

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ASSOCIATION OF PENNSYLVANIA STATE COLLEGE	:	
AND UNIVERSITY FACULTIES	:	
	:	
v.	:	Case No. PERA-C-05-210-E
	:	
STATE SYSTEM OF HIGHER EDUCATION	:	
WEST CHESTER UNIVERSITY	:	

PROPOSED DECISION AND ORDER

On May 10, 2005, the Association of Pennsylvania State College and University Faculties (APSCUF) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the State System of Higher Education (SSHE) had violated sections 1201(a)(1) and 1201(a)(5) of the Public Employee Relations Act (Act) by "assign[ing] graduate students who are not members of the APSCUF bargaining unit to instruct students in biology labs [at West Chester University]." APSCUF also alleged that it "did not become aware of this unfair practice until January 10, 2005." On June 16, 2005, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on September 20, 2005. The hearing examiner thereafter continued the hearing upon the request of APSCUF and without objection by SSHE.

On September 7, 2005, SSHE filed a motion to dismiss the charge. SSHE alleged that "[a]lthough APSCUF contends that it only learned of the alleged unfair practice on January 10, 2005, the local APSCUF president clearly knew of this practice no later than October 2, 1997," thus making the charge untimely. On September 16, 2005, SSHE requested a pre-hearing conference.

On October 4, 2005, the hearing examiner scheduled a pre-hearing conference for October 18, 2005, and denied SSHE's motion. As the hearing examiner explained, the motion raised a factual dispute that could not be resolved at that stage of the proceeding.

On October 18, 2005, the pre-hearing conference was held. The hearing examiner thereafter twice continued the hearing, once upon the request of both parties and once upon the request of APSCUF and without objection by SSHE. On January 23, 2006, the hearing was held. Both parties were afforded a full opportunity to present evidence and to cross-examine witnesses. On March 10, 2006, each party filed a brief.

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

FINDINGS OF FACT

1. On November 12, 1971, the Board certified APSCUF as the exclusive representative of a bargaining unit that includes "all department chairmen, full-time teaching faculty (including librarians with faculty status), part-time teaching faculty, and librarians without faculty status" employed by SSHE. (Case No. PERA-R-775-C)

2. In 1976, SSHE assigned a faculty member in the biology department at West Chester University (Dr. Jack Waber) to be the instructor for Biology 100. A wet lab involving hands-on experimentation with specimens and equipment was a part of the course. (N.T. 18-19)

3. By 1997, SSHE was offering several lab sections and was assigning faculty members to teach all of them. (N.T. 19, 48-49)

4. In 1997, SSHE replaced the wet lab with a virtual lab in which laboratory assignments are accessed and completed by computer. SSHE assigned graduate students to the virtual labs. SSHE did not assign faculty members to the virtual labs. (N.T. 19-21, 33-36)

5. By email dated October 1, 1997, the then chair of the biology department (Dr. Martha Potvin) wrote to APSCUF's then president at West Chester University (Dr. Emlyn H. Jones) as follows:

"Do you have a question about our use of graduate tutors in BIO 100? I have always assumed that if the union thought that something faculty were doing was in violation of the contract, that you would let us know. We have believed that we are operating well within the limits of the contract as the tutors are making sure expensive equipment doesn't walk away and are directing students through tutorials. They are not teaching disciplinary content and are not doing any evaluation of grading[.] If you would like to discuss this, Dr. Waber (who is the instructor of record and software co-author) and I would certainly meet with you."

(N.T. 39, 69; Respondent Exhibit 3)

6. By email dated October 2, 1997, Dr. Jones wrote to Dr. Potvin as follows:

"It seems to me that the only question I have you have answered. If they are not teaching and are serving only as door guards, the[n] the Union has absolutely no problem."

(Respondent Exhibit 3)

7. In 2002, Dr. Waber began using graduate students to prepare and administer quizzes for the labs. He did not seek the approval of SSHE before he did so. (N.T. 22-23, 37-38, 44, 74)

8. Effective July 1, 2003, the parties entered into a four-year collective bargaining agreement providing at article 7(c)(2) as follows:

"At no time shall graduate assistants instruct lectures or laboratories unless the FACULTY MEMBER assigned to teach the course is present in the classroom or laboratory."

(Complainant Exhibit 1)

9. On or after January 11, 2005, a director in APSCUF's contract department (Mary Beth Hamilton) learned for the first time ever that Dr. Waber was using graduate students to prepare and administer quizzes for the labs. (N.T. 8-9, 11-13)

10. On July 18, 2005, Dr. Waber for the first time ever sent to a dean at West Chester University (Dr. Charles D. Hurt) an email of "my description of the Bio 100 GA duties." Dr. Waber included "[a]dministering quizzes" among those duties and indicated that "[a]s the graduate assistants are Biology graduate students, they also mentor individual students if they should have a specific question about the subject matter for an individual exercise." (N.T. 39-42, 44; Respondent Exhibits 1-2).

DISCUSSION

The positions of the parties

APSCUF has charged that SSHE committed unfair practices under sections 1201(a)(1) and 1201(a)(5) by "assign[ing] graduate students who are not members of the APSCUF bargaining unit to instruct students in biology labs [at West Chester University]." According to APSCUF, because graduate students answer substantive questions and prepare and administer quizzes for Biology 100 labs in the absence of the faculty member assigned to teach the course, SSHE has repudiated article 7(c)(2) of the parties' collective bargaining agreement. APSCUF also submits that because faculty members performed that work in the past SSHE has transferred bargaining unit work to non-members of the bargaining unit as well.

SSHE contends that the charge should be dismissed because it has not repudiated article 7(c)(2), because it negotiated the right to use graduate students in the labs and because APSCUF did not demand bargaining over its use of graduate students in the labs. SSHE submits that the record does not show that it assigned graduate students to answer substantive question or to prepare and administer quizzes or that graduate students have answered substantive questions.

SSHE also submits that articles 7 and 37 of the parties' collective bargaining agreement show that it has the contractual right to use graduate students in the labs.

The applicable law

An employer commits unfair practices under sections 1201(a)(1) and 1201(a)(5) if it repudiates a provision in a collective bargaining agreement. Millcreek Township School District v. PLRB, 631 A.2d 734 (Pa. Cmwlth. 1993), appeal denied, 537 A.2d 626, 641 A.2d 590 (1994). If, however, the employer has a sound basis for arguing that it acted in conformity with rather than in repudiation of a provision in a collective bargaining agreement, no such unfair practices may be found. Pennsylvania State Troopers Association v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000)(construing analogous provisions of the Pennsylvania Labor Relations Act (PLRA)).

An employer also commits unfair practices under sections 1201(a)(1) and 1201(a)(5) if it unilaterally transfers bargaining unit work to non-members of the bargaining unit. PLRB v. Mars Area School District, 480 Pa. 295, 389 A.2d 1073 (1978). Again, however, no such unfair practices may be found if the employer has a sound basis for arguing that it acted in conformity with rather than in repudiation of a provision in a collective bargaining agreement. Bristol Township School District, 25 PPER ¶ 25031 (Final Order 1994).

When faced with a fait accompli, a union is under no obligation to demand bargaining before filing a charge. Snyder County, 36 PPER 96 (Final Order 2005).

An employer is liable for the actions of a supervisor acting as its agent, Lancaster County, 24 PPER ¶ 24027 (Final Order 1993), but an employer is not liable for the actions of one of its employees who is not its agent. City of Chester, 23 PPER ¶ 23096 (Proposed Decision and Order 1992). Nor is an employer liable for conduct of which it was not aware. Central Bucks School District, 33 PPER ¶ 33084 (Final Order 2002).

Evidence of post-charge conduct may be relied upon to shed light on the true character of the events set forth in a charge, PLRB v. General Braddock Area School District, 380 A.2d 946 (Pa. Cmwlth. 1977), but post-charge conduct may not form the sole basis for the finding of an unfair practice. Commonwealth of Pennsylvania, Pennsylvania State Police, 37 PPER 4 (Final Order 2006)(construing analogous provisions of the PLRA).

Any finding of an unfair practice must be supported by substantial evidence. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). Speculation is not substantial evidence. Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311 (Pa. Cmwlth. 1974). In order to be timely, a charge must be filed within four months of when the charging party knew or should have known of the unfair practices charged. Thomas v. Commonwealth of Pennsylvania, PLRB, 483 A.2d 1016 (Pa. Cmwlth. 1994).

The timeliness of the charge

In its brief, SSHE no longer contends that the charge is untimely filed. Nonetheless, because SSHE previously moved to dismiss the charge as untimely filed and because the timeliness of a charge is jurisdictional, Delaware County, 29 PPER ¶ 29087 (Final Order 1998), the timeliness of the charge will be addressed. The record shows that on or after January 11, 2005, APSCUF learned for the first time that graduate students were preparing and administering quizzes for the labs (finding of fact 9) and that APSCUF filed the charge within four months thereafter on May 10, 2005. Nothing in the record shows that APSCUF knew or should have known that graduate students were preparing and administering quizzes in 1997. To the contrary, the record only shows that APSCUF learned in 1997 that graduate students "are making sure expensive equipment doesn't walk away and are directing students through tutorials. They are not teaching disciplinary content and are not doing any evaluation of grading" (finding of fact 5). Thus, the charge is timely filed.

The charge alleging a repudiation of article 7(c)(2)

In support of its contention that SSHE committed unfair practices by repudiating article 7(c)(2), APSCUF points out that article 7(c)(2) provides that "[a]t no time shall graduate assistants instruct lectures or laboratories unless the FACULTY MEMBER assigned to teach the course is present in the classroom or laboratory" (finding of fact 8).

APSCUF also points out that since 1976 Dr. Waber has been assigned to teach Biology 100 (finding of fact 2), that since 1997 Dr. Waber has not been present for the labs (N.T. 18-21, 33-36), that in 2002 Dr. Waber began using graduate students to prepare and administer quizzes for the labs (N.T. 22-23), that Dr. Waber expects the graduate students to answer substantive questions (N.T. 24-25) and that Dr. Waber has written that "[a]s the graduate assistants are Biology graduate students, they also mentor individual students if they should have a specific question about the subject matter for an individual exercise" (Respondent Exhibits 1-2). In APSCUF's view, all of that proves that SSHE repudiated article 7(c)(2) by assigning graduate students to instruct the labs in the absence of the faculty member assigned to teach the course.

Notably, however, the record shows that Dr. Waber began using graduate students to prepare and administer quizzes for the labs without seeking the approval of SSHE to do so (finding of fact 7). The record also shows that he is not a supervisor but rather is a member of the bargaining unit (findings of fact 1-2). There is, therefore, no basis for finding that he was acting as SSHE's agent. See City of Chester, supra (employer was not liable for the actions of an employee not shown to be its agent); compare Westmoreland Intermediate Unit 7, 13 PPER ¶ 13231 (Proposed Decision and Order 1982) (unfair practices found where a supervisor knew that non-members of the bargaining unit were performing bargaining unit work). Moreover, the record shows that SSHE first became aware that he was using graduate students to prepare and administer quizzes for the labs when he told one of its agents (Dean Hurt) as much in an attachment to an email he sent on July 18, 2005 (finding of fact 10). APSCUF filed its charge almost two months earlier on May 10, 2005, so the knowledge Dean Hurt obtained from him on July 18, 2005, is immaterial.¹ See Commonwealth of Pennsylvania, Pennsylvania State Police, supra (charge alleging a transfer of bargaining unit work to non-members of the bargaining unit dismissed because the transfer occurred after the charge was filed). Thus, the fact that Dr. Waber began using graduate students to prepare and administer quizzes for the labs provides no basis for finding that SSHE assigned graduate students to instruct the labs and thereby repudiated article 7(c)(2). See Central Bucks School District, supra (an employer may not be held liable for conduct of which it was not aware).

Similarly, the record does not show that SSHE knew before the charge was filed that Dr. Waber expects graduate students to answer substantive questions. In addition, the record does not show that graduate students have ever met Dr. Waber's expectation. Indeed, as Dr. Waber testified, because he is not in the labs, he does not know if the graduate students have answered substantive questions (N.T. 36). Thus, the fact that Dr. Waber expects graduate students to answer substantive questions provides no better basis for finding that SSHE assigned graduate students to instruct the labs and thereby repudiated article 7(c)(2). See APSCUF v. PLRB, 661 A.2d 901 (Pa. Cmwlth. 1995) (the employer's apparent intention to transfer bargaining unit work to non-members of the bargaining unit provided an insufficient basis for finding that the employer in fact had done so).

Finally, the record shows that Dr. Waber wrote "[a]s the graduate assistants are Biology graduate students, they also mentor individual students if they should have a specific question about the subject matter for an individual exercise" in the attachment to the email he sent to Dean Hurt on July 18, 2005 (finding of fact 10). Again, the charge was filed more than two months before on May 10, 2005. Thus, the fact that Dr. Waber wrote "[a]s the graduate assistants are Biology graduate students, they also mentor individual students if they should have a specific question about the subject matter for an individual exercise" likewise provides no basis for finding that SSHE assigned graduate students to instruct the labs and thereby repudiated article 7(c)(2). See Commonwealth of Pennsylvania, Pennsylvania State Police, supra.

The charge alleging a unilateral transfer of bargaining unit work
to non-members of the bargaining unit

In support of its contention that SSHE committed unfair practices by unilaterally transferring bargaining unit work to non-members of the bargaining unit, APSCUF points out that the bargaining unit includes faculty members but not graduate students (finding of fact

¹ Although not dispositive, it is noted that after Dr. Waber told Dean Hurt that he was using graduate students to prepare and administer quizzes for the labs, Dean Hurt directed him not to do so, and he stopped doing so (N.T. 44, 55-56).

1), that prior to 1997 SSHE used faculty members to teach the labs (finding of fact 3) and that in 1997 SSHE assigned graduate students but not faculty members to the labs (finding of fact 4). As noted above, however, the record does not show that SSHE knowingly assigned graduate students to instruct the labs. Thus, the record does not show that SSHE transferred bargaining unit work to non-members of the bargaining unit. See Commonwealth of Pennsylvania, 29 PPER ¶ 29148 (Final Order 1998)(no transfer of police bargaining unit work occurred where the employer assigned non-police work to non-members of the bargaining unit).

As set forth in its brief at 20 (footnotes omitted), APSCUF submits that SSHE must have known that "graduate assistants were being used in place of faculty members in the [labs]" because

"the administration [at West Chester University] is responsible for assigning faculty to courses and reviewing and maintaining the records that pertain to such assignments. The university's own records document the fact that a single faculty member, Dr. Waber, was assigned to as much as 48 hours of laboratory as part of his workload for a single semester the work of four faculty members. This is both a violation of Article 23(a)(1)(a) of the CBA, and a physical impossibility, as Dr. Waber himself testified."

The inference of knowledge to be drawn from those facts is speculative at best. A charge, of course, must be supported by substantial evidence, not speculation. St. Joseph's Hospital, supra.

In view of the foregoing, there is no need to address SSHE's contention that the charge should be dismissed because it negotiated the right to use graduate students in the labs and because APSCUF did not demand bargaining over its use of graduate students in the labs.

CONCLUSIONS

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

1. SSHE is a public employer under section 301(1) of the Act.
2. APSCUF is an employee organization under section 301(3) of the Act.
3. The Board has jurisdiction over the parties.
4. SSHE has not committed unfair practices under sections 1201(a)(1) and 1201(a)(5) of the Act.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the complaint is rescinded and the charge dismissed.

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 days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-ninth day of March 2006.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner

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March 29, 2006

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STATE SYSTEM OF HIGHER EDUCATION
Case No. PERA-C-05-210-E

Enclosed is a copy of the proposed decision and order that I have issued this date.

Sincerely,

DONALD A. WALLACE
Hearing Examiner

Enclosure

cc: Mary Beth Hamilton
Jeffrey Cooper, Esquire
Thomas Krapsho
Michael L. Becker