. Ct. 259, 465 A.2d 731 (1983). See also Youngwood Borough Police Department v. PLRB, 114 Pa. Commonwealth Ct. 445, 539 A.2d 26 (1988), appeal denied, 522 Pa. 599, 562 A.2d 323 (1989). The hearing examiner found that:

"The record shows that PSU, in affiliating with the Geisinger Foundation, completely and permanently eliminated the patient care services PSU had been offering through the members of the bargaining unit, among others, at the hospitals and the outpatient clinics of the Milton S. Hershey Medical Center, with those services now being provided by the PSGHSF in its own right. Inasmuch as PSU has not retained control over the provision of those services by the PSGHSF and thus cannot be said to have transferred bargaining unit work to the PSGHSF, the refusal to bargain charge must be dismissed."

(PDO at 11).

SEIU initially excepts to finding of fact 4 in the PDO "insofar as it characterizes the transaction between [PSU] and [Geisinger] as a 'merger'" (exceptions at 1). However, the referenced finding only concerns discussions between PSU and Geisinger, and does not contain any finding regarding the nature of the transaction that was ultimately agreed to. Accordingly, we find no merit in this exception. Nor is the outcome here dependent upon whether PSU and Geisinger entered into a "merger" or an "affiliation."

SEIU next excepts to the hearing examiner's failure to make certain additional findings which would allegedly show that PSU has a close and ongoing relationship with the Hershey Medical Center hospital and that contrary to the hearing examiner's conclusions in the PDO (to which SEIU also excepts), that PSU exercises control over the PSGHSF and did not go out of the business of providing the services at issue. SEIU further excepts to the hearing examiner's finding that PSU no longer sets the terms and conditions of employment for the research nurses. In addition, SEIU excepts to the hearing examiner's alleged failure to address its argument that PSU unilaterally subcontracted the operation of the hospital without satisfaction of its bargaining obligation owed to SEIU.

However, we find that the aforementioned exceptions should be dismissed and the result reached in the PDO sustained, albeit for somewhat different reasons than were stated by the hearing examiner. Even assuming, arguendo, that PSU continues to exercise control over provision of health care services at the Hershey Medical Center and/or remains in the business of providing such services, as SEIU argues, the question remains whether PSU's decision to merge or affiliate with Geisinger to form the PSGHSF is a mandatory subject of collective bargaining. Although our research discloses no Pennsylvania public sector case authority on point, there is relevant federal authority which has held that an employer has no duty to collectively bargain over its decision to merge with another employer, but may have a duty to bargain over the impact or effects of the merger on its employees to the extent that such matters are severable from the merger decision itself and do not interfere with the employer's prerogative to make the decision whether to merge. See, e.g., International Association of Machinists and Aerospace Workers v. Northeast Airlines, Inc., 473 F.2d 549 (1<sup>st</sup> Cir. 1972), cert. denied, 409 U.S. 845, 93 S. Ct. 48 (1972); Providence Hospital v. NLRB, 93 F.3d 1012 (1<sup>st</sup> Cir. 1996). In Northeast Airlines, the court stated:

"[T]he Union urges that the court's holding that it cannot bargain about the effects of the merger rests on the faulty premise that the merger itself is non-negotiable. In making this argument, it relies on Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 85 S. Ct. 398 (1964), in which the Court held that at least some managerial decisions (in that case, subcontracting) may be the subject of mandatory collective bargaining. The Union, however, reads Fibreboard too broadly. There the company's decision to contract out maintenance work previously done by its own employees did not alter its basic operations: the work was still to be performed in the same plant; no capital investment was contemplated; the independent contractor was to do the same work as the present employees under similar conditions of employment. Courts have consistently refused to extend the duty to bargain recognized in Fibreboard to analogous management decisions which are more central to management's autonomous control over the direction of the business' operations.

"There are a number of reasons why we believe Fibreboard should not be extended to guarantee a union participation in a decision to merge. A merger is only a change in the ownership of the company. The impact of such a decision on jobs is not nearly so direct or immediate as the decision to subcontract work. While the change may eventually affect job security, such an effect is not an inevitable one, and could be bargained about separately from the merger itself . . . More basically, the decision to merge is much nearer the core of entrepreneurial control. It is the type of decision which Mr. Justice Stewart distinguished in Fibreboard, 379 U.S. at 223, 85 S. Ct. at 409:

'Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. . . .

[T]hose management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area [subject to collective bargaining]'. . . .

"To require an employer to include the union, in some cases possibly many unions, in discussions concerning a possible sale of the business would infringe greatly upon his control over his investment. Moreover, the nature of the decision itself makes it excessively burdensome to bring the union into the decision-making process. . . . Unlike a proposed subcontract, merger negotiations require a secrecy, flexibility and quickness antithetical to collective bargaining. Nor are the employees in a position

to judge the complex financial considerations often involved. The economic necessity for a merger cannot be eliminated by bargaining in the same way as could Fibreboard's need to subcontract its maintenance work. We find no error in the district court's conclusion that the NE merger need not be made the subject of collective bargaining. . . ."

473 F.2d at 556-557.

For essentially the same reasons as were expressed by the court in Northeast Airlines, we find that PSU's decision to merge or affiliate with Geisinger had a greater impact on its basic policy than on the bargaining unit employees' interest in wages, hours and working conditions, and therefore was not mandatorily bargainable under the balancing test adopted in PLRB v. State College Area School District, 461 Pa. 494, 337 A.2d 262 (1975). By joining with Geisinger to form a new corporate entity to operate the hospitals and clinics at Hershey Medical Center, which is governed by a board of directors appointed by both parties, PSU made a change in organizational structure, which is an express managerial prerogative under Section 702 of PERA. Moreover, in divesting itself of sole responsibility for operation of the hospitals and clinics so as to relieve the financial pressure on its college of medicine, PSU made a significant change in the scope and direction of its governmental enterprise.

On the other hand, the PDO contains no findings that the merger or affiliation decision itself had any demonstrable impact on employe wages, hours or working conditions. Nor does SEIU argue that such findings should have been made. Furthermore, the record indicates that the merger or affiliation did not impact on employe job security and had little or no effect on employe working conditions. Rather, the bargaining unit employes essentially perform the same duties in the same work location, albeit for a different employer (PSGHSF rather than PSU). Also, while SEIU offered testimony that PSGHSF allegedly made changes in employe wages and benefits after the merger or affiliation became effective, the only change which appears to have been a necessary consequence of the merger or affiliation is that the bargaining unit employes are apparently no longer eligible for membership in the State Employees' Retirement System (SERS). However, not only was the impact on employes reduced somewhat by state legislation which lowered the service requirement for the affected employes' vesting in SERS from ten years to five years, but we are aware of no reason why any such effect of the employer's decision cannot be bargained separately from the merger or affiliation decision itself (during effects or impact bargaining). Similarly, to the extent that SEIU alleges that PSGHSF made unlawful unilateral changes in employe wages and benefits, such allegations must be raised in an unfair labor practice charge filed in the appropriate forum, and not by way of the instant charge alleging that PSU refused to bargain about the merger that resulted in formation of PSGHSF. Like the federal court in Northeast Airlines, we find that the decision of PSU to merge or affiliate with Geisinger with regard to the services at issue is a matter of entrepreneurial control which need not be bargained with SEIU.

Moreover, like the federal court in Northeast Airlines, we find that PSU's merger or affiliation with Geisinger is not analogous to subcontracting (as occurred in Fibreboard, supra). Unlike a case of subcontracting, PSU did not assign the work at issue to non-unit personnel. Indeed, the unit members continue to perform all of the work at issue. That their employer is no longer solely PSU does not, in our judgment, warrant a conclusion that PSU has unlawfully transferred bargaining unit work. Therefore, the hearing examiner did not err in failing to find an unlawful transfer of bargaining unit work.

With regard to SEIU's claim of a right to bargain over the transfer or "transitioning" of the bargaining unit employes from PSU to PSGHSF, we find that this impact or effect of PSU's managerial prerogative decision to merge or affiliate with Geisinger for provision of

health care services at the Hershey Medical Center is not severable from the managerial decision itself. An employer has no duty to negotiate where the impact of the managerial prerogative decision is not severable from the underlying managerial decision. City of Wilkes-Barre, 29 PPER ¶ 29240 (Final Order, 1998); City of Philadelphia, 28 PPER ¶ 28048 (Final Order, 1997); Brookville Borough, 27 PPER ¶ 27005 (Final Order, 1995).

Finally, SEIU excepts to the hearing examiner's finding that the bargaining unit research nurses were involved in patient care, and to the hearing examiner's conclusion that the transfer of these employees to the PSGHSF was not an act of discrimination by PSU (which did not transfer research assistants). Upon review of the record, we find that the challenged finding of the hearing examiner is supported by substantial evidence. We also concur with the hearing examiner's conclusion that SEIU failed to meet its burden of proving that PSU discriminated against the research nurses. To the contrary, the record indicates that the research nurses were transferred to the PSGHSF because they had some involvement in patient care, and that the research assistants were not transferred because they did not have the same contact with patients.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and make the Proposed Decision and Order, as modified herein, final.

#### ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employee 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 the proposed decision and order, as modified herein, is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania, pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, John Markle Jr., Chairman, and Members L. Dennis Martire and Edward G. Feehan, this twenty-seventh day of July, 1999. 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.