

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ASSOCIATION OF PENNSYLVANIA STATE :
COLLEGE AND UNIVERSITY FACULTIES :
 :
v. : Case No. PERA-C-16-297-E
 :
PENNSYLVANIA STATE SYSTEM OF HIGHER :
EDUCATION and PENNSYLVANIA STATE :
ATHLETIC CONFERENCE :

PROPOSED DECISION AND ORDER

On October 17, 2016, the Association of Pennsylvania State College and University Faculties (APSCUF or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Pennsylvania State System of Higher Education (PASSHE), alleging that PASSHE violated Section 1201(a)(1) and (3) of the Public Employee Relations Act (PERA or Act) when it notified bargaining unit coaches on September 26, 2016 of a policy of the Pennsylvania State Athletic Conference (PSAC) "Related to Possible Delays of Practice and Play" to deter coaches from participating in a strike.

By letter dated November 8, 2016, the Secretary of the Board informed APSCUF that no complaint would issue. In doing so, the Secretary noted that the charge alleged that the policy was adopted by PSAC, which was not named as a respondent, and there were no factual allegations to support a finding that PSAC is an alter ego of PASSHE, as the named respondent. APSCUF filed an amended charge of unfair practices on November 22, 2016, naming PSAC as a respondent and as an alter ego of PASSHE, and alleging additional specifications of fact. The Board construed the amended charge as timely exceptions to the Secretary's November 8, 2016 declination since it was filed within the twenty-day period for filing exceptions. On February 21, 2017, the Board issued an Order Directing Remand to Secretary for Further Proceedings, directing the Secretary to issue a Complaint based on the allegations in the charge and the further clarifications in the amended charge, construed as exceptions.

On February 24, 2017, the Secretary issued a Complaint and Notice of Hearing, assigning May 10, 2017, in Harrisburg, as the time and place of hearing, if necessary. On March 2, 2017, the Secretary issued an Amended Complaint and Notice of Hearing, once again establishing a May 10, 2017 hearing date. PASSHE filed an Answer and New Matter to the Amended Complaint on March 17, 2017. PSAC also filed an Answer and New Matter to the Amended Complaint on March 20, 2017. The hearing was continued to May 22, 2017 at the request of PSAC and without objection by APSCUF or PASSHE.

Hearings were necessary and were ultimately held before the undersigned Hearing Examiner of the Board on May 22, 2017 and October 18, 2017, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The parties each filed briefs in support of their respective positions on January 23, 2018.

The Examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. PASSHE is a public employer within the meaning of Section 301(1) of PERA. (N.T. 6-7)
2. APSCUF is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 7)
3. APSCUF is the certified bargaining representative for separate units of faculty members and non-faculty athletic coaches employed by PASSHE at all 14 of its universities. (Joint Exhibit 1; PERA-R-97-451-E)
4. PSAC is an athletic conference, which has existed in some form since 1951 and which is currently affiliated, in large part, with the National Collegiate Athletic Association (NCAA) Division II. (PSAC Exhibit 1)
5. PSAC consists of all 14 PASSHE institutions, along with four non-PASSHE schools, including Gannon University, Mercyhurst University, University of Pittsburgh at Johnstown, and Seton Hill University. (N.T. 41-42; PSAC Exhibit 1)
6. PSAC has been incorporated as a nonprofit corporation in Pennsylvania consistent with Section 501(c)(3) of the Internal Revenue Code since 2010. (PSAC Exhibit 3; Union Exhibit 3)
7. PSAC is governed by a Board of Directors, which consists of the presidents from all 18 full member institutions. PSAC also employs a Commissioner, who reports directly to the Chairperson of the Board of Directors. (N.T. 20, 41, 377, 387-388; PSAC Exhibit 1)
8. The presidents of the PASSHE institutions are PASSHE employes, who serve at the pleasure of PASSHE's Board of Governors. (N.T. 326-327; 24 P.S. § 20-2006-A(a)(3))
9. APSCUF and PASSHE were parties to a collective bargaining agreement (CBA) covering the non-faculty athletic coaches, which was effective from July 1, 2011 through June 30, 2015. (Joint Exhibit 1)
10. By the summer of 2016, the CBA between the APSCUF faculty unit and PASSHE had also expired, and both bargaining units were in negotiations for successor agreements. (N.T. 106-107)
11. In early September 2016, the APSCUF faculty unit voted to authorize a strike. The APSCUF non-faculty athletic coaches' unit also voted to authorize a strike on September 14 and 15, 2016. (N.T. 107)
12. The faculty unit set a strike date of October 19, 2016. The non-faculty athletic coaches did not set a strike date. (N.T. 107)
13. By email dated September 26, 2016, PSAC Board of Directors Chairperson and Slippery Rock University President Cheryl Norton indicated the following to Slippery Rock Athletic Director Paul Lueken:

Paul, please find attached the conference policy for delayed and/or eliminated competitions. This policy was developed in 2005. Please be aware that this policy is in effect for any

labor work stoppage that may occur Oct. 19th or after. Feel free to share this with the coaches so they are aware of this conference policy.

(N.T. 233, 237, 315; Union Exhibit 7)

14. The policy provides, in pertinent part, as follows:

II. Cancellation, Rescheduling and Forfeiture

- A. In the event conference mandated play is disrupted, the conference will not reschedule any missed contests.
- B. If two PSAC teams are mandated to compete on a given day and one of the teams is not available to play, the team available will be given a win and the unavailable team a loss in the conference standings.
- C. If two PSAC teams are mandated to compete on a given day and BOTH teams are not available, both teams will be given a loss in the conference standings. The conference would determine its conference tournament participants based on winning percentage.
- D. The PSAC will encourage and facilitate teams that are available to play to reschedule alternate opponents to replace a league opponent who is not available, particularly if they can accommodate a team that has lost a date of competition due to another PSAC opponent not being available. If two teams have opponents not available to play on the same date of competition, every effort will be made to pair these teams together in order to continue competition.
- E. Game Officials will still be paid in the event a contest they are scheduled to work is not played.
- F. The conference will not permit institution's (sic) that have failed to make their team(s) available for conference mandated play to participate in NCAA tournament play in those respective sports. Article X-Section 14.5 of the PSAC Constitution states that "a member institution's non-compliance with championship participation shall be subject to disciplinary action in accordance with approved policy." In this case non-participation in the championship portion of the season shall be considered a breach of this regulation and the disciplinary action will be non-participation in NCAA play.
- G. The conference will not permit institution's (sic) that have failed to meet the NCAA minimum dates of competition for consideration for post-season play for a particular sport to seek a waiver from the NCAA for participation. NCAA Bylaw 18.4.2.1(a) requires that to be eligible to participate in NCAA play, an institution must be "eligible under the rules of the member conference." An institution that fails to meet the NCAA minimum competition dates will be considered ineligible by the conference. For those sports with automatic qualification for the conference champion to the NCAA tournament, in the event a team that wins the conference tournament has failed to meet the mandated schedule, the conference will award its automatic qualification to the highest seeded team that completed its mandated schedule.

(Union Exhibit 7) (Emphasis in original)

15. The APSCU non-faculty athletic coaches' unit learned of the existence of the policy on the morning of September 26, 2016 during a meeting among their negotiations team prior to a joint bargaining session between APSCUF and PASSHE, which was scheduled for September 26 and 27, 2016. (N.T. 108, 232-233, 264)

16. The faculty unit ultimately went on strike for three days on October 19, 20, and 21, 2016. (N.T. 107-108)

17. The non-faculty athletic coaches reached a successor agreement with PASSHE in October 2016 without ever going on strike. (N.T. 107-108)

DISCUSSION

APSCUF has alleged that PASSHE violated Section 1201(a)(1) and (3) of the Act¹ when it notified bargaining unit coaches on September 26, 2016 of a PSAC policy "Related to Possible Delays of Practice and Play" to deter coaches from participating in a strike.² PASSHE contends that the charge should be dismissed because APSCUF has not demonstrated that PSAC is an alter ego of PASSHE or that PASSHE and/or PSAC was motivated by anti-union animus in any way. PSAC joins the arguments of PASSHE and also raises a jurisdictional defense.

Section 301(1) of PERA provides as follows:

"[p]ublic employer" means the Commonwealth of Pennsylvania, its political subdivisions including school districts and any officer, board, commission, agency, authority, or other instrumentality thereof and **any nonprofit organization** or institution and any charitable, religious, scientific, literary, recreational, health, educational or welfare institution receiving grants or appropriations from local, State, or Federal governments **but shall not include employers covered or presently subject to coverage under...the "National Labor Relations Act."**

43 P.S. § 1101.301(1) (emphasis added).

PSAC submits that the Board lacks jurisdiction over PSAC in this case because the National Board has asserted jurisdiction over nonprofit athletic conferences in the past. PSAC cites two National Board cases, The Big East Conference, 282 NLRB No. 50 (1986) and Pennsylvania Interscholastic Athletic Ass'n, Inc., 365 NLRB No. 107 (2017), for the proposition that exclusive jurisdiction over PSAC lies with the NLRB, and not this Board. PASSHE joins PSAC's jurisdictional defense, however, is unavailing, as these two cases are readily distinguishable from the instant matter.

¹ Section 1201(a) of the Act provides that "[p]ublic employers, their agents or representatives are prohibited from: (1) Interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this act...(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employe organization... 43 P.S. § 1101.1201.

² Although the record shows that the policy was originally written in 2005, neither PASSHE nor PSAC contend that APSCUF knew or should have known about it any time prior to 2016.

Indeed, the National Board asserted jurisdiction over the Big East Conference and the PIAA because both of those organizations were governed by a constituent Board of Directors, whose designated representatives from public institutions were a small minority of the Board of Directors. Therefore, the designated representatives from the public institutions could not control the operations of the organization.³ Here, by contrast, there are 14 members of the 18-member PSAC Board of Directors, who are designated representatives of the PASSHE institutions. As a result, the PASSHE institutions could potentially control the operations of PSAC. Thus, the authority that PSAC relies on is clearly inapposite.

Instead, this matter appears to be controlled by the National Board's more recent decision in LTTS Charter School, Inc. d/b/a Universal Academy and Kimberly Free, Case 16-CA-170669 (2018) wherein the National Board affirmed the Administrative Law Judge's decision, dismissing the complaint. In Universal Academy, the ALJ explained that an entity is exempt from the reach of the National Labor Relations Act as a "State or political subdivision" when it is either (1) created directly by the State to constitute a department or administrative arm of the Government, or (2) administered by individuals responsible to public officials or the general public. Finding that the Academy was not exempt under the first prong because it was created as a nonprofit corporation by private individuals, who filed and drafted applications, operating documents, and bylaws, the ALJ concluded that the Academy was exempt under the second prong of the test. Indeed, the ALJ found that although the Academy's Board of Directors was appointed by private actors, the Texas Education Agency, a public agency, retained full statutory authority to reconstitute the Board of Directors. Likewise, the Texas Education Agency's decision to reconstitute the Board of Directors was subject to a fairly deferential standard of judicial review by the State Office of Administrative Hearings.

In this matter, the record shows that PSAC is governed by a Board of Directors, which consists of the presidents from all 18 full member institutions, 14 of which are from PASSHE institutions. The record also shows that the presidents of the PASSHE institutions are PASSHE employees, who serve at the pleasure of PASSHE's Board of Governors, which is the governing body of PASSHE. As such, it must be concluded that PSAC is administered by individuals responsible to public officials or the general public under the second prong of the National Board's test for exempt organizations under the National Act.⁴ Accordingly, I am not convinced the National Board would

³ In Big East Conference, only two of the nine member schools were public institutions, the University of Pittsburgh and the University of Connecticut, while in PIAA, there was only a single member of the 31-member Board of Directors, who was appointed by the Department of Education. The remaining members of the PIAA's Board of Directors were selected from among various interest groups related to interscholastic sports. See PIAA, Inc. and Office of Professional Employees International Union, Case 06-RC-152861 (Regional Director's Decision and Direction of Election, 2015).

⁴ I must conclude that PSAC was not created directly by the State to constitute a department or administrative arm of the Government, consistent with the first prong of the test. Although the Commonwealth Court opined in 2004 that PSAC was an entity of the Commonwealth government, Cooper v. PSAC, 841 A.2d 638 (Pa. Cmwlth. 2004), this predated PSAC's separate private incorporation in 2010 along with the addition of several new member non-PASSHE institutions.

assert jurisdiction over PSAC, and therefore, find that PSAC is within the reach of this Board's jurisdiction as a nonprofit organization.

Turning to the question of whether PSAC is an alter ego of PASSHE, the Board opined in Teamsters Local 764 v. Milton Borough and Milton Borough Regional Sewer Authority, 34 PPER ¶ 159 (Final Order, 2003) as follows:

The factors to consider in determining alter ego status are whether the two employers have "substantially identical management, business purpose, operation, equipment, customers, and supervision, as well as ownership." An additional factor to consider is whether the purpose of the creation of the alter ego was to evade application of the labor laws. No one factor is dispositive, and the determination must be based on the totality of the circumstances.

Because the determination of alter ego status is a totality of the circumstances analysis, establishing an actual common ownership over the two entities is not an absolute requirement. Nevertheless, to support an alter ego relationship, at a minimum, it must be shown that there is a continuation of control and management over the new entity.

34 PPER at 490 (citations omitted).

The record does not support a conclusion that PSAC is an alter ego of PASSHE. APSCUF points to the fact that PASSHE maintains control of the PSAC Board of Directors, by virtue of holding 14 of the 18 seats, as evidence of substantially identical management between the two organizations. However, even assuming this factor supports an alter ego conclusion, APSCUF has not shown that any other factor yields a similar determination.⁵ In fact, the record shows that PASSHE and PSAC do not share a substantially identical business purpose, operation, supervision, or customers.

To the contrary, PASSHE's enabling legislation in Act 188 states that its purpose "shall be to provide high quality education at the lowest possible cost to the students. The primary mission of the system is the provision of instruction for undergraduate and graduate students to and beyond the master's degree in the liberal arts and sciences and in applied fields, including the teaching profession." 24 P.S. § 20-2003-A(a). PSAC, on the other hand, exists to administer an athletic league on behalf of its members, which includes, only in part, the PASSHE schools. What is more, PASSHE operates on a dramatically different scale from the one on which PSAC functions. PSAC employs only four people, including its Commissioner, (N.T. 385), while PASSHE has approximately 360 to 405 members in the non-faculty

⁵ At least one Hearing Examiner has concluded that majority control of the governing body alone did not render a township the alter ego of a regional police commission. West Hills Regional Police Commission, 14 PPER ¶14238 (Proposed Decision and Order, 1983), *aff'd* by 15 PPER ¶ 15036 (Final Order, 1984). While PASSHE cites Milton Borough for the same proposition, the Board in that case appeared to base its holding that the Authority was not an alter ego of the Borough primarily on the Municipal Authorities Act, 53 Pa.C.S.A. §5610, which provides that the governing board is a separate and independent body, governing the operation and management of a regional authority that transcends the Borough, regardless of the fact that the Borough appointed five of the eight members to the governing body of the Authority.

athletic coaches' unit and approximately 5,500 to 6,000 members in the faculty unit. (N.T. 123). And, as PASSHE persuasively points out, these figures do not account for all the other PASSHE employees, who are neither coaches nor faculty. Further, PSAC serves only its member institutions, which include both PASSHE and non-PASSHE schools, along with their respective student-athletes. PASSHE, meanwhile, serves all of its student populations, well beyond those who are engaged in intercollegiate athletics. In addition, PASSHE is supervised generally by the Chancellor and Board of Governors, and on the local level by each individual university's council of trustees, along with its president, while PSAC is primarily supervised by its Commissioner. Finally, there is absolutely no evidence whatsoever that PSAC was created to evade application of the labor laws. As such, I am unable to find that PSAC is an alter ego of PASSHE, despite the make-up of PSAC's Board of Directors.⁶ Accordingly, the charge must be dismissed, as the record shows that a separate third party, PSAC, adopted the policy at issue, and not the public employer, PASSHE. See Ellwood City Police Wage and Policy Unit v. Ellwood City Borough, 29 PPER ¶ 29214 (Final Order, 1998) (city employer did not violate its duty to bargain because police officers lost overtime opportunity due to independent action of district justice over which city employer did not exercise control).

APSCUF also argues in its post-hearing brief that PASSHE used PSAC as an agent to effectuate the policy at issue in violation of the Act. However, as PASSHE correctly points out, APSCUF did not allege an agency relationship between PASSHE and PSAC in either specification of charges. Therefore, APSCUF's averment of an agency relationship between the two organizations is now untimely as a matter of law. See 43 P.S. § 1101.1505 (providing for a four-month statute of limitations period).

Nevertheless, even if APSCUF had timely alleged an agency relationship between PASSHE and PSAC, APSCUF has not proven the charge on this record. The Board has held that an agency relationship arises where (1) there is a manifestation by the principal that an agent shall act for it; (2) an acceptance by the agent of the undertaking; and (3) an understanding between the parties that the principal is in control of the undertaking. AFSCME District Council 87 v. Luzerne County, 43 PPER 140 (Final Order, 2012), *aff'd* 77 A.3d 53 (Pa. Cmwlth. 2013), 111 A.3d 1149 (Pa. 2015). The burden of proving an agency relationship is on the party asserting such a relationship, both as to the existence of the relationship and as to the nature and extent of the agent's authority. Teamsters Local 77 v. Delaware County, 29 PPER ¶ 29087 (Final Order, 1998).

The record is devoid of any evidence to support even one of the elements necessary to prove an agency relationship, much less all three elements of the test. Instead, the record shows the opposite to be true. As PASSHE notes in its post-hearing brief, PSAC Board of Directors members who are presidents of PASSHE institutions do not take direction from the Chancellor, the Board of Governors, or even their own university's council of trustees with respect to their votes on any PSAC matters. (N.T. 354). Nor

⁶ Even though the PSAC member institutions each pay dues to the conference in the amount of \$19,000, this total of \$266,000 for the PASSHE institutions still makes up less than half of the total PSAC income, the vast majority of which stems from NCAA grants amounting to \$482,075, along with private member dues of \$76,000, championships in the amount of \$33,000, advertising in the amount of \$20,200, and \$2,000 in other funds. (N.T. 388-389; PSAC Exhibit 4).

did the PSAC Board of Directors members need to get approval from the Chancellor, the Board of Governors, or the council of trustees before casting any vote with PSAC. (N.T. 300-301). Specifically, with regard to the policy at issue here, nobody from the PASSHE Chancellor's office or the Board of Governors directed the PSAC Commissioner to recommend the policy to the PSAC Board of Directors. (N.T. 451). In fact, the record shows that PASSHE itself is controlled by a Chancellor and Board of Governors, who have absolutely no role in the business affairs or management of PSAC. (N.T. 293-294, 300, 354, 427, 451). As a result, APSCUF has not proven that PSAC was an agent of PASSHE specifically as it relates to the September 2016 policy. Therefore, the charge must be dismissed.⁷

CONCLUSIONS

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

1. PASSHE is a public employer under Section 301(1) of PERA.
2. APSCUF is an employe organization under Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. PSAC is not an alter ego or agent of PASSHE.
5. PASSHE has not committed unfair practices in violation of Section 1201(a)(1) or (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 order shall be final.

⁷ Having found that PSAC was neither an alter ego nor agent of PASSHE relative to the September 2016 policy, it is not necessary to reach the merits of APSCUF's charge, as the record shows that an independent third party and not the public employer took the action complained of in the charge, as amended.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this 19th day of April, 2018.

PENNSYLVANIA LABOR RELATIONS BOARD

John Pozniak, Hearing Examiner