

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 :

**PROPOSED DECISION AND ORDER**

On September 10, 2015, 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 or Employer), alleging that PASSHE violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA or Act) 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.

On December 1, 2015, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning March 7, 2016, in Harrisburg, as the time and place of hearing, if necessary. The hearing was continued once at the request of APSCUF and without objection by PASSHE and once at the request of both parties.

Hearings were necessary and were ultimately held before the undersigned Hearing Examiner of the Board on January 9, 2017 and March 31, 2017, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. APSCUF filed a post-hearing brief on June 23, 2017. PASSHE filed a post-hearing brief on June 26, 2017.

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. 8)
2. APSCUF is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 9)
3. APSCUF is the certified bargaining representative of faculty members employed by PASSHE at all 14 of its universities. (Joint Exhibit 1, 2)
4. APSCUF and PASSHE were parties to a collective bargaining agreement (CBA), which was effective from July 1, 2007 to June 30, 2011. (Joint Exhibit 1)

5. On June 11, 2013, the parties executed a successor agreement, which was effective from July 1, 2011 to June 30, 2015. (Joint Exhibit 2)

6. Both the 2007 to 2011 CBA and the 2011 to 2015 CBA contain a provision in Article 11(F), which provides as follows:

Regulations Regarding the Hiring of Temporary and Regular Part-time FACULTY MEMBERS

1. The 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. A UNIVERSITY and local APSCUF may, by written local agreement, exceed the limit provided herein.
2. All Universities shall be in compliance with the twenty-five percent (25%) FTE limit as set forth above by no later than October 31, 2010.

(Joint Exhibit 1, 2)

7. 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. AFSCUF did not advance any of those grievances to arbitration. West Chester University has been in compliance with Article 11(F) since the fall of 2015. (N.T. 160-163, 196-198; Union Exhibit 31)<sup>1</sup>

8. Article 29(A) of the 2007 to 2011 CBA contains a provision governing retrenchment, which provides, 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.

(Joint Exhibit 1)<sup>2</sup>

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<sup>1</sup> The reporting service did not number the transcript pages consecutively. Therefore, citations to the January 9, 2017 hearing will appear as "N.T." and citations to the March 31, 2017 hearing will appear as "N.T. II."

<sup>2</sup> There is a similar provision in the 2011 to 2015 CBA, which requires PASSHE to meet and discuss changes that may lead to retrenchment, in Article 29(A)(2). It appears that the parties added a provision in Article 29(A)(1) which requires electronic notice of the possibility of retrenchment by August 1 for any retrenchments that may occur at the end of the subsequent academic year. (Joint Exhibit 2).

9. By letter dated April 13, 2011, the President of West Chester University, Greg Weisenstein, advised APSCUF Local West Chester President Clifford Johnston of the following:

This letter comes to you as required by Article 29 of the [CBA] between [APSCUF] and [PASSHE], which as you know requires notice of possible retrenchment because of financial considerations, program curtailment, elimination of courses or other reasons. Therefore, West Chester University of Pennsylvania may have to consider the retrenchment of faculty effective at the conclusion of the 2011-2012 academic year.

We will contact you in the near future to begin discussions about this matter and to schedule meet and discuss sessions. It is my expectation that the provisions of Article 29 of the CBA will be followed and that APSCUF and management will work together to get through this challenging situation.

(N.T. 157-158; Union Exhibit 30)

10. There were no actual retrenchments which occurred at West Chester University. (N.T. 165, 185)

11. Between 2011 and 2015, APSCUF made numerous requests to PASSHE for the budget and other information on the financial condition of West Chester University. (N.T. 151-156, 174, 188; Union Exhibit 32, 34, 35)

12. 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. The document instructs the universities to submit unbalanced budgets because "no assumptions have been made regarding potential changes to appropriations and/or tuition rates." (N.T. II 88-93; Employer Exhibit 3)

13. 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. The documents revealed the University's budget practice of transferring funds from the Educational and General fund to the plant fund. (N.T. 103, 152-154, N.T. II 37-38, 64; Union Exhibit 20)

14. On March 10, 2014, APSCUF obtained a report from an accounting firm named Boyer and Ritter, which reviewed West Chester University's budget reports and financial statements. The report indicated the following, in pertinent part:

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).

(N.T. II 97-104, 188; Employer Exhibit 5)

15. In December 2016, APSCUF and PASSHE ratified a successor CBA to the one that expired on June 30, 2015. (N.T. II 192-195)

#### DISCUSSION

APSCUF's charge alleges that PASSHE violated Section 1201(a)(1) and (5) of PERA<sup>3</sup> 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. PASSHE, on the other hand, submits that the charge should be dismissed because it was untimely filed, PASSHE shared accurate information with APSCUF and never misrepresented anything, and the complained of conduct has been rendered moot since the parties now have a successor agreement.

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. As a general matter, the nature of the unfair practice claim alleged frames the limitations period for that cause of action. Upper Gwynedd Township Police Dept. v. Upper Gwynedd Township, 32 PPER § 32101 (Final Order, 2001). A charge will 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. Community College of Beaver County Society of Faculty, PSEA/NEA v. Beaver County Community College, 35 PPER 24 (Final Order, 2004).

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<sup>3</sup> Section 1201(a) of PERA 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...(5) Refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative. 43 P.S. § 1101.1201.

In this case, APSCUF filed the charge on September 10, 2015, alleging that it discovered West Chester University had purposefully misclassified its operating surpluses to show deficits in order to deceive APSCUF and distort its financial conditions for collective bargaining and contract compliance purposes. APSCUF specifically alleged in the charge that it discovered this on May 15, 2015 after learning of a federal lawsuit filed by a former budget administrator from West Chester University named Colleen Bradley. However, as PASSHE correctly points out, the record shows that APSCUF knew or should have known of West Chester's budgeting practice complained of in the charge in March 2014. Indeed, as PASSHE notes in its post-hearing brief, APSCUF had a report from its own accounting experts, Boyer and Ritter, in March 2014 that told APSCUF exactly what they now contend is a violation of the Act. The report indicated the following, in pertinent part:

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).

(Employer Exhibit 5) (Emphasis added).

Thus, APSCUF should have been aware in March 2014 that West Chester University was generating Educational and General fund surpluses on a recurring basis, transferring those funds to unrestricted net assets or plant, and not always budgeting for those transfers. In fact, APSCUF received the Office of the Chancellor's budgeting instructions for the universities in October 2012, which specifically required the universities to submit unbalanced budgets for the 2013-2014 request year budget, and the budget reports and financial statements for West Chester in October 2013, which specifically revealed the university's budgeting practice of transferring funds from the Educational and General fund to the plant fund. Nevertheless, APSCUF was unequivocally aware of the exact conduct complained of in the charge by March 2014 at the latest. However, APSCUF did not file the charge until September 2015, which was well beyond the four-month limitations period set forth in the Act. Accordingly, the charge must be dismissed.

In any event, the charge must be dismissed as moot insofar as it alleges bad faith bargaining on behalf of PASSHE. It is well settled that charges of unfair practices, arising out of the bargaining process and alleging a refusal to bargain in good faith, are generally rendered moot once the parties enter a collective bargaining agreement. Temple Association of University Professionals, Local 4531 v. Temple University, 23 PPER ¶ 23118 (Proposed Decision and Order, 1992), 25 PPER ¶ 25121 (Final Order, 1994). Although courts generally will not decide a moot case because the law requires the existence of an actual controversy, the Pennsylvania Supreme Court has recognized two "well-organized exceptions to the mootness doctrine." Ass'n of Pennsylvania State College and University Faculties v. PLRB, 8 A.3d 300, 305 (Pa. 2010) (quoting In re Gross, 382 A.2d 116, 119 (Pa. 1978)). The Pennsylvania Supreme Court has reviewed moot matters, in its discretion, when the issue presented is one of great public importance or is one that is capable of repetition yet evading review. *Id.* at 305 (citing Rendell v. Pa State Ethics Comm'n, 983 A.2d 708, 719 (Pa. 2009)); Gross, *supra*.

In the instant matter, APSCUF alleges that its charge fits both exceptions to the mootness doctrine. APSCUF cites Ringgold School District, 26 PPER ¶ 26066 (Pa. Cmwlth. 1995) for the proposition that the disruption of public services<sup>4</sup> "raises an issue of important public interest, capable of repetition, which is apt to elude review." However, APSCUF's reliance on Ringgold School District is misplaced, as that case is readily distinguishable. Indeed, Ringgold involved the capability of a court sitting in equity to order court-monitored negotiations between the school board and its employe representative pursuant to Act 88. APSCUF has cited no authority for its claim that work stoppages necessarily create an issue of great public importance to support an exception to the mootness doctrine. In fact, Temple University, *supra*, involved a disruption of public services in the form of a faculty strike and picketing. Nevertheless, the Board concluded that the charge was moot because it related to the bargaining impasse which was resolved by the parties entering a successor agreement. As such, APSCUF has not demonstrated that its charge raises an issue of great public importance.

Nor has APSCUF demonstrated that the issue is one that is capable of repetition but likely to evade review. To be sure, APSCUF should now be acutely aware of the budgeting practice at West Chester and other PASSHE universities, which it complains of in the charge. Indeed, APSCUF was aware of that practice, even by its own admission, long before the parties entered the successor agreement in December 2016. As a result, it cannot be seriously contended that APSCUF could be "deceived" by such a practice when bargaining the next contract. Accordingly, the charge must be dismissed as moot.

#### 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.

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<sup>4</sup> The record shows that APSCUF went on strike during the negotiations for a successor agreement in October 2016. (N.T. II 187).

3. The Board has jurisdiction over the parties hereto.

4. The charge was not timely filed so as to meet the statute of limitations in Section 1505 of PERA.

5. The charge is moot.

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.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this 23<sup>rd</sup> day of August, 2017.

PENNSYLVANIA LABOR RELATIONS BOARD

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John Pozniak, Hearing Examiner