

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

TEMPLE UNIVERSITY HOSPITAL :  
NURSES ASSOCIATION :  
 : Case No. PERA-C-06-39-E  
 v. :  
 :  
TEMPLE UNIVERSITY HOSPITAL :

**PROPOSED DECISION AND ORDER**

A charge of unfair practices was filed with the Pennsylvania Labor Relations Board (Board) on January 25, 2006, by the Temple University Hospital Nurses Association (Union), alleging that Temple University Hospital (Temple) violated section 1201(a)(1) of the Public Employe Relations Act (Act) when it refused to allow bargaining unit employes to wear a sticker which displayed the message, "Bring Back Janell: Safety For All Our Staff," while those employes were in the hospital. On March 8, 2006, the Secretary of the Board issued a complaint and notice of hearing wherein this case was scheduled for hearing on April 17, 2006 in Philadelphia, Pennsylvania. After a series of continuance requests, a hearing was held on July 24, 2006, at which all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Temple filed a post-hearing brief.

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

FINDINGS OF FACT

1. Temple is an employer within the meaning of section 301(1) of the Act.
2. The Union is an employe organization within the meaning of section 301(3) of the Act.
3. Sometime after November 29, 2005, employes, including bargaining unit members started wearing a sticker, while working, that referenced Temple's discipline of Janell Clark, a bargaining unit member. The sticker is about 2 ¾" square and Day-Glo green. The text, "Bring Back Janell," forms a circular arch across the top of the sticker, while the words, "Safety For All Our Staff," appear underneath, are underlined and divided into three straight lines of text, with one word on the first line and two words each on the following lines. (Union Exhibit 4; Hospital Exhibit 1).
4. After seeing employes, including bargaining unit members, wearing the stickers in areas where patients received treatment, including patients' rooms, patient lounges and the solarium, a Temple nurse manager, Naté Guyton, was directed by her superiors to have the employes, including bargaining unit members, remove the stickers. Guyton was also told that employes could not wear the stickers "inside the hospital". Guyton met with, *inter alia*, Dawn Munn, the Union representative, and told her "you have to remove the sticker." Employes removed the stickers. (N.T. 32, 37-39, 41-43, 54, 55, 60, 61).
5. No patients or patients' families spoke to Temple managers about the stickers. (N.T. 45, 67).
6. Temple has allowed bargaining unit members, during work time, to wear an array of buttons in the past. These buttons included the following:
  - a. a 1 ¼ inch, round, red button with the text, "Temple Nurses: Priceless!," and the letters, "TUHNA/PASNP" on the bottom;
  - b. a 2 inch, round, blue button reading, "TUHNA says: PYXIS NOW! For PATIENT CARE" in straight line text;

- c. a 2 inch, round, white button with text reading, "NURSES FOR SCHWARTZ" and below that, "Congress '04"; and
- d. a series of five various sized buttons whose texts include the phrases, "1199 and AFSCME", "PSEA HEALTH CARE", "1199C NO GIVEBACKS! 1981", "PNA", and "ME TOO DISTRICT 1199C NUHCE AFSCME, AFL-CIO."

(N.T.17-19, 61, 62; Union Exhibit 1-3, Hospital Exhibit 2).

#### DISCUSSION

The Union charges Temple with violating Section 1201(a)(1) of the Act when it directed bargaining unit employees to remove a sticker from their attire while "inside the hospital." (N.T. 41). The sticker referenced a bargaining unit member who was disciplined over an incident with a patient. The Union was of the opinion that Temple should have sided with the employee since it believed it was the patient who was abusive and at fault. The Union grieved the discipline and arbitration was pending.

Temple asserts that it had the right to forbid wearing the sticker in question because it suggested to patients that the hospital was unsafe and would, consequently, be disturbing to patients. Temple argues that its restriction on wearing this sticker was presumptively valid in immediate patient care areas, and, because it has shown special circumstances, it may lawfully preclude employees from wearing this sticker even in non-immediate patient care areas.

Temple's prohibition against wearing this sticker in immediate patient care areas is invalid and violates the Act. Moreover, even if Temple's ban in immediate patient care areas were valid, the prohibition against wearing it in other areas violates the Act because Temple has not shown any special circumstances. Absent a showing of special circumstances, the ban in other than immediate patient care areas is presumptively invalid.

In Beth Israel Hospital v. NLRB, 437 U.S. 483 (1978), the Supreme Court set forth the test adopted by this Board in Temple University Hospital, 33 PPER ¶ 33149 (Final Order, 2002). In "strictly patient care areas" an employer's ban on solicitation and distribution is presumptively valid. Such areas include patients' rooms, operating rooms, and patient treatment areas such as therapy and x-ray. 33 PPER at 341. Extensions of this presumption include hallways, stairways, elevators used for patient transport, and waiting rooms where patients consult with doctors and family. St. John's Hospital and School of Nursing v. NLRB, 557 F.2d 1368 at 1375 (10<sup>th</sup> Cir. 1977).

While acknowledging that "hospitals may be justified in imposing somewhat more stringent prohibitions on solicitation than are generally permitted," the Court in Beth Israel Hospital also concluded "that the balance should be struck against the prohibition [of solicitation] in areas other than immediate patient care areas such as lounges and cafeterias absent a showing that disruption to patient care would necessarily result if solicitation and distribution were permitted in those areas." 437 U.S. at 495. That disruption is what is referred to as special circumstances.

Temple's asserted reason for the ban in immediate patient care areas shows it to be similar to the reason for the ban in Mt. Clemens General Hospital v. NLRB, 335 NLRB 48(2001), *enforced*, 328 F.3d 837 (6<sup>th</sup> Cir. 2003). In Mt. Clemens, the court upheld the decision of the National Labor Relations Board (NLRB) that the employer's ban on a union button was invalid, even in immediate patient care areas of the hospital.

In Mt. Clemens, nurses wore buttons that depicted a red "universal no" symbol, a circle bisected by a diagonal slash, over black letters spelling "F.O.T." The F.O.T. stood for forced overtime. The buttons were to protest the hospital's intransigent position with regard to discontinuing double-time payments for, yet continuing, mandatory overtime. 328 F.3d at 840. The hospital banned the buttons in both immediate patient care areas and non-patient care areas, as did Temple in this case. Id. at 846. Both the NLRB and the appeals court found that the hospital's ban was invalid not only in non-patient care areas but also in immediate patient care areas.

In Mt. Clemens, the administrative law judge (ALJ) reasoned that the hospital's ban on the buttons was invalid, even in immediate patient care areas, because the hospital had not banned other similar buttons in the past; hospital administrators were unaware of any complaints from patients or their families; and the hospital made no inquiries of patients or their families as to whether or not the buttons interfered with patient care or safety. 335 NLRB 48 at 50 (2001).

In support of its ban, Temple points to a Union newsletter that describes the Union's position on the Janell Clark disciplinary issue. The article, not surprisingly written in partisan language, describes the facts leading to Janell Clark's discipline. The gist of the article was that Temple had not talked to Janell Clark about her allegation that a patient was abusive toward her before it disciplined her. The article concludes that the current situation is "bad for staff and its [sic] bad for patients." The Union then calls on Temple to "make the Hospital a safe place for staff and patients." (Hospital Exhibit 4). From these tag lines Temple asserts that, if asked, nurses will tell patients that the hospital is unsafe for patients. What Temple did not do was ask any nurses at the hearing what, if anything, they were instructed to say, or what they would tell patients about the stickers, if asked.

In the past Temple allowed nurses the unfettered right to wear a button that exclaimed "PYXIS NOW! for PATIENT CARE" (Union Exhibit 2). The record reveals that this referred to the Union's wanting a new medication distribution system, run by computer, which dispenses both prescription and non-prescription medications in the hospital. (N.T. 22, 23). If patients asked what PYXIS was and nurses told them, patients would know that nurses thought the hospital should change the way drugs are dispensed to patients, immediately. That sense of urgency, connecting the immediate need to change current medication distribution practices with patient care, is likely to invoke anxiety in patients. Yet, Temple allowed nurses to wear that button in immediate patient care areas. The sticker in question here merely evidences a concern for the safety of nurses, not patients or their care. And any discussion in response to patient questions would likely center around the Union's perception of Janell Clark's treatment by the hospital. Temple's sole argument that discussions would lead patients to fear for their own safety is specious, not reasonably grounded in record evidence, and is at best conjecture. Moreover, as in Mt. Clemens, there is no evidence in this case that there were any complaints from patients or their families, or that Temple inquired of any patients or family members whether or not the stickers interfered with patient care or safety.

Since Temple's ban on this sticker is invalid in immediate patient care areas then, *a fortiori*, it is invalid in other than immediate patient care areas. Nevertheless, a discussion of why there are no special circumstances in this case is informative.

Assuming, *arguendo*, that Temple's ban on the stickers was valid in immediate patient care areas – which it was not – Temple must establish special circumstances on the record to overcome the presumption of invalidity of its prohibition in other than immediate patient care areas. To overcome that presumption, an employer must prove that the union's activities would either disrupt patient care or disturb the patients.<sup>1</sup> NLRB v. Baptist Hospital, Inc. 442 U.S. 773 at 781 (1979).

Temple argues that it established special circumstances by relying on a recent NLRB decision, Sacred Heart Medical Center, 347 NLRB No. 48 (June 30, 2006). In Sacred Heart the NLRB found there to be special circumstances in a situation where bargaining unit members started wearing buttons that proclaimed "RN's Demand Safe Staffing." In finding special circumstances the NLRB concluded that the obvious and singular meaning to be taken from that button was "a clear message to patients that their care is currently in jeopardy." 347 NLRB No. 48 at 2. Moreover, the NLRB concluded "the 'RN's Demand Safe Staffing' button sends a clear message to patients: current staffing levels at the

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<sup>1</sup> An employer may prove that the union's activities would either "disrupt patient care or disturb patients." Baptist Hospital, 442 U.S. at 781, n.11 (emphasis in original). Union activity "disrupt[s] patient care if it interferes with the health-care activities of doctors, nurses, and staff, even though not conducted in the presence of patients." Id. Moreover, union activity "that does not impede the efforts of those charged with the responsibility of caring for patients nonetheless may disturb patients exposed to it." Id.

hospital are unsafe, and medical care is thus being compromised. No inferential leap is required in order to conclude that a reasonable patient would be disturbed by this message." 347 NLRB No. 48 at 3. The sticker here is one that does not cast patient care in such an obviously ominous light, as does the button in Sacred Heart. Indeed, the sticker here is not about the care of patients at all, but rather the care of staff. The message on the sticker in this case is less like the message in Sacred Heart and more like the message on the button in Mt. Clemens General Hospital v. NLRB, *supra*.

Arguments made by Temple in this case to prove special circumstances echo those arguments made unsuccessfully by the hospital in Mt. Clemens. In both cases the hospitals' arguments are based upon speculation. In Mt. Clemens the hospital speculated that patients would be concerned about the quality of their care because nurses would explain the buttons by telling patients that they were not happy because the hospital was forcing them to work overtime. A physician at the hospital testified that the button would raise questions and cause patients and their families to think care might not be properly rendered because of the forced overtime issue.

Temple argues that the sticker "implied the existence of unsafe conditions at TUH (Temple University Hospital) and was likely to provoke questions from patients as to the meaning of the [sticker]." (Temple brief at 5). In Sacred Heart, *supra*, the NLRB based its decision largely on the fact that no questions needed to be asked because the button there "sent a clear message to patients that their care is currently in jeopardy," 347 NLRB No. 40 at 2, and that "current staffing levels . . . are unsafe, and medical care is thus being compromised." Id. at 3. Even though this sticker clearly references only the staff's safety, Temple initially speculates patients will infer that to mean they are unsafe. Temple then further speculates that when patients ask nurses what the sticker does mean, nurses will tell patients that they – the patients – are not safe.

The court rejected just this kind of argument in Mt. Clemens when it found the hospital's ban invalid because it "depend[ed] primarily on speculation about the possible effect of the buttons." 328 F.3d 837 at 847. Indeed, Temple had to speculate about the occurrence of, not one, but two inferential leaps to reach its conclusion that patients might be disturbed by this sticker. By contrast, in Sacred Heart, the NLRB found, "[n]o inferential leap is required in order to conclude that a reasonable patient would be disturbed by this message." 347 NLRB No. 48 at 3. There is a material difference between a clear statement that staff levels do not provide adequate care for patients, and a statement that is but a plea of safety for the staff.

Temple's ban on nurses wearing the sticker is invalid in both immediate patient care areas and in non-immediate patient care areas. Even were Temple's ban in immediate patient care areas valid, it has not shown any special circumstance to overcome the presumption of invalidity to its ban in non-immediate patient care areas. Temple has violated Section 1201(a)(1) of the Act and, therefore, shall immediately allow nurses to wear the sticker in question during working hours.

#### CONCLUSIONS

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

1. That Temple is an employer within the meaning of section 301(1) of the Act.
2. That the Union is an employe organization within the meaning of section 301(3) of the Act.
3. That the Board has jurisdiction over the parties hereto.
4. That Temple has committed unfair practices within the meaning of Section 1201(a)(1) of the Act.

ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the examiner

HEREBY ORDERS AND DIRECTS

that Temple shall:

(1) Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed under Article IV of the Act.

(2) Take the following affirmative action which the hearing examiner finds necessary to effectuate the policies of the Act:

(a) Immediately allow bargaining unit members to wear the sticker in question in both immediate patient care areas and non-immediate patient care areas;

(b) Post a copy of this decision and order within five (5) days of the date hereof and have the same remain so posted for a period of ten (10) consecutive days; and

(c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this decision and order by completion and filing of the attached affidavit.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-seventh day of October, 2006.

PENNSYLVANIA LABOR RELATIONS BOARD

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TIMOTHY TIETZE, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

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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 allowed bargaining unit members to wear the sticker in question during working hours in all areas of the hospital, that it has posted a copy of the 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.

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Signature/Date

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Title

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

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Signature of Notary Public