

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 :

FINAL ORDER

On October 17, 2016, the Association of Pennsylvania State College and University Faculties (APSCUF) filed a Charge of Unfair Practices with the Pennsylvania Labor Relations Board (Board) alleging that the Pennsylvania State System of Higher Education (PASSHE) violated Section 1201(a)(1) and (3) of the Public Employe Relations Act (PERA) when it notified bargaining unit coaches on September 26, 2016 of the policy of the Pennsylvania State Athletic Conference (PSAC) "Related to Possible Delays of Practice and Play".¹ On March 2, 2017, the Secretary of the Board issued a Complaint and Notice of Hearing on the Charge as amended.

Two days of hearing were held on May 22, 2017 and October 18, 2017, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Post-hearing briefs were filed by the parties on January 23, 2018. Based on the evidence presented by the parties, the Hearing Examiner found that the Board had jurisdiction over the parties, that PSAC was not an alter ego of PASSHE, nor acting as an agent of PASSHE, and concluded that PASSHE did not violate Section 1201(a)(1) or (3) of PERA. Accordingly, the Hearing Examiner issued a Proposed Decision and Order (PDO) on April 19, 2018, in which the Hearing Examiner rescinded the Complaint and dismissed APSCUF's amended Charge of Unfair Practices.

On May 8, 2018, APSCUF filed timely exceptions to the PDO with the Board challenging the Hearing Examiner's conclusion that PASSHE did not violate Section 1201(a)(1) and (3) of PERA. On May 9, 2018, PSAC filed timely exceptions and a supporting brief with the Board, regarding the Board's jurisdiction over PSAC. PASSHE filed a response

¹ On November 8, 2016, the Secretary of the Board issued a letter declining to issue a complaint, noting that PSAC was not named as a respondent. On November 22, 2016, APSCUF filed an amended Charge naming both PASSHE and PSAC as respondents. Because the Amended Charge was filed within the twenty-day period for filing exceptions to the Secretary's November 8, 2016 letter, the Board Secretary administratively construed the Amended Charge as exceptions to be addressed by the Board. On February 21, 2017, the Board issued an Order Directing Remand to the Secretary for Further Proceedings directing the Secretary to issue a Complaint on the Amended Charge of Unfair Practices.

to APSCUF's exceptions, and joined in the exceptions filed by PSAC.² Based on the testimony and documentary evidence presented at the hearing, the Hearing Examiner made Findings of Fact, which for purposes of the exceptions, are summarized in relevant part, as follows.

PSAC is an athletic conference, consisting of all 14 PASSHE institutions, along with four non-PASSHE schools. (FF 4 and 5). PSAC has been incorporated as a nonprofit corporation in Pennsylvania since 2010, and is currently affiliated, in large part, with the National Collegiate Athletic Association (NCAA) Division II. (FF 4 and 6). PSAC is governed by a Board of Directors, which consists of the presidents from all 18 full member institutions. (FF 7). The presidents of the PASSHE institutions are PASSHE employees, who serve at the pleasure of PASSHE's Board of Governors. (FF 8).

APSCUF is the certified bargaining representative for separate bargaining units of the faculty and the non-faculty athletic coaches employed by PASSHE at all 14 of its universities. (FF 3). APSCUF and PASSHE were parties to a collective bargaining agreement covering the non-faculty athletic coaches, which was effective from July 1, 2011 through June 30, 2015. (FF 9). By the summer of 2016, the collective bargaining agreement between the APSCUF faculty unit and PASSHE had also expired, and both the faculty bargaining unit and non-faculty athletic coaches were in negotiations for successor agreements. (FF 10).

In early September 2016, the APSCUF faculty unit voted to authorize a strike, and set a strike date of October 19, 2016. (FF 11-12). On September 14 and 15, 2016, the APSCUF non-faculty athletic coaches also voted to authorize a strike. (FF 11). However, the non-faculty athletic coaches did not set a strike date. (FF 12).

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.

(FF 13). The PSAC policy "Related to Possible Delays of Practice and Play" 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

² Following extensions of time granted by the Secretary of the Board, APSCUF filed a brief in support of exceptions on June 8, 2018, and PASSHE and PSAC filed briefs in response to APSCUF's exceptions on July 12, 2018.

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.

* * *

- 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.

(FF 14). APSCUF learned of the existence of the PSAC policy "Related to Possible Delays of Practice and Play" on the morning of September 26, 2016 during a meeting among the negotiation team for the non-faculty athletic coaches. A joint bargaining session between APSCUF and PASSHE for the non-faculty athletic coaches was scheduled for later that same day. (FF 15).

The faculty unit went on strike for three days on October 19, 20, and 21, 2016. (FF 16). The non-faculty athletic coaches reached a successor agreement with PASSHE in October 2016 without ever going on strike. (FF 17).

Couched in terms of "alter ego" and "agency", APSCUF claims that PASSHE violated PERA by acting through PSAC to adopt the policy "Related to Possible Delays of Practice and Play" and announcing the policy to the non-faculty athletic coaches after a strike vote to coerce the bargaining unit coaches from engaging in a protected strike. With regard to APSCUF's claim that PSAC is an alter ego of PASSHE, on exceptions APSCUF argues that the post-2010 PSAC is a mere alter ego of

the PSAC of 2005 when it was comprised solely of PASSHE institutions. As noted by the Hearing Examiner, an alter ego status arises where two employers have "substantially identical management, business purpose, operation, equipment, customers, and supervision, as well as ownership." Teamsters Local 764 v. Milton Borough and Milton Borough Regional Sewer Authority, 34 PPER ¶ 159 (Final Order, 2003). Upon review of the record, it has not been established that the presently constituted non-profit PSAC, comprised of both PASSHE institutions and private colleges and universities, is an alter ego of the PSAC that was made up exclusively of PASSHE institutions. With the post-2010 creation of the non-profit entity that includes non-PASSHE institutions, PSAC has altered its management, business purpose, operation, supervision and ownership. As such, the Hearing Examiner did not err in finding that PSAC cannot presently be construed as an alter ego of PASSHE.

Assuming APSCUF's allegations of an agency relationship are timely, the Hearing Examiner also found that APSCUF failed to sustain its burden of establishing that PSAC was an agent of PASSHE with respect to the policy "Related to Possible Delays of Practice and Play". To establish an agency relationship, the party asserting the agency must prove (1) 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), *affirmed*, 631 Pa. 303, 111 A.3d 1149 (2015); Teamsters Local 77 v. Delaware County, 29 PPER ¶ 29087 (Final Order, 1998) (the party asserting an agency relationship has the burden of proving both the existence of the relationship and the nature and extent of the agent's authority).

With regard to the allegations of an agency relationship, the Hearing Examiner accepted the testimony of PASSHE and PSAC witnesses in finding, as fact, as follows:

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 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).

(PDO at 7-8).

Indeed, as found by the Hearing Examiner, there is no manifestation by PASSHE that PSAC was acting for it. To the contrary, "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." (PDO at 7). Additionally, the Hearing Examiner accepted as credible the testimony of PASSHE and PSAC witnesses that showed that there was no understanding between PASSHE and PSAC that PASSHE was in control of PSAC or PSAC's policy "Related to Possible Delays of Practice and Play". In fact, the Hearing Examiner found that "PSAC Board of Directors members ... 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... [and] need to get approval from the Chancellor, the Board of Governors, or the council of trustees before casting any vote with PSAC." (PDO at 7-8). Accordingly, the Hearing Examiner did not err in determining that APSCUF failed to establish that PSAC was acting as an agent of PASSHE when implementing the policy "Related to Possible Delays of Practice and Play".

In its amended Charge, and on exceptions, APSCUF alleges that PASSHE violated Section 1201(a)(1) and (3) of PERA through the acts of the University Presidents while on the PSAC Board of Directors. The essential allegation is that the University Presidents, as employees of PASSHE, took action as members of the PSAC Board of Directors to issue the policy "Related to Possible Delays of Practice and Play", which would allegedly punish coaches for games missed because of a strike against PASSHE.

Given the credibility determinations and findings of fact of the Hearing Examiner, the evidence does not support a finding that PASSHE committed an unfair practice on this record. As found by the Hearing Examiner, the actions of the University Presidents, when taken as members of the PSAC Board of Directors, were not taken under the direction of, or with the authorization of, PASSHE, its Chancellor, Board of Governors, or the Universities' Councils of Trustees. In fact, as found by the Hearing Examiner, PASSHE has absolutely no role in the business affairs or management of PSAC. The Hearing Examiner further accepted as fact that the University Presidents, while conducting PSAC business, do not do so under the direction of PASSHE, or conduct PSAC's affairs in the interest of PASSHE. Based on the record, the Hearing Examiner determined that the University Presidents do not act as PASSHE's agents in voting on particular PSAC matters, and do not conduct PSAC business as an employee of PASSHE. Upon review of the record, there are no compelling circumstances warranting reversal of the Hearing Examiner's credibility determinations and findings.³ As such, APSCUF has failed to sustain its burden of establishing that the conduct of the University Presidents, while on the PSAC Board of Directors, were the actions of PASSHE for purposes of Section 1201(a)(1) or (3) of PERA.

PSAC argues on exceptions that the Hearing Examiner erred in concluding that the Board has jurisdiction over the parties, which would include PSAC. As discussed above, the Hearing Examiner did not err in finding, as fact, that the policy "Related to Possible Delays of

³ The Hearing Examiner makes relevant findings of fact and conclusions based on credibility determinations, and the Board will not disturb the Hearing Examiner's credibility determinations absent the most compelling of circumstances. *E.g. Mt. Lebanon Education Association v. Mt. Lebanon School District*, 35 PPER 98 (Final Order, 2004).

Practice and Play" was issued by PSAC, which is not the employer of the PASSHE non-faculty athletic coaches. See Ellwood City Police Wage and Policy Unit v. Ellwood City Borough, 29 PPER ¶ 29214 (Final Order, 1998), *affirmed*, 731 A.2d 670 (Pa. Cmwlth. 1999). Thus, for purposes of this unfair practice charge, it is of no moment whether PSAC is a public employer within the meaning of Section 301 of PERA, or an employer within the meaning of Section 2(2) of the National Labor Relations Act, 29 U.S.C. §152, because the dispositive factor is that PSAC was found not to be an employer of the PASSHE athletic coaches. Accordingly, we need not address PSAC's exceptions, as the Hearing Examiner concluded that there was no violation of Section 1201(a)(1) or (3) of PERA, dismissed the amended Charge of Unfair Practices and rescinded the Complaint issued against PSAC and PASSHE.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in concluding that in implementing and disseminating the policy "Related to Possible Delays of Practice and Play" PSAC was not under the direction of, or acting as an agent or alter ego of PASSHE. Further, based on the record, the Hearing Examiner did not err in finding that in issuing the policy "Related to Possible Delays of Practice and Play", PSAC was acting as an independent third-party, and not as an employer of the PASSHE athletic coaches. Accordingly, on this record, the Hearing Examiner did not err in concluding that APSCUF failed to sustain its burden to establish that PASSHE violated Section 1201(a)(1) and (3) of PERA. Thus, 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 Employe 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 April 19, 2018 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 twenty-first day of August, 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.