

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TEMPLE UNIVERSITY HOSPITAL, INC.
Employer

and

Case 04-RC-162716

TEMPLE ALLIED PROFESSIONALS,
PENNSYLVANIA ASSOCIATION OF
STAFF NURSES AND ALLIED
PROFESSIONALS (PASNAP)
Petitioner

DECISION ON REVIEW AND ORDER

On December 29, 2016, the National Labor Relations Board (Board) granted in part the Employer's Request for Review of the Acting Regional Director's Decision and Direction of Election¹ and invited the parties and interested amici to address (1) whether the Board should exercise its discretion to decline jurisdiction over the Employer; and (2) whether the Board should extend comity to a unit of the Employer's professional and technical employees certified by the Pennsylvania Labor Relations Board (PLRB) in 2006.² The parties filed briefs on review and responsive briefs, and the American Federation of Labor and Congress of Industrial Organizations filed an amicus curiae brief.

The Board has delegated its authority in the proceeding to a three-member panel. After carefully reviewing the record, briefs on review, and amicus curiae brief, we have decided to affirm the Acting Regional Director's decision. As explained below, we find no compelling reasons to exercise our discretion to decline jurisdiction over the Employer. We further decide to extend comity to the professional and technical unit certified by the PLRB in 2006.

The Employer has not persuaded us to take the rare step of exercising our discretion to decline jurisdiction over this nonprofit hospital that otherwise indisputably meets the Board's jurisdictional standards. The Employer and our dissenting colleague contend that the Board should decline jurisdiction because of the Employer's close ties with Temple University and its

¹ The Acting Regional Director directed an *Armour-Globe* self-determination election to determine whether the petitioned-for professional medical interpreters and transplant financial coordinators wished to be included in the existing bargaining unit of professional and technical employees employed by the Employer.

² The Board denied the Employer's Request for Review of the Acting Regional Director's finding that: (1) the Employer is not a political subdivision under Sec. 2(2) of the Act; and (2) even assuming principles of judicial estoppel apply, the Petitioner was not estopped from bringing the instant petition. Chairman Miscimarra would have granted the Employer's Request for Review with respect to all of the issues raised therein. He concurred in granting review with respect to whether the Board should exercise its discretion to decline jurisdiction and whether the Board should extend comity to the unit certified by the PLRB.

long history of bargaining with its represented employees under a state labor relations statute. We find no merit in those arguments.

Although, in certain circumstances, the Board may decline jurisdiction over private sector employers with close ties to a “political subdivision” explicitly excluded from the Act’s coverage under Section 2(2) of the Act (see *Management Training*, 317 NLRB 1355, 1358 (1995)), the Board has never held that Temple University is an exempt political subdivision. Instead, the Board has only exercised its discretion to decline jurisdiction over the University because of the “unique relationship between the University and the Commonwealth [of Pennsylvania].” *Temple University*, 194 NLRB 1160, 1161 (1972).

Further, even assuming, arguendo, that the University could be analogized to an exempt political subdivision, we would not discretionarily decline jurisdiction in the circumstances of this case. In *Management Training*, the Board decided that it will assert jurisdiction over an employer, despite its close ties with an exempt government entity, as long as it meets the definition of employer set out in Section 2(2) of the Act and the applicable monetary jurisdictional standards. 317 NLRB at 1358. The Board further explained that “jurisdiction should no longer be determined on the basis of whether the employer or the Government controls most of the employee’s [sic] terms and conditions of employment”; instead, the focus should be on whether the private employer controls “some matters relating to the employment relationship” involving the petitioned-for employees, such as to make it an employer under the Act. *Id.* at 1357-1358. Here, the record indicates that the Employer possesses sufficient control over its employees’ terms and conditions of employment, including their wages and benefits and the procedures for hiring, discipline, discharge, assignment, promotions, and transfers, to permit meaningful collective bargaining.³ Indeed, the University is generally not involved in the day-to-day functioning of labor relations at the Hospital nor does it negotiate collective-bargaining agreements for the Employer. There is also no dispute that the Employer meets the Board’s monetary jurisdictional standards. Therefore, applying the test in *Management Training*, we find that the Board should assert jurisdiction over the Employer. The fact that – as argued by the Employer and the dissent – the University also controls some aspects of the employment

³ The Employer and the dissent contend that the Employer is “substantially intertwined” with Temple University at the structural and operational level. In approximately 1995, however, the Employer became a non-profit corporation separate from the University, and at the hearing in this case the parties stipulated that the Employer and the University are not a single employer.

Our dissenting colleague states that “the Board’s discretion to decline jurisdiction in a particular case does not depend on whether an employer and an exempt government entity constitute a single employer.” He also states that *Management Training Corp.*, supra, “does not preclude, or even weigh against, declining jurisdiction as a discretionary matter in this case.” (emphasis added). To the contrary, a fundamental premise of *Management Training* is that, as the Act contemplates, the Board should encourage the practice and procedure of collective bargaining to the greatest extent possible in order to minimize industrial strife. 317 NLRB at 1359. That policy objective *does* weigh against declining jurisdiction in this case, where, as described above, meaningful collective bargaining is possible, irrespective of single employer status. Moreover, nothing in the arguments advanced here by the Employer and our dissenting colleague outweighs these considerations that favor extending statutory coverage to the employees in this case.

relationship and the Employer and University share some infrastructure and services, does not require a different result.⁴

Furthermore, the Commonwealth of Pennsylvania is not involved in the day-to-day operations of the Employer, except insofar as it licenses and regulates the healthcare and educational facilities of any nonprofit hospital corporation in the Commonwealth. Thus, unlike the Board's decision declining to assert jurisdiction over the University, there is no evidence that the Employer is "denominated as an 'instrumentality' of the Commonwealth" or that "there exist extensive, direct state controls" over the Employer's activities. *Temple University*, 194 NLRB at 1161. Accordingly, no "special circumstances" exist to decline jurisdiction as in *Temple University*. See, e.g., *St. Christopher's Hospital for Children*, 223 NLRB 166 (1976) (jurisdiction asserted over nonprofit hospital having contract with Temple University to serve as pediatrics department in the absence of evidence indicating that the considerations that led the Board to discretionarily decline jurisdiction over Temple University were equally applicable).

We also reject the Employer's and our dissenting colleague's contention that exercising jurisdiction will destabilize its decades-long bargaining relationships with the Petitioner and other unions covering multiple bargaining units, which are based on the parties operating under the Pennsylvania Public Employee Relations Act rather than the National Labor Relations Act. "[T]he stable bargaining relationship has been between the Employer and Union, not between the Employer and the PLRB." See *MCAR, Inc.*, 333 NLRB 1098, 1104 (2001). We are confident that the Employer and the unions representing its employees can continue their stable bargaining relationships regardless of which agency exercises jurisdiction over the Employer. Indeed, the Board has repeatedly asserted jurisdiction over bargaining units previously certified by the PLRB. See, e.g., *MCAR, Inc.*, supra. Accordingly, we find that it will effectuate the policies of the Act to assert jurisdiction over the Employer.⁵

Nor has the Employer demonstrated that we should decline to extend comity to the unit of professional and technical employees previously certified by the PLRB. The Board will accord comity to a state certification where "the state proceedings reflect the true desires of the affected employees, election irregularities are not involved, and there has been no substantial deviation from due process requirements." *Doctors Osteopathic Hospital*, 242 NLRB 447, 448 (1979). We find that the PLRB certification has met these standards in the instant case.

⁴ Nor does the fact that Hospital employees work side-by-side with, and may take direction from, medical staff employed directly by the University, alter our view.

⁵ The Employer argues that as in *Northwestern University*, 362 NLRB No. 167 (2015), an assertion of jurisdiction will not promote uniformity and stability in labor relations. The Board's concerns about uniformity and stability in labor relations in *Northwestern University*, however, are not applicable here, as *Northwestern* involved college athletes and a school in league competition with public colleges over which the Board had no jurisdiction. This case, in contrast, involves a nonprofit hospital and classifications of employees over which the Board has asserted jurisdiction on numerous occasions.

As for the Petitioner's supposed motivation for seeking NLRA jurisdiction—the potential threat posed by litigation that could result in the loss of the union's agency fee provisions—not only is such a threat speculative, but the Petitioner's motivations are not a relevant consideration in deciding whether to decline jurisdiction.

The unit certified by the PLRB is a combined unit of all professional and technical employees, and the professional employees were afforded a separate vote to indicate their preference for joining the unit. The Employer argues that extending comity would contravene the Board's Health Care Rule, Section 103.30 of the Board's Rules and Regulations, because the unit is a non-conforming unit that was certified after the 1989 Health Care Rule. However, the Rule provides that any unit which is not one of the eight specified units *or* a combination among those eight units is "non-conforming." See Section 103.30(f)(5). Because the unit is a combination of two of the eight specified units, it is not a non-conforming unit.

Moreover, the current PLRB certification, while issued in 2006, is for a bargaining unit that was originally certified in 1975 (albeit with a different collective-bargaining representative). The composition of the unit has largely remained the same since then, and there is no contention or indication that the 2006 certified unit included any newly organized employees. Accordingly, even assuming the unit is non-conforming, it was and still is an "existing non-conforming unit[]" and is therefore appropriate within the meaning of the Rule. See Section 103.30(a).

We also reject the Employer's contention that if the Board asserts jurisdiction over the Employer, the 2006 PLRB certification would have been void when issued, and therefore comity cannot be extended to a non-existent PLRB-certified unit.⁶ Contrary to the Employer, whether the Board could have asserted jurisdiction in 2006 is not a factor the Board considers when deciding whether to extend comity. E.g., *The West Indian Co., Ltd.*, 129 NLRB 1203 (1961) (granting comity despite contention of dissenting member that state certification was void *ab initio* because the Board had jurisdiction when certification issued).⁷ It therefore was appropriate

⁶ This argument is premised on the Board having had jurisdiction in 2006 under either of two scenarios: (1) by virtue of the 1974 Healthcare amendments to the Act extending jurisdiction to nonprofit hospitals; or (2) by virtue of the Board's 1995 decision in *Management Training*, supra, 317 NLRB 1355. Under this latter scenario, the Employer analogizes the University to an exempt governmental entity and the Employer to a contractor.

⁷ The Employer's contention that *Summer's Living Systems, Inc.*, 332 NLRB 275 (2000), enfd. sub nom. *Michigan Community Services, Inc. v. NLRB*, 309 F.3d 348 (6th Cir. 2002), controls this case is misplaced. In *Summer's Living Systems*, the Board found that state certifications issued for bargaining units during a time when the Board declined jurisdiction over the employing contractors (pursuant to *Res-Care, Inc.*, 280 NLRB 670 (1986)), were valid certifications and the Board accordingly extended comity. But as to the state certifications that issued after *Res-Care* was overruled by *Management Training*, supra, the Board found that these were void for want of state jurisdiction at the time of issuance, and on that basis, the Board did not extend comity to those certifications. Notably, prior to the Board's decision in *Summer's Living Systems*, a decision by the Michigan Court of Appeals determined that following issuance of *Management Training*, the state's jurisdiction over various elections held, and certifications issued, after *Management Training*, was pre-empted by the Board's jurisdiction. These elections and certifications were therefore void. See *American Federation of State, County and Municipal Employees v. Department of Mental Health*, 215 Mich. App. 1, 545 N.W.2d 363 (1996).

In this case, the Employer cites *Summer's Living Systems* to support its argument that the PLRB's 2006 certification is void because it was issued after the Board's decision in *Management Training*. The Employer's argument hinges on analogizing Temple University to an exempt government entity and the Employer to a private contractor for the exempt entity, as this was the situation of the parties in *Summer's Living Systems*. As indicated above, however, the Board has never held that Temple University is actually an exempt government entity. Further, unlike the situation in *Summer's Living Systems*, the Board's jurisdiction here does not depend on a change in Board law; rather, the Board has jurisdiction because the Employer is a nonprofit hospital and the Board has had jurisdiction over nonprofit hospitals since 1974. Thus, the only issue here is whether the 2006 certification meets the extant standards for granting comity, and we agree with the Acting Regional Director's determination that it does meet those standards. Finally, even accepting the Employer's exempt entity analogy, the circumstances in

for the Acting Regional Director to consider whether to extend comity to the PLRB-certified unit.

Accordingly, we affirm the Acting Regional Director’s decision and find it would effectuate the policies of the Act to assert jurisdiction over the Employer, and we extend comity to the PLRB-certified unit of the Employer’s professional and technical employees.

ORDER

This case is remanded to the Regional Director for further appropriate action.

MARK GASTON PEARCE, MEMBER

LAUREN McFERRAN, MEMBER

Chairman Miscimarra, dissenting.

The Petitioner seeks a Board-conducted election to add approximately 11 employees of Temple University Hospital, Inc. (“the Hospital”) in two unrepresented classifications to an existing bargaining unit of approximately 665 of the Hospital’s professional and technical employees, which existing unit was certified by the Pennsylvania Labor Relations Board (“the PLRB”). The Petitioner presses the Board to conduct an election even though the Hospital has repeatedly offered to include employees in those two classifications to the existing unit under PLRB procedures. Unlike my colleagues, I think that the Board should, as a matter of discretion, decline to assert jurisdiction over the Hospital, thus leaving the Hospital and its unionized employees to bargain collectively under Pennsylvania’s Public Employee Relations Act (“the PERA”), 43 P.S. § 1101.101 et seq., as they have done for at least the last 45 years.

The Board is not writing on a blank slate here. Since 1972, the Board has declined to assert jurisdiction over Temple University because of the “unique relationship between the University and the Commonwealth [of Pennsylvania].” *Temple University*, 194 NLRB 1160, 161 (1972). That unique relationship includes the fact that a 1965 Pennsylvania statute, the Temple University-Commonwealth Act, 24 P.S. § 2510-1 et seq., denominates Temple University an “instrumentality” of Pennsylvania, and the state has been substantially involved in the University’s financial affairs and governance. *Id.* Until 1995, Temple University Hospital was an unincorporated division of Temple University, and hospital employees were employed by the University. During that time period, the PERA governed collective-bargaining rights at the hospital.⁸¹

Summer’s Living Systems are distinguishable: unlike that case, there is no intervening state court case that determined, following a change in Board precedent, that the state’s jurisdiction over various units of employees was pre-empted by the Board’s jurisdiction. We therefore conclude that *Summer’s Living Systems* does not control the outcome of this case.

¹ See, e.g., *Temple University*, 6 Penn. Pub. Employee Rep. ¶ 06087 (1975) (rejecting claim that the National Labor Relations Act governed Temple University Hospital).

In 1995, the University incorporated a subsidiary, Temple University Health Systems (“TUHS”), as a shell corporation to hold the University’s health-care related assets and separately incorporated Temple University Hospital as a non-profit subsidiary of TUHS. Those acts of incorporation did not impact the applicable legal regime; throughout the 22 years since they occurred, the collective-bargaining relationships between the Hospital and its unionized employees continued to be governed by the PERA rather than by the National Labor Relations Act (“the NLRA”).²

At present, the Hospital and the University (over which the Board does not assert jurisdiction) remain substantially intertwined, structurally and operationally, as detailed in the Regional Director’s Decision and Direction of Election. For example, the University, the Hospital, and TUHS all have interlocking boards of directors, and University officials are involved in the Hospital’s day-to-day operations to varying degrees. Additionally, the Hospital’s budget must be approved by the TUHS board, which includes the Hospital’s budget as a component of its own. In turn, the University’s board of directors must approve the TUHS budget. Further, Hospital employees work side-by-side with medical staff employed directly by the University, and the latter routinely direct the former.³

In short, collective bargaining at the Hospital has for a half-century been governed by Pennsylvania statute rather than by the NLRA. Longstanding, stable bargaining relationships have formed and flourished at the Hospital under the state law regime. In fact, the unit of professional and technical employees at issue in this case dates back to 1975. The Hospital and the various unions representing the Hospital’s employees are familiar with bargaining against the backdrop of the PERA, which is protective of collective-bargaining rights but which differs from the NLRA in some of its contours.⁴ In light of circumstances presented (including the Board’s declination of jurisdiction over Temple University, the continued interconnectedness between the University and the Hospital, the long history of the PERA governing the Hospital’s bargaining relationships, and the Hospital’s willingness to add the two classifications to the existing unit

² See, e.g., *Temple University Hospital Nurses Association*, 42 Penn. Pub. Employee Rep. ¶ 55 (2011) (finding that Hospital unlawfully implemented a policy restricting employees from wearing buttons critical of the Hospital and its quality of care); *Temple University Hospital Nurses Association*, 41 Penn. Pub. Employee Rep. ¶ 174 (2010) (finding that Hospital violated its bargaining obligation when it unilaterally ceased deducting union dues for unit members who continued to work during a work stoppage).

³ While the Hospital and the University have a close relationship, the majority notes that the parties stipulated that the Hospital and the University are not a “single employer” under the Act, and my colleagues observe that the Board has never before found that the University is an exempt political subdivision under Sec. 2(2) of the Act. However, the Board’s discretion to decline jurisdiction in a particular case does not depend on whether an employer and an exempt government entity constitute a single employer. See, e.g., *Northwestern University*, 362 NLRB No. 167 (2015) (declining, as matter of discretion, to exercise jurisdiction in representation proceeding involving private university’s grant-in-aid scholarship football players notwithstanding absence of a single-employer relationship with an exempt government entity).

⁴ See, e.g., *Philadelphia Housing Authority*, 22 Penn. Pub. Employee Rep. ¶ 22227 (1991) (an employer governed by the PERA may unilaterally implement new terms and conditions of employment only if the parties have reached impasse on the subjects to be implemented *and* the employees are engaged in a work stoppage), *affd.* *Philadelphia Housing Authority v. PLRB*, 620 A.3d 594 (Pa. Cmwlth. 1993), cited with approval in *Temple University Hospital Nurses Association*, *supra*, 41 Penn. Pub. Employee Rep. ¶ 174.

under PLRB procedures), I see no persuasive reason for the Board to step in now, fully displace the governing legal regime, and thereby potentially disrupt existing bargaining relationships.⁵

Management Training Corp., 317 NLRB 1355 (1995), cited by the majority, does not preclude, or even weigh against, declining jurisdiction as a discretionary matter in this case. *Management Training* involved a run-of-the-mill federal government contractor. Applying *Res-Care, Inc.*, 280 NLRB 670 (1986), the Regional Director in *Management Training* declined to exercise jurisdiction over the contractor because the United States Department of Labor (DOL) exerted significant control over the contractor's employees' economic terms and conditions of employment, rendering the contractor incapable of engaging in meaningful bargaining. On review, a Board majority overruled *Res-Care* and held that "jurisdiction should no longer be determined on the basis of whether the employer or the Government controls most of the employee's [sic] terms and conditions of employment." *Management Training*, 317 NLRB at 1357.

The holding of *Management Training* is inapplicable here, and the facts of that case are distinguishable from those in the instant case. My basis for declining jurisdiction over Temple University Hospital, detailed above, is *not* that most of the employees' terms and conditions of employment are government-controlled or that bargaining between the Hospital and the Petitioner would be meaningless. Unlike here, the contractor in *Management Training* did not have a long history of bargaining with its represented employees under a state labor relations statute. Unlike here, the contractor in that case was not separately incorporated by an entity outside the Board's jurisdiction, it did not remain structurally and operationally intertwined with an exempt entity, and it did not thereafter, for decades, remain governed by state labor relations law. And, unlike here, the petitioner in *Management Training* did not seek to invoke the Board's jurisdiction for the first time to make a modest change to an enormous existing bargaining unit, previously certified by a state labor relations agency, and the employer there did not consent to such a change under state law procedures. In short, *Management Training* does not support the majority's assertion of jurisdiction over Temple University Hospital here.⁶

⁵ *St. Christopher's Hospital for Children*, 223 NLRB 166 (1976), cited by the majority, is readily distinguishable. There, the Board asserted jurisdiction over a nonprofit hospital that held a contract to serve as the pediatrics department of Temple's school of medicine. That hospital was governed by its own trustees and, unlike TUHS and the Hospital, was not related to the University structurally or operationally.

⁶ While *Management Training* is distinguishable, I agree with the views expressed by former Member Cohen, who dissented in that case. See *Airway Cleaners, LLC*, 363 NLRB No. 166, slip op. at 3 fn. 8 (2016) (Member Miscimarra, concurring).

Further, I disagree with the majority's assertion that the Act's policy of encouraging the practice and procedure of collective bargaining to eliminate industrial strife, cited in *Management Training*, counsels against declining jurisdiction over Temple University Hospital as a discretionary matter under the unique circumstances presented. As described above, employees at the Hospital have a long and productive history of collective bargaining under Pennsylvania statute. Thus, declining jurisdiction as a discretionary matter and maintaining the longstanding status quo would not serve to discourage collective bargaining. To the contrary, it would promote labor stability.

For these reasons, as a matter of discretion, I would decline jurisdiction over Temple University Hospital at this time and dismiss the Petitioner's election petition.⁷

PHILIP A. MISCIMARRA, CHAIRMAN

Dated, Washington, D.C., December 12, 2017.

⁷ Consequently, I need not and do not reach the issue of whether the Board should extend comity to the existing unit certified by the Pennsylvania Labor Relations Board. Likewise, while I, unlike my colleagues, would have granted the Employer's request for review of the Regional Director's decisions that the Hospital is not a political subdivision exempt from the Board's jurisdiction under Sec. 2(2) of the Act and that the Petitioner is not estopped from urging the Board to assert jurisdiction over the Hospital, see unpublished Order dated December 29, 2016, my conclusion that the Board should not assert jurisdiction over the Hospital as a matter of discretion renders it unnecessary to address those two issues.