

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 :

FINAL ORDER

Temple University Health System (Temple) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on October 26, 2009. Temple challenges a Proposed Decision and Order (PDO) issued on October 6, 2009, in which the Hearing Examiner concluded that Temple violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA). The Temple University Hospital Nurses Association (TUHNA) and Temple University Hospital Allied Health Professionals (TUHAHP) (collectively PASNAP¹), also filed timely exceptions and a supporting brief on October 26, 2009, challenging the Hearing Examiner's remedy for the unfair practice. PASNAP filed a brief in response to Temple's exceptions on November 16, 2009. Temple filed a response to PASNAP's exceptions and a supporting brief on November 17, 2009. After a thorough review of the exceptions and all matters of record, the Board makes the following:

ADDITIONAL FINDINGS OF FACT

6. Temple unilaterally included a clause in the 2006 tuition remission/reimbursement policy that provided as follows:

Nothing in this policy constitutes a contract, express or implied. TUHS, 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.

(Union Exhibit 2).

7. The 2006 tuition remission/reimbursement policy was effective August 31, 2006. (N.T. 49)

8. In 2006, PASNAP negotiated collective bargaining agreements with Temple for employees represented by TUHNA and TUHAHP. (N.T. 52).

9. The 2006 collective bargaining agreements between Temple and PASNAP provided that employees shall be eligible for tuition reimbursement in accordance with Temple policy. (Temple Exhibits 5 and 6).

DISCUSSION

In 2003, Temple made changes to the then existing tuition reimbursement policy, and PASNAP and Temple executed a written side agreement which states, in pertinent part, "[t]he parties agree to the following changes in the tuition policy...." Neither Temple's changes nor the 2003 agreement authorized Temple to make prospective changes in the policy. Nevertheless in 2006, Temple unilaterally issued more changes to the tuition reimbursement policy.

The unilaterally implemented 2006 tuition reimbursement policy was effective August 31, 2006, and PASNAP decided not to demand bargaining over the changes. Temple's 2006 changes to the tuition reimbursement policy included a clause which provided that:

¹ Both TUHNA and TUHAHP are affiliated with the Pennsylvania Association of School Nurses and Practitioners (PASNAP).

Nothing in this policy constitutes a contract, express or implied. TUHS, 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.

In 2006 PASNAP negotiated collective bargaining agreements with Temple for employees represented by TUHNA and TUHAHP. The negotiated collective bargaining agreements provided that employees shall be eligible for tuition reimbursement in accordance with Temple policy.

In 2009, while those collective bargaining agreements were in effect, Temple again unilaterally issued another tuition reimbursement policy, which was effective March 9, 2009. PASNAP, in a letter dated March 10, 2009, made its opposition to the new policy known, and asked Temple to delay implementation to provide an opportunity to bargain. Temple denied PASNAP's request.

Based on the testimony and documentary evidence presented, the Hearing Examiner determined that PASNAP did not waive its right to negotiate employee tuition reimbursement, which is a mandatory subject of bargaining. The Hearing Examiner also rejected Temple's claim that it had a sound arguable basis for believing that it was contractually privileged to unilaterally change the tuition reimbursement policy. Accordingly, the Hearing Examiner concluded that Temple violated Section 1201(a)(1) and (5) of PERA by unilaterally implementing the March 9, 2009 changes to the tuition reimbursement policy.

Temple argues on exceptions that all prior changes to the tuition reimbursement policy, including those in 2003, were unilaterally implemented without objection from PASNAP, and therefore PASNAP waived its right to prospectively bargain over changes to the policy. However, it is well settled that a union does not forever waive its right to bargain future changes to a mandatory subject by its acquiescence (either express or implied) to the employer's previous unilateral changes in the subject matter. *E.g.*, Crawford County v. PLRB and AFSCME, D.C. 85, AFL-CIO, 659 A.2d 1078 (Pa. Cmwlth. 1995). The fact that PASNAP agreed to Temple's changes to the tuition reimbursement policy in 2003, and did not demand bargaining over the 2006 changes, in no way affects PASNAP's ability to demand bargaining over changes to the policy in 2009. *Id.* Accordingly, the Hearing Examiner did not err in concluding that PASNAP did not waive its right to bargain over changes to the employee tuition reimbursement policy, and Temple's exception thereto is dismissed.

Temple also argues that it established a sound arguable basis in the collective bargaining agreements authorizing its changes to the tuition reimbursement policy. As noted by the Hearing Examiner, in Jersey Shore Area School District, 18 PPER ¶ 18061 (Proposed Decision and Order, 1987), 18 PPER ¶ 18117 (Final Order, 1987), the Board adopted what has become known as the "sound arguable basis" or "contractual privilege" defense to a claimed refusal to bargain. See 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 [i.e. contractually privileged]" under the terms of that agreement. Pennsylvania State Troopers Association v. PLRB, 761 A.2d 645, 651 (Pa. Cmwlth. 2000). Although the Board will not decide the correct interpretation of the agreement, it must, of necessity, review the contract to determine if the contract language could reasonably support the employer's asserted interpretation. Wilkes-Barre Township v. PLRB, 878 A.2d 977 (Pa. Cmwlth. 2005). Consistent with these holdings and Jersey Shore, the Board recently reiterated that the employer may establish the defense of a "sound arguable basis" for changes in terms and conditions of employment only "where there is language in the contract that supports the employer's claimed right to act unilaterally regarding a specific subject matter..." Port Authority Transit Police Association v. Port Authority of Allegheny County, 39 PPER 147 at 513 (Final Order, 2008).

As the case law in this area demonstrates, the employer's authority to unilaterally alter a mandatory subject of bargaining must arise from the terms of the collective bargaining agreement. Indeed, even before expressly adopting the contractual privilege defense in Jersey Shore, the Board recognized that in a mutually negotiated agreement, the parties may expressly provide that otherwise negotiable matters are the sole province

of the employer, thus negating a claim of an alleged failure to bargain subsequent employer changes to the subject matter. In the Matter of the Employees of the Port Authority of Allegheny County, 433 A.2d 578 (Pa. Cmwlth. 1981). However, where the employer asserts a contractual right to change a mandatory subject of bargaining, as Temple asserts here, it must point to specific, agreed-upon contract language which arguably indicates that the union expressly and intentionally authorized the employer to take the precise unilateral action at issue. See Port Authority Transit Police Association v. Port Authority of Allegheny County, *supra*.

Here, Temple points to language in the collective bargaining agreements stating generally that tuition reimbursement shall be "in accordance with" Temple policy, which Temple asserts gives it a sound arguable basis to act unilaterally because Temple, without the agreement of PASNAP, had previously inserted language in the tuition reimbursement policy that reserved to itself the right to make changes to the policy. Although not cited by Temple, Canon-McMillan School District, 12 PPER ¶12376 (Final Order, 1981), requires something more than that offered by Temple here. In Canon-McMillan School District, the Board found that the union did not establish a violation of the employer's bargaining obligation because precise statutory language that authorized the employer to act with respect to sabbatical leave issues was expressly identified and specifically incorporated into the collective bargaining agreement. However, consistent with that decision, and Board decisions since Jersey Shore Area School District, general boilerplate language in an agreement incorporating, or providing that some employee benefit will be "in accordance with" a non-negotiated policy, is insufficient to demonstrate that the union even arguably intended to relinquish any statutory right of collective bargaining. See Port Authority Transit Police Association v. Port Authority of Allegheny County, *supra*.

Indeed, taken to its logical conclusion, Temple's argument would afford it a unilateral right to entirely eliminate tuition reimbursements, despite its alleged agreement with PASNAP that tuition reimbursements shall be provided in accordance with the Temple policy. Moreover, the language unilaterally inserted into Temple's policy provides that the policy is not a contract. If the policy, by its own terms is not a contract, then Temple cannot have any reasonable argument that PASNAP effectively agreed to authorize Temple to make changes in the policy. Furthermore, as evidenced by Section 2 of Article 18 of the TUHAHP collective bargaining agreement, Temple was fully aware of how to reach an agreement with PASNAP that arguably granted it the authority to revise an incorporated policy. As set forth in that section (governing policies on recreational and cultural facilities), Temple and PASNAP agreed that employees' use of Temple facilities would be "in accordance with policies set forth and revised by Temple from time to time." (Temple Exhibit 6, emphasis added).

Temple cannot reasonably assert that it believed that PASNAP afforded it a right to act unilaterally in the sections of the agreements covering tuition reimbursement, where no specific language expressly addressing that right is included. Accordingly, where the contract is silent on Temple's authority to act unilaterally with respect to its tuition reimbursement policy, the Hearing Examiner did not err in rejecting Temple's asserted contractual privilege defense to PASNAP's charge of unfair practices under Section 1201(a)(1) and (5) of PERA, and Temple's exceptions thereto are dismissed.

PASNAP also filed exceptions, arguing that the Hearing Examiner erred in failing to award payment for "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." (PDO at 6). Specifically, PASNAP asserts that make-whole relief for the affected employees must include recoupment of any fees or costs that they had incurred in securing alternative financing for tuition caused by Temple's unlawful changes in the tuition reimbursement policy.

The particular remedy for an unfair practice is within the sound discretion of the Board. PLRB v. Martha Company, 359 Pa.347, 59 A.2d 166 (1948); In re Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978). While the Board is within its authority to review the relief directed by the Hearing Examiner, Teamsters, Local 764 v. Lycoming County, 37 PPER 12 (Final Order, 2006), *affirmed unreported*, 38 PPER 178 (Pa. Cmwlth. 2007); IAFF, Local 840 v. Edwardsville Borough 37 PPER 108 (Final Order 2006), generally the Board will defer to the Hearing Examiner's assessment of the appropriate remedy.

To remedy the unfair practice for changes in the tuition reimbursement policy, the Hearing Examiner directed Temple to compensate affected employees for amounts for which they would have been reimbursed under the policy existing prior to March 9, 2009, thus restoring the *status quo ante*. Upon review of PASNAP's exceptions, the Hearing Examiner's failure to award unsubstantiated amounts for costs and fees that may have been incurred by some employees to voluntarily secure alternative financing does not warrant revision. The actual relief directed by the Hearing Examiner is neither punitive nor speculative. Accordingly, on review of the record, PASNAP's exception to the Hearing Examiner's remedy is dismissed.

After a thorough review of the exceptions and all matters of record, the exceptions filed by Temple and PASNAP shall be dismissed, and the PDO made absolute and final.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed by Temple and PASNAP are hereby dismissed, and the October 6, 2009 Proposed Decision and Order, 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 nineteenth day of January, 2010. 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.

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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; that it has posted a copy of the Proposed Decision and Order and Final Order as directed; and that it has served a copy of this affidavit on PASNAP at its principal place of business.

Signature / Date

Title

SWORN AND SUBSCRIBED to before me
The day and year aforesaid

Signature of Notary Public