

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEMPLE UNIVERSITY HOSPITAL :
NURSES ASSOCIATION :
 :
 v. : Case No. PERA-C-01-74-E
 :
TEMPLE UNIVERSITY HOSPITAL :

FINAL ORDER

On April 11, 2002, the Temple University Hospital (Temple) filed exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) from a March 22, 2002 Proposed Decision and Order (PDO) in which the hearing examiner found that Temple violated Section 1201(a)(1) of the Public Employee Relations Act (PERA) by precluding members of the Temple University Hospital Nurses Association (Union) from distributing a newsletter at the entrances to the hospital.¹ Following a grant of an extension of time to file its brief, the Union filed a brief in opposition to the exceptions on May 16, 2002. After a thorough review of the exceptions and all matters of record, the Board makes the following:

ADDITIONAL FINDINGS OF FACT

10. David Baron, M.S.E.D., D.O., an expert in the field of psychoneuroimmunology, reviewed the Union's newsletter, and opined that distribution of the newsletter would have a negative effect on a patient's anxiety, and thus an effect on patient care. (N.T. 319). He noted that "for some of the patients ..., if they were to see that would be more than enough fodder to say this isn't the place I want to be and turn around and walk out." (N.T. 334).

11. It was cold outside Temple on December 6, 2000 at 6:30 a.m., and some people entering Temple wore coats. (N.T. 113).

12. Between 6:30 a.m. and 8:00 a.m. on December 6, 2000, bargaining unit employes were entering Temple for the start of their shift. (N.T. 128, 131, and 148).

13. Patients entering the hospital would use any of the four entrances to the hospital, including the Ontario East Garage entrance or the main entrance. (N.T. 175-177). Patients for morning procedures would arrive at Temple before 8:00 a.m. (Exhibit T27A - T27G, N.T. 200 and 247).

14. While witnesses testified that the Union newsletter was intended to be distributed only to Temple employes, one of the nurses distributing the Union newsletter on December 6, 2000 gave a copy of the newsletter to anybody that was willing to accept it. (N.T. 114).

¹ Temple also requests oral argument on the issues raised in its brief. However, because the issues have been thoroughly addressed in the briefs, Temple's request is denied.

DISCUSSION

On December 6, 2000, at around 6:30 a.m., three employees were distributing a Union newsletter at the Ontario East Garage entrance and the main entrance to Temple University Hospital. At approximately 6:40 a.m., they were told to move to the sidewalk because they were not permitted to distribute literature on Temple property. The employees continued distributing the newsletter from the sidewalk on Ontario Street until 6:55 a.m.

On February 15, 2001, the Union filed a Charge of Unfair Practices alleging that Temple violated Section 1201(a)(1) and (5) of PERA. The Union alleged that Temple interfered with, and restrained employees from distributing union literature in nonworking areas on nonworking time by its actions on December 6, 2000. The Union also alleged that Temple unilaterally changed the terms and conditions of employment by denying the Union access to bulletin boards.

Noting that a grievance had been filed, the hearing examiner deferred the Section 1201(a)(5) portion of the charge concerning the alleged denial of access to the contractually provided for bulletin boards in accordance with Pennsylvania Labor Relations Board v. Pine Grove Area School District, 10 PPER ¶10167 (Order Deferring Unfair Practice Charge Until Further Order of Board, 1979). As for the alleged ban on distribution at the entrances to Temple, the hearing examiner found that because the entrances were neither work areas nor "immediate patient care areas," Temple's ban on distribution at these locations was a violation of Section 1201(a)(1) of PERA.

Initially, Temple argues that with regard to a Section 1201(a)(1) violation, a distinction must be drawn between organizational campaigns where selection of an employee representative is concerned, and those cases where an incumbent union is merely distributing a newsletter to its members. Section 1201(a)(1) of PERA provides that it is an unfair practice for an employer to interfere with, restrain or coerce employees in the exercise of their rights guaranteed in Article IV of PERA. In relevant part, Article IV of PERA protects the right of "public employees to organize, form, join or assist in employee 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..." Under these provisions, Article IV rights are involved where an incumbent union distributes information to its members. As noted by the National Labor Relations Board in Phoenix Transit System and Amalgamated Transit Union, Local Union No. 1433, AFL-CIO, 337 NLRB No. 786, slip opinion at 4 (2002):

In any litany of the ways in which employees organize themselves for collective bargaining, their day-to-day discussions and interchange of ideas must surely rank very high. For this reason it is regarded as protected activity. Thus [an employee's] efforts to communicate with, and convince others of the validity of his ideas and feelings about the cause of unionism, and the injustices of their employer, must generally be regarded as protected as well.

Further, as pointed out by counsel for the General Counsel, this right to freedom of communication is not limited to organizational rights, "for nonorganizational protected activities are entitled to the same protection and privileges as organizational activities." Container Corp., 244 NLRB 318, 322 (1979).

See Eastex, Inc. v. National Labor Relations Board, 437 U.S. 556, 98 S. Ct. 2505 (1978). Accordingly, we reject Temple's suggestion to allow greater opportunity for the employer to ban distribution of literature merely because an incumbent union is attempting to disseminate information to its members.

Temple also argues that the hearing examiner erred in interpretation and application of federal labor law. When the policies for the protections of public and private employees do not conflict, the Board may look to the National Labor Relations Act and federal law for guidance in interpreting PERA. Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978). Here, the policies concerning distribution of literature in a patient care facility are similar for both the private and public sectors, as noted by the Court of Common Pleas' reliance on Beth Israel Hospital v. N.L.R.B., 437 U.S. 483 (1978) in Board of Commissioners of Montgomery County v. Pennsylvania Labor Relations Board, 15 PPER ¶15089 (Montgomery County, 1984). While our view of the federal law differs somewhat from the hearing examiner's, we believe that the hearing examiner did not err in concluding that Temple violated Section 1201(a)(1) of PERA.

In recognizing the interests of hospitals to provide a tranquil environment for patients, the NLRB adopted a presumption that a hospital's ban on solicitation and distribution in "strictly patient care areas" was lawful. St. John's Hospital and School of Nursing, Inc. v. NLRB, 557 F.2d 1368 (10th Cir. 1977). The NLRB defined "strictly patient care areas"² exclusively as patient's rooms, operating rooms, and patient treatment areas such as x-ray and therapy. In enforcing the NLRB's order, in part, the Tenth Circuit extended the NLRB's presumption to include such areas as hallways, stairways, and elevators used for patient transport, and also to waiting rooms where patients may meet with doctors and family. St. John's Hospital, 557 F.2d at 1375.

In its first opportunity to address the NLRB's presumption, the United States Supreme Court in Beth Israel Hospital, *supra*, upheld its validity, but noted that under the NLRB's presumption, a hospital's ban on solicitation in other than immediate patient care areas must be supported by an effect on patient care. Beth Israel Hospital, 437 U.S. at 500. Thereafter, in NLRB v. Baptist Hospital, Inc., 442 U.S. 773 (1979), the Court reiterated that

The [NLRB's] presumption, of course, does no more than place on the Hospital the burden of proving, with respect to areas to which it applies, that union solicitation may adversely affect patients.

² Also known as "immediate patient care areas".

* * *

The Court's restatement of the [NLRB's] presumption makes it clear that a hospital may overcome the presumption by showing that solicitation is likely either to disrupt patient care or disturb patients. ... Solicitation may disrupt patient care if it interferes with the health-care activities of doctors, nurses, and staff, even though not conducted in the presence of patients. And solicitation that does not impede the efforts of those charged with the responsibility of caring for patients nonetheless may disturb patients exposed to it.

Baptist Hospital, Inc., 442 U.S. at 781-82. As noted by the Supreme Court in both Beth Israel Hospital and Baptist Hospital, the lawfulness of a ban on solicitation or distribution of literature at a hospital is determined on a case-by-case basis. Baylor University Medical Center v. NLRB, 662 F.2d 56 (D.C. Cir. 1981).

Upon review of Beth Israel Hospital, Baptist Hospital, and Baylor University Medical Center, the Board hereby adopts the following policy and presumptions for bans on solicitation and distribution of literature in hospitals within the jurisdiction of the Board. In this regard, the Board recognizes four zones of interest within a hospital: 1) nonworking areas, 2) patient care areas, 3) immediate patient care areas, and 4) patient access areas.

Concerning solicitation and distribution in nonworking areas, the United States Supreme Court in Republic Aviation Corp v. NLRB, 324 U.S. 793 (1945) established that "restrictions on employee solicitation during nonworking time, and on distribution during nonworking time in nonworking areas, are violative of §8(a)(1) unless the employer justifies them by a showing of special circumstances which make the rule necessary to maintain production or discipline." Beth Israel Hospital, 437 U.S. at 492-93. Thus, a ban on solicitation during nonworking time is presumptively invalid, as is a ban on distribution in nonworking areas.

Along those lines, since the business of a hospital is providing patient care, "patient care areas" are "work areas" under Republic Aviation, supra. Patient care areas not only include those areas where patients are treated, but also areas where procedures, tests or other treatment related tasks are performed outside the presence of patients. See Baptist Hospital, Inc., 442 U.S. at 781-82. While solicitation may not be banned while employees are in these locations on nonworking time, because they are work areas, a ban on distribution of literature in these areas of the hospital is presumptively valid. See Republic Aviation, supra.

In addition, the NLRB has recognized certain areas as "immediate patient care areas" where the interests of the hospital in providing adequate patient care compels the presumption that solicitation and distribution of literature in these areas should be banned. These areas include patient's rooms, operating rooms, x-ray and therapy areas. In addition, immediate patient care areas include the halls, stairways and elevators through which patients may be transported, and waiting areas

where patients may meet with physicians or family. St. John's Hospital, supra.

There is also a fourth type of area to be recognized in a hospital, a "patient access area". Patient access areas may be nonworking areas where employe solicitation and distribution would be presumptively permitted. However, patients, who have an interest in a tranquil environment for their treatment, also have access and use these areas. These areas typically would include a cafeteria, gift shop, chapel, lobby, entrance, or other public area of the hospital. See St. John's Hospital, supra.

Finding that the entrances were not patient care areas or work areas, the hearing examiner concluded that Temple's ban on distribution at the entrances was presumptively unlawful. While we agree with the hearing examiner that the entrances were not established as patient care areas, since both patients and hospital staff use these entrances they are patient access areas.

To uphold a ban on solicitation and distribution in patient access areas, the hospital bears the initial burden of establishing that the time, place and manner of solicitation or distribution has an effect on patient care. If the hospital fails in this respect, then its ban on solicitation and distribution in that area is an unnecessary restraint on Article IV rights and thus a violation of Section 1201(a)(1) of PERA. See NLRB v. Harper-Grace Hospitals, Inc., 737 F.2d 576 (6th Cir. 1984). If, however, it is shown that the solicitation or distribution has an impact on patient care, then the hospital's ban is presumptively valid. The union may rebut that presumption by establishing that it has a substantial interest in soliciting or distributing literature at that particular place and time, or in the chosen manner. In connection with the union's purported interests, either party may present evidence of the availability of alternative means for the union to communicate with bargaining unit members. See NLRB v. Southern Maryland Hospital Center, 916 F.2d 932 (4th Cir. 1990).

Temple presented the testimony of David Baron, M.S.E.D., D.O., an expert in the field of psychoneuroimmunology, the study of stress on the immune system. Upon reviewing the Union's newsletter, he indicated that distribution of the newsletter would have a negative effect on a patient's anxiety, and thus an effect on patient care. (N.T. October 12, 2001, pg. 319). Dr. Baron noted that he typically treats substance abuse patients and that "for some of the patients ..., if they were to see that would be more than enough fodder to say this isn't the place I want to be and turn around and walk out." (N.T. October 12, 2001, pg. 334).

The hearing examiner noted that a similar "stress to patients" argument was rejected by the NLRB in Brockton Hospital, 333 NLRB No. 165 (2001), affirmed, ___ F.3d ___, No. 01-1219 (D.C. Cir., June 28, 2002). However, Dr. Baron not only rendered a general opinion concerning the stress to patients, but gave testimony concerning the effect that increased anxiety may cause patients to refuse to enter the hospital for treatment. Thus, because Dr. Baron's uncontested testimony does more than render a general opinion about stress and speaks to a specific effect of that anxiety, taken as a whole, his opinion is sufficient to support the conclusion that distribution of the

newsletter to patients entering the hospital would have a detrimental impact on patient care. See Baylor Hospital, supra.

Furthermore, the decision in Brockton Hospital is distinguishable. In Brockton Hospital, the Administrative Law Judge and Court determined that because no patients saw the newsletter there was insufficient evidence to support that patients were affected. In this case, however, there was evidence presented that patients entering the hospital may have received a copy of the newsletter.

Temple presented testimony that patients entering the hospital use the Ontario East Garage entrance and the main entrance. Testimony was also presented that patients entering the hospital for morning surgery would arrive before 8:00 a.m. Further, Temple elicited on cross-examination that it was cold on the morning of December 6, 2000 and staff identification badges may not have been visible under a coat or scarf. In addition, at least one of the nurses distributing the newsletter gave a copy to anyone willing to accept it. Thus, patients entering the hospital may have seen the Union's newsletter.

Accordingly, because patients entering the hospital may have received the Union's newsletter, and upon receipt, some ambivalent patients may have declined treatment because of heightened anxiety, there is sufficient evidence to establish an adverse impact on patient care. This, however, does not end our inquiry, as we must now determine whether that impact on patient care is substantially outweighed by the Union's interests in distributing its newsletter. In determining the Union's interest in distributing literature at a particular time or place, we must consider, among other things, the volume of employees versus patients in the given area at the time, see Baylor University Medical Center, 662 F.2d at 60, and the availability of alternative means of communicating with employees. St. John's Hospital, 557 F.2d at 1375.

The Union presented testimony that the distribution of the newsletter was to take place between 6:30 and 8:00 a.m. at the main entrance and the Ontario East Garage entrance.³ The testimony indicated that there were about 900 bargaining unit nurses employed at the hospital, and that a nursing shift started around the time of the distribution. The closest entrance to the employees' parking area in the Ontario West Garage is the main entrance, and those employees parking in the Ontario East Garage would arrive through the Ontario East Garage entrance.

There is also evidence that on average approximately fifteen patients arrived for admission between 6:30 a.m. and 8:00 a.m. Those patients may have arrived through any one of the entrances to Temple, but forty-two percent of admissions arrive through the emergency room entrance where no distribution took place. Further, Dr. Baron testified that some patients, if exposed to the newsletter may have been affected, and, if they were also ambivalent about going to the hospital, may have refused to enter for treatment. Based on the evidence presented, the number of employees in the area of either the Ontario East Garage entrance or the main entrance between the hours of 6:30 a.m. and 8:00 a.m. would significantly outnumber those patients

³ The nurses actually stopped distributing the newsletter at 6:55 a.m.

who may have been affected that were arriving at that time through those areas.

Testimony was also elicited concerning other available means the Union has to communicate with its members. Based on this testimony, the hearing examiner found that employes may post and distribute literature in the employe lounge and locker room, (Finding of Fact No. 4), and that Temple is also required to provide the Union with a monthly list of new bargaining unit employes. (Finding of Fact No. 5). Temple also indicated that meeting rooms are available to the Union upon request. However, the hearing examiner found that the Union has a grievance pending regarding the posting of literature in the locker rooms, and that the Union has had to file grievances to obtain the monthly list of new employes. (Finding of Fact Nos. 4 & 5). The hearing examiner also noted that Temple could decline the Union's request for a meeting room at any time.

From the evidence presented, it cannot be said that the Union would be guaranteed their right to distribute the newsletter in a manner covered under the collective bargaining agreement, since it was necessary to utilize the grievance procedure to secure that right. Likewise, prompt access to the monthly new employe lists is not guaranteed, and the Union could have been denied a meeting room. Accordingly, it does not appear that the Union had an assured alternative place and time to distribute its newsletter on Temple property, and as such, it did not have sufficient available alternatives to its distribution at the entrances.

Since there were insufficient alternatives for the distribution of the newsletter, and because the Union's distribution was coordinated to reach employes arriving for their shift, the Union's interest in distributing its newsletter at the main entrance and Ontario East Garage entrance between the hours of 6:30 a.m. and 8:00 a.m. substantially outweighed Temple's established concerns over patient care. Accordingly, Temple unlawfully interfered and restrained the Union's exercise of rights protected under Article IV of PERA when it required the employes to move to the public sidewalk to distribute the newsletter.

Temple, also argues that the hearing examiner erred in failing to find that the Union waived its right to distribute the newsletter at the entrances to the hospital. Article IV, Section 1 of the collective bargaining agreement provides that "[n]o employee shall engage in any Association activity, including the distribution of literature, which can interfere with the performance of work during the employees' working time or in working areas at any time." (Temple's Exhibit 9). As found by the hearing examiner, and as noted above, the main entrance and Ontario East Garage entrance were not shown to be patient care areas or work areas. Accordingly, Article IV, Section 1 of the collective bargaining agreement, by its terms, does not apply to bar the Union's distribution of literature at those locations.

After a thorough review of the exceptions and all matters of record, the Board concludes that that the hearing examiner did not err in finding that Temple violated Section 1201(a)(1) of PERA, and thus, the exceptions will be dismissed.

ORDER

In view of the foregoing and in order to effectuate the policies of Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the Exceptions filed to the Proposed Decision and Order of March 22, 2002 are dismissed, and the Proposed Decision and Order, as amended herein, be and the same 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 sixteenth day of July, 2002. 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.

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AFFIDAVIT OF COMPLIANCE

Temple University Hospital hereby certifies that it has ceased and desisted from interfering, restraining or coercing employes in the exercise of the rights guaranteed under Article IV of the Act, that it has posted a copy of the final order and proposed decision and order as directed therein, and that it has served a copy of this affidavit on the Union at its principal places of business.

Signature/Date

Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

Signature of Notary Public