COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF

:

: Case No. PERA-R-05-498-E

: (PERA-R-5757-E)

TEMPLE UNIVERSITY HEALTH SYSTEM

SECOND ORDER DIRECTING SUBMISSION OF ELIGIBILITY LIST

On April 21, 2006, this hearing examiner issued an Order Directing Submission of Eligibility List (ODSEL) in the above-captioned case. That ODSEL found a sufficient showing of interest under the Public Employe Relations Act (Act) by the Association of Staff Nurses and Allied Professionals (PASNAP) and ordered TUHS to immediately submit an employe list. The unit PASNAP sought to represent for purposes of collective bargaining was a unit of professional and technical employes employed by the Temple University Health System (TUHS). Those employes PASNAP sought to represent were already represented by another union, the Professional and Technical Employees Association, an affiliate of the National Union of Hospital and Health Care Employees, AFSCME, District 1199C, AFL-CIO (District 1199C). The April 21, 2006, ODSEL did not require the employee list submitted by TUHS to differentiate between professional and nonprofessional employes.

On May 10, 2006 the Pennsylvania Labor Relations Board (Board), issued an Order Directing Remand for Further Proceedings. The purpose of the remand order was to have TUHS submit a list that differentiated between professional and non-professional employes and to have the Board's Representation Coordinator conduct a telephone conference among the parties to facilitate resolution of any disagreements regarding the professional status of the listed employes.

On May 17, 2006 the Board received TUHS's differentiated list of emloyes. TUHS listed "respiratory therapist" under the nonprofessional heading. Because District 1199C took the position that respiratory therapists were professional, a hearing on that issue was necessary. That hearing was held on June 2, 2006 in Philadelphia, Pennsylvania. The sole purpose of that hearing was to give District 1199C the opportunity to present evidence on the professional status of respiratory therapists under the Act.

FINDING OF FACT

That FINDINGS OF FACT numbers 1 through 13 inclusive, as set forth in the April 21, 2006, Order Directing Submission of Eligibility List are incorporated by reference herein and made a part hereof.

- 14. On May 26, 2006 the parties agreed upon the hearing date of June 2, 2006 for District 1199C to have the opportunity to present evidence for its position that the job classification of respiratory therapist was professional under the Act. That hearing was necessary because District 1199C disagreed with TUHS's differentiated list of professional and non-professional employes as submitted pursuant to the Board's remand order of May 10, 2006. Only District 1199C asserted that respiratory therapists were professional employes. The list as submitted categorized respiratory therapists as nonprofessional, and a subsequent conference call failed to resolve that classification disagreement. (June 2, 2006 N.T. 6, 18; 43 P.S. Section 1101.301(7))
- 15. District 1199C requested a subpoena for Tina Aument on Friday, May 26, 2006. District 1199C then requested subpoenas for Dinah Perry, Ricky Grant, Carmella Carter and Lydell Douglass. All five subpoenas were prepared and mailed overnight on Tuesday, May 30, 2006. District 1199C received the subpoenas on Wednesday, May 31, 2006. (June 2, 2006 N.T. 10)

¹ Monday May 29, 2006 was Memorial Day, a legal holiday in Pennsylvania, and the PLRB offices were closed.

- 16. On May 31,2006 the Union sent by registered mail², return receipt requested, the five subpoenas to the above-mentioned individuals, all respiratory therapists in TUHS's employ. The subpoenas were for the June 2, 2006 hearing, then three days in the future. District 1199C sent only the actual subpoena and a cover letter addressed to each individual employe in that mailing. District 1199C had not, on the day of hearing, received any return receipts from the five mailings (June 2, 2006 N.T. 10, 11, Intervener Exhibit A)
- 17. None of the individuals to whom subpoenas were directed appeared at the June 2, 2006 hearing. (June 2, 2006 N.T. 7)
- 18. At the close of the hearing on June 2, 2006 District 1199C moved for a continuance to secure service and/or enforce the subpoenas. (June 2, 2006 N.T. 11, 12)
- 19. The parties have agreed that the following are professional positions: activities therapist, activities therapist senior, audiologist senior, buyer, clinical dietician specialist, cyto technologist, dietician-clinical, exercise physiologist, hla medical technologist, junior dosimetrist, medical technologist, medical technologist senior, occupational therapist senior, patient relations representative, physical therapist, physical therapist senior, physician's assistant, physician's assistant senior, psychologist, senior clinical dietician, social worker I, social worker II, social worker senior, senior accountant, senior certified surgical assistant, senior exercise physiologist, speech pathologist, speech pathologist senior, staff accountant, and therapeutic recreational specialist (certified).

DISCUSSION

The hearing in this case arose because District 1199C took the position that the job classification of "respiratory therapist" was professional, despite TUHS's indicating that classification as nonprofessional on the list of employes submitted pursuant to the Board's remand order of May 10, 2006. The June 2, 2006 hearing was afforded District 1199C so it could present evidence to support its position that respiratory therapists were professional employes under the Act.

To effectuate its proofs, District 1199C requested, and received on Tuesday, May 31, 2006, five subpoenas for the Friday, June 2, 2006 hearing. Incredibly, District 1199C chose to serve those subpoenas by registered mail, return receipt requested, instead of having them personally served. Needless to say, District 1199C did not have adequate proof of service (the signed return receipt) by Friday June 2, 2006 at the hearing. None of the witnesses at whom the subpoenas were directed attended the hearing, and, consequently, District 1199C had absolutely no evidence to present.

After calling the names of the witnesses at whom it directed subpoenas, and hearing no response, District 1199C moved for, "a very short continuance, so that it can either move for enforcement of these subpoenas. . ." or so it "would be able to secure service, as well as address any scheduling needs that the employes have with their employer [TUHS]." (June 2, 2006 N.T. 11). The motion, on both grounds, was denied.

Section 1606 of the Act recites the necessary elements of perfected service for "process and papers of the board. . . ." Such process, including subpoenas, may be served personally or by registered mail. Should registered mail be the method used, "the return post office receipt. . . shall be proof of service. . . ." 43 P.S. §1101.1606.

It is unclear how District 1199C thought it could successfully move for the enforcement of subpoenas whose service was unperfected, and it offered no legal authority

² Exhibit Intervener A actually indicated that each letter was sent "certified mail". I use the term "registered mail" because that is the term, albeit anachronistic, used in the Act. 43 P.S. §1101.1606

³ Given the truncated nature of the proceedings it is worth noting that District 1199C did not send a courier to pick up the subpoenas the day they were prepared, but rather chose to have them sent overnight, thereby losing yet another day. Moreover, District 1199C did not comply with 34 Pa. Code § 95.95 since it did not tender witness and mileage fees to witnesses. (June 2, 2006 N.T.10)

⁴ Additionally, it is a breathtaking coincidence that out of some fifty respiratory therapists available, District 1199C chose to attempt service on five who were working the day of the hearing (June 2, 2006 N.T. 11, 16-17).

to support its motion. To state the obvious, where there is no adequate service of subpoenas, there is nothing to enforce. District 1199C's argument is pure buncombe.

The truncated nature of scheduling in this case called for a modest degree of logistical sophistication in order to properly and timely serve the necessary witnesses. District 1199C took none of the obvious, and basic, steps necessary to quickly effectuate service under the circumstances. Both in the receipt of, and the service of subpoenas, District 1199C consciously chose not to take advantage of the quickest methods, despite the need to perfect service in a matter of days. District 1199C's decision about the method of service is, at best, the benchmark for aphronia. Considering the dilatory method of service chosen by District 1199C, and the fact that it attempted to subpoena only employes working on June 2nd, the plea that it, "did everything within its power to effectuate service in a timely fashion and arrange for witnesses to be here" (June 2, 2006 N.T. 11), is simply not true.

The National Labor Relations Board (NLRB) has consistently for the last thirty-one years found respiratory therapists to be nonprofessional employes. South Hills Health System and Jefferson Hospital Technical Employees Association/PSEA Health Care, Case 6-RC-11793, issued May 11, 2000; Children's Hospital of Pittsburgh, 222 NLRB 588, 593, 91 LRRM 1440 (1976); St. Elizabeth's Hospital of Boston, 220 NLRB 325, 327, 90 LRRM 1420 (1975). District 1199C has presented no viva voce testimony, nor cited even one case to the contrary. Because District 1199C presented no evidence and no authority at the June 2, 2006, hearing to support its bald assertion that respiratory therapists are professional employes, respiratory therapists are found to be non-professional under the Act by the adoption of the NLRB's analysis.

CONCLUSIONS

That CONCLUSIONS numbers 1 through 3, as set forth in the aforesaid Order Directing Submission of Eligibility List are incorporated by reference herein and made a part hereof.

- 4. The unit appropriate for collective bargaining is a subdivision of TUHS's unit, working at Temple University Hospital and Temple University Children's Medical Center, comprised of all full-time and regular part-time professional and technical employes, excluding physicians, nurses, pharmacists, office clerical employes, students, and employes on temporary visas, management level employes, supervisors, first level supervisors, confidential employes and guards; as amended.
- 5. Pursuant to Section 604(2) of the Act, the professional employes are entitled to vote on whether or not they desire to be included in a unit that includes nonprofessional employes. In the event that a majority of the professional employes do not vote to be included in a unit that included nonprofessional employes, the appropriate units will be:
 - UNIT I: All full time and regular part-time technical employes, excluding physicians, nurses, pharmacists, office clerical employes, students, and employes on temporary visas, management level employes, supervisors, first level supervisors, confidential employes and guards.
 - UNIT II: All full time and regular part-time professional employes, excluding physicians, nurses, pharmacists, office clerical employes, students, and employes on temporary visas, management level employes, supervisors, first level supervisors, confidential employes and guards.
- 6. The following are professional positions: activities therapist, activities therapist senior, audiologist senior, buyer, clinical dietician specialist, cyto technologist, dietician-clinical, exercise physiologist, hla medical technologist, junior dosimetrist, medical technologist, medical technologist senior, occupational therapist senior, patient relations representative, physical therapist, physical therapist senior, physician's assistant, physician's assistant senior, psychologist, senior clinical dietician, social worker I, social worker II, social worker senior, senior accountant, senior certified surgical assistant, senior exercise physiologist, speech pathologist, speech pathologist senior, staff accountant, and therapeutic recreational specialist (certified).

7. Respiratory therapists are nonprofessional employes under the Act.

ORDER

In view of the foregoing and in order to effectuate the policies of the \mbox{Act} , the hearing examiner

HEREBY ORDERS AND DIRECTS

1. That TUHS shall immediately submit to the Board an alphabetized list of the names and addresses of the employes eligible for inclusion in the unit set forth above. This list shall differentiate professional and non-professional employes.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that any exceptions to this order may be filed to the order of the Board's Representative to be issued pursuant to 34 Pa. Code § 95.96(b) following the conduct of an election.

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania, this fourteenth day of June 2006.

PENNSYLVANIA LABOR RELATIONS BOARD

TIMOTHY TIETZE, Hearing Examiner

June 14, 2006

Richard S. Meyer, Esquire BLANK ROME LLP One Logan Square Philadelphia, PA 19103-6998

Lance Geren, Esquire FREEMAN AND LORRY, PC 1601 Market Street, 2nd Floor Philadelphia, PA 19103 Jonathan Walters, Esquire MARKOWITZ & RICHMAN 121 S. Broad Street, 11th Floor Philadelphia, PA 19107

John B. Langel, Esquire
BALLARD SPAHR ANDREWS & INGERSOLL
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599

TEMPLE UNIVERSITY HEALTH SYSTEM Case No. PERA-R-05-498-E (PERA-R-5757-E)

Enclosed please find a copy of the Second Order Directing Submission of Eligibility List issued in the above-captioned matter.

Sincerely,

Timothy Tietze Hearing Examiner

Enclosure

cc: Robert Birnbrauer Henry Nicholas April Smith