

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEMPLE UNIVERSITY HOSPITAL NURSES :
ASSOCIATION/PASNAP, TEMPLE UNIVERSITY :
HOSPITAL ALLIED HEALTH :
PROFESSIONALS/PASNAP, NORTHEASTERN :
HOSPITAL NURSES ASSOCIATION/PASNAP :

Case No. PERA-C-07-212-E

v. :

TEMPLE UNIVERSITY HEALTH SYSTEM :
(TEMPLE UNIVERSITY HOSPITAL AND :
NORTHEASTERN HOSPITAL) :

HEALTH PROFESSIONALS AND ALLIED :
EMPLOYEES, AFT/AFL-CIO, LOCAL 5106 :

Case No. PERA-C-07-261-E

v. :

TEMPLE UNIVERSITY HEALTH SYSTEM (TEMPLE :
UNIVERSITY HOSPITAL, EPISCOPAL CAMPUS) :

PROPOSED DECISION AND ORDER

In Docket number PERA-C-07-212-E, a charge of unfair practices was filed with the Pennsylvania Labor Relations Board (Board) on May 17, 2007, as amended on June 27, 2007, by the Temple University Hospital Nurses Association/PASNAP, Temple University Hospital Allied Health Professionals/PASNAP, and Northeastern Hospital Nurses Association/PASNAP (collectively, PASNAP), alleging that Temple University Health System (Temple) violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (Act) when it adopted a unilateral revision to an existing drug and alcohol testing policy, and refused to give the PASNAP requested information concerning that policy.

On July 12, 2007, the Secretary of the Board issued a complaint and notice of hearing wherein this case was scheduled for hearings on July 18 and 30, 2007 in Philadelphia, Pennsylvania, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Each party filed a post-hearing brief.

In Docket number PERA-C-07-261-E, a charge of unfair practices was filed with the Board on June 18, 2007, by the Health Professionals and Allied Employees AFT/AFL-CIO Local 5106 (Local 5106), alleging that Temple violated Section 1201(a)(1) and (5) of the Act when it adopted the same revision to the existing drug and alcohol policy as was protested in the PASNAP charge. On June 28, 2007, the Secretary of the Board issued a complaint and notice of hearing wherein this case was listed for hearings on July 18 and 30, 2007, in Philadelphia, Pennsylvania, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Each party 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. (PERA-C-07-212-E Stipulated Fact 4).

2. PASNAP and Local 5106 are employe organizations within the meaning of Section 301(3) of the Act. (PERA-C-07-212-E Stipulated Fact 1, 2, 3).

3. In late November of 2006, Temple advised both PASNAP and Local 5106 that it had prepared a drug and alcohol policy that included a new, non-cause-based component. Temple made it clear to both PASNAP and to Local 5106 that it would "meet and discuss," but would not bargain over the new policy. (PERA-C-07-212-E Stipulated Fact 8; N.T. 103, PERA-C-07-261-E Stipulated Exhibit 4, 7).

4. On or about April 30, 2007, Temple decided that it would implement the new non-cause-based drug and alcohol policy in all of its facilities effective June 4, 2007. (PERA-C-07-212-E Stipulated Fact 16, Stipulated Document 2; PERA-C-07-261-E Stipulated Exhibit 1, 12).

5. Temple produced an anecdotal list of twenty-five employes who left Temple's employ for various reasons. This anecdotal list included, employes not in PASNAP bargaining units; employes who tested positive in pre-employment testing; employes who tested positive in for-cause and protective testing; employes tested because they were reported by other employes; employes dismissed for theft of controlled substances; and employes for whom no reason was listed for their leaving Temple's employ. No members of Local 5106's bargaining units were on the anecdotal list. (N.T. 14, 15, 192, 196, 107, 210; PERA-C-07-212-E Temple Exhibit 3).

6. Temple currently uses both reasonable suspicion testing and protective testing as criteria in deciding which employes will be subject to drug and alcohol testing. Reasonable suspicion testing occurs when a Temple employe is the source of information that another employe may be impaired. Protective testing occurs when the reporting entity is other than a Temple employe. (N.T. 203-205).

7. While nurses are generally assigned their own group of patients for whom they are responsible, nurses often assist one another in caring for patients, including giving medications. In some situations, such as operating rooms, nurses are regularly observed by physicians. New nurses are also assigned more experienced nurses to act as preceptors. Preceptors make reports about whether the new nurses meet a prescribed set of criteria. Nurse managers need to observe nurses regularly in order to effectively evaluate them. Bargaining unit nurses have an ethical duty to report other nurses they believe to be impaired on the job, and, in fact have done so in the past. (N.T. 347, 348, 352, 361, 376, 378, 388; PERA-C-07-212-E Temple Exhibit 3).

DISCUSSION

PASNAP and Local 5106 allege that Temple violated the above-mentioned Sections of the Act when it unilaterally promulgated and implemented a non-cause-based drug and alcohol policy that covered PASNAP's and Local 5106's bargaining unit members. PASNAP alone also asserts that Temple violated the Act when it refused PASNAP's relevant information request so PASNAP could bargain over that drug and alcohol policy in a meaningful way. Needless to say, Temple does not agree with the allegations in either charge.

Temple parries the allegations by asserting that these charges were filed beyond the applicable limitation period; that Temple had no duty to bargain over the new, non-cause-based drug and alcohol policy; that even if Temple had a duty to bargain, PASNAP and Local 5106 waived any right to bargain over it; and that Temple satisfied its obligation to supply requested information to PASNAP. Because none of Temple's proffered defenses are legally sufficient to justify its actions, Temple has violated the Act as alleged in both charges.

Before reaching the merits of the charges we must first determine whether they were timely filed. Temple argues that because it first refused to bargain in 2006 with PASNAP and Local 5106 over the new drug and alcohol policy, this charge cannot be timely filed under the Act's four-month limitations period. 43 P.S. § 1101.1505. An examination of Board law, however, does not support Temple's position.

As a general rule, "the nature of the unfair practice claim alleged frames the limitations period for that cause of action[,]" and a "[m]ere statement of future intent to engage in activity (which arguably would constitute an unfair practice) does not constitute an unfair practice...." Upper Gwynedd Township, 32 PPER ¶ 32101, 264 (Final Order, 2001). Therefore, "the Board normally looks to the date of implementation of a unilateral change in evaluating [the] timeliness of a claim that a policy was unlawfully, unilaterally implemented." Id. See also Allegheny County Deputy Sheriffs' Association v. Allegheny County and Allegheny County Sheriff, 35 PPER 75 (Final Order, 2004)(law well established that statute of limitations starts to run from date of implementation of unilaterally promulgated drug policy); County of Lebanon, 27 PPER ¶ 27122 (Proposed Decision and Order, 1996), 27 PPER ¶ 27260 (Final Order, 1996)(where no-smoking policy was adopted but not implemented until a later date, implementation date triggered running of limitations period). PASNAP's and Local 5106's charges, as filed, allege that a violation of the Act occurred when Temple implemented its new drug and alcohol policy in June of 2007 - a date clearly within four-months of the date these charges were filed. So, both of these charges were timely filed.

We next examine whether Temple has established a sufficient factual basis, under Board law, so that the unilateral implementation of the new, non-cause-based drug and alcohol policy constituted a management prerogative. There is a dearth of Board law on when an employer must bargain over the implementation of a non-cause based drug and alcohol policy. In the seminal case, Cambria County Transit Authority, 21 PPER ¶ 21007 (Final Order, 1989), *aff'd* 22 PPER ¶ 22056 (Court of Common Pleas of Cambria County, 1991), the Board used the State College¹ balancing test to determine whether an employer must bargain before implementing a non-cause-based drug and alcohol policy. And, as always, when the State College balancing test is used, the facts determine the outcome.

In order for Temple to prevail here it must prove "that the impact of the drug and alcohol policy on [Temple's] interests outweighs the impact on the employees' interest in their terms and conditions of employment." 21 PPER at 22. In non-cause-based drug and alcohol testing situations, the Board balances "the employees' reasonable expectation of privacy as a working condition and related matters such as employee discipline[,]" against, in this case, the employer's interest in providing safe and efficient care for its patients. Id.² "The Board will sanction an employer's unilateral decision to randomly test its employees for drug and alcohol abuse only where a real drug or alcohol problem is demonstrated among the employer's work force and where an immediate and substantial public safety risk is presented." 21 PPER at 26.

According to the Board, in order to overcome its bargaining obligation, Temple must demonstrate "a very real drug and alcohol problem among its employees[,]" and further "that the Employer's decision was not merely a symbolic or a public relations gesture to demonstrate that [Temple employees] are 'clean' where no problem in fact existed."³ 21 PPER at 23. The Board went on to "emphasize the importance of record evidence in cases of this sort[,]" and endorsed the idea that, in order to unilaterally promulgate a non-cause-based drug and alcohol policy, an employer must show "demonstrated substantial, factual drug and alcohol problems among" the employees subject to that unilaterally promulgated policy. Id. Temple has not made such a showing among the employees it unilaterally chose to test.

The point d'appui of Temple's proofs concerning the existence of a "very real drug and alcohol problem among its employees" is an anecdotal list of some twenty-five employees and the reasons for their leaving Temple's employ. Temple argues that this list establishes a more than sufficient basis to allow it to unilaterally implement this non-cause-based drug and alcohol policy. A perusal of this list reveals it to be less of a tocsin than

¹ PLRB v. State College Area School District, 461 Pa. 494, 337 A.2d 262 (1975).

² Moreover, even if Temple won the balancing test, and consequently the policy itself were a management prerogative, Temple still must bargain over "consequential matters" such as the nature, integrity and reliability of the testing process, as well as the resultant discipline. Cambria County, 21 PPER at 26.

³ *Cf.* Commonwealth of Pennsylvania (Government Dick Thornburgh), 13 PPER ¶ 13097 (Final Order, 1982), *aff'd* 479 A.2d 683 (Cmwlth. Ct. 1984)(public perception about integrity of government singularly sufficient to allow Commonwealth to unilaterally promulgate code of employee conduct).

Temple asserts it to be. In point of fact, the list includes employees who, for the reasons listed below, cannot form the basis for Temple's assertion of a "very real drug and alcohol problem among its employees," that can be cured by non-cause-based testing.

The evidentiary purpose of this anecdotal employee list is to show that non-cause-based testing is the necessary ameliorative response to the "demonstrated substantial [and] factual[,] drug and alcohol problems among" Temple's bargaining units of nursing and technical staff. Consequently, employees not members of the bargaining units, employees whose drug use was uncovered by pre-employment testing, and employees whose drug use was uncovered by for-cause and protective testing are not evidence of a problem that only non-cause-based testing would solve. See City of Pittsburgh, 21 PPER ¶ 21052 (Proposed Decision and Order, 1990).

Keeping the rule from City of Pittsburgh in mind, it is necessary to remove from this list the employees who are simply not in the PASNAP bargaining units covered by the unilaterally promulgated, non-cause-based drug and alcohol policy in question. Employees number 2, 11, 14, 17 and 20 are such employees.⁴ Two employees, numbers 20⁵ and 24, were terminated pursuant to pre-employment testing, and cannot be considered. Employee number 7 was terminated pursuant to a for-cause test and cannot be considered. Employee number 16 was dismissed pursuant to a protective test and, likewise, cannot be considered. Simply put, employees whose drug and alcohol use was discovered by means that existed in the prior policy cannot be used to justify the new, unilaterally implemented, non-cause-based testing. City of Pittsburgh, *supra*.

Aside from the above-excluded employees there are other employees on Temple's anecdotal list that simply do not support the need for a unilaterally implemented, non-cause-based drug and alcohol test. Other nurses reported employees number 7, 10, 12 and 13. That simply evidences other avenues of discovery, much like those employees discovered by for-cause testing.

Moreover, the peer reporting among registered nurses highlights a material, factual difference between this case and Cambria County, *supra*. In Cambria County, the Board considered it an important factor that the drivers worked in solitude, and therefore observation of their on-the-job behavior was not possible. In the hospital setting, while nurses work independently, virtually their every move is observed, at least casually, by other nurses and on regular occasions by physicians.⁶ And as this record shows, even these casual observations have led to multiple peer reportings of suspicious behavior.⁷ Moreover, when asked if peer reporting occurs in Temple University Hospital, Temple University Health System's vice president of human resources candidly testified, " I don't have any names, but I'm sure that occurs." (N.T. 224).

There are also employees on Temple's anecdotal employee list for whom the information listed is just too vague or too remote to be of meaningful evidentiary value. Employee number 3 left Temple's employ in 1999, but Temple offers no evidence of the reason for her separation. The record does show that employee number 3 was the subject of a State Board of Nursing action for drug related activities some six-and-a-half years later in 2006. That 2006 action is so removed that no connection between it and employee number 3's generic separation from Temple can be reasonably drawn. The same analysis is applicable to employee number 22: there is no reason given for her separation from Temple in April of

⁴ The parties agreed to use numerical designations rather than actual names of employees for confidentiality. The twenty-five named individuals on Temple Exhibit 3 were each assigned a number corresponding to their place on the list. The first name was number one, and so on serially down the list.

⁵ Some employees listed are excluded from consideration for multiple factors.

⁶ Record testimony reveals that while nurses work independently, they do regularly assist one another in caring for each other's patients, including the giving of medications. (N.T. 376, 378, 388).

⁷ Perhaps that's because the *American Nurses Association's Code of Ethics for Nurses*, in Provision 3.6, titled "Addressing impaired practice", requires that "the nurse must take action to report" a colleague who appears to be impaired "to persons authorized to address the problem...."
<http://nursingworld.org/MainMenuCategories/ThePracticeofProfessionalNursing/EthicsStandards/CodeofEthics.aspx>

2001, and the record shows that she violated the terms of the State Nursing Board's voluntary recovery program over three years later in August of 2004.

There is also a group of five employes, numbers 4, 5, 8, 12 and 23, whose listed reason for separation from Temple is "theft of narcotics."⁸ A non-cause-based drug and alcohol policy will not expose those employes who steal narcotics. While admittedly, there is some likelihood that those employes who stole drugs might be personally using those drugs, this pure supposition is insufficient to establish the scope of actual drug abuse necessary to allow Temple to unilaterally establish this non-cause-based drug and alcohol policy.⁹

Incredibly, Temple stipulated at the hearing that there are no employes in the Local 5106 bargaining units that appear on Temple's anecdotal list of employes. (N.T. 15). This list, then, offers absolutely no basis for Temple's unilateral implementation of the non-cause-based drug and alcohol policy as to Local 5106's unit members.

In an effort to fill the evidentiary vacuum in both charges, Temple turns to professional and popular publications, and the American Nurses Association website, to bolster its flagging argument. Those sources describe the general problem that health professionals with on-the-job access to controlled substances have the potential to abuse those controlled substances to a greater degree than does the general public, by the very nature of their professional access to those drugs.

Those general, sociological observations about a professional segment of the population do not, however, establish that Temple, in fact, has an actual drug and alcohol problem among its employes sufficient to overcome the need to bargain this new, non-cause-based policy. Indeed, had Temple proved a real drug and alcohol problem among its employes it would not need to bootstrap the argument with these informative, but irrelevant articles. And, if Temple's argument is accepted - that professional and popular publications are the proofs necessary - then any public hospital in the Commonwealth can unilaterally implement a non-cause-based drug and alcohol policy tomorrow, and the Cambria County rationale is rendered nugatory.¹⁰

Aside from the questionable evidentiary value of Temple's anecdotal employe list, Temple admitted to a breathtaking lack of information about the need for a non-cause-based drug and alcohol policy at the time of its implementation. By way of example, Temple had no idea how many reasonable suspicion tests were conducted on bargaining unit members from either charge in the last eight years (N.T. 192); Temple did not know how many bargaining unit nurses from either charge it had reported to the State Board of Nursing over drug theft or misappropriation (N.T. 198-200); Temple did not ask its own Chief Nurse if she had any records concerning reporting nurses from either charge to the State Board (N.T. 198-200); Temple did not know how many protective tests it performed on bargaining unit members from either charge, nor the results thereof (N.T. 206, 207); Temple did not know how many bargaining unit employes from either charge were terminated for diverting narcotics or being under the influence on the job; even though the reason for each employes' termination is listed in the personnel file, Temple never reviewed that information (N.T. 213-216); and Temple made no effort to ascertain how many bargaining unit employes from either charge had been subject to drug and alcohol testing under the existing policy before the new, non-cause-based policy was implemented (N.T. 208-210).

⁸ Despite the undisputed fact that Temple has an affirmative duty to report to the Pennsylvania State Board of Nursing when it believes any registered nurse has stolen or misappropriated controlled substances, this exhibit shows that only employe number 5 was reported to the State Nursing Board. This anomaly casts doubt on the accuracy of both the entire exhibit and Temple's records from which the exhibit was gleaned. (N.T. 198-200; Temple Exhibit 3).

⁹ In its brief, PASNAP makes a passing statistical argument to compare "incident rates" in the Cambria County case with the instant case. Such vague statistical references merely highlight Danish philosopher, Robert Storm-Peterson's observation that "[s]tatistics are like lampposts: they are good to lean on, but they don't shed much light." No statistical analyses between the incident rates in these two cases played any part in this decision.

¹⁰ Moreover, since Temple's anecdotal list does not form any basis for the new drug and alcohol policy's unilateral implementation as to Local 5106, Temple's sole proofs offered for a "substantial and factual" drug and alcohol problem among Local 5106's employes are these professional and popular publications.

Temple readily admits that there is no central, official (or unofficial) repository of employees sent for reasonable suspicion testing, employees who were reported to the State Board of Nursing, and employees who had improperly diverted controlled substances. (Temple's brief at 24-25). That's why the anecdotal list was, in fact, merely anecdotal. What this stark admission reveals is that Temple had no organized, official, institutional recordkeeping to evidence its claim of a real drug problem and, therefore, to support its unilateral implementation of the non-cause-based drug and alcohol policy.

Amazingly, Temple tries to pass off this lack of supporting official, institutional proof as evidence to shore-up its unilateral implementation of the drug and alcohol policy by arguing, "[w]hat [the anecdotal list] plainly suggests is that there were more instances of drug related events among registered nurses and technicians within the [Temple University] Health System than are reflected in. . .[the anecdotal list]." (Temple brief at 25). To "plainly suggest" a fact is a far evidentiary cry from proving that fact. To make up for its own lack of supporting records, Temple unsuccessfully attempts to pass off mere conjecture as factual proof.¹¹

One source Temple did consult in drafting its new policy was a similar drug and alcohol policy in use by the Southeastern Pennsylvania Transportation Authority (SEPTA). How the use of that SEPTA policy alleviates the need for Temple to bargain its own policy, however, remains a mystery, since the SEPTA policy in no way establishes any drug or alcohol problem among Temple's employees.

Temple next tries to lighten its evidentiary load by arguing that if it establishes a real drug and alcohol problem among any of its employees, regardless of where they work, it may unilaterally impose a non-cause-based drug and alcohol policy at all of its constituent locations. Both at the hearing and in its post-hearing brief, Temple argues that Cambria County, *supra*, while offering general guidance, falls short in one area of the law:

to require [Temple] to establish a Cambria County Transit Authority-type showing of an ongoing substance abuse problem one bargaining unit at a time makes no sense and would undermine the public policy in favor of rooting out substance abuse especially in safety sensitive employees such as those subject to the random testing program at [Temple].

(Temple's brief at 19). What Temple wants is a rule "requiring [Temple] to show no more than that there is a substance abuse issue among registered nurses and technicians within the [Temple University] Health System without regard to the specific entity where they are employed." (Temple's brief at 19).

While at first blush there is an elemental simplicity to this proposal, it completely ignores the basic fact that there is a separate and distinct bargaining obligation between Temple and *each* of its bargaining units. Merely because there are myriad bargaining units¹² does not relieve Temple of its statutory duty to honor each unit's separate right to bargain for its own members.

In order to establish its right to unilaterally promulgate a system-wide, non-cause-based drug and alcohol policy, Temple must show *in each bargaining unit* a sufficient, ongoing drug and alcohol problem resulting in an immediate and substantial public safety risk that outweighs its employees' reasonable expectation of privacy as a working condition. For each individual bargaining obligation, Temple must establish by independent proofs that it meets the Cambria County test in order to unilaterally establish a non-cause-based drug and alcohol policy for that bargaining unit without violating the Act.

Temple complains that individually bargained-for, non-cause-based drug and alcohol policies will be different for each unit and will, therefore, create an enforcement

¹¹ Moreover, by Temple's own admission, no Local 5106 bargaining unit employees were included in the anecdotal list, so this "tip of the iceberg" argument is even more inapplicable to all of those employees.

¹² Temple has some twelve bargaining units, each having its own collective bargaining agreement with Temple. (N.T. 256).

quagmire. Yet, there is no evidence that Temple had but one drug and alcohol policy for all its constituent institutions before it unilaterally implemented the policy in question.¹³ It is certainly possible that Temple might have to bargain policies with each unit that contain some differences. And, those potential differences might require Temple to be on the *qui vive* as it administers the different policies. Nevertheless, intricacy of execution is not an affirmative defense to a failure to bargain charge.

Moreover, the difficulty-in-execution excuse rings hollow since both conceptually, and in practice, Temple is familiar with, and has experience in, applying different rules to different bargaining units, even in the same facility: there are already significant differences among the collective bargaining agreements currently in place, including different probationary periods, different wage rates, and different holidays, and last, but not least, different drug and alcohol policies.

In order to carry the day, then, Temple must make an independent, adequate showing in each bargaining unit for which it unilaterally established the non-cause-based drug and alcohol policy. On this record Temple has not shown sufficient proofs to unilaterally create the policy it did for any of its bargaining units without violating the Act. And it certainly has not established an evidentiary basis to unilaterally promulgate one policy for all bargaining units. Temple must rescind the non-cause-based drug and alcohol policy that is the genesis of these charges, and return these bargaining unit members to the status quo ante.

Temple also argues that both PASNAP and Local 5106 waived their right to bargain over the new non-cause-based drug and alcohol policy because the parties' respective collective bargaining agreements contain management rights clauses that give Temple the right, generally, to make and enforce reasonable work rules. Considering that the Board has, for at least the last twenty years, repeatedly, consistently and soundly rejected just this position, it is stunning that Temple seriously attempts to trot out this same tired argument again. See Jersey Shore Area School District, 18 PPER ¶ 18061 (Proposed Decision and Order, 1987); 18 PPER ¶ 18116 (Final Order, 1987)(broadly worded management-rights clause did not constitute necessary clear and unmistakable waiver by union of its right to bargain over subject in question); see also, Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, PSP, 33 PPER ¶ 33022 (Final Order, 2001)(same); Fairview Township Police Association v. Fairview Township, 31 PPER ¶ 31019 (Final Order, 1999)(same); Indiana Borough v. Pennsylvania Labor Relations Board, 28 PPER ¶ 28187 (Pa. Cmwlth. 1997)(same); Middletown Township Police Benevolent Association v. Middletown Township, 27 PPER ¶ 27203 (Final Order, 1996)(same); Crawford County v. Pennsylvania Labor Relations Board and AFSCME, District Council 85, AFL-CIO, 26 PPER ¶ 26148 (Pa. Cmwlth. 1995)(same); AFSCME, District Council 85, AFL-CIO v. Crawford County, 25 PPER ¶ 25001 (Final Order, 1993), *aff'd*, 25 PPER ¶ 25110 (Court of Common Pleas Crawford County, 1994)(same); City of Bethlehem v. Pennsylvania Labor Relations Board, 24 PPER ¶ 24045 (Pa. Cmwlth. 1993)(same); Township of Upper Saucon v. Pennsylvania Labor Relations Board, 24 PPER ¶ 24025 (Pa. Cmwlth. 1993)(same); United Steelworkers of America, Local 8125 v. East Taylor Township, 24 PPER ¶ 24166 (Final Order, 1993)(same).¹⁴

Temple also asserts that Local 5106 waived its right to bargain the new non-cause-based drug and alcohol policy because it "never submitted any counter-draft or counter-proposal of any kind in any form." And, according to Temple, "[n]o clearer indicia of waiver could exist." (Temple brief at 27). What is clear is that Local 5106 was not the model of clarity in its opposition to the implementation of the new, non-cause-based drug and alcohol policy.¹⁵ What is also clear is that Temple never offered to bargain with Local 5106 over that policy. Rather, Temple in its letter to Local 5106, sent them a draft of the "completed Drug and Alcohol Policy[,]" and offered only "to meet and discuss

¹³ In point of fact, PERA-C-07-261-E Local 5106 Exhibit 1, evidences a different drug and alcohol policy than does PERA-C-07-212-E Stipulated Exhibit 1. So the record supports Temple's having at least two different policies before it unilaterally implemented the policy in question. (N.T. 101).

¹⁴ And this is, by far, not an exhaustive list of Board cases with this consistent holding.

¹⁵ Yet, it is clear that Local 5106 made it plain to Temple that it had serious problems with the "random testing" portion of the new policy. (Stipulated Exhibit 9, PERA-C-07-261-E).

the policy." (PERA-C-07-261-E Stipulated Exhibit 4). Local 5106's witnesses clearly testified that Local 5106 objected to the policy (N.T. 103), and had no opportunity to accept or reject the policy (N.T. 103). Additionally, Local 5106 never indicated it was willing to agree with the policy (N.T. 104). In point of fact, in its January 17, 2007, letter to Temple, Local 5106 stated in no uncertain terms, "[w]e cannot agree with the Drug and Alcohol Policy as written." (PERA-C-07-261-E Stipulated Exhibit 7). Moreover, for at least the last twenty-three years it has been the Board's position that "[t]he employer has a duty to introduce proposals dealing with mandatory subjects of bargaining in face-to-face negotiations." Jersey Shore Area School District, 18 PPER at 178 (Proposed Decision and Order, 1987). Therefore, "it is not enough that the employer provide the union with notice of the proposed change; the subject must be affirmatively introduced into the bargaining process." Id. Temple did not do that here with either PASNAP or with Local 5106.

Under a somewhat cryptic subheading of its brief, Temple argues that it "engaged in an extensive meeting with [PASNAP]" and made "several material changes in response to [PASNAP's] comments...." (Temple brief at 28). Temple then goes on to argue

[Temple] may not have considered these modifications to be the product of bargaining, but that certainly is arguable. Accordingly, even assuming...that [Temple] had an obligation to bargain implementation of the random testing and not simply to meet and discuss about its ancillary aspects, to a substantial extent, it did so.

Temple brief at 28). To the extent that Temple is arguing that it had no duty to bargain, but if it did, then it *almost* fulfilled that duty, the argument is anserine. To the extent that Temple is arguing that it had only to meet and discuss the consequential matters that accompany the policy's implementation, the argument is wrong. Cambria County, supra.

Having found Temple to be in violation of the Act by its unilateral promulgation of the non-cause-based drug and alcohol policy, we now turn to PASNAP's allegation that Temple failed to turn over requested information PASNAP needed to competently bargain. Temple's position is that "[a]ssuming a duty to bargain, [Temple] substantially discharged any obligation it had to provide requested information to [PASNAP]." As evidence of that substantial discharge, Temple goes on to state that "Silberman¹⁶ acknowledged that the vast majority" of requested items were "responded to in one way or another[,]" and that Temple "responded to the majority of the requests[,]" and "that with very few exceptions, [PASNAP] got an answer...." (Temple's brief at 30).

Each of those quotes is but another admission that Temple did not give PASNAP all the information requested. The law is not that the employer must give the union *substantially* all of the information it needs, or that the employer must give the union the *majority* of the information it needs, or that the employer must give the union the requested information with *very few exceptions*. The law, simply stated, is that the employer must tender to the union *all* relevant, requested information necessary for the union to police the contract or to decide on the filing of a grievance. Commonwealth of Pennsylvania v. PLRB, 527 A.2d 1097 (Pa. Cmwlth. 1987). Moreover, if the information requested does not exist, then the employer must tell the union that it does not exist. AFSCME v. Berks County (Coroner), 36 PPER 36 at 112, n. 20 (Final Order, 2005).

It is telling to note that Temple does not defend its lack of disclosure on the basis that the requested information was not relevant to the issue at hand, or because PASNAP requested the information in an overly burdensome form. Temple's description of how it *almost* gave PASNAP all the requested information is *almost* an affirmative defense to a violation of Section 1201(a)(1) and (5) of the Act. Consequently, along with rescinding the non-cause-based drug and alcohol policy, insofar as it applies to PASNAP and Local 5106, Temple must give PASNAP the remainder of the information requested so PASNAP may bargain a non-cause-based drug and alcohol policy from a sufficient knowledge base, should Temple still wish to bargain one.

¹⁶ A reference to Alan Jerome Silberman, the PASNAP staff representative and, more specifically, PASNAP's doyen in attempting to negotiate with Temple over the new non-cause-based drug and alcohol policy. (N.T.45-49).

CONCLUSIONS

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

1. Temple is an employer within the meaning of section 301(1) of the Act.
2. PASNAP and Local 5106 are employe organizations within the meaning of section 301(3) of the Act.
3. The Board has jurisdiction over the parties hereto.
4. Temple has committed unfair practices within the meaning of Section 1201(a)(1) and (5) of the Act under docket number PERA-C-07-212-E.
5. Temple has committed unfair practices within the meaning of Section 1201(a)(1) and (5) of the Act under docket number PERA-C-07-261-E.

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. Cease and desist from refusing to bargain collectively in good faith with an employe organization which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.
3. Take the following affirmative action which the hearing examiner finds necessary to effectuate the policies of the Act:
 - (a) Immediately rescind the non-cause-based drug and alcohol policy as implemented on June 4, 2007 insofar as it applies to Local 5106's and PASNAP's bargaining unit members:
 - (b) Immediately provide to PASNAP the requested information still outstanding;
 - (c) 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
 - (d) 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 first day of November 2007.

PENNSYLVANIA LABOR RELATIONS BOARD

TIMOTHY TIETZE, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEMPLE UNIVERSITY HOSPITAL NURSES :
ASSOCIATION/PASNAP, TEMPLE UNIVERSITY :
HOSPITAL ALLIED HEALTH :
PROFESSIONALS/PASNAP, NORTHEASTERN :
HOSPITAL NURSES ASSOCIATION/PASNAP :

Case No. PERA-C-07-212-E

v. :

TEMPLE UNIVERSITY HEALTH SYSTEM :
(TEMPLE UNIVERSITY HOSPITAL AND :
NORTHEASTERN HOSPITAL) :

HEALTH PROFESSIONALS AND ALLIED :
EMPLOYEES, AFT/AFL-CIO, LOCAL 5106 :

Case No. PERA-C-07-261-E

v. :

TEMPLE UNIVERSITY HEALTH SYSTEM (TEMPLE :
UNIVERSITY HOSPITAL, EPISCOPAL CAMPUS) :

AFFIDAVIT OF COMPLIANCE

Temple hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1) and (5) of the Act; that it has rescinded the non-cause-based drug and alcohol policy as implemented on June 4, 2007, insofar as it applies to members of PASNAP and Local 5106; that it has provided to PASNAP the requested information still outstanding; that it has posted the proposed decision and order as directed and that it has served a copy of this affidavit on PASNAP and Local 5601 at their principal places of business.

Signature/Date

Title

SWORN AND SUBSCRIBED to before me
The day and year first aforesaid

Signature of Notary Public