UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4

TEMPLE UNIVERSITY HOSPITAL,
Employer,

Case No. 04-RC-162716

and

TEMPLE ALLIED PROFESSIONALS/
PENNSYLVANIA ASSOCIATION OF
STAFF NURSES AND ALLIED
PROFESSIONALS,

Petitioner.

BRIEF OF EMPLOYER TEMPLE UNIVERSITY HOSPITAL ON REVIEW OF THE ACTING REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

AGENCY DECISIONS

FEDERAL STATUTES

STATE STATUTES

REGULATIONS

I. INTRODUCTION

Temple University Hospital ("TUH"), pursuant to Section 102.67 of the Rules and Regulations of the National Labor Relations Board ("NLRB" or "Board") and the Board's December 29, 2016 Order, hereby submits this Brief for the Board's consideration in this matter.

On December 29, 2016, the Board granted in part TUH's Request for Review of the Acting Regional Director of Region 4's Decision and Direction of Election (the "Decision"),[1] and invited the parties and interested *amici* to file briefs addressing the following issues:

1. Should the Board exercise its discretion to decline jurisdiction over the Employer TUH?; and

2. Should the Board extend comity to the unit of the Employer's professional and technical employees certified by the Pennsylvania Labor Relations Board ("PLRB") in 2006?

As explained in TUH's Request for Review, incorporated herein by reference, the Acting Regional Director erred when he failed to exercise his discretion to decline jurisdiction over TUH and when he extended comity to a nonconforming unit of 665 employees (the "TAP unit") represented by Petitioner Temple Allied Professionals, Pennsylvania Association of Staff Nurses and Allied Professionals ("the Union" or "PASNAP") for the sake of ordering an Armour-Globe self-determination election among the 11 employees covered by the Petition.[2]

By virtue of the Board's decision in 1972 in which it declined to exercise jurisdiction over Temple University – Of the Commonwealth System of Higher Education ("TU") because of TU's unique relationship with the Commonwealth, TUH and all of the

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[1] The Acting Regional Director issued the Decision on January 22, 2016.

[2] A more comprehensive summary of the facts introduced at the hearing is included in TUH's Request for Review. References to exhibits are to the evidence adduced at that hearing and are denominated B-__ for Board exhibits, E-__ for TUH exhibits and P-__ for Union exhibits.

facilities that comprise Temple University Health System ("TUHS") have always been public employers under Pennsylvania's Public Employe Relations Act ("PERA").[3] As a consequence, the 10 years of bargaining history between the Union and TUH, and the more than 40 years of bargaining history and specific collective bargaining provisions between 21 other unions and TU, TUHS and TUH are premised on rights and obligations under PERA, which are different in material ways from those under the NLRA.[4] By extending jurisdiction over TUH, the Board would upend the bargaining history between the parties and other unions, as well as material terms in the existing collective bargaining agreements which are based on PERA. Altering the statutory scheme under which TUH and its unions have operated for decades and upending this history serves no beneficial purpose.[5] Rather, the extension of jurisdiction over TUH would result in two dueling statutory schemes applying to TU and TUH, heedless of the fact that these employers are heavily intertwined and have significant overlap in their operations, including overlapping control functions and overlapping employees. Therefore, the Board should reverse the Decision and decline to extend jurisdiction over TUH because extending Board jurisdiction

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3 See Temple Univ., 194 N.L.R.B. 1160 (1972). Neither the Region nor the Board has called the Temple University decision into question, despite the Union's invitation to do so. The relationship between TU and the Commonwealth remains largely the same, and is, in some ways, stronger now than it was in 1972. (See B-6).

4 TUHS and TUH, which the parties stipulated are treated interchangeably for labor relations purposes, (B-7, ¶ 23), have roughly 3,500 unionized employees in 11 bargaining units. See infra Section II.A.2(a).

5 Notably, the Union does not seek Board jurisdiction on the basis that PERA inadequately protects employee rights, but rather as an attempt to protect its own financial interests from a potentially adverse U.S. Supreme Court ruling on the constitutionality of public-sector agency fees. The resulting instability is particularly unjustified given that the 11 petitioned-for employees can join the TAP unit under PERA without objection from TUH or the need for a hearing or an election. See 34 Pa. Code § 95.23(c) (2017).

over TUH does not effectuate the policies of the National Labor Relations Act ("NLRA" or the "Act"); it contravenes them.

Nor should the Board extend comity to the nonconforming TAP bargaining unit. This nonconforming unit was certified in a non-profit acute care hospital in 2006, long after the 1974 Health Care Amendments[6] and 1989 Health Care Rule,[7] as well as the Board's 1995 Management Training decision, which expanded Board jurisdiction over certain private employers with close ties to exempt government entities. It would be repugnant to the policies of the NLRA and inconsistent with Board precedent to extend comity to the TAP unit because it was both certified after Management Training and fails to comply with the Board's Health Care Rule. As a result, even if the Board decides to exercise jurisdiction over TUH, the Board must decline to grant comity and dismiss the Petition because the 11 people the Union seeks to represent are not a permissible stand-alone unit under the Health Care Rule.

II. ARGUMENT

A. The Board Should Decline To Assert Jurisdiction Over TUH Because Jurisdiction Over TUH Is Contrary to the Policies of the NLRA.

The Board exercises its discretion to decline jurisdiction when doing so effectuates the purposes of the Act. See, e.g., Northwestern Univ., 362 N.L.R.B. No. 167 (2015) ("But as the Supreme Court has stated . . . even when the Board has the statutory authority to act . . . the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case.") (internal quotations omitted) (citing NLRB v. Denver Bldg. & Const. Trades Council, 341 U.S. 675, 684 (1951) and NLRB v.

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6 Health Care Institutions Amendments, Pub. L. No. 93-360 (1974) (codified as amended at 29 U.S.C. §§ 152, 158, 169, 183 (2016)).

7 Final Rule, 54 Fed. Reg. 16,336 (1989) (codified at 29 C.F.R. § 103.30 (2017)).

Teamsters Local 364, 274 F.2d 19, 23 (7th Cir. 1960)). In 1972, the Board determined that it would not effectuate the purposes of the Act to exercise jurisdiction over TU in light of its close relationship with the Commonwealth. See Temple Univ., 194 N.L.R.B. 1160 (1972). Here, equitable considerations and the principles of Temple University weigh heavily in favor of the Board exercising its discretion to decline jurisdiction over TUH, a wholly-owned subsidiary of TU, for the following reasons: 1) the close relationship between TU, TUHS, and TUH makes NLRB jurisdiction unworkable; 2) the bargaining history and labor-management relations between TU, TUHS, and TUH and their unions counsel against the widespread disruption that the NLRB's exercise of jurisdiction would bring; and 3) exercising jurisdiction will do nothing to protect the principal rights Congress intended to provide employees under the NLRA.[8]

1. The Board Should Decline Jurisdiction Over TUH Based on the Principles of *Temple University* and the Close Relationship Between TU, TUHS, and TUH.

The Board should not assert jurisdiction over TUH in light of its relationship with TU, over which the Board declined jurisdiction more than 40 years ago based on the conclusion that it was not consistent with the purposes of the Act to exercise jurisdiction. As the Union recognized when it successfully sought to represent this bargaining unit before the PLRB in 2006, TU and TUH are so intertwined that the two cannot be separated for purposes of the appropriateness of the Board's jurisdiction. (E-1); Temple Univ. Health Sys., 39 PPER ¶ 49 (2006). TU can and does control TUH in key ways that make it inappropriate for their labor relations to operate under separate and distinct legal schemes. As summarized below, the

[8] Recognizing as much, the Region initially, and correctly, dismissed the Petition in November 2015, stating that the purposes of the Act would not be effectuated based on the Board's 1972 decision and the relationship between TU, TUHS, and TUH. Yet, the Acting Regional Director subsequently, and erroneously, concluded that the NLRB should exercise jurisdiction over TUH, notwithstanding the Board's declination of jurisdiction over TU, and by extension TUH, in 1972.

evidence adduced during the proceedings at the Region demonstrates that TU, TUHS, and TUH are significantly interrelated and that the Petition should therefore be dismissed under the principles set forth in Temple University.

a. TU, TUHS, and TUH Are Substantially Intertwined on a Structural and Operational Level.

The Pennsylvania General Assembly created TU to discharge an essential function of the state government – "extend[ing] Commonwealth opportunities for higher education." 24 Pa. Stat. Ann. § 2510-2 (West 2016). TUH was originally incorporated as part of TU in 1910 with a primary purpose "to support Temple University and its Health Sciences Center academic programs by providing the clinical environment and service to support the highest quality teaching and training programs for health care students and professionals, and to support the highest quality research programs." (E-2). In 1995, TU created TUHS to manage the critical function of TUH, which was to act as the "primary training site for all of the residents and all of the [TU] School of Medicine students." (Tr. 12/16/15 at 79).

In March 2015, then TU President Neil Theobald confirmed in his statutorily-required testimony before the Pennsylvania House of Representatives Appropriations Committee both that TU, in reality, exercises control over TUHS and TUH, and that the operations of TUHS and TUH are an important aspect of the University's Commonwealth-chartered mission. In his opening testimony, Dr. Theobald emphasized that "Temple is also the indispensable provider of health care in the [C]ommonwealth's largest city[]" shouldering the burden of providing the majority of care to indigent patients in the City of Philadelphia. (Transcript of Budget Hearing, at 16 (Mar. 24, 2015), http://www.legis.state.pa.us/WU01/LI/TR/ Transcripts/2015_0038T.pdf;

see B-6, ¶ 18).[9] Dr. Theobald reiterated this theme in his closing remarks to the Appropriations Committee, where he was seeking an increase in the Commonwealth's appropriation to TU, stating, "[t]he biggest problem I have as president of Temple University is running a safety net hospital, five safety net hospitals . . . ." (Id. at 126).

The record is replete with additional evidence showing that TU exercises meaningful corporate control over TUHS and TUH and that there is significant overlap and sharing across the three entities with respect to employees, including high-level executives; finances; physical property and key infrastructure systems. Indeed, TU, TUHS, and TUH are so intertwined that it would be irrational and completely arbitrary to have TU and TUH operate under two different statutory schemes for something as fundamental as their labor relations.

Corporate Control

- TU controls TUHS as its sole member; in other words, TUHS is wholly owned (100%) by TU. (Tr. 12/16/15 at 77-78).
- TU created TUHS's bylaws and reserved significant powers which limit the ability of TUHS to take certain actions, like changing the number of directors on the board, selling assets, and entering into management contracts, without the express approval of TU. (E-3 at 2).
- In addition, the TU board of trustees, which includes trustees that are statutorily appointed by the Commonwealth, controls the board of TUHS; it is the sole entity with power to appoint directors to, and remove directors from, TUHS's board and it has the power to dissolve the board altogether. (E-3 at 3-5). TU also has authority to call meetings of the TUHS board. (Tr. 12/16/15 at 91).
- TU, TUHS, and TUH have interlocking boards with leadership of TU, including its president and the Chair of its board, serving on the boards of TUHS and TU.[10] (E-3 at 11; Tr. 12/16/15 at 90-92).

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[9] The location cited in the parties' stipulation for the transcript of Dr. Theobald's testimony on the Pennsylvania General Assembly website no longer works and is corrected above.

[10] The Chair and the Vice Chair of the TUHS board must come from the TU board of trustees. (E-3 at 11).

- TUHS is the sole member of TUH, has the authority to appoint and remove TUH board of directors, and reserves similar powers that TU does over TUHS. (Tr. 12/16/15 at 93-94; E-6).

Overlap of Personnel

- There is significant overlap between TU, TUHS, and TUH at the leadership level. Tr. 12/16/15 at 74, 98). For example, Larry Kaiser, the CEO of TUHS is, in fact, an employee of TU who also serves as the Senior Executive Vice President of Health Affairs and Dean of the Temple University School of Medicine ("TUSM").[11] (Tr. 12/16/15 at 92, 111-12; P-9 at 176). The same is true of Verdi DiSesa, the COO of TUHS, to whom the operational leadership of TUHS and the CEO of TUH reports, as well as other leaders of TUHS to whom the leadership of TUH reports. (Tr. 12/16/15 at 103-05). In fact, DiSesa became the CEO of TUH in March 2016, in addition to his positions with TU and TUHS. (Verdi J. DiSesa, MD, MBA, to become President and CEO of Temple University Hospital, Lewis Katz Sch. of Med. (Jan. 26, 2016), https://medicine. temple.edu/news/verdi-j-disesa-md-mba-become-president-and-ceo-temple-university-hospital).

- There is also overlap between TU, TUHS, and TUH at the employee level. Significantly, the faculty physicians who provide care at TUH, who are integral to the services that it provides, and are, in fact, the reason an acute care hospital like TUH can function, are not employees of TUH, they are not employees of TUHS. They are, in fact, employees of TU. (B-7, ¶ 18).

- Employees of TU, TUH and TUHS work side-by-side on a daily basis at TUH, Temple University Physicians ("TUP") and Temple Physicians, Inc. ("TPI") across a variety of positions.[12] (B-7, ¶¶ 3, 18). This includes both medical personnel and other types of personnel, including maintenance and finance and non-employee contracts administration, as TU employees are responsible for maintenance of TUH facilities and management of infrastructure projects. (B-7, ¶ 18).

- As a result of these day-to-day interactions, employees of one entity may be taking direction from employees of another. (B-7, ¶ 18). For example, physicians who practice at TUH, but who are employed by TU, routinely direct the work of TUH employees, including Union-represented employees, in a variety of areas

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[11] In fact, as shown on the TU 990 introduced by the Union, Kaiser was the most highly compensated employee of TU. (P-9).

[12] TUP is the physician practice plan of TU which provides services at TUH and other TUHS facilities staffed by employees of TU, TUH and other TUHS entities. TPI is a subsidiary of TUHS in which many physicians who are employed by TU provide outpatient medical services. Many of the physicians who provide services through TPI also practice at TUP facilities. (B-7, ¶ 4; Tr. 12/16/15 at 105-06).

including maternity, cancer center, cardiac catheterization lab, emergency department, radiology and many others. (B-2, ¶ 18).

- When incidents that could lead to discipline arise, they are reported to management of the employee to take appropriate disciplinary action, which can include discharge. (B-7, ¶ 18). For example, physicians who are employed by TU may direct TUH to dismiss a resident employed by TUH who is not satisfying the criteria of the program. (B-7, ¶ 18). A TU Program Director manages each residency program. (B-7, ¶ 18). Program Directors supervise and evaluate all residents within their programs. (B-7, ¶ 18). Included in that function is the determination of whether a resident will be disciplined, matriculate to the next training level, successfully complete the program, or be removed from the program. (B-7, ¶ 18).

- Physicians who are employed by TU also may report unsafe practice by nurses or other employees of TUH which, if confirmed, may lead to the termination of those TUH employees, including Union-represented employees. (B-7, ¶ 18). For example, there have been several incidents over the past few years where physicians have initiated patient safety reports, referred to as MIDAS reports, or reported incidents directly to TUH management which have been investigated by TUH management in conjunction with TUHS human resources and legal staff, and which have led to termination of the TUH staff member involved. (B-7, ¶ 18).

Financial Interrelationship

- As a result of these intertwined services and personnel, TU, TUHS, and TUH all make annual allocations of funds to each other. These services are not billed on a fee for service basis and the resulting allocations total more than a hundred million dollars annually, which are shown on the financial statements as related party transactions. (Tr. 12/16/15 at 98-99, 149; E-4 at 27).

- The wages, pay scales and benefits of the petitioned-for employees, as well as other non-represented employees of TUH, are developed by the Chief Human Resources Officer of TUHS, John Lasky, in consultation with the Chief Financial Officer and Sr. Vice President of TUHS, Robert Lux, with suggestions from the leadership of TUH. (B-7, ¶ 14). They are approved by TUHS under the direction of Larry Kaiser, CEO of TUHS and Dean of TUSM. (Id.) These personnel costs are included in the budget of TUHS that must be approved annually by the Board of Trustees of TU. (Id.).

- Kaiser, CEO of TUHS and Dean of TUSM, provides approval of contract terms offered for employees of TUH and TUHS during collective bargaining, consistent with the approval provided for wages and benefits of non-represented employees based on the control that TUHS exercises over the operations of TUH by virtue of TUHS's control over TUH's board, TUHS's control over TUH's budget and

TUHS's control over TUH's labor relations and human resources functions. (B-7, ¶ 20).

- The Board of Directors of TUHS is consulted regarding collective bargaining terms for TUH employees. (B-7, ¶ 20). For example, the TUHS board was not only consulted but formed a labor sub-committee in 2009-2010 to review the negotiations and related matters around the PASNAP contracts with TAP and TUHNA, the nurses' unit at TUH represented by PASNAP, when the negotiations turned protracted and contentious leading up to a 30 day strike in Spring 2010. (B-7, ¶ 20).

- Economic terms for labor negotiations for TUH and TUHS contracts must be consistent with budget parameters which are approved by TUHS and, ultimately, by TU through its approval of the TUHS budget.[13] (B-7, ¶ 20).

- By law, TU must report information on the salary and benefits of its employees to the Commonwealth. That includes employees who spend their days working at TUH and TUHS. In addition to the leadership of TUHS who are TU employees, discussed above, skilled maintenance work at TUH is performed by employees of TU who are represented by IUOE under a collective bargaining agreement that applies solely to work performed at the TU's Health Science Campus, which includes TUH, TUSM and other medical-related facilities of TU. (B-2, ¶ 5; Tr. 12/16/15 at 104-06, 115-18; B-7, ¶ 18).

- TU purchases general liability insurance that covers TUHS and TUH. Professional liability insurance is maintained as a single insurance program of TUHS and TU covering TUH. TU physicians are partially covered by TU and partially covered by TUH for professional liability insurance purposes. (B-7, ¶ 34).

- TUHS and TU have joint pension and post-retirement health benefit plans with assets totaling more than $450 million. (E-4).

- Employees of TUH/TUHS receive tuition benefits at TU for themselves and eligible dependents. (B-7, ¶ 15 and Ex. F).

- TU prepares consolidated financial statements that include the revenues and expenses of TUHS, TUH, and the other facilities within TUHS. (E-8).

Property and Shared Infrastructure

- TU and the Commonwealth each own a portion of the parcels that make up TUH. (B-7, ¶ 31).

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[13] The TUHS budget must be approved annually by TU's Board of Trustees. (E-6). Similarly, the TUH budget must be approved annually by TUHS's board. (E-10).

- For purposes of the jurisdiction of the TU police force under Pennsylvania law, 71 P.S. § 646 et seq., TU's campus is defined to include facilities of TUHS. Because TUHS facilities are considered part of TU's campus, TU is required to report crimes that occur within the vicinity of TUHS facilities, including TUH buildings, on its campus crime log under the federal Clery Act. (B-7, ¶ 22 and Ex. I).

- Legal services between TU and TUHS "essentially function as one office with two locations." (Tr. 12/16/15 at 98). The legal offices of TU and TUHS work in close coordination with each other. (Id.). For example, the General Counsel of TUHS is counsel to TUSM while TU's Office of University Counsel provides representation to TUHS on certain matters. The General Counsel of TUHS has a dual reporting relationship to the CEO of TUHS – a TU employee – and to TU University Counsel – also a TU employee. (Tr. 12/16/15 at 74, 98; E-7).

- TUH has no separate legal and labor relations functions, relying on TUHS for labor relations and TUHS and TU for legal representation. (Tr. 12/15/15 at 96-99; B-7, ¶ 23).

- Negotiators for TU and TUHS confer regarding matters of collective bargaining and contract administration when needed. (B-7, ¶ 21).

- TU manages and supports TUHS's (including TUH's) network over which TUHS information is transmitted. For example, if TUHS has difficulties with its network performance (e.g., network is slow, network connections fail between users and their systems/data) then TUHS gets TU network services involved to diagnose and resolve the issue to restore access and connectivity. (B-7, ¶ 36).

- TU provides TUHS's external internet connectivity. (B-7, ¶ 36).

- TU manages and supports TUHS's primary and back up data centers including providing physical security and environmental systems like HVAC, electrical, etc. Both data centers are located on the TU campus. (B-7, ¶ 36).

- TUH employees use email addresses from one or both of the parent organizations. TUH employees have email addresses that are @tuhs.temple.edu. TU employees have email addresses that are @temple.edu. Individuals with dual responsibilities at TU and TUHS/TUH may have both e-mail addresses – @temple.edu and @tuhs.temple.edu. For example, Beth Koob, Chief Counsel and Corporate Secretary of TUHS, has a TUHS and TU email address. (B-7, ¶ 35).

In summary, the record establishes that TU, TUH, and TUHS are significantly interrelated on a structural and operational level, which has rendered the entities so interdependent that the same reasons justifying the Board's decision to decline jurisdiction over TU should apply to TUH as well. Because the Acting Regional Director disregarded such

evidence, the Board should reverse the Decision and act within its discretion to decline jurisdiction over TUH as it did in 1972 over TU.

b. Exercising Jurisdiction Over TUH Employees Would Reduce the Uniformity, Predictability and Administrability of Labor Relations at TU, TUHS, and TUH.

Due to the unusual degree of interconnectedness between TU and TUH, if the Board asserts jurisdiction over TUH, both entities will be faced with different rules controlling different segments of their operations. This factor, which the Acting Regional Director ignored, weighs heavily against the exercise of jurisdiction. Despite TU employees working side-by-side with TUH employees, some would be subject to PERA and the others subject to the NLRA. (See B-7, ¶ 18, stipulating: "Employees of TU, TUH and TUHS work side-by-side on a daily basis at TUH, TUP and TPI across a variety of positions. This includes both medical personnel and other types of personnel, including maintenance and finance and non-employee contracts administration as TU employees are responsible for maintenance of TUH facilities and management of infrastructure projects."). That fact is as troubling here as it was in Northwestern when the Board declined to exercise jurisdiction. Northwestern Univ., 362 N.L.R.B. No. 167, at 5 (noting, as one of the reasons for declining to exercise jurisdiction, the "inherent asymmetry of the labor relations regulatory regimes" that would result if the Board exercised jurisdiction because some of the players in the same division would be subject to the NLRA where others would be subject to state labor laws). As discussed below, employees in the existing TAP unit, and in other TUH and TUHS units, are accustomed to enjoying the protections of PERA and working alongside TU employees who are also subject to PERA.[14] There is no rational

[14] Although TUH disagrees with the finding that it qualifies as an employer under Section 2(2) of the Act, it recognizes that the Regional Director would presumably also find all entities under TUHS to be employers under Section 2(2) given that TUH and TUHS are

justification for disrupting the longstanding uniformity of labor relations between these entities by asserting jurisdiction over TUH. The result would be the same inherent asymmetry of labor relations regulatory regimes that was present in Northwestern because some of the employees working side by side would be subject to the NLRA (the TUH employees) and others (the TU employees) would be subject to state labor laws. Creating this paradigm would not effectuate the policies of the Act and should be rejected by the Board by exercising its discretion to decline jurisdiction.

2. In Light of the Bargaining History and Labor-Management Relations Between TU, TUHS, and TUH and Their Unions Since 1972, Declining Jurisdiction Over TUH Is Consistent with the Purposes of the Act.

The purpose of the NLRA is to encourage "the practice and procedure of collective bargaining [] by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 753-55 (1985). Here, as neither Board jurisdiction nor the Petition itself furthers that purpose, the Board should exercise its discretion to decline jurisdiction.

a. NLRB Jurisdiction Will Destabilize the Settled Expectations of Unionized TUH Employees.

Exercising jurisdiction over TUH will not promote labor stability. To the contrary, it would throw decades of labor relations into disarray and mean disruption for multiple bargaining units across TUHS. Extending Board jurisdiction in this case would have serious implications for approximately 3,479 unionized TUHS employees spanning 11 different

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interchangeable for the purpose of labor relations. Accordingly, TUH includes other TUHS locations, such as Jeanes Hospital and the TUH Episcopal Campus in its analysis.

bargaining units represented by a number of different locals.[15] (See B-2, ¶ 5). Indeed, as of September 2015, TUH had the following 4 bargaining units:

- 665 non-professional technical and professional employees and LPNs represented by the Union in the TAP unit;
- 633 service employees represented by the National Union of Hospital and Healthcare Employees, AFSCME, AFL-CIO and its Affiliate District 1199C (Service);
- 317 clerical and clerk employees represented by the Guild of Professional, Technical and Clerical Employees, a Division of the National Union of Hospital and Healthcare Employees, AFSCME, AFL-CIO and its Affiliate District 1199C (Clerical); and
- 1,201 nurses represented by Temple University Hospital Nurses Association/Pennsylvania Association of Staff Nurses and Allied Professionals.

(Id.). As of September 2015, approximately 391 employees at TUH Episcopal Campus were unionized across 5 bargaining units, as follows:

- 101 service employees represented by the National Union of Hospital and Healthcare Employees, AFSCME, AFL-CIO and its Affiliate District 1199C;
- 90 mental health techs represented by the National Union of Hospital and Healthcare Employees, AFSCME, AFL-CIO and its Affiliate District 1199C Mental Health Unit;
- 54 non-professional technical employees represented by Health Professionals and Allied Technical Unit;
- 128 registered nurses and professionals represented by Health Professionals and Allied Employees; and
- 18 maintenance employees and engineers represented by the International Union Operating Engineers, Local 835.

(Id.). As of September 2015, Jeanes Hospital had a bargaining unit of approximately 243 nurses

[15] Notably, these figures do not even take into account the more than 6,000 unionized employees spread across 11 bargaining units at TU, including units like the TAUP faculty unit that would currently be illegal under the NLRA. (B-2, ¶ 5); see NLRB v. Yeshiva Univ., 444 U.S. 672 (1980).

represented by Jeanes Hospital Nurses Association/Pennsylvania Association of Staff Nurses and Allied Professionals. (Id.). Moreover, since the Regional Director's decision, the International Brotherhood of Electrical Workers, Local Union 98, AFL-CIO now represents a unit of approximately 29 maintenance employees at the Institute for Cancer Research, a wholly-owned subsidiary of TUHS subsidiary American Oncologic Hospital d/b/a The Hospital of the Fox Chase Cancer Center. Granting the Union's Petition to add 11 employees to a 665-person bargaining unit therefore affects thousands of represented employees and at least four unions that share no affiliation with PASNAP.

Exercising Board jurisdiction over TUH would bring into question the representation of these other bargaining units, which are not parties to this case, because, as discussed below in Part II.B, granting comity to the state certifications of any nonconforming bargaining units that were certified after the passage of the Health Care Rule and Management Training Corp., 317 N.L.R.B. 1355 (1995), is inconsistent with Board law. See Summer's Living Sys., Inc., 332 N.L.R.B. 275 (2000), *enforced sub nom.* Michigan Cmty. Servs., Inc. v. NLRB, 309 F.3d 348 (6th Cir. 2002). At the very least, the Board, TUH/TUHS, and the various other unions would be forced to expend considerable time and resources in future cases to determine the existence of these units under Board precedent.

Beyond the potential for Board jurisdiction to put the represented status of currently unionized employees at issue, exercising jurisdiction would also be disruptive to the underlying bargaining relationships between the unions and management, contravening a main purpose of the NLRA. There is no dispute that the parties have operated under Pennsylvania

state law for decades with the full participation of the Union and other unions.[16] The entire fabric of the parties' collective bargaining relationship is based on the parties operating under PERA rather than the NLRA, which in turn has resulted in certain provisions in collective bargaining agreements. For example, PERA has governed what subjects are included in the collective bargaining agreements, what notice is required for bargaining, what notice is given for a strike, what happens at impasse, and what obligations TUH has to meet and discuss with its unions over certain managerial rights and certain changes to terms and conditions of employment that it would not be required to do under the NLRA. (See, e.g., E-9 at 69; B-2, Ex. A at 12, 16, 18, 22, 57, 58).

Additionally, the economic weapons that both parties have under PERA are substantially different than those under the NLRA, and the parties have worked under that balance for decades. For example, when the parties reached impasse during collective bargaining negotiations in 2009, TUH made a last best offer to the Union. Yet, for months, TUH

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[16] Indeed, this disruption is even less defensible when considering that the Union, over the past 10 years, affirmatively sought the jurisdiction of the PLRB on behalf of employees of TU/TUH/ TUHS on at least 25 occasions, in different contexts, repeatedly asserting to the tribunal that TU/TUH/TUHS are public employers. (B-2, ¶ 12). In 2014, the Union went to the PLRB, not the NLRB, to add positions, similar to those it seeks here, to its TAP bargaining unit. By agreement with TUH, under the procedures set forth in PERA, several of those positions were added to the TAP unit without a hearing and without an election, which would not have been permitted under the NLRA. (See id.). See also 34 Pa. Code § 95.23(c) (2017) (giving PLRB authority to issue a unit clarification order upon joint request of the collective bargaining representative and employer). In addition, the Union has continued to operate under the jurisdiction of the PLRB even after filing the Petition. In 2014, the Union filed an unfair labor practice charge before the PLRB asserting that a non-unionized employee was terminated by TUH based on union activity, stipulating that TUH was a public employer under the jurisdiction of the PLRB. (B-2, ¶¶ 11, 12). A hearing was held in October 2014 and briefs were submitted. At the time of the Petition, that matter remained pending before the PLRB, yet the Union never notified the PLRB of its position that the PLRB did not have jurisdiction. The PLRB rendered a decision in favor of TUH in November 2016. Temple Univ. Health Sys., 48 PPER ¶ 54 (PDO 2016).

was unable to impose contract terms on the Union based on the current state of the law under PERA, which prohibits implementation at impasse in the absence of a work stoppage by employees. If the parties were under the jurisdiction of the NLRB, TUH would have had the right to, and would have, imposed its last best offer and a 30-day strike could possibly have been avoided. (Tr. 12/16/15 at 142-44).

Moreover, the Union has repeatedly asserted that it had no obligation to provide the strike notice TUH would be entitled to under the Act. For example, Bill Cruice, Executive Director of the Union both then and now, wrote to TUHS in 2003, "As you know, unlike the National Labor Relations Act, Pennsylvania's PERA contains no legal requirement that the [Union] provide this 10-day notice." (E-12, writing with respect to a unit of nurses also represented by PASNAP).

Simply put, asserting jurisdiction is inconsistent with the expectations of thousands of employees in the bargaining units at TUH and TUHS who have collective bargaining relationships that have existed for decades and who have no say in the current proceedings. Like the relationship between TUH and the Union, these other bargaining relationships are premised on operating under PERA, not the NLRA. In Northwestern, the Board noted that its assertion of jurisdiction should help promote uniformity and stability, and recognized that asserting jurisdiction in that case would not have that effect, and therefore, declined to exercise jurisdiction. Here, too, asserting jurisdiction would not promote uniformity and stability. Instead, the bargaining rights of thousands of employees would be impacted by the Board's determination to change course and exercise jurisdiction which would completely undermine labor stability – a fact that the Acting Regional Director failed to appropriately consider.

b. Conversely, Declining to Exercise Jurisdiction Will Not Deprive Employees of Rights.

Consistent with the purposes of the Act, declining jurisdiction will not negatively impact employee rights. See 29 U.S.C. § 151 (2016) (discussing policy behind NLRA and the importance of employees' right to organize and bargain collectively). To the contrary, TUH has repeatedly offered to include the 11 petitioned-for employees in the existing TAP bargaining unit under the PLRB's procedures, which would avoid the need for a hearing and delay, or even for an election.[17] (Tr. 12/16/15 at 58); 34 Pa. Code § 95.23(c). The employees currently represented by the Union enjoy rights under PERA and their collective bargaining agreement that are, in some respects, broader than those under the NLRA, as discussed above. Because TUH has offered to include the 11 petitioned-for employees in the current bargaining unit without delay, the Board will not be depriving these employees of the principal rights Congress granted employees under the NLRA – the right to organize and bargain collectively for fair wages, benefits, and working conditions – if it decides to decline jurisdiction over TUH.

Accordingly, declining jurisdiction is consistent with the purposes of the Act.

c. The Board Should Decline Jurisdiction Because the Union Only Filed This Petition in a Misguided Attempt to Shield Its Agency Fees From Constitutional Challenge.

In deciding whether to exercise its discretion to decline jurisdiction over TUH, the Board should also consider that the Union filed the Petition for an improper purpose – namely, to avoid the anticipated outcome of the then-pending Friedrichs case before the U.S. Supreme Court, which could have limited the ability of unions to collect agency fees from employees of

[17] The parties utilized this procedure in 2014 when the Union sought to add employees to the TAP bargaining unit. (Tr. 12/16/15 at 58).

state actors.[18] See Friedrichs v. California Teachers Ass'n, 136 S. Ct. 1083 (2016) (mem.) (per curiam). While a union's motive may be irrelevant when determining whether the Board's jurisdiction exists, it is appropriate for the Board to consider the parties' motives when the Board is deciding whether to exercise its discretion to decline jurisdiction. Indeed, the ability to weigh equitable considerations is a hallmark of having discretion to make a decision. Cf. La Botz v. FEC, 61 F. Supp. 3d 21, 33-34 (D.D.C. 2014) (noting an agency's prosecutorial discretion involves "balancing of factors which are appropriately within its expertise, including whether agency resources are better spent elsewhere, whether its action would result in success, and whether there are sufficient resources to undertake the action at all") (citing Heckler v. Chaney, 470 U.S. 821, 831 (1985)); Ravancho v. INS, 658 F.2d 169, 177 (3d Cir. 1981) (Aldisert, J., dissenting) ("I recognize that the concept of discretion is founded on equitable considerations; a court that reviews for abuse of discretion, like the agency charged with its exercise, must view the totality of circumstances in reaching a decision."). Thus, the driving force behind the Petition is relevant to the Board's analysis here of whether to decline jurisdiction.

The Board's jurisdiction should be exercised to effectuate the purposes of the Act, which are to protect employee rights to organize and bargain collectively, not to further the financial goals of labor organizations. The Union's fear of Friedrichs drove the Petition to the Board, where it has no place. In doing so, the Union unnecessarily compromised the due process

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[18] Bill Cruice, Executive Director of the Union, stated to TUHS on August 7, 2015: "I would like to meet with you for an hour or so fairly soon to discuss the strong possibility that PASNAP will soon take the position that Temple University Hospital is, in fact, subject to the jurisdiction of the NLRB rather than the PLRB . . . A key part of the context of this move by the union is the coming politically motivated US Supreme Court Freidrichs [sic] decision, which will deem unconstitutional agency fee (fair share) provisions for those employers considered 'state actors' under the 1st and 14th amendments." (E-14). Ultimately, the Union's fears did not come to pass; the Supreme Court issued a 4-4 split decision in Friedrichs, affirming the lower court's decision that upheld agency fees.

rights of both the employees who are involved with the Petition (and who have gone unrepresented for a year because of the Union's self-motivated actions) as well as those employees who are not involved with the Petition, including thousands of employees at TUHS who are represented by other unions. [19]

Nor is there any reason to believe that declining to assert jurisdiction here will impact the Board's exercise of jurisdiction over other employers. Future cases should be readily distinguishable because the Board is unlikely to encounter the same historical and equitable considerations that are present here, such as the long bargaining history and reliance of the parties on coverage of state law; the prior Board decision declining to exercise jurisdiction over a closely-related employer with significant operational entanglements; the sheer size and scope of the bargaining units at issue; the comparatively tiny number of employees covered by the Petition; and the openly political/financial motivation of the Union in seeking Board jurisdiction.

Accordingly, the Board should exercise its discretion under the Act to decline jurisdiction over TUH.

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[19] The Union's tactic is also ineffective because whether the Board exercises jurisdiction over TUH has no bearing on whether TUH unions will be impacted by a future U.S. Supreme Court ruling on the constitutionality of agency fees, if the issue comes before the Court again. The proper inquiry for an agency fee analysis is whether TUH is a state actor for constitutional purposes; TUH's status under the NLRA is not dispositive. Current federal precedent suggests that TUH will be a state actor and therefore subject to constitutional limits regardless of whether it is an "employer" under the Act. See, e.g., Jones v. Temple Univ., 622 Fed. App'x 131 (3d Cir. 2015) (non-precedential) (explaining, in the context of an employee termination, that TUH is part of TU which is a state entity that acts under color of state law); Unger v. Nat'l Residents Matching Program, 928 F.2d 1392 (3d Cir. 1991) (recognizing TU and TUH to be state actors for purposes of Section 1983).

B. The Board Should Not Extend Comity to the Unit of TUH's Professional and Technical Employees Certified by the PLRB in 2006.[20]

The touchstone for the Union's argument that TUH is a private employer is the Board's 1995 decision in Management Training in which the Board expanded its jurisdiction to cover certain private employers who have close ties to exempt government entities. As well, the Union does not dispute that the facts that existed when it filed the present Petition also existed when the TAP unit was created in 2006. As a result, if the Union is correct that the Board, not the PLRB, has jurisdiction over TUH under Management Training then, necessarily, the NLRB should not exercise its discretion to grant comity to the unit of TUH's professional and technical employees certified by the PLRB in 2006 because the Board denies comity where the underlying state certification is void for want of jurisdiction.[21]

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[20] On its face, the Petition seeks representation of 11 employees in a stand-alone unit, which is indisputably an inappropriate unit. The Hearing Officer agreed. (Tr. 12/16/15 at 21) ("[A]s a preliminary matter, the only unit before us are the 11 or so employees and that's the only unit that would be certified. The unit that was certified by the Pennsylvania Labor Relations Board, we can't have an Armour-Globe addition to a unit that we haven't certified."). The Union orally amended its Petition on January 5, 2016 to request an Armour-Globe self-determination election and that comity be granted to the nonconforming PLRB unit of 665 non-professional and professional employees.

[21] In the Order granting review in part and invitation to file briefs, the Board declined to decide the merits of TUH's argument that if the Board finds TUH is an employer under the NLRA it necessarily means that the 2006 PLRB certification of the TAP unit is void *ab initio* for want of jurisdiction and that comity cannot be granted, as the Board found in Summer's Living Systems, Inc., 332 N.L.R.B. 275 (2000), *enforced sub nom.* Michigan Community Services, Inc. v. NLRB, 309 F.3d 348 (6th Cir. 2002), under analogous facts. Were the Board to address the PLRB's jurisdiction at the time it certified the TAP unit in 2006, it would necessarily have to reach the same result in light of its holding that TUH is an employer within the meaning of Section 2(2) of the NLRA. However, the Board need not address whether the PLRB had jurisdiction over the TAP unit in 2006 to refuse to extend comity to that unit. Summer's Living Systems involved an unfair labor practice charge which brought jurisdiction over the entire unit into question before the NLRB and the Board was unable to avoid addressing the proper jurisdiction of the state board at the time the unit was certified. Here, however, the Board can decline to extend comity to the TAP unit (665 employees) for purposes of the instant petition involving 11 currently unrepresented employees without addressing the underlying jurisdiction question. Were

Critically to the question on which the Board granted review, the Board also denies comity where the underlying unit certification is repugnant to the NLRA. Here, the underlying 2006 PLRB certification of the TAP unit is repugnant to the principles of the NLRA and Board precedent because: 1) the unit was certified after the Board's decision in Management Training; 2) the unit was certified after the 1974 health care amendments which made non-profit hospitals covered by NLRA, and after the NLRB promulgated its Health Care Rule setting appropriate bargaining units in acute care hospitals, like TUH, and the unit does not conform to that Rule; and 3) granting comity would undermine settled relationships and labor stability among TUH and its many unions (only one of which is a party to this matter).

1. Granting Comity to the PLRB Certification Runs Afoul of Board Precedent Addressing Certifications Post-*Management Training.*

TUH is unaware of any case in which the Board has granted comity to a state-certified nonconforming unit certified after the Board's decision in Management Training. It would be repugnant to the Act and inconsistent with Board precedent to do so here.

The Board's decision in Summer's Living Systems is controlling. There, the Board refused to grant comity over state certifications that were issued after the Board's 1995 decision in Management Training that brought a new class of employers – private employers with ties to government entities (as the Board has found TUH to be) – within the purview of the NLRA. Here, the PLRB's certification of the TAP unit occurred in 2006, long after Management Training. Thus, granting comity here would directly conflict with the Board's decision in Summer's Living Systems and the Board should decline comity over the TAP unit.

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the Board to grant comity, by contrast, the question of the PLRB's jurisdiction over the TAP unit would be fully before the Board, as it was in Summer's Living Systems and similar cases, and the same result (declining comity) would necessarily hold.

2. Granting Comity to the Nonconforming 2006 PLRB Certification Would Require the Board to Ignore its Own Regulations and a Congressional Mandate.

In addition, granting comity to the nonconforming TAP unit is repugnant to the Act and contradicts Board rules and a Congressional directive. The 2006 PLRB certification involves a nonconforming unit under the Board's Health Care Rule, which governs the composition of bargaining units in acute care hospitals, because the unit contains both professional and technical employees. See 29 C.F.R. § 103.30 (listing appropriate bargaining units in acute care hospitals). The cases cited previously by the Region and the Board involving comity in the context of acute care hospitals all pre-date the Board's issuance of the 1989 Health Care Rule, and therefore, do not support the extension of comity in this case. In fact, TUH is not aware of any Board decision extending comity to a state certification involving a nonconforming unit at an acute care hospital where that certification was issued after the Health Care Rule. Because extending comity to the 2006 PLRB certification would require the Board to ignore its own regulations and the Congressional mandate to avoid proliferation of bargaining units in health care, the Board should decline to do so in this case.

The vast majority of the cases involving the Board's extension of comity to hospital and/or healthcare certifications occurred shortly after the 1974 health care amendments to the NLRA, which extended jurisdiction over health care institutions for the first time, and reflect that the Board generally only extends comity to state labor board certifications issued before the amendments became effective. See Taylor Hosp., 249 N.L.R.B. 137 (1980) (extending comity to PLRB certification issued prior to health care amendments); Doctors Osteopathic Hosp., 242 N.L.R.B. 447, 450 (1979) (extending comity when PLRB certification was based on proceedings, including an election, that occurred in 1973, before the health care amendments); St. Joseph's Hosp., 221 N.L.R.B. 1253 (1976) (granting comity only after noting

that the initial certification of the unit, the filing of the petition for the unit, and the hearing related to the unit all took place before the effective date of the amendments); Allegheny Gen. Hosp., 230 N.L.R.B. 954 (1977) (granting comity over PLRB unit certification that was issued prior to health care rules). Conversely, this case involves a certification that was issued by the PLRB in 2006, long after the health care amendments, rendering these cases inapplicable.

The NLRB, in adopting the Health Care Rule, heeded the congressional "admonition" in the legislative history to the 1974 amendments to give due consideration to preventing undue proliferation of bargaining units in the health care industry. American Hosp. Ass'n v. NLRB, 499 U.S. 606, 616-17 (1991) (upholding the final rule as based on substantial evidence and supported by reasoned analysis). Under the final rule, which was issued in 1989, acute care hospitals are allowed only the following eight bargaining units: 1) all registered nurses; 2) all physicians; 3) all professionals except for registered nurses and physicians; 4) all technical employees; 5) all skilled maintenance employees; 6) all business office clerical employees; 7) all guards; and 8) all nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards. See American Hosp. Ass'n, 499 U.S. at 608; 29 C.F.R. § 103.30.

The Health Care Rule is a clear regulatory pronouncement by the Board that acute care hospital units "shall" be restricted based on job classification. 29 C.F.R. § 103.30. While there is an exception in the rule for nonconforming units, that only applies to nonconforming units that "are existing" as of 1989. The nonconforming unit at issue in this matter was certified by the PLRB in 2006, well ***after*** the Board's Health Care Rule. Therefore, the TAP unit over which the Union seeks a grant of comity clearly contravenes the plain language of the Board's regulations. Indeed, had the Union come before the Board in 2006 seeking to represent the TAP

unit, the Board would not have certified the unit because the Union's petition sought to represent what the Union concedes is a nonconforming unit in an acute care hospital.

The Board's decision in Mental Health Center is particularly instructive as the Board declined to extend comity where doing so would run afoul of the statutory language of the Act. Mental Health Ctr. of Boulder Cnty., 222 N.L.R.B. 901 (1976) (refusing to extend comity where the state certification involved a nonconforming unit of professional and non-professional employees was "at a variance with the policies enunciated by Congress in the National Labor Relations Act"). Similarly, here, extending comity to the TAP unit would run afoul of the Board's regulations, and therefore comity should be denied as it was in Mental Health Center. Declining comity here is further supported by the Board's rationale in Albert Einstein Medical Center, as the promulgation of the Health Care Rule clearly enunciates the Board's policy on appropriate units at acute care facilities. Albert Einstein Med. Ctr., 248 N.L.R.B. 63 (1980) (declining to extend comity to PLRB unit where the unit included a combination of professional and technical employees that went against Board policy).

Because the nonconforming TAP unit contravenes the regulatory pronouncements of the Board, the Congressional mandate that the Board issue regulations to prevent undue proliferation of bargaining units in acute care hospitals, and the plain language of the resulting Health Care Rule, granting comity is repugnant to the Act and comity is not appropriate.

3. The Board Should Decline to Extend Comity Because Doing So Would Undermine Settled Relationships and Labor Stability.

Extending comity to the 2006 PLRB certification is also inconsistent with the overarching purpose of the NLRA. As recognized by the Second and Sixth Circuits, "comity refers to a rule of convenience or expediency whereby the Board sustains settled issues or relationships, so long as federal policy is not undermined" and absent "compelling and

countervailing reasons" not to support settled relationships. Michigan Cmty. Servs., 309 F.3d at 357 (internal quotation and citation omitted).

Here, a grant of comity would do just the opposite. It will upend the settled relationships TUH has had with its many bargaining units for decades. See supra Section II.A.2. It will impact thousands of employees at TUH and TUHS who are not parties to this proceeding, unions who are not parties to this proceeding, and, as explained above, supra Section II.A.2, Temple University and its relationship with its unions as well as undermine one of the core principles of the NLRA – "industrial peace." Michigan Cmty. Servs., 309 F.3d at 360 (noting the Act's fundamental policy favoring labor peace). Finally, it will contravene federal policy that requires bargaining units at acute care hospitals certified after 1989 to conform to the Health Care Rule. See supra Section II.B.2.

Accordingly, the Board should exercise its discretion and not extend comity to the 2006 PLRB certification, as it is repugnant to the Act and inconsistent with the Board's comity principles.

III. CONCLUSION

For the foregoing reasons, TUH respectfully requests that the Board reverse the Acting Regional Director's Decision and exercise its discretion to decline jurisdiction over TUH. At minimum, the Board should decline to extend comity to the TAP certification because doing so would be repugnant to the Act. Thus, the Petition must be dismissed because the Union seeks to represent a group of employees that cannot be certified as a stand-alone bargaining unit under NLRB rules.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Shannon D. Farmer, hereby certify that on the 26th day of January, 2017, a true and correct copy of the foregoing Brief of Employer Temple University Hospital on Review of the Acting Regional Director's Decision and Direction of Election was filed electronically on the National Labor Relations Board website and served via email on the following:

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