COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA SOCIAL SERVICES UNION LOCAL 668 SERVICE EMPLOYEES INTERNATIONAL UNION	:	
v.	:	Case No. PERA-C-10-388-E
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE PHILADELPHIA CAO	:	

PROPOSED DECISION AND ORDER

On October 25, 2010, Local 668, PA Social Services Union, SEIU (Union) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the PA Department of Welfare, Philadelphia County Board of Assistance, Sophiny Pek-Lilly, Labor Relations Unit Chief (Commonwealth), violated section 1201(a)(1) of the Public Employe Relations Act (PERA) by, among other things, prohibiting employes at the Ridge/Tioga county assistance office in Philadelphia from wearing in areas where clients may be serviced a union button stating "More Staff = Quality Services."[1] On November 8, 2010, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on February 15, 2011. On January 21, 2011, the hearing examiner, upon the request of the Union and without objection by the Commonwealth, continued the hearing. On May 5, 2011, the hearing examiner held the hearing[2] and afforded both parties a full opportunity to present evidence[3] and to cross-examine witnesses.[4] On August 26, 2011, the Commonwealth filed a brief by hand-delivery. On August 29, 2011, the hearing examiner received a brief from the Union.

The hearing examiner, on the basis of the evidence presented by the parties at the hearing and from all other matters of record, makes the following:

FINDINGS OF FACT

1. The Board has certified the Union as the exclusive representative of a bargaining unit that includes income maintenance caseworkers employed by the Commonwealth at county assistance offices operated by the Department of Public Welfare. (Case No. PERA-R-1278-C)

2. The income maintenance caseworkers meet with clients who apply for cash assistance, food stamps and medical assistance provided by the Commonwealth. (N.T. I 9-10, 14-15, 20-21, II 34-36)

3. On July 20, 2010, the supervisor of the Ridge/Tioga county assistance office in Philadelphia (Ms. Pek-Lilly) directed bargaining unit members not to wear or display in areas where clients are serviced a button stating "More Staff = Quality Services." (N.T. I 5)

4. Clients may reasonably read the buttons as meaning that the Commonwealth is not providing them with quality services because of a lack of staff. (N.T. II 41)

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[1] The Union alleged that the Commonwealth committed additional unfair practices, but the parties subsequently settled those portions of the charge at the outset of the hearing. See n. 4. Thus, those portions of the charge are no longer before the Board and will not be addressed.

[2] References to the notes of testimony from the hearing in this case are preceded by a I.

[3] Upon the request of the parties, the hearing examiner has taken administrative notice of the notes of testimony from a related hearing in Case No. PERA-C-07-21-E (N.T. I 5). References to the notes of testimony from the hearing in that case are preceded by a II.

[4] At the outset of the hearing, the parties settled the charge except as it relates to the prohibition on the wearing of the "More Staff = Quality Services" button in client service areas at the Ridge/Tioga county assistance office in Philadelphia (N.T. I 5).

DISCUSSION

The Union has charged that the Commonwealth committed an unfair practice under section 1201(a)(1) of the PERA by prohibiting employes at the Ridge/Tioga county assistance office in Philadelphia from wearing in areas where clients may be serviced a button stating "More Staff = Quality Services." According to the Union, the prohibition is coercive of employes in the exercise of their right to engage in activities protected by the PERA -- mobilization campaigns centered on workload, the state budget and the negotiation of collective bargaining agreements.

In support of the charge, the Union cites Republic Aviation Corp. v. NLRB, 324 U.S. 793, 16 LRRM 620 (1945), for the proposition that employes have the right to wear union buttons "while at work" in the absence of "'special considerations' to justify a broad employer ban." Brief at 3. Noting that employes at other county assistance offices have worn "More Staff = Quality Services" buttons for years without incident (N.T. II 16, 18-19, 25-26, 28, 44), the Union would have the Board find that no "special considerations" justify the prohibition on the wearing of the button in client service areas at the Ridge/Tioga county assistance office in Philadelphia. In further support of the charge, the Union cites Commonwealth of Pennsylvania, Department of Welfare, Allegheny County Assistance Office, 25 PPER ¶ 25135 (Proposed Decision and Order 1994), where Hearing Examiner Leonard opined that employes were engaged in a protected activity under the PERA when they posted at the work place signs protesting workload.

The Commonwealth contends that the charge should be dismissed (1) because the prohibition is limited to areas where clients are serviced by employes and thus is not coercive of any right employes might have to engage in activity protected by the PERA and (2) because even if the prohibition were coercive any interest the employes might have in the matter is outweighed by the interest of the Commonwealth in servicing the public. The Commonwealth relies on Temple University Hospital, 38 PPER 38 (Final Order 2007)(Temple II), where the Board found that a ban on the wearing of a sticker that read "Bring Back Janell Safety for All Our Staff" was not coercive to the extent that it applied in areas where the stickers might be seen by patients at a hospital.

In response, the Union submits that Temple II is inapposite because that case dealt with a hospital rather than with a county assistance office.

In Republic Aviation Corp., supra, the Supreme Court held that a work place rule prohibiting union solicitation while on non-working time is presumptively invalid and therefore unlawful unless the employer shows that special circumstances make the rule necessary in order to maintain production or discipline, while a work place rule prohibiting union solicitation during working time is presumptively valid and therefore lawful unless the union shows that the employer adopted it for a discriminatory purpose. As the Supreme Court explained:

> "The [National Labor Relations] Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline."

324 U.S. at n. 10, 16 LRRM at n. 10, citing Peyton Packing Company, Inc., 49 NLRB 828, 843-844, 12 LRRM 183 (1943).

Under Republic Aviation Corp., then, employes do not have the right to wear union buttons "while at work" in the absence of "'special considerations' to justify a broad employer ban," as the Union contends, unless the employes are wearing the buttons during non-working time and the employer is unable to establish special circumstances making the rule necessary in order to maintain production or discipline. Nor do employes have the right to wear union buttons during working time in the absence of evidence that the employer has banned the wearing of such buttons for a discriminatory purpose. Thus, in and of itself, the fact that employes at other county assistance offices have worn the "More Staff = Quality Services" button for years without incident is not dispositive. Nothing in Commonwealth of Pennsylvania, Department of Welfare, Allegheny County Assistance Office, supra, provides otherwise.

Moreover, in Temple University Hospital, 33 PPER ¶ 33149 (Final Order 2002)(Temple I), the Board, citing federal authority applying Republic Aviation Corp. in hospital settings, refined the law to be applied insofar as union solicitations in such settings are concerned. The Board explained as follows:

> "Upon review of Beth Israel Hospital [v. NLRB, 437 U.S. 483 (1978)], [NLRB v.] Baptist Hospital[, Inc., 442 U.S. 773 (1979)], and Baylor University Medical Center [v. NLRB, 662 F.2d 56 (D.C. Cir. 1981)], the Board hereby adopts the following policy and presumptions for bans on solicitation and distribution of literature in hospitals within the jurisdiction of the Board. In this regard, the Board recognizes four zones of interest within a hospital: 1) nonworking areas, 2) patient care areas, 3) immediate patient care areas, and 4) patient access areas.
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> Concerning solicitation and distribution in nonworking areas, the United States Supreme Court in Republic Aviation Corp v. NLRB, 324 U.S. 793 (1945) established that 'restrictions on employee solicitation during nonworking time, and on distribution during nonworking time in nonworking areas, are violative of §8(a)(1) unless the employer justifies them by a showing of special circumstances which make the rule necessary to maintain production or discipline.' Beth Israel Hospital, 437 U.S. at 492-93. Thus, a ban on solicitation during nonworking time is presumptively invalid, as is a ban on distribution in nonworking areas.
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> Along those lines, since the business of a hospital is providing patient care, 'patient care areas' are 'work areas' under Republic Aviation, supra. Patient care areas not only include those areas where patients are treated, but also areas where procedures, tests or other treatment related tasks are performed outside the presence of patients. See Baptist Hospital, Inc., 442 U.S. at 781-82. While solicitation may not be banned while employes are in these locations on nonworking time, because they are work areas, a ban on distribution of literature in these areas of the hospital is presumptively valid. See Republic Aviation, supra.
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> In addition, the NLRB has recognized certain areas as 'immediate patient care areas' where the interests of the hospital in providing adequate patient care compels the presumption that solicitation and distribution of literature in these areas should be banned. These areas include patient's rooms, operating rooms, x-ray and therapy areas. In addition, immediate patient care areas include the halls, stairways and elevators through which patients may be transported, and waiting areas where patients may meet with physicians or family. St. John's Hospital [and School of Nursing, Inc. v. NLRB, 557 F.2d 1368 (10th Cir. 1977)].
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> There is also a fourth type of area to be recognized in a hospital, a 'patient access area'. Patient access areas may be nonworking areas where employe solicitation and distribution would be presumptively permitted. However, patients, who have an interest in a tranquil environment for their treatment, also have access and use these areas. These areas typically would include a cafeteria, gift shop, chapel, lobby, entrance, or other public area of the hospital. See St. John's Hospital, supra."

Id. at 341-342.

In addition, the Board explained as follows:

> "To uphold a ban on solicitation and distribution in patient access areas, the hospital bears the initial burden of establishing that the time, place and manner of solicitation or distribution has an effect on patient care. If the hospital fails in this respect, then its ban on solicitation and distribution in that area is an unnecessary restraint on Article IV rights and thus a violation of Section 1201(a)(1) of PERA. See NLRB v. Harper-Grace Hospitals, Inc., 737 F.2d 576 (6th Cir. 1984). If, however, it is shown that the solicitation or distribution has an impact on patient care, then the hospital's ban is presumptively valid. The union may rebut that presumption by establishing that it has a substantial interest in soliciting or distributing literature at that particular place and time, or in the chosen manner. In connection with the union's purported interests, either party may present evidence of the availability of alternative means for the union to communicate with bargaining unit members. See NLRB v. Southern Maryland Hospital Center, 916 F.2d 932 (4th Cir. 1990)."

Id. at 342 (footnote omitted). The same analysis applies to patient care areas and immediate patient care areas. Temple University Health System and Temple University Hospital, 42 PPER 55 at n. 2 (Proposed Decision and Order 2011).

In Temple II, supra, the Board further explained as follows:

> "In order to ban employes from wearing union buttons, or in this case stickers, in areas where they may be seen by patients, the hospital must show that its prohibition on wearing a particular button, is 'necessary to avoid disruption of health care operations or disturbance of patients.' Mt. Clemens General Hospital [v. NLRB], 328 F.3d [837] at 847 (*quoting* NLRB v. Harper-Grace Hospitals, 737 F.2d 576, 578 (6th Cir. 1984); Sacred Heart Medical Center, 347 NLRB No. 48 at 2 (*quoting* Beth Israel Hospital v. NLRB, 437 U.S. 483, 507 (1978)). Actual complaints from patients or family are not required, Temple I, it is enough for the Hospital to establish that by understanding the message of the button or sticker a reasonable patient or family member would be negatively impacted. In this regard, the Hospital is not required to provide patients to testify about the impact on them, but rather may show that the situation is likely to either disrupt patient care or disturb patients. In the latter circumstance, the employer may rely on the solicitation's objective impact on a reasonable patient."

38 PPER at 101.

Temple I and Temple II, of course, both dealt with a hospital, while the instant case deals with a county assistance office, as the Union points out. The analysis set forth in those two cases is wholly applicable here, however, because the Commonwealth has a legitimate interest in keeping labor disputes from affecting its services to clients at a county assistance office much like a hospital does in keeping labor disputes from affecting services to its patients. See PSSU, Local 668 of PSSU v. PLRB, 763 A.2d 560 (Pa. Cmwlth. 2000), the court held that "[b]ased upon [the Commonwealth's] substantial interest in providing professional services to the public [at county assistance offices], the Board properly concluded that a dress code, which outlines specific minimum standards of appropriate attire, is appropriately within employer's managerial prerogative and is not subject to collective bargaining." Id. at 563.

Application of the applicable law to the facts of record leads to the conclusion that the Commonwealth lawfully prohibited employes at the Tioga/Ridge county assistance office in Philadelphia from wearing in areas where clients may be serviced a button stating "More Staff = Quality Services." Notably, the record shows that the prohibition only applies to areas where clients may be serviced (finding of fact 3) and thus is limited as was the ban that only applied to patient care areas in Temple II. Moreover, the button may reasonably be read by clients as suggesting that the Commonwealth does not have enough staff to provide quality services, as the director of operations for the office of income maintenance testified based on her years of experience (N.T. II 41) (finding of fact 4), thereby engendering concern

among clients as to the quality of services they are receiving.[5] Support for such a construction of the button may be found in Temple II, where the Board found that the sticker reading "Bring Back Janell Safety for All Our Staff" conveyed a substantially similar message to the patients in a hospital. As the Board explained in that case,

> "[i]t is not unreasonable for patients upon reading 'Bring Back Janell Safety for All Our Staff' that they may become concerned about their own safety. A reasonable patient may likely question, "Is the hospital unsafe without Janell?" or "If the staff is unsafe, am I safe?" The fact that a patient may have to inquire to find the answer to these questions does not dissolve the conclusion that a reasonable patient upon reading 'Bring Back Janell Safety for All Our Staff' may question their own safety and become disturbed by the message."

38 PPER at 101. Thus, the prohibition is presumptively valid.

In order to rebut the presumptive validity of the prohibition, the Union had to present evidence establishing that it has a substantial interest in wearing the button in client service areas. See Temple II. A close review of the record does not show that to be the case, however. Although the Union presented testimony by three former clients of county assistance offices that they did not read the button "More Staff = Quality Services" negatively (N.T. I 11, 16-17, 21), it did not show that the employes had no alternative means of communication available to them. Accordingly, the charge must be dismissed.

CONCLUSIONS

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

1. The Commonwealth is a public employer under section 301(1) of the PERA.

2. The Union is an employe organization under section 301(3) of the PERA.

3. The Board has jurisdiction over the parties.

4. The Commonwealth has not committed an unfair practice under section 1201(a)(1) of the PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the charge is dismissed and the complaint rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this sixteenth day of September 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner

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[5] In reaching this result, the hearing examiner has applied the objective standard of Temple II calling for the interpretation of a particular button from the point of view of a reasonable patient at a hospital or in this case a client at a county assistance office. The hearing examiner, therefore, has not relied on testimony presented by the Union that three former clients of county assistance offices did not personally interpret the button negatively (N.T. I 11, 16-17, 21) or on the testimony of the director of operations for the office of income maintenance to the extent that the Commonwealth presented it to show that she personally interpreted the button negatively.