COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE CORRECTIONS OFFICERS ASSOCIATION	:	
v.	:	CASE NO. PERA-C-12-220-E
COMMONWEALTH OF PENNSYLVANIA[1]	:	

PROPOSED DECISION AND ORDER

On July 25, 2012, the Pennsylvania State Corrections Officers Association (Union or PSCOA) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board). In the charge, the Union alleged that the Commonwealth of Pennsylvania (Commonwealth) violated Section 1201(a) (1) of the Public Employe Relations Act (PERA). The Union specifically alleged that the Commonwealth engaged in unfair practices by denying the Union's request to permit a licensed AFLAC representative to enter Commonwealth property.

On August 21, 2012, the Secretary of the Board issued a complaint and notice of hearing directing a hearing for March 8, 2013, in Harrisburg. During the hearing on that date, both parties in interest were afforded a full and fair opportunity to present evidence and cross-examine witnesses. Both parties filed post-hearing briefs.

The examiner, based upon all matters of record, makes the following findings of fact.

FINDINGS OF FACT

1. The Commonwealth is a public employer within the meaning of Section 301(1) of PERA. (N.T. 4-5; PERA-R-01-153-E, Order and Notice of Election, 2001).

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 4-5; PERA-R-01-153-E, Order and Notice of Election, 2001).

3. PSCOA contracted with AFLAC to obtain certain insurance benefits and rates for its members. To obtain the PSCOA rate for AFLAC benefits, a licensed AFLAC agent must personally explain the benefits to the individual employes and witness their signing for those benefits. (N.T. 49-51, 55-56, 78-79).

4. On May 24, 2011, the Union filed a charge of unfair practices against the Commonwealth, Department of Corrections (DOC), Dallas SCI; it was assigned Case No. PERA-C-11-164-E. (N.T. 11-14; Commonwealth Exhibit 1).

5. In the specification of charges for that charge, the Union alleged, in relevant part, as follows:

. . . .

6. This charge arises out of requests by the PSCOA to permit its members' access to an AFLAC representative on-site at the various institutions.

7. On or about April 18, 2011, the PSCOA requested permission to have an AFLAC representative come on-site to meet with its members.

[1] I have amended the caption.

8. The Commonwealth responded in the negative, noting they would not permit outside vendors in the institutions.

9. The PSCOA did not pursue this further.

10. On Monday, May 16, 2011, the DOC Training Coordinator for the State Correctional Institute at Dallas and Retreat sent an informational e-mail regarding a third party benefit representative who would be on-site at SCI-Dallas on Wednesday, May 18. The e-mail stated:

    . . . .

    On Wednesday, May 18, 2011, Mike Conigliaro, a representative from BBS Benefit solutions will be at SCI Dallas from 10 a.m. to 3 p.m. in the Admin. Bldg. Training room to provide information to AFSCME and PSSU employes about insurance products

    . . . .

    . . . .

12. The above-noted actions of the Commonwealth represent disparate treatment of the members of the PSCOA.

(Commonwealth Exhibit 1).

6. The PSCOA local at Frackville SCI filed a grievance, at No. 11-012. The Commonwealth Office of Administration conducted an investigation of the grievance. (N.T. 14-15, 35-36; Commonwealth Exhibit 2).

7. The grievance provides, in relevant part, as follows:

> Management has denied the use of suitable facilities for representatives of the association to conduct business on non-work hours. Other institutions in the Commonwealth were offered the use of facilities for the same purposes but management at Frackville has denied this local union and its representatives the same courtesy showing a disparity of treatment of Bargaining Unit members assigned to this facility and others around the state. These actions have not done anything to promote harmonious relations between labor and management at this institution.

(Commonwealth Exhibit 2).

8. The PSCOA is always permitted to use its own business agents or employes to conduct Union business on Commonwealth property as it relates to Commonwealth employment; it is not permitted to solicit business on behalf of a third party. There is no provision in the parties' collective bargaining agreement that permits third-party vendors at Commonwealth institutions, facilities or grounds. (N.T. 22, 39-40, 45-46; Commonwealth Exhibit 5).

9. The Commonwealth adheres to Management Directive No. 205.14, which was revised on November 21, 2011, but has been in effect for many years. (N.T. 41; Commonwealth Exhibit 5).

10. Management Directive No. 205.14 provides, in relevant part, as follows:

> **4. DEFINITIONS.** For the purpose of this directive, the following definitions apply:

. . . .

b. Commonwealth Facilities. Buildings or parts of buildings, offices, and grounds owned or leased by the commonwealth for use by an agency.

5. POLICY.

a. Commonwealth facilities are to be used exclusively for conducting official business of the commonwealth, or by persons having legitimate business therein.

b. Commonwealth facilities and equipment shall be used only by individuals or organizations that have legitimate business on the premises. Commonwealth facilities and equipment shall not be used by employees, vendors, retailers, or the public for purposes not specifically or directly connected with the official business of the commonwealth, or other activity authorized in accordance with this directive.

c. All activity not specifically or directly connected with the official business of the commonwealth is strictly prohibited in commonwealth facilities at all times, except as authorized in accordance with paragraph 5.d. Examples of the kinds of activities prohibited are:

(1) Commercial, retail, or business activities, whether for profit or nonprofit purposes, including sales, negotiations, the taking of orders, displaying of wares, and marketing of products or services to commonwealth employees or the public.

(2) Political activity of any kind, regardless of the partisan or nonpartisan nature of the activity.

(3) Distribution of leaflets and written materials, except as provided in paragraph 5.d.

(4) Soliciting, harassing, intimidating, coercing, or in any manner invading the privacy of recipients of government services or benefits or individuals who have legitimate business with the commonwealth.

. . . .

d. The commonwealth will permit persons to e enter common, public areas of commonwealth facilities during the hours they are open to the public, for the purposes of distributing nonpartisan literature or printed material related to voter registration, and to solicit voter registrations and collect completed voter registration mail applications for timely transmittal to the appropriate county voter registration commission. All groups or individuals engaging in such solicitations and collections shall:

. . . .

6. RESPONSIBILITIES.

a. Agency Heads shall ensure that this policy is disseminated and enforced, and that it is included in agency regulations promulgated pursuant to section 506 of the Administrative Code. Exceptions to this policy, for unusual situations, may be requested by agency heads from the Secretary of Administration.

b. Supervisors shall ensure that activities not specifically or directly connected with the official business of the commonwealth or otherwise authorized in accordance with this directive are prohibited in commonwealth facilities. Supervisors who fail to comply with this directive will be subject to appropriate disciplinary action.

c. Commonwealth Employees are required to comply with this directive. Any commonwealth employee who fails to comply with this directive will be subject to appropriate disciplinary action.

. . . .

(Commonwealth Exhibit 5).

11. The Commonwealth Office of Administration recognized that a disparity arose between PSCOA and other unions regarding third-party vendors at DOC institutions. The Commonwealth resolved both Grievance No. 11-012 and the unfair practice charge at Case No. PERA-C-11-164-E. (N.T. 15-16, 36, 108; Commonwealth Exhibit 3).

12. The settlement agreement was executed on September 12, 2011, and provides, in relevant part, as follows:

    1. Within one year of the execution of this agreement, representatives from AFLAC will be permitted access to each of the Department of Corrections' institutions one time. This access shall not exceed one continuous 24-hour period per institution. PSCOA must provide advance notice of the date of the visit to each institution. After notice is give, the Department will determine the specific location at each institution where AFLAC will be permitted to have access to employees.

    2. Employees will be permitted to meet with representatives of AFLAC at their respective institutions, in the specific location designated by the Department, before or after their assigned shift. Employees who wish to meet with AFLAC representatives during their shift must submit a leave request. Approval of leave for this purpose may be granted subject to management's responsibility to maintain efficient operations consistent with Article 10, Section 2 of the parties' collective bargaining agreement.

    3. The parties agree that this is a full and final, non-precedential settlement that disposes of all issues raised by the above-referenced charge of unfair practices, the above-referenced grievance and any other related grievances.

    4. The parties agree that nothing herein shall constitute an admission of an unfair labor practice or of the allegations contained in the above-referenced charge of unfair practices or any violation of the collective bargaining agreement.

5. The PSCOA will accordingly withdraw the above-referenced charge of unfair practices and the above-referenced grievance and any related grievances will be deemed settled.

(Commonwealth Exhibit 3).

13. Article 31 of the parties' collective bargaining agreement, entitled Association Business, provides, in relevant part, as follows:

> Section 2. No Association member or representative shall solicit members, engage in organizational work, or participate in other Association activities during working hours on the Employer's premises except as provided for in the processing of grievances.
>
> Association members or representatives may be permitted to use suitable facilities on the Employer's premises to conduct Association business during non-work hours upon obtaining permission from the Employer's human resource officer or designated representative. Any additional costs involved in such use must be paid for by the Association.
>
> Association representatives shall be permitted to investigate and discuss grievances during working hours on the Employer's premises if notification is given to the human resource officer or a designated representative. If the Association representative is an employee of the Employer, the employee shall request from the immediate supervisor reasonable time off from regular duties to process such grievances. The Employer will provide a reasonable number of employees with time off, if required, to attend negotiating meetings.

(Commonwealth Exhibit 4).

14. In the summer of 2012, Union President Roy Pinto emailed Ty Stanton of the Commonwealth Office of Administration requesting permission to meet with members in the parking lots of each DOC institution. (N.T. 51-54; Union Exhibit 1).

15. Mr. Pinto's email stated as follows:

> The months of July and August I would like to visit each Institution and set up in the parking lot for a day to meet each shift coming and going without causing a problem at the institution. The purpose of this is to get members signed up for the union benefits, PAC and membership. I would like to get your approval first then I will make a schedule up showing where and when we will be there and provide it to you.

(Union Exhibit 1).

16. After Mr. Stanton requested more information, Mr. Pinto sent the following email to Mr. Stanton:

> [We] will be getting members who wish to sign up for membership cards, PAC cards, CUSA sign up, aflac, Bobby wilt foundation donations so I would say that we would need to setup a table or something to write on but it would be similar to the pig roasts just without any mess. But I know we did not do a schedule in advance for that and I would like to have one this time so no member can say they did not know we were going to be there.

(Union Exhibit 1).

17. Mr. Stanton granted Mr. Pinto's request and further requested that Mr. Pinto provide him with a schedule. (Union Exhibit 1).

18. Mr. Stanton subsequently revoked his approval relying on Management Directive 205.14 and the settlement agreement between the Commonwealth and PSCOA resolving the unfair practice charge at Case No. PERA-C-11-164-E and Grievance No. 11-012. (N.T. 54-55, 62).

19. On July 10, 2012, Darrell Drennan, an independent licensed agent with AFLAC, entered the grounds of the Norristown State Hospital (NSH), a Department of Public Welfare (DPW) facility, offering benefits to PSCOA, H-1 bargaining unit members at the front-gate parking lot. During the 24-hour period that he was there, he signed up 25-30 members. (N.T. 57, 68-69, 73).

20. PSCOA did not obtain or seek permission for the AFLAC agent to enter the grounds of the NSH in July 2012. No one at NSH would have the authority to grant that permission. Such permission must be obtained from DPW, labor relations, which would obtain permission from the Governor's Office of Administration. (N.T. 128-129).[2]

DISCUSSION

After the close of the Union's case-in-chief during the hearing, the Commonwealth moved for the dismissal of the Union's charge of unfair practices. (N.T. 99-101). I deferred my ruling at that time. (N.T. 99-101). In its post-hearing brief, the Commonwealth emphasized that its motion should be granted because the Union failed to meet its burden of proving a ***prima facie*** case that the Commonwealth unreasonably restricted PSCOA's access to Union members. (Commonwealth's Post-hearing Brief at 4).

In considering the Commonwealth's motion to dismiss, I am limited to evaluating the Union's case-in-chief to determine whether the Union met its burden of establishing a ***prima facie*** case. The Board will find an independent violation of Section 1201(a) (1) if the actions of the employer, in light of the totality of the circumstances, had a tendency to coerce a reasonable employe regardless of whether any employes were in fact actually coerced. ***Northwestern School District***, 16 PPER ¶ 16092 (Final Order, 1985). After reviewing the Union's case, I am granting the Commonwealth's motion to dismiss.

The Union argues that the Commonwealth coerced, intimidated and /or restrained its members in exercising their protected rights under Article IV of PERA when it allegedly denied the Union reasonable access to its members. (Union's Post-hearing Brief at 8-9). The Union cites the United States Supreme Court Decision in ***National Labor Relations Board v. Babcock-Wilcox Co***, 351 U.S. 105, 76 S. Ct. 679, 100 L. Ed. 975 (1956) for the proposition that an employer may not prohibit nonemployee communication with employes on the employer's property when reasonable alternative channels of communication are unavailable. (Union's Post-hearing Brief at 9-10). The Union maintains that the size of the H-1 bargaining unit, combined with the fact that only one-third of its members are working at any one time, makes it difficult to access most employes at off-site Union meetings. Many of the institutions, contends the Union, are isolated from communities making access to employes who commute long distances difficult. PSCOA believes that the most effective way to access most members is to approach them on site while they are beginning or ending their shift.

In ***Babcock-Wilcox***, Justice Reed, writing for the Court, stated the following:

> It is our judgment, however, that an employer may validly post his property against nonemployee ***distribution of union literature*** if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message

[2] This finding supports an alternative disposition and is not in support of my ruling on the motion to dismiss.

> and if the employer's notice or order does not discriminate against the union by allowing other distribution.
>
> . . . . But when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield ***to the extent needed to permit communication of information on the right to organize***.

Babcock-Wilcox, 351 U.S. at 112, 76 S. Ct at 684 (emphasis added). The emphasized language clearly ensures a union's access to employes on an employer's property to communicate matters involving the right to organize, support a union and seek mutual aid and protection as guaranteed under Article IV of PERA (or Section 7 of the National Act). Nothing in ***Babcock-Wilcox*** or Article IV of PERA protects nonemploye communication with employes on an employer's property for the purpose of selling insurance, or any other products, to employes.

The Union's case demonstrates that the Commonwealth granted the Union's request to visit each institution to distribute information before the Commonwealth became aware that a third-party insurance provider would be present to sell insurance to Commonwealth employes. The Commonwealth rescinded its approval when it became aware that PSCOA would be bringing AFLAC agents. Therefore, the Commonwealth did not interfere with PSCOA members' access to PSCOA representatives on Commonwealth property to discuss Union business or programs. It restricted access to AFLAC agents on Commonwealth property. Ensuring access to AFLAC agents is not a protected activity guaranteed by PERA and, therefore, it is not an obligation of the Commonwealth.

The Union also cites ***South Allegheny Educ. Ass'n v. South Allegheny Sch. Dist.***, 21 PPER ¶ 21161 (Proposed Decision and Order, 1990) for the proposition that an employer may not prohibit nonemploye union visitors from accessing union members on the employer's property during nonwork time where that employer had a past practice of permitting nonemploye union visitors regular access, so long as they were not disruptive. However, the Commonwealth argues that the ***South Allegheny*** case is limited in that the employer changed a past practice of permitting union and non-union representatives access to teachers on the school district's property during their lunch break. (Commonwealth's Post-hearing Brief at 5). The record of the Union's case shows that there was no past practice of permitting AFLAC or other third-party agents onto Commonwealth property, with the exception of what was permitted under the terms of the settlement agreement. The established past practice of permitting Union representatives onto Commonwealth property did not change, and ***South Allegheny*** is inapposite.[3]

The Commonwealth argues that the Board will not find a violation of Section 1201(a)(1) where the employer is complying with a settlement agreement or the parties' collective bargaining agreement. In May 2011, the Union filed an unfair practice charge alleging that the DOC engaged in unfair practices by permitting a nonemployee third-party onto Commonwealth property at SCI Dallas for AFSMCE and PSSU employes after denying PSCOA's request for an AFLAC representative to come onsite for its members. Also in May 2011, the PSCOA local at SCI Frackville filed a grievance complaining of disparate treatment in being denied access to "representatives of the association" during nonwork time, while other facilities in the Commonwealth were offered such access for the same purpose. The Commonwealth's Office of Administration investigated the grievance and the unfair practice and learned that the Union was complaining that the Commonwealth denied AFLAC representatives access to DOC institutions for PSCOA members while other third-party vendors were permitted access to different union members at the DOC institutions.

[3] The Union argues that Mr. Waneck testified that it was the Commonwealth's practice to regularly allow insurance agents onto Commonwealth property. (Union's Post-hearing Brief at 11). However, Mr. Waneck testified during the Commonwealth's case and not during the Union's case. Having granted the motion to dismiss, I am unable to consider this testimony. Also, the Union's conveyance of the testimony is not complete. Mr. Waneck testified that The Commonwealth has, in the past, allowed for exceptions to Management Directive 205.14, pursuant to Section 6.a. of the Directive, to permit limited term access for initial offers of insurance when the various Commonwealth unions offer a new insurance product to its employes. The Settlement is consistent with that past practice. In this litigation, the Union is seeking more third-party access than the Commonwealth's past practice allows.

Recognizing the disparity, the Commonwealth settled the unfair practice charge and the grievance. The resulting settlement agreement (Settlement) provides that within one year from execution (i.e. September 12, 2011), the Commonwealth will permit AFLAC agents access to each SCI one time and that such access shall not exceed one continuous 24-hour period per SCI. The Settlement controls the manner in which AFLAC representatives will be given access to each SCI. In the instant case, the Union has again alleged that the Commonwealth engaged in unfair practices when Mr. Stanton rescinded his approval applying Management Directive 205.14 and the Settlement. The Commonwealth argues that "[t]o allow AFLAC insurance agents onto the grounds of DOC institutions, a year after it agreed to allow the agents on the grounds on a 'one time' only basis, would render the settlement language meaningless. There would be no incentive for any employer to resolve an unfair practice charge or a grievance if the settlement did not permanently resolve an issue." (Commonwealth's Post-hearing Brief at 7). However, the record does not support the Commonwealth's argument that the one-year term of the Settlement expired.

Between the end of June and the beginning of July 2012, when Mr. Stanton revoked his approval for permitting an AFLAC representative at the SCIs, over two months remained open on the Settlement. Conceivably, there may have been several, if not many or all, SCIs that had not been visited by an AFLAC representative before the one year term of the Settlement ended. The Union's case does not contain evidence regarding which, if any, SCI's had been visited by an AFLAC representative during the nine-month period between the execution of the Settlement and Mr. Pinto's request to have an AFLAC representative access each SCI.[4] Therefore, Mr. Stanton's blanket refusal to permit AFLAC agents access to all SCIs without ascertaining which SCIs' had been visited already and which were still entitled to have an AFLAC visit under the terms of the open Settlement may not have been in compliance with the Settlement. Absent evidence that the AFLAC agents had their one-time 24-hour visit at every SCI, and given the evidence that Mr. Stanton prohibited AFLAC agents at all SCIs within the Settlement period, I must conclude that the Commonwealth failed to demonstrate that it complied with the Settlement, as a defense to the charge.

Additionally, however, the Union did not allege that the Commonwealth repudiated the Settlement or that an AFLAC agent was entitled to visit any number of SCIs yet to be visited within the one-year term of the Settlement. Therefore, that determination is not properly before me for consideration. Indeed, the Commonwealth's blanket denial of access to any AFLAC agents when there was time left for AFLAC visits under the Settlement, would certainly have a chilling effect on the employes' and their Union's efforts to resolve grievances and unfair practice charges, if unused AFLAC visits remained outstanding under the Settlement. However, this has not been alleged, argued or proven by the Union.

The Union has been on notice for many years that Management Directive 205.14 prohibits insurance companies from entering Commonwealth property to solicit Commonwealth employes. Also, Article 31 of the parties' collective bargaining agreement permits only Union representatives to conduct Union related business on Commonwealth property. The Commonwealth denied the Union's request for an ALFAC representative to enter the grounds of the SCIs pursuant to the Management Directive 205.14 and the collective bargaining agreement. When the Office of Administration discovered that there was a disparity in the application of the Directive and that AFSCME and PSSU had access to a third-party vendor on Commonwealth property, the Office of Administration obtained approval from the Secretary of Administration for an exception to the Directive and agreed to allow AFLAC agents to visit the grounds of each SCI for one year for one 24-hour period. The one-time limited access is consistent with the Commonwealth's past practice.

In its specification of charges and in support of its disparate treatment claim, the Union alleged that, on July 10, 2012, the Union "was permitted access (with their AFLAC agent) onto the grounds of" [the NSH]. However, the Union does not develop this position in its Post-hearing Brief, and the matter is therefore waived. Alternatively, the record does not support the allegation. Although presented during the Commonwealth's

[4] NSH is not a DOC SCI.

case, which I have not considered in disposing of the motion to dismiss, Richard Szczurowski credibly testified that PSCOA did not obtain or seek permission for the AFLAC agent to enter NSH grounds in July of 2012.

Accordingly, the motion to dismiss is granted and the charge is dismissed.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds as follows:

1. The Commonwealth of Pennsylvania is a public employer under PERA.

2. The Pennsylvania State Corrections Officers Association is an employe organization under PERA.

3. The Board has jurisdiction over the parties hereto.

4. The Commonwealth has **not** committed unfair practices within the meaning of Section 1201(a) (1).

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the hearing examiner

HEREBY ORDERS AND DIRECTS

That the charge is dismissed and the complaint is 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 nineteenth day of August, 2013.

PENNSYLVANIA LABOR RELATIONS BOARD

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Jack E. Marino, Hearing Examiner