

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
: Case No. PERA-U-07-339-E
: (PERA-R-95-369-E)
:
TEMPLE UNIVERSITY HEALTH SYSTEM :

FINAL ORDER

Temple University Health System (Temple) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on October 8, 2008, challenging a Proposed Order of Unit Clarification (POUC) issued on September 18, 2008. In the POUC, the Board's Hearing Examiner determined that seventy-six (76) pool nurses should be accreted into the existing bargaining unit of full-time and regular part-time nurses. The Temple University Hospital Nurses Association/PASNAP (Association) filed a brief in opposition to the exceptions on October 23, 2008.

The Hearing Examiner's findings of fact are summarized as follows. The existing bargaining unit, which was certified pursuant to a Nisi Order of Certification issued on November 9, 1995, includes "[a]ll full-time and regular part-time general duty and staff nurses including all graduate nurses, clinical nurse instructors, nurse anesthetists, and cardiac catheterization technologists." The parties stipulated that as of April of 2008, the bargaining unit consisted of a total of nine hundred eighty (980) employees. In addition to full-time and regular part-time nurses, Temple also employs what are called "pool nurses." Pool nurses advise Temple about their availability to work six weeks in advance. Temple then places them on the nursing work schedule based upon the pool nurses' availability, Temple's needs and the availability of nurses already included in the bargaining unit.

Pool nurses are registered nurses who work side-by-side with staff nurses, generally perform the same daily duties as staff nurses and are scheduled and receive assignments in the same manner as staff nurses. Temple, when advertising for open nursing positions, includes solicitations for full-time, part-time and pool nurses. Pool nurses supplement the nursing complement when there are insufficient staff nurses available to work. Staff nurses have altered their status and become pool nurses, and pool nurses have similarly become staff nurses. Pool and staff nurses work in general medical-surgical units, the emergency room, the maternity ward, the infant intensive care unit, the intensive care unit, the cardiac intensive care unit, the neurosurgery intensive care unit, the pediatric intensive care unit, and in the operating rooms. Pool nurses and staff nurses, when working, report to the same nurse managers. Seventy-six (76) of these pool nurses worked at least one-half of the immediately prior twenty-six, two-week pay periods ending January 19, 2008.

In the POUC, the Hearing Examiner determined that these seventy-six pool nurses shared an identifiable community of interest with the other nurses in the bargaining unit. Because adding these pool nurses to the existing unit would increase the unit by less than 15 percent, an election was not necessary pursuant to the Board's procedure of accreting additional employees to an existing unit set forth in Westmoreland Intermediate Unit, 12 PPER ¶ 12347 (Order and Notice of Election, 1981).¹ Accordingly, the Hearing Examiner concluded that the pool nurses should be accreted into the existing unit without the conduct of a representation election.

In its exceptions, Temple generally argues that the Hearing Examiner erred by finding that the pool nurses share an identifiable community of interest with the nurses currently in the bargaining unit. Temple also excepts to the Hearing Examiner's conclusion that the petition does not raise a question of representation necessitating an

¹ Pursuant to Westmoreland Intermediate Unit, a party attempting to increase an existing unit by fifteen (15) percent or more raises a question of representation in the unit and must file a representation petition to determine whether a majority of the additional employees desire to be represented by the existing bargaining representative. If the unit would be increased by less than 15 percent, a question of representation is not raised and a party may file a petition for unit clarification to accrete the employees into the bargaining unit.

election to include the pool nurses in the unit. Finally, Temple argues that the Petition for Unit Clarification, which was filed mid-contract, is untimely.

Before addressing Temple's argument that an identifiable community of interest does not exist between the pool nurses and the nurses currently in the bargaining unit, we must address Temple's argument that, even assuming that a community of interest does exist, accreting the pool nurses to the bargaining unit would increase it by more than 15 percent, thus raising a question of representation and necessitating a representation election among the pool nurses. The basis for Temple's argument is that 147 pool nurses worked for Temple during the relevant one-year time period examined by the Hearing Examiner, which is exactly 15 percent of the number of nurses in the existing bargaining unit (980).

If 147 is the number of pool nurses at issue in this case, Temple would be correct that a question of representation would be raised and an election would be necessary pursuant to Westmoreland Intermediate Unit, supra. However, the Hearing Examiner determined that only 76 of the pool nurses worked on a sufficiently regular and consistent basis to show that they are, in fact, regular part-time employees who are entitled to be in the bargaining unit and not casual employees excluded from the bargaining unit. The formula that the Hearing Examiner used to reach this number is set forth in Finding of Fact No. 4, which requires that, to be in the unit, pool nurses must have provided service in "at least one-half of the immediately prior, twenty-six pay periods ending January 19, 2008." Temple does not argue that the Hearing Examiner's mathematical calculations are incorrect. Rather, Temple argues that the formula he used draws a distinction among the pool nurses that is unwarranted. The Board disagrees.

A regular part-time employee is one who works on a regular and consistent basis with an expectation of continued employment. School District of the Township of Millcreek, 10 PPER ¶ 10049 (1979), 10 PPER ¶ 10303 (Final Order, 1979), affirmed, 11 PPER ¶ 11344 (Erie County Court of Common Pleas, 1980), affirmed, 440 A.2d 673 (Pa. Cmwlth. 1982). The Board has developed a test to determine whether part-time employees are regular part-time employees so as to create a community of interest with full-time employees in regard to wages, hours and other terms and conditions of employment, or whether a part-time employee is a casual employee lacking a sufficient community of interest to be included in a bargaining unit with full-time employees. In Bethlehem Township, 10 PPER ¶ 10050 (Order and Notice of Election, 1979), the Board stated:

"The testimony tends to show that part-timers do not have any regularity of employment but rather are called in as required due to vacancies which exist as a result of full-time employees taking annual or sick leave. In the absence of a regularity of employment with an expectancy of continued employment, the Board will not include such employees within a bargaining unit. They are considered to be casual employees without collective bargaining rights under Act 111. However, where employees do exhibit a regularity of employment with consistent and repeated service and some expectancy of continued employment they will be deemed regular part-time and included within the unit comprised of full-time police officers."

10 PPER at 81 (emphasis added). See also North Braddock Borough, 14 PPER ¶ 14191 (Order Directing Submission of Eligibility List, 1983); Liberty Borough, 14 PPER ¶ 14276 (order Directing Submission of Eligibility List, 1983). These cases turn on the actual employment record of the contested employees. In Westmont Hilltop School District, 8 PPER 236 (Nisi Decision and Order, 1977), the Board, quoting, Dauphin County Commissioners, 7 PPER 7 (Order and Notice of Election, 1976), stated as follows:

"The only requirement is that of a 'regularity of employment' which must exist with a fair degree of frequency as distinguished from casual employees who perform an occasional job for a temporary purpose or are hired as a matter of special engagement."

8 PPER at 237.

Temple suggests that the formula used by the Hearing Examiner is unwarranted and arbitrary and is being advocated by the Association simply to avoid an election. However, there is no evidence for this assertion. Rather, this formula is based on prior Board cases, which set forth the standard that employees should work a significant period of time over an extended time period to show that they are regular part-time employees. See Gettysburg Borough, 22 PPER ¶ 22083 (Order Directing Submission of Eligibility List, 1991); Borough of Whitaker, supra; Westmoreland County, 27 PPER ¶ 27038 (Order Directing Submission of Eligibility List, 1996).

The formula utilized by the Hearing Examiner, which is consistent with the Board cases cited above, is certainly not arbitrary, nor is there any evidence that it was advocated by the Association or devised by the Hearing Examiner to avoid an election. Rather, this formula is an accurate indicator of which pool nurses have an employment relationship with Temple that is more than merely casual.² Accordingly, the Board dismisses Temple's exceptions to the Hearing Examiner's decision in this regard.

Temple also argues that the Hearing Examiner erroneously stated that pool nurses have an even greater expectation of continued employment than do staff nurses. The Hearing Examiner's statement in this regard constitutes dicta and was merely a comment on the fact that pool nurses can choose not to work, even up to the last minute of when they are scheduled to work, without being disciplined, whereas staff nurses do not have this luxury and would likely be disciplined for such conduct. However, review of the testimony reveals that a pool nurse who consistently canceled prior to a shift and thus, appeared to be unreliable, would simply not be scheduled for work any more by the nurse manager. (N.T. at 129-130). This testimony is additional proof that the 76 pool nurses who have worked in at least half of the pay periods in the prior year are employees who have shown that they are reliable and are called back to work because of that reliability, giving them an expectation of continued employment which makes their employment more than casual.

Next, Temple argues that the pool nurses do not share an identifiable community of interest with the nurses already in the bargaining unit. Temple specifically excepts to the Hearing Examiner's Finding of Fact No. 3, wherein he found that pool nurses and staff nurses work side-by-side and perform the same general duties. It is well-settled that the Hearing Examiner's findings of fact must be supported in the record by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." PLRB v. Kaufmann Department Stores, Inc., 345 Pa. 398, 29 A.2d 90 (1942). A finding is not unsupported simply because of conflicting evidence. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). Indeed, it is the hearing examiner's function to weigh the credibility of conflicting evidence in order to reach a finding. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004). "Temple University Hospital Nurses Association/PASNAP v. Temple University Hospital, 39 PPER 45 at 157-158 (Final Order, 2008). Temple cites conflicting evidence in support of its argument that the Hearing Examiner's finding is not supported by the evidence. However, a review of the record reveals that this finding is supported by testimony adduced at the hearing, which reveals that, despite some differences, pool nurses and staff nurses have the same general duties. Temple has simply failed to show that this finding is not supported by the evidence.

With regard to Temple's more general argument that the Hearing Examiner erred by finding an identifiable community of interest, it should be noted that when determining whether an identifiable community of interest exists, the Board will consider such factors as work performed, educational and skill requirements, pay scales, hours and benefits, working conditions, interchange of employees, grievance procedures, and bargaining history. State System of Higher Education v. PLRB, 757 A.2d 442 (Pa. Cmwlth. 2000) (citing Fraternal Order of Police v. PLRB, 557 Pa. 586, 735 A.2d 96 (1999)). Further, it is well-settled that an identifiable community of interest can exist despite differences among employe classifications. Id.; Washington Township Municipal Authority v.

² If we were to accept Temple's argument that all 147 pool nurses should be included in the unit, employees such as Urlanda Baylis, who only worked 12.75 hours in one pay period in the previous year (Union Exhibit 2, p. 22), and Karen Joy Nothnagel, who only worked 16 hours in one pay period in the previous year (Union Exhibit 2, p. 279), would be included in the unit. These employees are clearly casual employees as it cannot be argued that they have rendered regular and consistent service to the employer. Their exclusion alone destroys Temple's argument that an election is required under Westmoreland Intermediate Unit's fifteen (15) percent rule.

PLRB, 569 A.2d 402 (Pa. Cmwlth. 1990), appeal denied, 525 Pa. 652, 581 A.2d 575 (1990); Western Psychiatric Institute and Clinic v. PLRB, 330 A.2d 257 (Pa. Cmwlth. 1971); Pittston Area School District, 12 PPER ¶ 12180 (Final Order, 1981); Peters Township School District, 16 PPER ¶ 16070 (Order Directing Submission of Eligibility List, 1985); and Neshannock Township School District, 17 PPER ¶ 17153 (Final Order, 1986).

Moreover, in making unit determinations, the Board is guided by its broad-based bargaining unit policy. This policy is based on Section 604(1)(ii) of PERA, which directs the Board, when making the determination of an appropriate unit, to take into account the effects of overfragmentization of bargaining units. In City of Philadelphia, 10 PPER ¶ 10059 (Final Order, 1979), the Board stated that:

The public policy of the Commonwealth and the purpose of the Act as set forth in Section 101 is to promote orderly and constructive relationships between public employers and their employees and to preserve at the same time the rights of the citizens of the Commonwealth to keep inviolate the guarantees for their health, safety and welfare. It is our considered judgment that the public policy of the Act will best be effectuated by avoiding the dangers of overfragmentization inherent in the certification of a bargaining unit limited to a small number of employees from among a much larger group. The whipsaw effect bargaining with a myriad of fragmented bargaining units has on an employer undermines rather than fosters harmonious employee-employer relations and the rights of the public.

Id. at 97. Further, in County of Allegheny, 11 PPER ¶ 11031 (Court of Common Pleas of Allegheny County, 1979), the Court affirmed the Board's rejection of a request to isolate a single classification for bargaining unit purposes as a violation of PERA's admonition against overfragmentization of bargaining units. Pursuant to the broad-based bargaining unit policy, the Board will certify classifications of employees in a single unit when those employees perform the same general function. See Philadelphia Housing Authority, 31 PPER ¶ 31110 (Order Directing Submission of Eligibility List, 2000), 32 PPER ¶ 32046 (Final Order, 2001).

We have already rejected Temple's argument that the Hearing Examiner erred in calculating that 76 of the pool nurses worked with sufficient frequency so that they are not mere casual employees but are regular part-time employees eligible for inclusion in a bargaining unit. Thus, if we were to accept Temple's argument that an identifiable community of interest does not exist between the pool nurses and the nurses already in the bargaining unit, a unit of pool nurses would, of necessity, constitute a separate, single-classification unit standing alone. Absent the conclusion that an identifiable community of interest is totally lacking between the pool nurses and the staff nurses, such a unit, limited to pool nurses, would be in violation of the Board's broad-based bargaining unit policy. Allentown City School District, 38 PPER ¶ 100 (Final Order 2007).

Temple cites numerous differences between the duties of a pool nurse and a staff nurse as evidence of a lack of an identifiable community of interest. However, these differences fail to show that a community of interest is completely lacking. Rather, the evidence shows that both pool nurses and staff nurses work side-by-side and perform similar duties while working in general medical-surgical units, the emergency room, the maternity ward, the infant intensive care unit, the intensive care unit, the cardiac intensive care unit, the neurosurgery intensive care unit, the pediatric intensive care unit and in the operating rooms. Further, the evidence shows that pool nurses and staff nurses report to the same nurse managers. Both pool nurses and staff nurses must have professional degrees and they both use that specialized knowledge to provide health care in the same workplace for the same types of patients. Clearly, an identifiable community of interest between these two groups of employees is not completely lacking.³

³ One difference cited by Temple is the fact that pool nurses do not receive fringe benefits. Temple excepts to the Hearing Examiner's conclusion that this is not relevant. While we agree that the lack of fringe benefits is a relevant factor, this difference is not enough to negate the identifiable community of interest between the pool nurses and staff nurses otherwise evidence on this record. Another difference identified by Temple is the way open positions are advertised. Similarly, any difference in this regard does not destroy the identifiable community of interest between pool and staff nurses.

Temple also argues that the staff nurses and pool nurses have such a substantial conflict of economic interest that their community of interest is destroyed. Temple cites Pittston, supra, and City of Philadelphia, 10 PPER ¶ 10286 (1979), in support of the proposition that the function of a "community of interest" standard is to assure that an employe group neither embraces employes having a substantial conflict of economic interest nor omits employes who show a unity of economic interest with other employes. In support of its argument that the interest of pool nurses and staff nurses are in substantial conflict, Temple points to the current bargaining agreement, which places the interests of pool nurses and bargaining unit nurses in direct conflict with regard to job assignments. However, giving various priority regarding job assignments for purposes of general scheduling and overtime based on job classification, seniority and other factors is a common practice and does not create the kind of economic conflict that would destroy a community of interest among these employes.

Temple also argues that a community of interest does not exist among pool nurses and staff nurses because its bargaining history with the Association shows that pool nurses have always been excluded from the bargaining unit. However, the bargaining history between the parties is just one factor used by the Board when considering whether an identifiable community of interest exists, and it is certainly not a controlling factor. See Fraternal Order of Police, Star Lodge 20 v. PLRB, 522 A.2d 697, 701 (Pa. Cmwlth. 1986). In this case, the other factors, such as common education, skills, duties, supervision and working conditions support a finding of an identifiable community of interest despite a bargaining history that has excluded pool nurses from the existing unit. Accordingly, Temple's exception to the Hearing Examiner's conclusion that an identifiable community interest exists between the pool nurses and the staff nurses is dismissed.

Finally, Temple argues that the Association's Petition for Unit Clarification is untimely and urges the Board to adopt the rule followed by the National Labor Relations Board (NLRB), which will not entertain a petition for unit clarification during the term of a collective bargaining agreement. See Logan Memorial Hospital, 231 NLRB 778, 96 LRRM 1063 (1977). However, this same argument was specifically rejected by the Board in Chambersburg Area School District, 20 PPER ¶ 20149 (Final Order, 1989), wherein the Board explained its adherence to the policy of processing unit clarification petitions at any time as follows:

While it is true that the Board may look to NLRB precedent as a guide in deciding cases under the Public Employe Relations Act (PERA), Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978), it is equally true that the Board is not bound by federal precedent. AFSCME v. PLRB, 108 Pa. Commonwealth Ct. 482, 529 A.2d 1188 (1987); PLRB v. State College Area School District, 461 Pa. 494, 337 A.2d 262 (1975).

... [i]t should be pointed out that nothing in the statute or in the Board's Rules and Regulations would require the dismissal of such a petition. The Board has been since the inception of PERA in 1970, processing unit clarification petitions at any time during the contract period with no indication that the processing of such petitions causes inordinate disruption of the collective bargaining relationship. In view of the Board's twenty years of experience processing these unit clarifications, we see no need to now restrict the rights of parties to raise unit determination issues at any time. The adoption of the NLRB policy would leave employes entitled to representation under PERA without the benefit of the rights granted by the statute and may work to deny them these rights altogether since their rights may be bargained away in the negotiating process.

PERA places the exclusive authority to determine the appropriateness of bargaining units upon the Board. Association of Pennsylvania State College and University Faculties v. PLRB, 34 Pa. Commonwealth Ct. 239, 383 A.2d 243 (1978), see also 43 P.S. 1101.604, while the federal statute allows for recognition of bargaining units with no involvement of the NLRB. The NLRB policy is premised upon the notion that an employer may voluntarily recognize an employe representative and may enter into an agreement with the union concerning the scope of the bargaining unit. That agreement can then be interpreted by an

arbitrator to include or exclude classifications from the unit. Under PERA, the Board is charged with [the] duty to determine the appropriate bargaining unit and an arbitrator may only decide whether employees fall within the unit as described by [the] Board. See Northwest Tri-County Intermediate Unit No. 5 Education Association v. Northwest Tri-County Intermediate Unit No. 5, 77 Pa. Commonwealth Ct. 92, 465 A.2d 89 (1983). Accordingly, the Board, in applying its expertise to a different statutory scheme, has properly chosen to process unit clarification petitions at any time.

Id. at 405-406 (footnote omitted). The Board continues to adhere to this reasoning and declines Temple's invitation to follow NLRB precedent.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss Temple's exceptions and affirm the Proposed Order of Unit Clarification.

In view of the foregoing and in order to effectuate the policies of the Public Employee Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by Temple are hereby dismissed, and the September 18, 2008 Proposed Order of Unit Clarification be and hereby is made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member, and James M. Darby, Member, this twenty-first day of January, 2009. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.