COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF	:	
	:	Case No. PERA-U-03-318-E
	:	(PERA-R-95-379-E)
TEMPLE UNIVERSITY HOSPITAL	:	

FINAL ORDER

On September 13, 2005, the Temple University Hospital Nurses Association, Pennsylvania Association of Staff Nurses and Allied Professionals (Union) filed timely[1] Exceptions with the Pennsylvania Labor Relations Board (Board) to a Proposed Order of Unit Clarification (POUC) issued on August 24, 2005. Included with the Exceptions was the Union's request for an extension of time in which to file its Brief in Support of its Exceptions, which was granted by the Board Secretary. Prior to the filing of the Union's Brief, Temple University Hospital (Hospital) filed its response to the Union's Exceptions on September 29, 2005. The Union thereafter filed its Brief in Support of its Exceptions on October 13, 2005. On November 3, 2005, the Hospital filed its Brief in Opposition to the Union's Exceptions and after a request for an extension of time in which to file its brief in opposition to the Union's Exceptions, Temple University (University) filed its brief opposing the Exceptions on November 11, 2005.

In deciding "employer" status for purposes of the Public Employe Relations Act (PERA), we are guided by our Supreme Court's decisions in Sweet v. PLRB, 457 Pa. 456, 322 A.2d 362 (1974) and Costigan v. Philadelphia Finance Department Employees Local 696, et al., 462 Pa. 425, 341 A.2d 456 (1975), which incorporated the United States Supreme Court's decision in NLRB v. E.C. Atkins, 331 U.S. 398, 67 S.Ct. 1265, 91 L.Ed. 1653 (1947). Those cases stand for the proposition that in determining employer status for purposes of collective bargaining, the essential inquiry is the identification of the entity or entities that control wages, hours and terms and conditions of employment of the employes in question. The goal in identification of an employer for purposes of collective bargaining is to place on the management side of the bargaining table the entity that ultimately controls matters negotiable under Section 701 of PERA.

In the POUC, the hearing examiner concluded that the University and the Hospital are separate employers for purposes of collective bargaining with the Union and that the nurses that are employed by Temple University should be excluded from the unit of nurses employed by the Hospital that was certified by the Board prior to the reorganization of the University and the Hospital. This unit clarification proceeding was initiated by the Hospital, which, in the aftermath of the reorganization that occurred in 1995, alleges that the University no longer controls the working conditions of Hospital employes. In deciding this issue, the hearing examiner applied the test set forth in Southeastern Pennsylvania Transportation Authority, 31 PPER ¶ 31035 (Final Order, 2000), for determining whether two employers should be treated as a single employer. The test is derived from and fully set forth in Boich Mining Company v. NLRB, 955 F.2d 431 (6TH Cir. 1992) as follows:

> The [National Labor Relations Board] and the courts have enunciated four criteria to determine whether two employers should be treated as a single entity: 1) common ownership; 2) common management; 3) centralized control of

[1] The POUC was issued on August 24, 2005. Accordingly, the Union had 20 days from that date to file exceptions. 34 Pa. Code § 95.98(a)(1). The filing deadline for the Union's Exceptions was September 13, 2005. The Board's rules and regulations provide that Exceptions are "deemed received upon actual receipt or on the date deposited in the United States mail, as shown on a United States Postal Form 3817, Certificate of Mailing enclosed with the Statement of Exceptions." 34 Pa. Code § 95.98(a)(1). The Union deposited its Exceptions with a private courier, United Parcel Service, on September 13, 2005. The Board has held that timely deposit with a commercial courier, as demonstrated by transmittal information of the courier included with the Exceptions, constitutes substantial compliance with the Board's rules and regulations. Delaware County Solid Waste Authority, 18 PPER ¶ 18027 (Final Order, 1986); Wilkes-Barre Police Benevolent Association v. City of Wilkes-Barre, 32 PPER ¶ 32137 (Final Order, 2001). Accordingly, the Union's exceptions are timely filed.

labor relations; and 4) interrelationship of operations. (citations omitted) While not all factors need to be present and no single factor bears overwhelming importance in the analysis, the Board has established a hierarchy among these factors:

> Of 'paramount significance is the nature of the day to day operations and labor policies in the entities in question.' Moreover, it is active rather than potential control which is significant. Indeed, in the absence of common ownership, the Board will find separate but related employers not to be neutrals if they jointly control the labor relations of a group of employes.

Teamsters Local 50 (E.J. Dougherty Oil), 269 NLRB [170], at 174 [1984](citations omitted). See also Teamsters Local 688 (Fair Mercantile), 211 NLRB 496 (1974). In short, the analysis of whether two [employers] should be considered [one employer] depends on the practical day-to-day operations of the companies, and the issue will be decided on a case-by-case evaluation of the factual relationship between the two entities.

955 F.2d at 434.

In its Exceptions, the Union contends that the hearing examiner erred in 1) making various findings of facts; 2) concluding that the University and the Hospital are separate entities for purposes of collective bargaining; 3) addressing various pieces of evidence in the application of the test to determine whether or not the University and the Hospital are separate entities; 4) concluding that creation of separate units of nurses, i.e. one employed by the University and the other employed by the Hospital, does not constitute overfragmentization of bargaining units prohibited by PERA; and 5) ordering that the nurses employed by the University be excluded from the bargaining unit of Hospital nurses.

In reviewing the POUC, the Union's Exceptions to the POUC and the positions of the parties, the Board will address the contentions of the parties with respect to each of the four criteria used to determine whether the University and the Hospital should be considered single or separate entities for purposes of bargaining with their employes.

Common Ownership

The hearing examiner made findings of fact regarding the corporate structure of Temple University and its subsidiary organizations. The hearing examiner found that prior to 1995, the Hospital was an unincorporated division of the University and that in August, 1995, the University established three new non-profit corporations – Temple Central (a shell corporation for the assets of the Hospital), Temple University Children's Hospital (renamed Temple University Children's Medical Center) and Temple University Health System. The hearing examiner recognized that there is some overlap on the Boards of Directors of the University, the Health System and the Hospital. Six of the twelve voting members of the Health System's Board also serve on the University's Board. Five of the 20 voting members of the Hospital's 32 member board also serve on the University's Board and six of the voting members on the Hospital's Board also serve on the Health System's Board. The Union argues in its exceptions that the University controls the Hospital because six of the 12 voting members of the Health Systems Board are also University Board Members and that the seventh voting member is the University's Vice-President/Chief Financial Officer/Treasurer. The corporate structure of the various entities involved in this case reveals an overlap of Board members, posing a question of the potential control by the University. However, in Mercy Hospital of Buffalo, 171 LRRM 1339, 336 NLRB 1282 (2001), the National Labor Relations Board (NLRB) stated as follows:

> Common ownership alone, however, does not establish a single employer relationship. A single employer relationship will be found only if one of the entities exercises actual or active control over the day to day operations or labor relations of the other.

171 LRRM at 1343. In United Food and Commercial Workers International Union, Local No. 1439, 271 NLRB 754 (1984), the NLRB stated, "Common ownership and potential control of the day-to-day activities of corporate divisions is inherent in every corporate division relationship, and certainly is not a factor to be accorded weight." Id. at 756. See also Dow Chemical Company, 326 NLRB No. 23, 160 LRRM 1013 (1998)(wholly owned subsidiary and a parent were not a single employer even though common ownership was clearly indicated where a parent did not exercise actual or active control over the subsidiary's day-to-day operations or labor relations). The corporate structure indicates overlapping membership on the various boards and that the University, as the sole member of the Health System, appoints the directors on the Health System Board and the Health System Board, as a sole member of the Hospital, appoints the members of the Hospital Board. However, the facts fail to reveal that through the appointment and membership on the various Boards of Directors, that the University exercises actual control over the day-to-day operations of the Hospital.

Common Management

With respect to the common management criterion, the hearing examiner found that the Executive Director and Chief Executive Officer of the Hospital reports to the Health System Chief Operating Officer, who in turn reports to John W. Marshall, III, Chairman and Chief Executive Officer of the Health System. The hearing examiner found that daily operational control of the Health System, including the Hospital, lies with a nine member executive team under Chairman Marshall's leadership. The Hospital's CEO works with the Hospital's Board and the Health System's Executive Management Team to develop the Hospital's strategic planning decisions. The Hospital and the Health System each maintain separate administrative functions and offices from those of the University. The Hospital and University have separate legal counsel and each has separate financial operations including separate budgets, general ledgers, and accounts payable and receivable. Both the University and the Hospital are each audited separately by different auditors. The hearing examiner found as fact that managers and executives at the University play no role in the management of the Hospital and vice versa. He also found that no officer of the University serves as or reports to any officer of the Hospital and conversely no officer of the Hospital serves as or reports to any officer of the University.[2] The hearing examiner concluded that the University and the Hospital do not have a common management structure.

In its Exceptions, the Union initially relies upon the University's appointment of the Health System's Board of Directors and its Chief Executive Officer and the overlap of directors on the University and Health System Boards to substantiate its claim that the University and the Hospital, through the Health System, share common management. However, in Mercy Hospital of Buffalo, supra., the NLRB stated that "[a]lthough there is some overlap of directors… the fact that each entity has its own president with the responsibility for day-to-day operations of the companies precludes a finding of common management based on the existence of common directors." 171 LRRM at 1333. See also Dow Chemical Company, supra. (parent organization and its wholly-owned subsidiary were not single entity where there was no evidence that parent board of directors exercised day-to-day control over subsidiary). In Western Union Corporation, supra., no common management was found even though the subsidiaries' Boards of Directors were appointed by the parent corporation, because the record established that each subsidiary had its own Board of Directors and its own roster of corporate officers. The Union also relies on the fact that Hospital nurses "work under the direction" of the physicians/faculty members who are

[2] The hearing examiner did find that the Chairman of the Health System is required to make an annual report to the University's Board of Directors and to attend University Board meetings. In its Exceptions, the Union contends that the hearing examiner erred in failing to credit the testimony of the University's Chief Financial Officer in which he stated that Mr. Marshall, the Chief Executive Officer of the Health System, has a reporting relationship to the University's President and the University's Board of Directors. However, the hearing examiner relied on contrary testimony by the Chief Counsel and Corporate Secretary of the Health System and the Health System's Vice-President for Human Resources who each testified that the University's Chief Financial Officer was incorrect and that there was no reporting requirement between Mr. Marshall and the University's President and Board of Directors other than the annual report required in the Health System's by-laws. Other than the testimony that the hearing examiner did not credit, the Union points to no contrary evidence that would substantiate a reporting requirement between Mr. Marshall and the University's President and Board of Directors.

University employes. However, the record reveals that the Hospital nurses, while carrying out the medical treatment plans for the patient set forth by the respective physicians, are directed, assigned and evaluated by Nurse Managers who are Hospital employes.[3] Accordingly, the hearing examiner was correct in concluding that the Hospital and the University did not have common management as that is envisioned under the test in Boich.

Centralized Control of Labor Relations

As noted above, the centralized control of labor relations is "the most critical factor" in determining whether two entities should be considered a single employer and that common ownership is not determinative in the absence of centralized control over labor relations. Mercy Hospital of Buffalo, 171 LRRM at 1342-3.

With respect to this critical factor, the hearing examiner found that the University and the Health System took the first practical steps in separating their labor relations functions at the end of October, 2002. Robert Birnbrauer, who was previously the Associate Vice-President and Chief Negotiator for the University, was appointed the Health System's Vice-President of Human Resources. Deborah Hartnett was appointed the Associate Vice-President of Human Resources for the University. Birnbrauer reports to the Health System's Chief Executive Officer and Hartnett reports to the University Vice-President/CFO and Treasurer. The human resources departments of the Hospital and the University share no employes and have separate budgets. Recruitment, grievance handling, benefits administration, payroll and union dues remission have also been separated between the University and the Hospital.

In its exceptions and its brief in support thereof, the Union contends that the separation of the labor relations operations of the Health System and the University was a mere "paper restructuring" (Union's Brief, page 12). It argues that University and the Hospital jointly control all of the functions associated with labor relations. However, the October, 30, 2002, memorandum from Martin S. Dorph, University Vice President/CFO and Treasurer evidences a splitting of the labor relations functions as between the Health System, and thereby, the Hospital, and the University. The memorandum's reference to "coordinating any labor relations issues effecting both University and Health System" employes is a mere recognition of the ongoing effort, begun in 1995, to separate all functions. Until the negotiation of separate collective bargaining agreements by the University and the Hospital in the near future, the employes at issue in this case are covered by the same contract. Accordingly, the testimony upon which the Union relies that evidences a limited joint resolution of grievances is understandable in that the University and the Hospital may be impacted separately regarding the interpretation of any particular provision of that agreement. What the hearing examiner referred to as peripheral tasks to be accomplished in that process does not negate the fact that the labor relations functions of the University and the Hospital are clearly on the path to separation. See Ameron Inc. Steel and Wire Division, 288 NLRB 747, 128 LRRM 1190 (1988) (the entities were found to be separate where they had established their own personnel departments and had taken steps to separate the labor relations functions).[4]

[3] On page 8 of its Brief in Support of its Exceptions, the Union contends that the Nurse Managers, employes of the Hospital, are responsible for supervising, approving leave, scheduling, assigning and evaluating nurses employed by the University. However, the Union's citation to the record evidenced at R. 135-137 does not support that notion. A fair reading of the testimony contained therein reveals that the Nurse Managers do not supervise University nurses, but supervise and manage the schedules of Hospital nurses only.

[4] The Union also relies upon a memorandum that was sent just prior to the initial hearing in the case in which the University notified the Union that both Hospital and University representatives would meet with him to discuss a formal grievance concerning vacation entitlement of University nurses only. The Union also relies upon a University job description that involved a position in the Health System. Both the University and the Hospital contend that the memorandum involving the vacation grievance was a mistake by the University, and that the job description that was forwarded to the Union was dated 1997 and was no longer "current". These two limited instances fail to overcome the overwhelming evidence that the University and the Hospital are inexorably moving to the total separation of their labor relations functions.

Interrelationship of Operations

The examination of the criteria of interrelationship of operations analyzes whether or not the entities involved are similar in function with the same facilities and services. Dow Chemical Company, supra. The hearing examiner determined that the Hospital and the University, while they share the same business location, provide different services and functions. The Hospital provides direct health care to its patients while the University provides graduate, undergraduate, and professional education to its students. Even though the Hospital does provide a venue in which the University's medical students receive the practical portion of their professional education, the hearing examiner concluded that the interrelation between the Hospital and the University is conducted at arms length and is insufficient to establish that the Hospital and the University are one or joint employers. Western Union Corp, supra. The Union relies on several factors for its argument that the operations of the Hospital and the University are so interrelated that they must be considered a single employer. The Union cites the fact that the Hospital and the Health System rely on the University for purchasing, maintenance service, and construction management services. However, the Union has not shown that the purchase of such services is anything but an arms-length transaction and accordingly, the Hospital's purchases of these services supports the hearing examiner's decision that the Hospital and the University are separate. In Boich, the court specifically cited the arms-length transactions between the entities and stated that "[a]rms-length transactions are rarely present in a single employer situation." 955 F.2d at 435.

The Union also contends that key employes of the Health System were on the University payroll for up to seven years after the 1995 reorganization. However, as noted above, the evidence does reveal that the Hospital and the University are moving toward total separation. There may still exist minor peripheral issues that need to be resolved, but the existence of those peripheral issues does not lead to the conclusion that the two entities are still one. The Union also contends that pension and insurance benefits have not been separated, but the evidence reveals that the only thing that has not been separated is that there is commingling of members in one older Temple University pension plan. (R 218-19) Further, the Union's contention that there is an ongoing interchange of employes between the Hospital and the University is not borne out by the record. A fair reading of the record indicates that the transfer of employes is part of the ongoing separation process. Contrary to the assertion of the Union on page 10 of its brief, the University is neither "shuffling employes up and back at will" nor are employes "utilized as an University-wide pool".

While the University and Hospital are essentially operating side-by-side in a relationship that is mutually beneficial to each party, under the case law, the University and the Hospital have sufficiently separated their functions, in particular, their labor relations functions, such that the hearing examiner correctly concluded that the University and the Hospital constitute separate employers for purposes of bargaining with the Union and that the University nurses should be excluded from the unit of Hospital nurses. In arguing in favor of a single employer finding, the Union points to the meshing of the University and Hospital operations and the alleged interchangeability of the employes, relying upon Soule Glass and Glazing Co. v. NLRB, 652 F.2d 1055 (1st Cir., 1981), where a single employer was found. However, in that case, the conclusion of a single employer was based upon the fact that the individual who owned Soule Glass and its subsidiaries made all major decisions for each entity, with the court specifically emphasizing his control over labor relations decisions. Accordingly, the hearing examiner correctly applied the case law in concluding that the University and the Hospital are separate employers.

Since the University and the Hospital are separate and not joint employers under the analysis of the existing case law, the establishment of two separate units is required under PERA. Section 604 of PERA states that "the Board shall determine the appropriateness of a unit which shall be the public employer unit or a subdivision thereof." 43 P.S. §1101.604. Clearly given this language, the Board is not authorized by PERA to create a multi-employer bargaining unit.

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 by the Temple University Hospital Nurses Association, Pennsylvania Association of Staff Nurses and Allied Professionals, be and are the same hereby dismissed and the Proposed Order of Unit Clarification issued on August 24, 2005, is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member, and James M. Darby, Member, this twenty-first day of February, 2006. 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.