

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEMPLE UNIVERSITY HOSPITAL NURSES :
ASSOCIATION, JEANS HOSPITAL NURSES :
ASSOCIATION, PENNSYLVANIA ASSOCIATION :
OF STAFF NURSES AND ALLIED PROFESSIONALS :
: Case No. PERA-C-09-310-E
v. :
: :
TEMPLE UNIVERSITY HEALTH SYSTEM, TEMPLE :
UNIVERSITY HOSPITAL, JEANS HOSPITAL¹ :

PROPOSED DECISION AND ORDER

A charge of unfair practices was filed with the Pennsylvania Labor Relations Board (Board) on August 5, 2009, by the Temple University Hospital Nurses Association, Jeans Hospital Nurses Association, and the Pennsylvania Association of Staff Nurses and Allied Professionals (PASNAP²), alleging that Temple University Health System, Temple University Hospital, and Jeans Hospital (collectively, Temple) violated Section 1201(a)(1) and (3) of the Public Employe Relations Act (PERA) when it refused to re-hire three laid-off nurses who were active in PASNAP.

On August 21, 2009, the Secretary of the Board issued a complaint and notice of hearing wherein this case was scheduled for hearing on December 14, 2009, 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. Additional days of hearing were necessary and were held on February 4 and June 17, 2010. On each further day of hearing, all parties in interest were again 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 a public employer.
2. The Unions designated herein as PASNAP are employe organizations.
3. In March of 2009, nurses at Northeastern Hospital received notice that it was going to close. Temple decided that it would try to fill open positions at its other facilities with nurses from Northeastern Hospital, if possible. To that end, Temple gave Northeastern Hospital Nurses lists of open positions, held a job fair, and granted individual interviews to interested nurses. (N.T. 37, 81, 158, 206-207).
4. Temple University Hospital (TUH), in anticipation of increased maternity traffic because of Northeastern's closure, opened ten new beds in the labor and delivery antenatal unit. Concomitant to the increase in beds, TUH created twenty new registered nurse positions, and undertook to recruit nurses from Northeastern Hospital to fill those positions. Nineteen of the twenty openings were filled with Northeastern nurses. (N.T. 204-206, 234, 240,245, 247. 249, 250, 252-253, 255-256, 260, 263, 265-266, 268, 270).
5. Nurse Manager Margaret Brown was solely responsible for filling those twenty labor and delivery antenatal unit nursing positions. Brown had been the nurse manager of the labor and delivery antenatal unit at TUH for nine years. Immediately before that she was a nurse manager and director of nursing at Episcopal Hospital, until it closed. (N.T. 202-204, 213).

¹ The caption appears as amended by the Secretary.

² 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.

6. On March 24, 2010, Brown visited Northeastern to discuss the availability of TUH labor and delivery antenatal unit positions with interested nurses. Alburger and Dwyer were at that meeting. Brown told the assemblage that there were twenty available positions in the TUH labor and delivery antenatal unit. Brown took note of how Alburger and Dwyer behaved at that meeting, and thought it "inappropriate." (N.T. 37-39, 82, 86, 206, 208, 209, 210).

7. Brown organized tours of her unit for interested Northeastern nurses. Alburger and Dwyer took advantage of this opportunity and toured TUH on March 26, 2010. The forty-five minute tour was conducted by a TUH staff nurse, Myra Rubin. Her recommendation for either Alburger or Dwyer was not positive. (N.T. 42-43, 83, 211, 227).

8. On April 3 and 9, 2010, Brown conducted individual interviews with interested candidates from Northeastern. Those candidates interviewed only with Brown, and Brown solely made the recommendations of who to hire. Interviews lasted about thirty minutes. Brown reviewed the candidates' job request forms and résumés before the interview. For each interview, Brown completed an Interview Summary Form. After both days of interviewing were completed, Brown separated the forms into a "hire" and "not hire" pile. (N.T. 212-214, 216-217, 220; Temple Exhibits 5-35).

9. The criteria used by Brown in her decision making, included the candidates' years of service, certifications, effectiveness as a team member, responsibilities in the Northeastern unit, activeness in performance improvement, status as a preceptor or charge nurse, voiced attitudes towards patients, and the perceptions of co-workers. (N.T. 220, 282).

10. Brown did not recommend Alburger for hire. Only one of the candidates who were asked identified Alburger as a co-worker they would bring to TUH, if they could. Brown saw this as a negative for team building. Brown thought Alburger's communications skills were weak, based upon her one-on-one interview. Brown was particularly concerned over Alburger's answer to a question about how the hospital had changed over the years. Brown found Alburger's response "disdainful," and Brown inferred from that answer that Alburger might have a problem dealing with Temple's vastly diverse patient base. Additionally, staff gave negative reports to Brown about Alburger's attitude on the tour of TUH. (N.T. 223-227).

11. Brown did not hire Dwyer, either. None of the candidates who were asked to name three co-workers they'd bring if they could, told Brown that they would bring Dwyer. Brown considered Dwyer's behavior at the Northeastern Hospital group meeting as negative. Brown also considered it a negative that Dwyer, with thirty years experience, chose not to be a preceptor. And, TUH staff reported negatively about Dwyer's attitude on the tour of TUH. (N.T. 241, 243-244).

DISCUSSION

PASNAP charges Temple with violating Section 1201(a)(1) and (3) of PERA because it did not re-hire three nurses active in PASNAP, after those nurses were laid-off as a result of Northeastern Hospital's closure.³

Temple asseverates that it filled the positions in question solely on the applicants' qualifications and departmental needs, and that the Complainants' union activity played no part in the decision making.

Because PASNAP has not proved knowledge of Alburger's and Dwyer's protected activity on Temple's part, this charge is dismissed in its entirety.

To prevail when charging a violation of Section 1201(a)(3), PASNAP must show, by substantial and legally credible evidence, that the employes in question engaged in protected activity, that the employer was aware of that protected activity, and that but for the protected activity by those employes the complained of adverse action would not have been taken by the employer. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). The St. Joseph's test is equally applicable to charges stemming from an employer's refusal to rehire employes active in union matters. Private Industry Council

³ The charge, as originally filed, alleged that three nurses, Kristine Campbell, Alice Alburger, and Margaret Peggy Dwyer were discriminated against by Temple because of their union activity. By agreement between the parties, I will not consider the charge insofar as it relates to Campbell in this Proposed Decision and Order. (See Temple's post-hearing brief at 2, n. 1).

of Westmoreland/Fayette, Inc., 28 PPER ¶ 28138 (Proposed Decision and Order, 1997), 29 PPER ¶ 29004 (Final Order, 1997).

PASNAP has not proved by substantial and legally credible evidence that Brown had knowledge of Alburger's and Dwyer's protected activity. Brown credibly and consistently denied any such knowledge, and PASNAP has not proved otherwise. (N.T. 99, 210, 219-220, 282). Absent that knowledge, as a matter of law, Temple cannot have violated Section 1201(a)(3) of PERA. Temple University (Jeanes Hospital), 29 PPER ¶ 29033 (Proposed Decision and Order, 1998).

Aside from that evidentiary sockdolager, Temple has put forth valid business reasons for choosing the nurses it did hire. Even though this charge is dismissed based upon PASNAP's failure to prove knowledge on Temple's part, we will examine Temple's stated reasons for why it hired the nurses it did, and why neither Alburger nor Dwyer were among them. An examination of the law insofar as it applies to discrimination in the hiring process is a fruitful place to start.

Some incongruities or anomalies in the hiring process, do not, in themselves, establish discrimination on the employer's part. Private Industry Council of Westmoreland/Fayette, Inc., *supra*. Not placing "special significance" on prior experience in the same position, standing alone, does not prove animus. Not hiring a candidate whose supervisors were "pleased with [the employe's] work," is not sufficient evidence to establish animus. Portage Area School District, 17 PPER ¶ 17190 at 512 (Proposed Decision and Order, 1986).

However, a hiring procedure based solely on an oral interview may deserve increased scrutiny because of its inherent subjectivity. Wilson Area School District, 27 PPER ¶ 27174 (Proposed Decision and Order, 1996). Nevertheless, not hiring the nurse with more years of experience and a greater variety of nursing experience does not violate PERA, when the employer's reasons for the other hire are valid. Hazelton Area School District, 19 PPER ¶ 19138 (Proposed Decision and Order, 1998).

In support of its argument that Temple discriminated against Alburger and Dwyer when it refused to hire them into open vacancies, PASNAP touts their experience, credentials, and positive evaluations.

For experience, PASNAP calls my attention to the fact that Alburger and Dwyer were the most senior nurses in the maternity department at Northeastern and were cross-trained in all areas of the department.

For credentials, PASNAP offers the fact that Dwyer has a Bachelor of Science degree, that Alburger holds certifications and accreditations not earned by "many others," and that both hold obstetric in-patient certifications.

For positive evaluations, PASNAP calls my attention to the annual evaluations of both Alburger and Dwyer. For both of their 2007-2008 evaluations, Alburger and Dwyer were rated "meets expectations." (PASNAP Exhibit 6, 11).

The real crux of PASNAP's case, however, is the allegation that Temple purposely skewed the hiring criteria in order to exclude Alburger and Dwyer from being rehired at TUH. In order to apperceive PASNAP's allegations that Temple consciously manipulated the hiring process in order to exclude Alburger and Dwyer, it is helpful both to examine why Temple held these interviews, and how the hiring manager conducted the interviews and decided which candidates to employ. Then, we will consider PASNAP's criticisms of the process.

Around March of 2009, Temple notified nurses at Northeastern Hospital that the facility was going to close. Temple also decided that it would try to fill open positions at its other facilities with nurses from Northeastern, if feasible. To that end, Temple gave nurses at Northeastern a list of open positions, held a job fair, and gave interviews to interested, qualified applicants.

Anticipating an increase in its labor and delivery antenatal unit because of Northeastern's closing, TUH created twenty new registered nurse positions. TUH recruited nurses from Northeastern for those vacancies. And indeed, TUH filled nineteen of the twenty vacancies with Northeastern nurses.

Filling those vacancies was the job of Brown, who before working nine years at TUH as the nurse manager of the labor and delivery unit, worked at Episcopal Hospital for twenty-five years as a nurse manager and director of nursing. Before holding individual interviews, Brown held a meeting in March of 2010 at Northeastern, to discuss the availability of openings with interested nurses.

At Northeastern, Brown met with about fifteen nurses for ninety minutes. Brown told the assembled nurses of the twenty vacancies in the TUH labor and delivery antenatal unit and, in her words, "tried to allay their concerns, tried to connect with the group, to really get across the point that we knew where they were and how frustrated and angry. . .that we were putting a unit together. . .and also provide jobs for people that, you know, were a fit." (N.T. 209). Essentially, Brown wanted "to reassure them that there is life after the institution they thought they were going to retire from...." (N.T. 206).⁴

Alburger and Dwyer were present and vocal at that meeting. Brown was of the opinion that the behavior of both was "inappropriate." Both made "sarcastic remarks," and other nurses behind them occasionally rolled their eyes at the remarks made by the two. When other nurses asked questions "they would jump in and monopolize." (N.T. 210, 228, 273, 274).

Brown told the Northeastern nurses that they could have the opportunity to tour both TUH and the labor and delivery unit. On March 26, 2009, Alburger and Dwyer took that opportunity and toured the labor and delivery unit for about forty-five minutes. Their tour guide was a TUH staff nurse, Myra Rubin.

Alburger and Dwyer, along with all other interested nurses, then interviewed individually with Brown. These individual interviews were held on consecutive Fridays, April 3 and April 9, 2009. Brown filled out an Interview Summary Sheet for, and followed the same process with, each interviewee. Brown neither asked, nor was she independently aware, of whether any candidates were active in PASNAP. Brown had become an experienced interviewer during her thirty-four years as a nurse manager. According to Brown, everyone had a "clean slate," and these interviews offered candidates the opportunity "to sell themselves and ask questions." (N.T. 243).

After each of the two Fridays, Brown reviewed that set of summary sheets at home and divided them into two piles; recommend for hire, and recommend not hire. The criteria Brown used fell into eight basic categories. Not in any order of importance, Brown balanced the candidates' years of service, certifications, effectiveness as a team member, responsibilities in the unit, participation in performance improvement, information from the senior team, position as charge nurse or preceptor, attitude toward patients, and what co-workers thought of them. Brown also considered the candidates' individual interview performance.

Alburger's performance at the individual interview did not impress Brown. Alburger's answers to Brown's questions were "guarded" and "stiff." As Brown put it, Alburger gave "short abrupt answers," and she did not "sell herself well." (N.T. 225). But more importantly, Alburger made a statement about teaching "the lower socio-economic population," that Brown felt was disdainful.⁵

Dwyer fared no better than did Alburger in the individual interview process. According to Brown, Dwyer displayed "an arrogance that was seen with longevity." Putting it in the vernacular, Brown explained it as an attitude of "did this, did that, been there, done that." (N.T. 242). Moreover, Dwyer's answers were "sarcastic and negative." (Id.). Dwyer told Brown that she preferred not to be a preceptor, but that she would help people, if asked. Brown felt that the kind of team player she needed didn't wait to be asked. (N.T. 293).

⁴ Brown confessed to the assemblage that she particularly understood their plight because she had worked at Episcopal Hospital for twenty-five years when that institution closed its doors and she was hired at TUH. (N.T. 83, 202-203, 260-261).

⁵ When counsel for PASNAP questioned Brown on cross-examination over this statement by Alburger, and what it meant, Brown's testimony did not falter. (N.T. 282-283). In its brief, PASNAP refers to Brown's testimony as "an unfounded and vicious accusation," and a "ludicrous allegation." (PASNAP's post-hearing brief at 21). Nevertheless, Brown's testimony remains uncontradicted. Alburger never re-took the stand to rebut either Brown's rendition or interpretation of that statement.

Especially pertinent to Brown's decision was how the new hires would mesh with the existing staff, since TUH expected an immediate increase in labor and delivery patients because of Northeastern's imminent closing. Brown was particularly focused on creating an immediately cohesive team for her unit. To that end, Brown had asked applicants for the names of three other Northeastern nurses that each would want to bring along, if they could.

Nurses who were consistently named by others as someone they'd like to bring to TUH as co-workers, Brown considered to be team builders. Only one nurse interviewed named Alburger as someone she'd like to bring with her, and no one named Dwyer as someone to bring. This was viewed by Brown as a negative.

Another element of team building was whether, after touring TUH, a Northeastern nurse was positively or negatively recommended by the staff conducting the tour. When Brown's staff was sufficiently impressed by an applicant during the tour, they would comment to Brown. That was true whether the impression was positive or negative.

The TUH staff made a recommendation about Alburger. It was that she "had a negative edge," and asked Brown not to make her the first choice. (N.T. 227). Likewise feedback for Dwyer from the TUH staff was that she was "edgy and sarcastic." For Brown's team building effort, these were negative comments by existing staff and were material.

Essentially, PASNAP seeks to show discrimination on Temple's part by undermining the validity of Brown's methods in determining who to hire at TUH. To that end, PASNAP highlights every discrepancy and contradiction it can muster in Brown's processes, in an attempt to prove that Brown purposefully sought to exclude Alburger and Dwyer from being re-hired because of their protected activity as union advocates.

To the extent that there are minor discrepancies and contradictions in Brown's methods and procedures I am not convinced that they are the product of discrimination. Using the following analysis, I found her to be a credible and forthright witness who harbored no animus.

Credibility judgments are based upon a witness's appearance, general bearing, conduct on the stand, demeanor, manner of testifying (e.g. candor, frankness, clearness of statements), and the certainty of the witness with respect to the facts. Ross Township 32 PPER ¶ 32175 (Proposed Decision and Order, 1992) (citing In Re Gaston's Estate, 361 Pa. 105, 62 A.2d 904 (1949)).

The demeanor of a witness is the touchstone of credibility. Robinson v. Robinson, 183 Pa. Super. 574, 133 A.2d 259 (1957).

The legal maxim, *testes ponderantur, non numerantur* holds true; witnesses are weighed, not counted. The truth is sought by weighing the credibility of respective witnesses and not by a mere numerical count.

Considering all the above-mentioned factors I find Brown eminently credible, and I accept her rendition of facts and her denial of union animus in decision making.⁶

Moreover, those discrepancies and inconsistencies highlighted by PASNAP merely reflect what Brown readily admitted; that each interview took a slightly different tack. In some cases experience was a determining factor, in other cases it was not. (N.T. 264, 279, 289). The continuing leitmotif for Brown, however, was building a "cohesive group," and hiring nurses who, despite Northeastern's closing, had a "positive attitude." (N.T. 219, 259-260).

Some allegations made by PASNAP to support its discrimination claim are simply not borne out by the record. By way of example, PASNAP asserts that "[d]uring the hearing, it came out that Brown did not actually ask the 'name three people' question of most candidates." (PASNAP's post-hearing brief at 8). But, the record reveals the following testimony concerning how many people Brown asked for three names:

⁶ Brown's expatiation on her "amazing experience" interviewing candidates offers an *aperçu* into her attitude and motivation. (N.T. 261-262).

PASNAP's ATTORNEY: Do you remember how many people out of the group you asked that question of?

BROWN: No.

PASNAP's ATTORNEY: Was it 50 percent? Was it more than 50 percent?

BROWN: More than 50 percent.

(N.T. 301).

PASNAP goes on to argue that the "only thing that differentiated Dwyer and Alburger from those other candidates that were hired, other than their superior experience and ability, was the fact that they were Union representatives." (PASNAP's post-hearing brief at 9).

In fact, there was another thing that differentiated these two from those hired; Brown's perception that they did not display a positive attitude so as to help create a cohesive group. Whether or not PASNAP thinks that a proper criterion is simply of no moment. It is not pretextual, and it does not prove discrimination. Portage Area School District, supra; Hazelton Area School District supra.

This record supports the conclusion that Brown had no knowledge of Alburger's or Dwyer's union activities, and that Temple failed to re-hire those two for the reasons it put forth, and not because Alburger was a union representative and Dwyer was vice-president and also a union representative. Therefore, this charge is dismissed in its entirety.

CONCLUSION

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

1. Temple is a public employer within the meaning of Section 301(1) of PERA.
2. The unions designated as PASNAP are employe organizations within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties.
4. Temple has not committed unfair practices within the meaning of Section 1201(a)(1) and (3) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the charge is dismissed and the complaint rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this sixteenth day of September, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

TIMOTHY TIETZE, HEARING EXAMINER