

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ASSOCIATION OF PENNSYLVANIA STATE :
COLLEGE AND UNIVERSITY FACULTIES :
 : Case No. PERA-C-15-263-E
v. :
 :
PENNSYLVANIA STATE SYSTEM OF HIGHER :
EDUCATION :

FINAL ORDER

The Association of Pennsylvania State College and University Faculties (APSCUF) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on September 1, 2017, to a Proposed Decision and Order (PDO) issued on August 23, 2017. In the PDO, the Hearing Examiner dismissed APSCUF's Charge of Unfair Practices alleging that the Pennsylvania State System of Higher Education (PASSHE) violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA) by knowingly providing APSCUF with false financial information about West Chester University and other PASSHE universities, and misclassifying monetary surpluses in order to show operating deficits for collective bargaining and contract compliance purposes. PASSHE filed a response to APSCUF's exceptions on September 8, 2017. Following an extension of time granted by the Secretary of the Board, APSCUF filed a brief in support of the exceptions on September 28, 2017. PASSHE also obtained an extension of time, and filed a brief in opposition to the exceptions on October 24, 2017.

On December 1, 2015, the Secretary of the Board issued a Complaint and Notice of Hearing on APSCUF's Charge of Unfair Practices filed on September 10, 2015. After continuances were granted at the request of the parties, hearings were held on January 9, 2017 and March 31, 2017. During the hearings, all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs. Based on the evidence presented by the parties and arguments raised in the briefs, the Hearing Examiner made necessary Findings of Fact, which are adopted herein and summarized as follows.

APSCUF is the certified bargaining representative of faculty members employed by PASSHE. APSCUF was a party with PASSHE to a collective bargaining agreement (CBA), which was effective from July 1, 2007 to June 30, 2011. (FF 3 and 4).

By letter dated April 13, 2011, the President of West Chester University, Greg Weisenstein, advised APSCUF Local West Chester President Clifford Johnston of possible retrenchment of faculty effective at the conclusion of the 2011-2012 academic year because of financial considerations, program curtailment, elimination of courses or other reasons. (FF 9). Article 29(A) of the 2007-2011 CBA contained a provision governing retrenchment, which provided, in relevant part, as follows:

The STATE SYSTEM/UNIVERSITIES shall meet and discuss with APSCUF or its designee regarding any changes, including those involving curriculum and programs, which will lead to retrenchment, and thereby impact wages, hours and terms and conditions of employment, as required by Section 702 of [the Act]. In connection with such duty to meet and discuss, accurate information, statistics or financial data related to any such proposed change shall be made available to APSCUF. This shall not be construed to require the STATE SYSTEM/UNIVERSITIES to compile such material in the form requested which is not already compiled in that form, unless mutually agreeable.

(FF 8). There were no actual retrenchments which occurred at West Chester University at the conclusion of the 2011-2012 academic year. (FF 10).

APSCUF filed a series of grievances between 2010 and 2013 alleging that West Chester University was not in compliance with the provision in Article 11(F) of the CBA, which provided that "[t]he full-time equivalent (FTE) of temporary and regular part-time FACULTY MEMBERS at any University shall not exceed twenty-five percent (25%) of the full-time equivalent (FTE) of all FACULTY MEMBERS employed at that University as of October 31 of the previous year." APSCUF did not advance any of those grievances to arbitration.

In connection with the April 13, 2011 retrenchment letter, the grievances concerning Article 11(F) of the CBA, and the parties' negotiations for a successor agreement to the 2007-2011 CBA, APSCUF made numerous requests to PASSHE for the budget and other information on the financial condition of West Chester University. (FF 11). In October 2012, APSCUF received a copy of a document submitted to PASSHE's Board of Governors by the Office of the Chancellor entitled "Educational and General Operating and Budget Summaries for [PASSHE] Entities," which explained the Office of the Chancellor's budgeting instructions to the universities for the 2013-2014 request year budget. (FF 12). On June 11, 2013, APSCUF and PASSHE executed a successor CBA, which was effective from July 1, 2011 to June 30, 2015. (FF 5).

By October 2013, APSCUF had received budget reports and financial statements for the PASSHE universities, including West Chester, which showed Educational and General fund surpluses at West Chester University. The documents revealed West Chester University's budget practice of transferring surplus funds from the Educational and General fund to the plant fund. (FF 13). On March 10, 2014, APSCUF obtained a report from the accounting firm of Boyer and Ritter, which APSCUF retained to conduct a financial analysis regarding several universities within PASSHE, including West Chester University. Based on review of West Chester University's budget reports and financial statements, the report of Boyer and Ritter stated, in pertinent part, as follows:

The University's net position is comprised of mainly two major categories - Invested in "Capital Assets, net of related debt" - representing the University's land, buildings, and other physical assets, net of liabilities (such as borrowing to build and maintain those assets). The other category is "Unrestricted Net Position." The Unrestricted balance is directly affected by the Educational & General operations of the University.

According to the external financial statements, the University has experienced positive improvements in their (sic) unrestricted net position (e.g. \$40.8 million in 2012/13) from a deficit balance of \$37,521 in 2008/09. The "Invested in Capital Assets, net of related debt" balance has increased 26% since 2008/09. The University has invested in infrastructure without taking on too much debt. The ability to do this is one indicator the University has been financially stable (revenue consistently exceeding expenses)...

The University transfers monies to Plant - Unrestricted for capital and/or life cycle assets annually. Periodically, these transfers are not budgeted. The University adjusts their (sic) fund transfers when it experiences changes in operating surpluses (e.g. revenues exceeding expenses).

(FF 14).

Since the fall of 2015, West Chester University has been in compliance with Article 11(F) of the CBA. (FF 6 and 7). In December 2016, APSCUF and PASSHE ratified a successor CBA to the one that expired on June 30, 2015, which is effective from July 1, 2015 through June 30, 2018. (FF 15).

Based on the evidence presented, the Hearing Examiner dismissed APSCUF's Charge of Unfair Practice alleging that PASSHE violated Section 1201(a)(1) and (5) of PERA as untimely. Section 1505 of PERA provides that "[n]o petition or charge shall be entertained which relates to acts which occurred or statements that were made more than

four months prior to the filing of the charge.” 43 P.S. § 1101.1505. A charge will nevertheless be considered timely if it is filed within four months of when the charging party knew or should have known that an unfair practice was committed. *E.g. Lancaster County v. PLRB*, 62 A.3d 469 (Pa. Cmwlth. 2013); *Community College of Beaver County Society of Faculty, PSEA/NEA v. Beaver County Community College*, 35 PPER 24 (Final Order, 2004). On this record, the Hearing Examiner found that APSCUF knew or should have known in March 2014 of PASSHE’s budget practices alleged to be bargaining violations, but did not file the Charge of Unfair Practices until September 2015. The Hearing Examiner therefore dismissed the charge as untimely, as it was filed with the Board after the four-month limitations period set forth in Section 1505 of PERA.

APSCUF alleges on exceptions that the Hearing Examiner erred in finding that the Charge of Unfair Practice was untimely. APSCUF asserts that it did not know until 2015 that PASSHE was misrepresenting West Chester University’s allocation and use of surpluses from the Educational and General fund that were allegedly transferred to the plant fund. APSCUF asserts in its brief in support of exceptions that while it may have known as of March 2014 that West Chester University had operating surpluses, it was unaware that millions of dollars in unrestricted assets reported in the financial statements as being allocated in the plant fund for building construction and maintenance was actually money being rolled over for use by the educational fund.

The Hearing Examiner expressly acknowledged APSCUF’s claim of the alleged misrepresentation of funds. Specifically, the Hearing Examiner stated as follows in the PDO:

APSCUF’s charge alleges that PASSHE violated Section 1201(a)(1) and (5) of PERA by knowingly providing APSCUF with false financial information about West Chester University and misclassifying monetary surpluses in order to show operating deficits for collective bargaining and contract compliance purposes. Specifically, APSCUF contends that West Chester never disclosed the extent of its operating surpluses since those surpluses and roll-over balances available to the various academic departments in the Educational and General budget were routinely transferred to a reserve account called the plant fund where they were falsely designated as being committed to various capital projects.

(PDO at 4).

Nevertheless, the Hearing Examiner determined that APSCUF should have been aware of the budgeting practices complained of in the charge by March 2014. The Hearing Examiner noted that the budget reports and financial statements for West Chester provided to APSCUF in October 2013, specifically revealed West Chester University’s practice of transferring funds from the Educational and General fund to the plant fund. Also, the report prepared for APSCUF in March 2014 by the accounting firm of Boyer and Ritter showed that West Chester University was generating Educational and General fund surpluses on a recurring basis, transferring those funds to unrestricted net assets or to the plant fund, and not always budgeting for those transfers. The Hearing Examiner concluded that APSCUF knew or should have known in March 2014 of the alleged unfair practice of PASSHE’s misrepresentation of budget allocations, but did not file the charge until September 2015, which was well beyond the four-month limitations period set forth in Section 1505 of PERA.

Upon review of the record, the Hearing Examiner did not err in finding that APSCUF knew, or should have known, of the alleged misrepresentation of the allocation of operating surpluses at West Chester University no later than March 2014. APSCUF claims in its brief on exceptions that it was not aware of an “SAP budget” used to track allocated funds for specific departments within West Chester University. However, the financial reports (FINRPT) provided by PASSHE to APSCUF in October 2013, and reviewed by APSCUF’s accountants (Boyer and Ritter), are replete with references to “SAP” and the tracking numbering system used in PASSHE’s “SAP” computer software. Indeed, the “Index of FINRPT

Worksheets" introduced into evidence by APSCUF identifies computer worksheets that show the mapping of "SAP" account numbering to the financial report. (APSCUF Exhibits 19-22). APSCUF's assertion on exceptions that it was unaware of the existence of "SAP" until 2015 cannot be sustained.

APSCUF further claims on exceptions that it could not have been aware of PASSHE's "misleading" allocation of operating surpluses to the plant fund, where allegedly unbeknownst to APSCUF, those plant funds were simultaneously available for use in the Educational and General fund for each department at West Chester University. However, Ginger Coleman, PASSHE's Budget Director, was questioned regarding the specifics of West Chester University's transfers to the plant fund in the 2012/2013 financial report. (APSCUF Exhibit 21). Ms. Coleman testified that the 2012/2013 FINRPT for West Chester University identifies \$3.5 million for department rollovers. She testified that a department rollover occurs if "[a] department is designated a certain budget each year and ... the department does not spend that full amount, they are allowed to roll those ... unspent funds over to the next year." (N.T. March 31, 2017 at 55). On that same 2012/2013 FINRPT, Ms. Coleman identified \$91.3 million designated for plant activities, which represented an increase of \$26 million from the previous fiscal year. (APSCUF Exhibit 21 at 30). When asked where that money came from, Ms. Coleman testified "[t]hat primarily [it] would come from either the ... Educational and General fund, reflected on the other transfers out line or from the auxiliary fund..." (N.T. March 31, 2017 at 56). On the 2012/2013 FINRPT, Ms. Coleman pointed to the \$26 million transfer from the Educational and General fund. Specifically, referencing the 2012/2013 FINRPT, Ms. Coleman testified that "[i]t would be on what we call the minor object tab. So in Union Exhibit 21 on page 11, there's a line toward the middle of the page in the transfer section labeled 803 and in parenthesis 813, and you can see in the Educational and General fund that \$24.8 million was transferred to one of the other columns within that year." (N.T. March 31, 2017 at 57).

Indeed, upon reviewing those financial reports, the accounting firm of Boyer and Ritter reported to APSCUF in March 2014 that West Chester University's "[u]nrestricted balance is directly affected by the Educational & General operations of the University... The University transfers monies to Plant - Unrestricted for capital and/or life cycle assets annually. Periodically, these transfers are not budgeted. The University adjusts their (sic) fund transfers when it experiences changes in operating surpluses (e.g. revenues exceeding expenses)." (FF 14). In light of the alleged significant annual operating surpluses and increases to the plant fund as shown in the FINRPTs obtained by APSCUF in October 2013 and discussed in APSCUF's March 2014 report from Boyer and Ritter, APSCUF knew, or at least should have known, at the latest by March 2014, of its allegation that PASSHE was not disclosing the extent of its operating surpluses available as rollover balances to the various academic departments in the Educational and General budget.

Moreover, in its exceptions, APSCUF points to the transfers to the plant fund in the 2013/2014 FINRPT. APSCUF argues that "[b]y the 2013-2014 FIN report, the vice-president's ability to imagine phony projects was apparently exhausted; instead of listing specific projects as he previously had, the FIN report states only 'various projects, renovations and deferred maintenance \$58,505,845.'" (Brief in Support of Exceptions at 5; APSCUF Exhibit 22 at 29). APSCUF argues that this entry on the FIN report evidences the fraudulent nature of PASSHE's transfer to the plant fund at West Chester University. However, Ms. Coleman credibly testified that APSCUF was provided a copy of the FIN reports annually in November or December for the prior fiscal year. (N.T. March 31, 2017 at 37-38). Thus, on or about December 2014, APSCUF would have been provided with the 2013/2014 FINRPT. Accordingly, even based on APSCUF's reliance on the 2013/2014 FINRPT, APSCUF knew or should have known of PASSHE's alleged misrepresentation of transfers to the plant fund more than four months prior to the filing of its Charge of Unfair Practices on September 10, 2015.

Upon review of the record, the Hearing Examiner did not err in concluding that APSCUF's September 10, 2015 Charge of Unfair Practices was not filed within four-months

of when it knew, or should have known of the alleged unfair practice. Accordingly, the Hearing Examiner did not err in dismissing the Charge of Unfair Practices as untimely, as required by Section 1505 of PERA.

In the alternative, the Hearing Examiner determined that the charge must be dismissed as moot because APSCUF and PASSHE reached a successor collective bargaining agreement in December 2016. Temple Association of University Professionals, Local 4531 v. Temple University, 25 PPER ¶ 25121 (Final Order, 1994). On exceptions, APSCUF argues that the Hearing Examiner erred in declaring the Charge of Unfair Practices to be moot. APSCUF contends that the CBA ratified in December 2016 is effective from July 1, 2015 through June 30, 2018, and the parties will be negotiating a successor CBA, at which time PASSHE could repeat its alleged conduct of misrepresenting its budget and cause a breakdown in negotiations and a strike by employees. (Brief in Support of Exceptions at 10-13).

In Medical Rescue Team South Authority v. Association of Professional Emergency Medical Technicians, 30 PPER ¶30063 (Final Order, 1999), the Board recognized that "[f]requently, charges of unfair practices over bargaining tactics that do not result in affirmative relief but only remedial cease and desist orders from the Board are mooted by entry into a bilaterally negotiated agreement..." Id., at 136. In Medical Rescue Team South Authority, the Board adopted the reasoning of the New Jersey Public Employment Relations Commission in Ramapo-Indian Hills Regional High School District, 16 NJPER ¶ 21255 at 117-118 (Decision and Order, 1990):

We have often held that the successful completion of contract negotiations may make moot disputes over alleged misconduct during negotiations. We have so held irrespective of whether the charging party is a majority representative or a public employer. Continued litigation over past allegations of misconduct which have no present effects unwisely focuses the parties' attention on a divisive past rather than a cooperative future. Under all the circumstances, this case does not warrant an exception to our reluctance to resurrect precontract negotiations disputes.

Medical Rescue Team South Authority, 30 PPER at 136; see Association of Pennsylvania State College and University Faculties v. Pennsylvania Labor Relations Board, 8 A.3d 300 (Pa. 2010) (upholding the Board's policy of dismissing alleged bargaining violations as mooted by a successor contract). In distinguishing those cases which involve remedial relief for present and unresolved effects on employees from allegations of bargaining violations between the employee representative and the employer that are mooted by a successor agreement, the Board held as follows:

In determining whether alleged past violations of bargaining obligations occurring during negotiations should be heard, the Board considers as paramount whether its involvement after a successor agreement has been reached, is appropriate under the facts of any particular case. In this regard, the Board distinguishes between those charges where the employees continue to suffer residual effects of an unlawful, unilateral change to wages, hours and working conditions, which are typically not moot, as opposed to those involving bargaining tactics which do not result in affirmative relief to the employees, but rather cease and desist orders, which are generally mooted by the parties' entry into a collective bargaining agreement.

AFSCME, District Council 33 and AFSCME, Local 159 v. City of Philadelphia, 36 PPER 158 at 467-468 (Final Order, 2005).

Generally, whether to grant remedial relief or issue a cease and desist order for the commission of an unfair labor practice is a matter of Board discretion. PLRB v. Martha Company, 59 A.2d 166 (Pa. 1948). In this case, there would be no remedial relief for the employees that would be feasible, warranted or non-speculative. Indeed, when asked

by the Hearing Examiner on January 9, 2017, what remedy APSCUF was seeking, counsel responded "[w]e'd like to redo those years [(July 1, 2011 to June 30, 2015)].... [I]nsofar as the statutory remedy available to us, ... it would be a finding that the law was... violated... So the employer should be ordered ... to cease and desist..." (N.T. January 9, 2017 at 10-11). Moreover, with respect to APSCUF's claim that PASSHE's alleged bargaining violations also impacted the processing of the grievances filed in 2011, APSCUF repeatedly chose not to pursue those grievances to arbitration,¹ and there is no dispute that West Chester University has been in compliance with Article 11(F) of the CBA since the fall of 2015. Accordingly, on this record, APSCUF would be entitled, at best, to no more than a cease and desist order for PASSHE's alleged past bargaining violations. Accordingly, under Board policy, APSCUF's Charge of Unfair Practices, alleging a bargaining violation for which only a cease and desist order would be issued, is rendered moot by the parties' 2015-2018 CBA.

Nevertheless, APSCUF argues that the Charge of Unfair Practices, while technically moot, falls within the exceptions to the Board's mootness policy because PASSHE's alleged unfair bargaining tactic of providing false financial information is capable of repetition and likely to evade review in subsequent negotiations. However, in rejecting a very similar argument raised in APSCUF v. PLRB, the Pennsylvania Supreme Court stated as follows:

[T]here is no basis to conclude that [the Board] abused its discretion in rejecting the mootness exception argument forwarded to it by the Association, and declining to pursue the moot charges in this instance. The Board, which is expert in this area, explained its approach to this particular class of moot cases, where charges are rendered moot by the parties' later voluntary execution of a new collective bargaining agreement ... The Board's general policy in this regard is intended to move beyond "past allegations of misconduct which have no present effects" and focus instead on "a cooperative future," ... This policy appears to be sensible and the Board's reliance on the policy in evaluating mootness exceptions is entitled to deference. Absent some particularized showing otherwise by the complaining party in a particular dispute, there is nothing unreasonable in the Board's deeming the moot issue to be "evading review" only because the parties reached a voluntary agreement—a salutary end to the conflict. And, it is not at all apparent that the Association's bald allegation that "only a legal adjudication that the employer acted illegally ... is likely to assuage" the fear that it might so act again, ... was sufficient to defeat that policy.

APSCUF v. PLRB, 8 A.3d at 307. Indeed, what the hearing examiner noted in Temple Association of University Professionals Local 4531 v. Temple University, 40 PPER 129 (Proposed Decision and Order, 2009) and AFSCME District Council 33, supra., is equally applicable on this record. "[A]s far as evading review, it is [complainant] that holds the key there. All [complainant] needs do is not sign a successor agreement until the unfair practice is decided, the mootness issue never comes to fruition and the charge is reviewed on the merits." Temple University, 40 PPER at 432. "While it is clear from the record [complainant] faced hard choices in these negotiations, it did have choices to make, and the choice it made rendered this charge moot." City of Philadelphia, 36 PPER 95 at 272 (Proposed Decision and Order, 2005), *affirmed*, 36 PPER 158 (Final Order, 2005). The alleged unfair practices of which APSCUF complains in this case would not be susceptible to evading Board review absent APSCUF's own voluntary concession to an agreement. As such, on this record, APSCUF has failed to sustain its burden of establishing an exception to the Board's policy that the dispute in this case regarding alleged past bargaining violations by PASSHE was rendered moot by APSCUF's ratification of, and entry into, the 2015-2018 CBA with PASSHE in December 2016.

¹ See 43 P.S. §1101.903 ("[a]rbitration of disputes or grievances arising out of the interpretation of the provisions of a collective bargaining agreement is mandatory").

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in concluding that APSCUF's Charge of Unfair Practices filed with the Board on September 10, 2015, was not filed within four months of when APSCUF knew or should have known of PASSHE's alleged unfair practice of misrepresenting financial information. 43 P.S. §1101.1505. Additionally, upon review of the record, the Hearing Examiner did not err in concluding, in the alternative, that APSCUF's Charge of Unfair Practices alleging that PASSHE violated Section 1201(a)(1) and (5) of PERA was rendered moot by the parties' agreement to the July 1, 2015 to June 30, 2018 CBA. See APSCUF v. PLRB, *supra*. Accordingly, the exceptions filed by APSCUF 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 Employee Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Association of Pennsylvania State College and University Faculties are hereby dismissed, and the August 23, 2017 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, James M. Darby, Chairman, Robert H. Shoop, Jr, Member, and Albert Mezzaroba, Member this sixteenth day of January, 2018. 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.