

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

TEMPLE UNIVERSITY HOSPITAL NURSES :  
ASSOCIATION, TEMPLE UNIVERSITY :  
HOSPITAL ALLIED HEALTH :  
PROFESSIONALS AND NORTHEASTERN :  
HOSPITAL NURSES ASSOCIATION :  
 : Case No. PERA-C-09-97-E  
v. :  
 :  
TEMPLE UNIVERSITY HEALTH SYSTEM<sup>1</sup> :

**PROPOSED DECISION AND ORDER**

A charge of unfair practices was filed with the Pennsylvania Labor Relations Board (Board) on March 12, 2009, by the Temple University Hospital Nurses Association, Temple University Hospital Allied Health Professionals and Northeastern Hospital Nurses Association (PASNAP<sup>2</sup>), alleging that Temple University Health System (Temple) violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) when it adopted a unilateral revision to an existing tuition reimbursement policy.

An amended charge was filed with the Board on April 20, 2009, wherein PASNAP added an allegation that Temple violated Section 1201(a)(9) of PERA.<sup>3</sup> The Secretary of the Board issued an amended complaint and notice of hearing on April 29, 2009, keeping the original hearing date.

On April 1, 2009, the Secretary of the Board issued a complaint and notice of hearing wherein this case was scheduled for hearing on May 18, 2009 in Philadelphia, Pennsylvania.

An amended charge was filed with the Board on April 20, 2009, wherein PASNAP added an allegation that Temple violated Section 1201(a)(9) of PERA. The Secretary of the Board issued an amended complaint and notice of hearing on April 29, 2009, keeping the original hearing date. At the hearing on May 18, 2009, 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 PERA. (PERA-C-07-212-E).

2. The Unions designated herein as PASNAP are employe organizations within the meaning of Section 301(3) of PERA. (PERA-C-07-212-E).

3. In 2003, Temple approached PASNAP with proposed changes to the existing tuition reimbursement policy. After internal union discussions, PASNAP decided to agree to those proposed changes. The parties then executed a writing which states, in pertinent part, "[t]he parties agree to the following changes in the tuition policy...." (N.T. 18, 19; PASNAP Exhibit 1).

<sup>1</sup> The caption appears as amended by the Secretary of the Board. Additionally, the Unions' attorney moved to withdraw the Northeastern Hospital Nurses Association as a party to this action. To the extent it is not reflected in the record, that motion is granted. (N.T. 32, 33). *A fortiori*, Northeastern Hospital, named in the charge, has committed no unfair practices under this charge.

<sup>2</sup> Part of the Secretary's caption amendment was to remove "PASNAP" after the name for each Complainant union. "PASNAP" is the acronym for Pennsylvania Association of School Nurses and Practioners. For the sake of simplicity I will use PASNAP to refer to the Complainants, collectively, in this proposed decision and order.

<sup>3</sup> Although PASNAP in its amended charge added an allegation that Temple violated Section 1201(a)(9) of PERA, it made no argument in its brief concerning that allegation. I have therefore dismissed this allegation.

4. In 2006, Temple unilaterally issued another tuition reimbursement policy. This 2006 policy made changes to the prior policy. PASNAP decided not to ask for bargaining over these changes to the tuition reimbursement policy. (N.T. 49, 50; PASNAP Exhibit 2).

5. Effective March 9 2009, Temple unilaterally issued another tuition reimbursement policy. PASNAP, however, was not willing to accept these new changes, and in a letter dated March 10, 2009, PASNAP made its opposition to the new policy known, chided Temple for not first bargaining over the newly implemented policy, and asked Temple to delay implementation. Temple denied the request to delay implementation and offered to "meet and discuss" the matter. (PASNAP Exhibit 6; Temple Exhibit 12, 13, 14).

#### DISCUSSION

PASNAP argues that Temple violated Section 1201(a)(1) and (5) of PERA when it unilaterally altered the existing tuition reimbursement policy as it applied to bargaining unit members.

Temple parries the allegation by arguing that, "pursuant to the [parties' collective bargaining] agreement as well as the contractual privilege doctrine, there has been no unfair labor practice." (Temple's post-hearing brief at 17). Neither of these defenses, however, carries the day, and consequently, Temple has committed unfair practices under Section 1201(a)(1) and (5) of PERA.

A review of the material facts is a helpful place to start. We will then examine the applicable law.

In December of 2003, PASNAP and Temple bargained over changes to the tuition reimbursement policy, to be effective January 1, 2004. This bargained-for policy was incorporated into the parties' 2003 contract book. (PASNAP Exhibit 1; Temple Exhibit 2).

In early March of 2006, Temple announced a unilateral change to the then-existing tuition reimbursement policy. (PASNAP Exhibit 2). PASNAP did not oppose the March 2006, tuition reimbursement policy changes unilaterally made by Temple, and consequently took no action. That tuition reimbursement policy was incorporated into the 2006-2009 collective bargaining agreement. (Temple Exhibit 6)

In March of 2009, Temple again announced a unilateral change to the tuition reimbursement policy. This unilateral change, however, was neither welcomed by nor agreed to by PASNAP. Temple did not offer to bargain with PASNAP in formulating this new policy, but merely offered to meet and discuss the already formulated policy. In a March 10, 2009, letter to Temple, PASNAP set forth its objections to the lack of bargaining over the new changes to the policy, and asked Temple to postpone implementation. (Temple Exhibit 12). Temple declined to postpone implementation of the policy. (Temple Exhibit 13).

The law is clear, and has been, since at least 1978; tuition reimbursement is a mandatory subject of bargaining. In re Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (Pa. 1978). The law is also clear that an employer cannot present its bargaining representative with a *fait accompli*, and still meet its bargaining obligation. Teamsters Local 764 v. Snyder County, Snyder County Prison Board, 36 PPER 96 (Final Order, 2005).

Moreover, PASNAP's failure to demand bargaining over Temple's previous unilateral implementation of changes to a mandatorily bargainable subject does not operate as a waiver of PASNAP's right to bargain over such changes in the future. Crawford County v. PLRB and AFSCME, D.C. 85, AFL-CIO, 659 A.2d 1078 (Pa. Cmwlth. 1995).

Temple takes issue with the application of the Crawford County principal of law to this case. And, that's because, according to Temple, "the parties negotiated that tuition would be governed by [Temple's] tuition policy, which permits [Temple] to unilaterally change the terms of the policy." (Temple's post-hearing brief at 13).

It is a fact that the parties' last collective bargaining agreement, on page 22, simply states that employees are eligible for tuition reimbursement "benefits in accordance to [sic] the [Temple] policy." (Temple Exhibit 6).

But, it is the 2006 rendition of the tuition reimbursement policy, unilaterally implemented by Temple, over which PASNAP did not demand bargaining, that is the *point d'appui* of Temple's argument. That rendition of the policy contains boilerplate language that has no bearing on the terms of the tuition reimbursement policy.<sup>4</sup> Nevertheless, it is that language upon which Temple hangs its legal hat. That language states: "Nothing in this policy constitutes a contract, express or implied. [Temple], in its sole discretion, may modify, alter, delete, suspend or discontinue any part or parts of the policy at any time, with or without prior notice to its employees." (PASNAP Exhibit 2).

This language appears in the section under "SCOPE," rather than under the section marked, "POLICY." Moreover, this language does not make any changes to the tuition reimbursement policy, but rather, attempts to unilaterally remove future bargaining over a mandatory subject.

The Board recognizes two similar but distinct affirmative defenses for a failure to bargain type charge. One is the defense of waiver. The other is the defense of contractual privilege, sometimes referred to as sound arguable basis.

To the extent that Temple is arguing that PASNAP has waived its right to bargain over future changes to the tuition reimbursement policy, that argument fails. The Board has adopted the policy that "[a] waiver of bargaining rights will not be lightly inferred." Crawford County, 659 A.2d at 1083.

The Board's waiver doctrine simply stands for the proposition that the collective bargaining representative does not waive its right to demand bargaining over unilateral changes in mandatory subjects, merely because it has not demanded bargaining over past unilateral changes in that mandatory subject.

An employer may use the affirmative defense of waiver when the parties have previously bargained over and reached agreement on that issue. The waiver doctrine has never meant that a bargaining representative waives the right to complain about future changes, when it fails to timely complain about past unilateral changes. Crawford County, *supra*.

Here, Temple unilaterally tried to remove a mandatory subject of bargaining from future negotiations, by attempting to disguise that removal as simply a prior, unilateral change in the mandatory subject itself. Temple wants to use the affirmative defense of waiver, not to implement unilateral changes to the tuition reimbursement policy, but, rather in an attempt to wholly remove that mandatory subject from future bargaining. Waiver is simply inapplicable in that situation.

To the extent Temple argues contractual privilege, that defense also fails under these facts. In Jersey Shore Area School District 18 PPER ¶ 18061 (Proposed Decision and Order, 1987), 18 PPER ¶ 18117 (Final Order, 1987), the Board adopted the National Labor Relations Board reasoning as set forth in NCR Corporation, 271 NLRB 1212, 117 LRRM 1062 (1984).

This defense calls for the dismissal of a charge when the employer establishes a "sound arguable basis in the language of the parties' collective bargaining agreement, or other bargained-for agreement, for the claim that the employer's action was permissible" under the terms of that agreement. Pennsylvania State Troopers Association v. PLRB, 761 A.2d 645, 651 (Pa. Cmwlth. 2000).

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<sup>4</sup> I have, *sua sponte*, taken administrative notice that Temple's policies and procedures documents from other Board cases also include this standard language about what Temple reserves to "its sole discretion." Temple University Hospital Nurses Association/PASNAP, Temple University Hospital Allied Health professionals/PASNAP, Northeastern Hospital Nurses Association/PASNAP v. Temple University Health System University Hospital, Episcopal Campus, 38 PPER 149 (Proposed Decision and Order, 2007), 39 PPER 145 (Final Order, 2008), Exhibit A to charge of unfair practices, Stipulated Document #1, Temple University Health system Policies and Procedures, 950.553, June 2, 2007.

For purposes of this analysis, the words "bargained for" are the *clou*. The parties did not bargain over Temple's unilaterally implemented tuition reimbursement policy document in 2006.

The above-described defenses of waiver and contractual privilege are both based upon the fact that the parties have bargained over, and come to agreement on, the issue in question. Waiver is the applicable defense when the Board can establish what the parties previously agreed to; contractual privilege is the applicable defense when the Board is unable to determine whether the employer's or the union's interpretation is what the parties previously bargained as their agreement.

Both of these defenses are accepted by the Board because they evidence *bargaining* and reaching agreement. There was no bargaining over Temple's unilateral attempt to remove tuition reimbursement from future bargaining. Absent the singularly necessary element of bargaining, neither waiver nor contractual privilege are applicable defenses to an unfair practice charge alleging a violation of Section 1202(a)(1) and (5) of PERA.

Temple argues in its brief that Port Authority Transit Police Association v. Port Authority of Allegheny County, 39 PPER 147 (Final Order, 2008) supports its argument for contractual privilege. That case, however, unlike this case, involved a *bargained for* clause in the parties' collective bargaining agreement; not a prior, unilaterally implemented attempt to remove a mandatory subject of bargaining from future negotiation.

Temple also calls my attention to two similar cases with identical captions; Pennsylvania State Troopers Association v. PLRB. The citations of these two cases are 761 A.2d 645 (Pa. Cmwlth. 2000), and 804 A.2d 1291 (Pa. Cmwlth. 2002). Both of these cases involved a successful employer defense of contractual privilege. But, that defense was successful because, in both cases, it involved the interpretation of a *bargained-for* clause in the collective bargaining agreement; not a prior, unilaterally implemented attempt to remove a mandatory subject from future negotiation.

This trine of cases involves the Board finding that contractual privilege was a valid defense because there was evidence that the parties *bargained* over the subject at issue. In Port Authority, *supra*, the issue was two conflicting sentences about pensions in the collective bargaining agreement. In the Pennsylvania State Troopers Association cases, *supra*, the issues, respectively, were the interpretation of a bargained-for side agreement over promotion, and the interpretation of a bargained for contractual clause about physical fitness. Tellingly, neither of these cases involved a prior, unilaterally implemented attempt to remove a mandatory subject from future negotiation.

By refusing to negotiate with PASNAP over the latest unilaterally implemented tuition reimbursement policy, Temple has violated Section 1201(a)(1) and (5) of PERA. The condign remedy is for Temple to rescind the tuition reimbursement policy that was effective on March 3, 2009, covering both employes and dependants as set forth in PASNAP Exhibit 6. To restore the *status quo ante*, Temple must reinstate the tuition reimbursement policies as they existed immediately prior to its unilateral implementation the policies as set forth in PASNAP Exhibit 6.

PASNAP also urges that any make whole remedy must include, "loss of tuition benefits, costs and/or fees associated with any actions taken to make up the loss in tuition benefits; and any other losses incurred." (PASNAP brief at 18).

I am limited to placing affected employes in the same position as if the unfair practice had not occurred. Therefore, the make whole remedy in this case is for employes who were adversely affected by Temple's unilateral change in the tuition reimbursement policy to be reimbursed as they would have been under the policy immediately in effect before the unilateral change that is the subject of this unfair practice charge.

#### 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 PERA.

2. The unions collectively referred to as PASNAP are employe organizations within the meaning of section 301(3) of PERA.

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 PERA.

5. Temple has not committed unfair practices within the meaning of Section 1201(a)(9) of PERA.

ORDER

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

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 PERA:

(a) Immediately rescind the tuition reimbursement plans for employes and dependants as set forth in PASNAP Exhibit 6, insofar as they apply to PASNAP's bargaining unit members, and reinstate those tuition reimbursement policies that were in effect immediately prior to the implementation of the policies as set forth in PASNAP Exhibit 6:

(b) Immediately make adversely affected employes whole for the benefits they would have received under the tuition reimbursement plan immediately preceding the unilaterally implemented plan as set forth in PASNAP Exhibit 6;

(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 sixth day of October 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

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TIMOTHY TIETZE, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

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**AFFIDAVIT OF COMPLIANCE**

Temple hereby certifies that it has ceased and desisted from violations of Section 1201(a)(1) and (5) of PERA; that it has rescinded the tuition reimbursement policies as set forth in PASNAP Exhibit 6, insofar as they apply to PASNAP bargaining unit members; that it has reinstated the tuition reimbursement policies that were in effect immediately prior to the implementation of the policies as set forth in PASNAP Exhibit 6; that it has made adversely affected employees whole for the benefits they would have received under the tuition reimbursement plan immediately preceding the unilaterally implemented plan as set forth in PASNAP Exhibit 6; and that it has served a copy of this affidavit on PASNAP at their principal places of business.

\_\_\_\_\_  
Signature/Date

\_\_\_\_\_  
Title

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

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Signature of Notary Public