COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF	:	
	:	
	:	Case No. PERA-R-05-498-E
	:	
TEMPLE UNIVERSITY HEALTH SYSTEM[1]	:	

ORDER DIRECTING SUBMISSION OF ELIGIBILITY LIST

On October 25, 2005, the Pennsylvania Association of Staff Nurses and Allied Professionals (PASNAP), filed with the Pennsylvania Labor Relations Board (Board) a petition for representation seeking to represent an already certified bargaining unit comprised of all 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. Those employes, at the time PASNAP filed its petition, were 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 petitioned for employes work at Temple University Hospital (TUH) and Temple University Children's Medical center (TUCMC), both part of Temple University Health System (TUHS). On November 9, 2005, the Secretary of the Board issued an order and notice of hearing directing that a hearing be held on December 30, 2005, in Philadelphia, Pennsylvania. The hearing examiner continued the hearing to January 30, 2006. On that day a hearing was held. On February 13 and 14, 2006, additional days of hearings were held. All parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. All parties filed post-hearing briefs with the Board.

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

FINDINGS OF FACT

1. PASNAP is an employe organization.

2. District 1199C is an employe organization.

3. Temple University (University) is a public employer.

4. TUHS, which includes TUH and TUCMC, is a public employer.

5. Findings of Fact three (3) through seven (7), inclusive, from In the Matter of the Employes of Temple University Hospital, 36 PPER 117 (Proposed Order of Unit Clarification, 2005) are incorporated by reference and specifically made part of this record. (PERA-U-03-318-E)

6. The testimony of Beth Koob, George Moore, Robert Birnbrauer, Robert Lux, and Richard Donald Lutman from the hearings in PERA-U-03-318-E is specifically admitted as part of this record, along with all previously admitted exhibits referenced in their testimony. (N.T. 16, 17, 18)

7. There is a sufficient showing of interest by PASNAP for those employes who are employed by TUHS.

8. There is an insufficient showing of interest by PASNAP for those employes who are employed by the University.

[1] The caption appears as amended by the hearing examiner. In the body of the petition, as filed, PASNAP listed the name of the employer as, "Temple University/Hospital (including Children's Hospital) Robert Birnbrauer, Deborah Hartnett".

9. John Smith a former employe of TUHS working at Temple University Hospital filed grievances over his suspension and subsequent termination. Smith had, as his grievance hearing officer, Timothy Ferhle, a manager employed by the University. Smith's suspension and ultimate termination were decided by managers and/or supervisors at Temple University Hospital, part of TUHS. Richard Donald Lutman, a TUHS manager would normally have heard Smith's grievance, but Smith had leveled accusations against Lutman and Lutman recused himself from the process. (N.T. 107-112)

10. Edith "Fifi" Hamilton and Ernestine Bristow are employes of TUHS working at Temple University Hospital and Temple University Childrens Medical center, respectively, and both are delegates for District 1199C. Union delegates handle member grievances. Both of these delegates have handled grievances filed by bargaining unit members employed by the University. The University does not assign delegates to handle specific grievances. (N.T. 113-118)

11. The parties stipulated and agreed that there are both professional and nonprofessional employes employed at each of the following locations, TUCMC, TUH, and the University. (N.T. 34, 35)

12. TUHS employes working at TUH report to supervisors and managers at TUH. Likewise, TUHS employes working at TUCMC report to supervisors and managers at TUCMC. (N.T. 136-138; Hospital Exhibit A)

13. The parties stipulated and agreed that University employes are supervised only by other University employes. (N.T. 142-144; Hospital Exhibit A)

DISCUSSION

This case involves PASNAP's seeking to represent a unit of employes currently represented by the incumbent, District 1199C. PASNAP has petitioned for a certified unit employed by the University, including those employed by Temple University Hospital and Temple University Childrens Medical Center. The rub is that by a proposed order of unit clarification issued some two months before this petition was filed, the University was found to be a separate employer from TUHS, which is comprised of, *inter alia*, Temple University Hospital (TUH) and Temple University Childrens Medical Center (TUCMC). Despite that proposed order, PASNAP did not modify its petition to reflect the new reality of two employers for purposes of collective bargaining.

Both PASNAP and District 1199C argue in this case that the University and TUHS are still one employer, despite a final order by the Board to the contrary. In the Matter of the Employes of Temple University Hospital, PERA-U-03-318-E (Final Order, February 21, 2006)[2]. PASNAP, which was a party to the February 21 Board decision, reiterates, in this case, those arguments it previously made to both the hearing examiner and to the Board. Essentially, the argument is, again, that the record facts simply do not support the legal conclusion that the University and TUHS are two employers. *See generally*, Southeastern Pennsylvania Transportation Authority, 31 PPER § 31035 (Final Order, 2000); Boich Mining Company v. NLRB, 955 F.2d 431 (6th Cir. 1992). Absent more, PASNAP's repeated argument is unpersuasive.

District 1199C's argument, boiled down to its essence, is that the record shows the University and TUHS to be one employer and if they are two employers then the Board has no jurisdiction over TUHS. In support of its position that there is still only one employer, District 1199C highlights both testimony from the prior case and testimony it elicited in this case. To the extent District 1199C argues that facts from the prior case support the single-employer position, that argument is rejected now, as it was before.

The meager testimony elicited in this case upon which District 1199C bases its single-employer argument is; that University and TUHS employes work "side-by-side in the same department"; that the same pension plan is available to both University and TUHS

[2] That case dealt with the "one employer versus two employers" issue but involved a unit of nurses.

employes; that after the University and TUHS split their labor relations departments, neither hired additional staff; that during the 2001 contract negotiations between District 1199C and the University, only the University's associate vice president of human resources was at the table for the University and no representative of TUHS was present; that "union delegates employed by TUHS handle[d] grievances of employees employed by the University"; and that the "University has heard grievances for TUHS."

The mere fact that employes of the University and TUHS may work in close proximity to one another, and indeed, even in the same hospital department, sheds little light on whether there are one or two employers in this case. District 1199C brashly concludes that it is "patently unbelievable that two employees working side by side do not take direction from the same supervisors...." What may be patently unbelievable to District 1199C, nonetheless, still requires factual proof in a Board hearing, and there is simply no proof to support that conclusion on this record.

The fact that the two employers here may make available the same pension plan does not carry the day, either. *See*, Boich Mining Company, *supra*; Newspaper & Mail Deliverers Union of New York, 271 NLRB 60, 117 LRRM 1008 (1984); Western Union Corp., 224 NLRB 274 (1976), *aff'd* 571 F. 2d 665 (D.C. Cir. 1978).

As further evidence that the split between the University and TUHS is a mere charade, District 1199C asserts that after the labor relations department split neither the University nor TUHS hired additional labor relations staff. How this tangential fact may be evidence of single-employer status is somewhat less than luculent.

District 1199C also offers as evidence of single-employer status, that in 2001, during negotiations for a successor collective bargaining agreement between District 1199C and the University, only the University, and not TUHS, had a representative at the table. Since those negotiations occurred some two years before the unit clarification petition was filed which resulted in the University's and TUHS's being adjudicated separate employers by the Board, and the year before the October 30, 2002 memo in which the University's labor relations department split in two[3], it is little wonder that only the University was at the table, since it was the singular employer at that time.

District 1199C next argues that there was an intermingling of University and TUHS employes in the grievance process. More specifically District 1199C points to situations where its delegates who were, as District 1199C characterizes them, "employed by TUHS" handled grievances for employes who were, as District 1199C describes them, "employed by the University".[4] It is, however, District 1199C that assigns delegates to handle grievances. Neither the University nor TUHS normally assign District 1199C delegates to handle specific grievances.

District 1199C also highlights an instance where a University management employe, in late 2002 and early 2003, was involved in the grievance procedure of a TUHS bargaining unit employee, as evidence that there remains only one employer. The grievant there, a TUHS employe named Smith, had a University manager as his grievance-hearing officer[5]. Nevertheless, the record shows that a TUHS manager made the decision to suspend and finally to terminate Smith. District 1199C also fails to note that the only reason the University's manager heard the grievance was that Smith had cast aspersions upon Richard Lutman, the TUHS manager who would have normally have been the one to hear that grievance.

In short, the veracity of District 1199C's argument for a single employer was best summed up by Shakespeare when he wrote, "He draweth out the thread of his verbosity finer than the staple of his argument."[6]

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[3] *See* Finding of Fact 6, p.2, In the Matter of the Employes of Temple University Hospital, 36 PPER 117 (Proposed Order of Unit Clarification, 2005).

[4] It would appear from the phrasing of this argument that District 1199C is conceding that there are, in fact, two employers.

[5] See footnote 4.

[6] William Shakespeare, *Love's Labours Lost*, Act V, Scene 1 (1595-1596)

For the first time, in its post-hearing brief, District 1199C asserted that if there are two employers here then the Board has jurisdiction over only one, namely, the University. Because District 1199C first raised a challenge to the Board's jurisdiction in its post-hearing brief, the other parties were invited to submit supplemental briefs on that issue.[7]

The National Labor Relations Board (NLRB), over thirty years ago in Temple University, 194 NLRB 1160, 79 LRRM 1196 (1972) concluded that, because of the University's unique relationship with the Commonwealth of Pennsylvania, the policies of the National Labor Relations Act (NLRA) were best effectuated by the NLRB's declining jurisdiction over the University. *See also*, Temple University, 6 PPER 127 (Order and Notice of Election, 1975).

As authority for its position that the NLRB has jurisdiction over TUHS, District 1199C cites St. Christopher's Hospital, 223 NLRB 166, 91 LRRM 1417 (1976). In that case the NLRB found that it had jurisdiction over St. Christopher's Hospital because it had only a tenuous, two-fold relationship with the University; under a 1947 contract it agreed to function as the University medical school's pediatrics department, and full-time attending hospital physicians also held faculty appointments with the University medical school. Those facts describe a materially different, and significantly more distant, relationship between the University and St. Christopher's than that which currently exists between the University and TUHS.

District 1199C also refers to testimony that sometime in the past the NLRB held an election for the operating engineers' union at Jeanes hospital, an institution which is under the purview of TUHS. Based upon this sketchy bit of information District 1199C concludes that the NLRB must, consequently, have jurisdiction over TUHS as an employer, separate from the University. How that leap of logic is accomplished, however, is not mentioned in District 1199C's brief. In support of this argument District 1199C states, "Further, the unrebutted testimony revealed that while the University continues to be governed by the Temple University Commonwealth Act[8][sic], this Act has no application to TUHS." (District 1199C's brief at 11). Tellingly, there is no citation to the record for this assertion. Perhaps that's because a review of the record reveals no such testimony. The statement appears to be cut from whole cloth.

Merely because there are two employers here for purposes of collective bargaining does not automatically mean that the Board is divested of jurisdiction over one of those employers. There are two employers for purposes of collective bargaining, but both remain under the auspices of the Temple University-Commonwealth Act. The criteria necessary for excluding an employer from the Temple University-Commonwealth Act are different from those used to determine single employer status for collective bargaining under the Public Employe Relations Act (PERA). District 1199C fails appreciate that difference in its arguments.

Having resolved District 1199C's issues, albeit not in its favor, we now turn to two issues raised solely by TUHS: whether there needs to be a self-determination question on the ballot for professional employes in whatever elections are ordered, and whether there is a sufficient community of interest between the employees who work at different TUHS locations to remain in one bargaining unit.

TUHS asserted at the hearing, and in its brief, that if there are two separate employers in this case, then election ballots must ask professional voters, *inter alia*, if they wish to be in a unit that includes non-professional employes. 43 P.S. § 1104.604(2). This procedure is often referred to as a "self-determination election." TUHS argues that even if the professional employes have previously had a self-determination election, when the incumbent union faces a rival, those same professional employees must be given another opportunity to decide whether they wish to be in the same unit with non-professional employes. In support of this position TUHS cites, *inter alia*, American Medical Response, Inc., 344 NLRB No. 161, 177 LRRM 1337 (2005).

[7] By letter of March 27, 2006 the other parties where invited to submit supplemental briefs on or before April 4, 2006. PASNAP and TUHS availed themselves of that opportunity.

[8] Temple University-Commonwealth Act, 24 P.S. § 2510-1 *et seq.*

In that case the employer's nurses, who were unrepresented, expressed an interest in being represented. There was, at that time, a unit of nonprofessional employes represented by SEIU.[9] Pursuant to the applicable California procedures, after the requisite number of nurses signed a representation petition, an election was held to incorporate the nurses into the existing unit. The nurses' ballot merely asked whether they wished to be represented by SEIU or no organization. SEIU carried the day. Two years later a rival union petitioned to represent that professional/nonprofessional unit on the same day that an employe filed a petition seeking to decertify SEIU. An election was directed and the ballot given to all voters simply asked whether employes wished to be represented by SEIU, the rival, or by neither. After SEIU lost the election it filed objections alleging that the professional employes should have been asked, on their ballots, whether they wished to be in a unit with nonprofessional employes. Not to do so, argued SEIU, violated Section 9(b)(1) of the National Labor Relations Act (NLRA), the mirror section to 42 P.S. § 1104.604(2) of PERA. The NLRB decided that SEIU was, in fact, correct; the election was nullified and a new one ordered. In reaching its decision the NLRB relied on Westinghouse Electric Corp., 116 NLRB 1545, 39 LRRM 1039 (1956).

In Westinghouse the Petitioner timely filed a petition to represent a professional/nonprofessional unit already represented by the Intervener. The Intervener's position was that the professional employes (engineers) in the unit were not really professional, but if they were, there was no need for a self-determination ballot because those professional employes had, six years before, opted to be in the mixed unit. In response to that argument the NLRB found that the engineers were, indeed, professional employes and further reasoned that Section 9(b)(1) of the NLRB required professional employes be given another opportunity to decide whether they wished to be in a unit with the nonprofessionals. While that result has appeal under the NLRA, PERA differs sufficiently to reach the opposite conclusion. Using private sector NLRB precedent in public sector situations is frowned upon when the underlying policies are different. Temple University Health Systems v. PLRB, 734 A.2d 448 (Pa. Cmwlth. 1999), *appeal denied*, 749 A.2d 474 (1999); *see also*, Somerset County Commissioners, 2 PPER 60 at 64 (Decision of PLRB, 1972)(NLRA more inclusive than PERA and therefore not always applicable in public sector certification process).

Under PERA there is an admonition against over-fragmentization of units, and indeed, the Board has a history of establishing broad-based units. 43 P.S. § 1101.604(1). Such an admonition is absent from the NLRA. Further, "it is the Board's general policy in cases involving rival representation petitions to hold an election in the same unit that the Board previously found appropriate and certified...." Midwestern Intermediate Unit IV, 15 PPER § 15178 at 394 (Final Order, 1984)(citations omitted).

Additionally, under PERA there can be no voluntary recognition absent certification by the Board. 43 P.S. § 1101.602 and 603. Under federal law there can clearly arise, as it did in American Medical Response, Inc., *supra*, a situation where professionals may be included in a unit with nonprofessionals without a self-determination vote. In contrast, the statutory scheme of PERA initially prevents that kind of mixed unit absent the consent of the professionals voting. And in this case those professionals have already voted to be in a mixed unit. Once that vote has been cast under Board law it is difficult to sever the professionals from the nonprofessionals. In the Matter of the Employes of Perry County, 34 PPER 156 (Proposed Order of Dismissal, 2003). For all of the above reasons, regardless of federal precedent, there need not be another self-determination election for the professional employes in this unit.

The question of whether TUHS employes working at different locations share a sufficient community of interest to stay in one unit is a severance question that is properly brought before the Board in a unit clarification petition. In the Matter of the Employes of Perry County, *supra*. As stated above, the Board holds rival elections with the unit as previously certified. Midwestern Intermediate Unit IV, *supra*. It will do so here.

PASNAP has a showing of interest for those TUHS employes in the previously certified unit working at Temple University Hospital and Temple University Childrens

[9] Service Employees International Union

Medical Center. Consequently TUHS is ordered to immediately submit to the Board a current list of those employes. Insofar as PASNAP has petitioned to represent employees of the University this petition is dismissed for an insufficient showing of interest.

CONCLUSIONS

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

1. The University and TUHS are employers within the meaning of section 301 (1) of the Act.

2. PASNAP and District 1199C are employe organizations within the meaning of section 301(3) of the Act.

3. The Board has jurisdiction over the parties.

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.

ORDER

In view of the foregoing and in order to effectuate the policies of the 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.

2. That this petition is dismissed for an insufficient showing of interest insofar as it seeks to represent employes of Temple University.

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 twenty-first day of April 2006.

PENNSYLVANIA LABOR RELATIONS BOARD

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TIMOTHY TIETZE, Hearing Examiner