COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PSSU LOCAL 668 SEIU AFL-CIO-CLC	:	
	:	
v.	:	Case No. PERA-C-06-543-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF LABOR & INDUSTRY	:	
OFFICE OF VOCATIONAL REHABILITATION	:	

PROPOSED DECISION AND ORDER

On October 13, 2006, the Pennsylvania Social Services Union, Local 668, SEIU, AFL-CIO-CLC (PSSU), filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the Commonwealth of Pennsylvania (Commonwealth) violated sections 1201(a)(1) and 1201(a)(3) of the Public Employe Relations Act (Act) "by canceling the Alternative Headquartering Benefit for workers represented by [PSSU] in the Bureau of Blindness and Visual Services[.]" On December 1, 2006, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on January 30, 2007. The hearing examiner subsequently continued the hearing upon the request of PSSU without objection by the Commonwealth and upon the request of the Commonwealth without objection by PSSU. On May 3, 2007, the hearing was held. Both parties were afforded a full opportunity to present evidence and to cross-examine witnesses. At the conclusion of PSSU's case-in-chief, the Commonwealth moved to dismiss the charge on the ground that PSSU had not presented a prima facie case (N.T. 44). The hearing examiner took the motion under advisement pending a review of the record and any briefs the parties might file (N.T. 45). On May 29, 2007, PSSU filed a brief. On June 15, 2007, the Commonwealth filed a brief.

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

FINDINGS OF FACT

1. PSSU is the exclusive representative of a bargaining unit that includes employes of the Commonwealth working in the bureau of blindness and visual services and employes of the Commonwealth working in the bureau of vocational rehabilitation services. (N.T. 9-11, 21-22)

2. By 1999, the Commonwealth was paying employes in the bureau of blindness and visual services for their time from the moment they left their homes to work to the moment they returned to their homes from work and was reimbursing them for their travel from their homes to their work sites and back. Employes in the bureau of vocational rehabilitation services were not paid or reimbursed on the same "portal-to-portal" basis. The Commonwealth reimbursed them for their travel from a designated headquarters site. (N.T. 12-16, 41)

3. In 2001, the Commonwealth implemented an alternative headquartering program under which some of the employes in the bureau of blindness and visual services and some of the employes in the bureau of vocational rehabilitation services were headquartered in their homes instead of in an office. (N.T. 16-20; Complainant Exhibit 2)

4. In 2003, the Commonwealth presented the following proposal during negotiations for a successor collective bargaining agreement covering employes in the bureau of blindness and visual services:

> "Eliminate all portal-to-portal practices.
>
> Provide that current travel time language would apply to all employees who do not travel as a routine part of their job.
>
> Modify travel time language for all employees who travel as a routine part of their job to eliminate travel time for employees who travel fewer than 50 miles from

their home or headquarters to the first field work site of the day and/or who travel fewer than 50 miles from their last field work site of the day to their home or headquarters.

Delete language requiring portal-to-portal pay for employees who travel to and from their worksite in Employer-provided vehicles."

The Commonwealth subsequently "dropped" its proposal in that regard. (N.T. 22-24; Complainant Exhibit 4)

5. In 2005, the Commonwealth "pulled back in" all but two of the employes in the bureau of blindness and visual services who were headquartered in their homes instead of in an office. Employes in the bureau of vocational rehabilitation services who were headquartered in their homes instead of an office continued to be headquartered in their homes. (N.T. 29, 35-36, 40-41)

6. By letter dated September 20, 2006, the deputy executive director of the office of vocational rehabilitation (Thomas E. Washic) wrote to a representative of PSSU (Joan Bruce) as follows:

"The following is in response to PSSU's request for information related to the AHQ program within OVR.

As previously stated, OVR removed AHQ from certain employees within the Altoona and Harrisburg District Offices (DOs) of BBVS because it was no longer operationally beneficial to continue AHQ for these individuals. Some of the operational considerations included: increased expenses for mileage, lunches, additional telephone lines, etc.; portal-to-portal issues; technology issues such as slow connections, lack of support for computer problems, etc.; issues with case files, including unavailability to supervisors/secretaries when questions or inquiries arose, disorganized/misplaced files, lost documents, etc.; and insufficient clerical support for those on AHQ. We emphasize that OVR now has sufficient space within these DOs to provide an office for all employees. In most cases, it was not cost effective to maintain an AHQ office and an office in the DO for employees on AHQ (with the exception of the employees in the Altoona DO who were not removed from AHQ).

With regard to the employees who continue to be on AHQ, BBVS continues to experience greater operational efficiency, increased productivity, and cost savings. The coast savings are significant enough to outweigh any occasional issues associated with technology, case files, clerical support, etc. The great distance between these employees' headquarters and the Altoona DO and the proximity of their headquarters to their caseloads is a significant factor in keeping these employees on AHQ. Their headquarters are within their assigned territories, thereby making them closer and more accessible to BBVS' customer base both in terms of time and distance.

Finally, BPO (now BVRS) continued AHQ for the majority of the employees involved in the pilot because overall, they realized a reduction in expenses. This is largely attributed to the fact that BVRS does not have portal-to-portal. Conversely, BBVS removed the majority of the employees involved in the AHQ pilot from AHQ because overall, BBVS realized an increase in expenses.

Jim Millwood was a Business Enterprise Agent alternately headquartered. All Business Enterprise Agents report to the Business Enterprise Program (BEP) Coordinator in Harrisburg, not to the District Managers. The District Offices only provide administrative support. Mrs. Strollo was not involved in the decision to change the location of Mr. Millwood's headquarters. That decision was made by then BEP Coordinator Mark Frankel who retired in February 2005. Mr. Millwood was one of four agents that had the responsibility for all areas of the Commonwealth. Due to Mr. Millwood's remote location and his large territory, it was economically more efficient to have him remain alternately headquartered.

I trust that the above is an adequate response to your questions in this regard.

Should you have any other questions or need further information, please ask."

(Complainant Exhibit 10)

DISCUSSION

PSSU has charged that the Commonwealth committed unfair practices under sections 1201(a)(1) and 1201(a)(3) "by canceling the Alternative Headquartering Benefit for workers represented by [PSSU] in the Bureau of Blindness and Visual Services[.]" As set forth in the specification of charges, PSSU alleges that the Commonwealth violated section 1201(a)(3) because it "discriminate[ed] against the unionized workers for utilizing a negotiated benefit, portal-to-portal expenses, a benefit the [Commonwealth] attempted to remove during negotiations and failed." PSSU alleges that the Commonwealth violated section 1201(a)(1) because its "actions were intended to have a chilling action on the workers and the workplace."

The Commonwealth has moved to dismiss the charge on the ground that PSSU did not present a prima facie case during its case-in-chief. The Commonwealth also contends that the charge should be dismissed because it rebutted any prima facie case that PSSU may have presented. According to the Commonwealth, it lawfully changed the alternative headquartering program for employes in the bureau of blindness and visual services for economic reasons.

The charge under section 1201(a)(3)

An employer commits an unfair practice under section 1201(a)(3) if it discriminates against employes for having engaged in an activity protected by the Act. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). "The motive creates the offense." PLRB v. Stairways, Inc., 425 A.2d 1172, 1175 (Pa. Cmwlth. 1981), quoting PLRB v. Ficon, 434 Pa. 383, 388, 254 A.2d 3, 5 (1969).

In order for the Board to find a violation of section 1201(a)(3), the charging party must show by substantial evidence during its case-in-chief that the employes engaged in a protected activity, that the employer knew that the employes engaged in the protected activity and that the employer discriminated against the employes because they engaged in the protected activity. Perry County, 634 A.2d 808 (Pa. Cmwlth. 1994). If the charging party presents a prima facie case during its case-in-chief, the charge is to be sustained unless the employer shows that it would have taken the same action even if the employes had not engaged in the protected activity. Id. If the charging party does not present a prima facie case during its case-in-chief, the charge is to be dismissed, and any defense the employer might have presented in rebuttal need not be addressed. Montour County, 35 PPER 147 (Final Order 2004). Evidence presented in rebuttal to the charging party's case-in-chief is not to be considered in deciding whether or not the charging party has presented a case-in-chief. Temple University, 23 PPER ¶ 23033 at n. 5 (Final Order 1992).

A discriminatory motive may be found where an employer indicates that it took an employment action because employes engaged in a protected activity. Mt. Lebanon School District, 35 PPER 98 (Final Order 2004). Close timing between the protected activity and the employer's action coupled with the disparate treatment of similarly situated employes will support the same finding. City of Reading v. PLRB, 568 A.2d 715 (Pa. Cmwlth. 1989). Remote timing between the protected activity and the employer's action will not. Cameron County School District, 37 PPER 45 (Final Order 2006). Nor will an employer's explanation linking an employment action to a protected activity where the explanation is not coercively phrased. City of Williamsport, 26 PPER ¶ 26202 (Final Order 1998); City of Easton, 9 PPER ¶ 9109 (Nisi Decision and Order 1978). An employer does not violate section 1201(a)(3) if it takes an employment action for an economic reason. Kennett Consolidated School District, 37 PPER 89 (Final Order 2006).

PSSU did not present a prima facie case during its case-in-chief. Accordingly, the Commonwealth's motion to dismiss must be granted, and the Commonwealth's defense to the charge need not be considered.

During its case-in-chief, PSSU established that by 1999 employes in the bureau of blindness and visual services enjoyed portal-to-portal benefits under which the Commonwealth paid them for their time from the moment they left their homes to work until the moment they returned to their homes from work and reimbursed them for travel from their homes to their work sites and back, that employes in the bureau of vocational rehabilitation services were not paid or reimbursed by the Commonwealth on the same basis, that in 2001 the Commonwealth implemented an alternative headquartering program under which some of the employes in the bureau of blindness and visual services and some of the employes in the bureau of vocational rehabilitation services were headquartered in their homes instead of in an office, that in 2003 the Commonwealth presented a collective bargaining proposal to eliminate the portal-to-portal benefit for the employes in the bureau of blindness and visual services, that the Commonwealth "dropped" the proposal, that in 2005 the Commonwealth "pulled back in" all but two of the employes in the bureau of blindness and visual services who were headquartered in their homes instead of in an office, that employes in the bureau of vocational rehabilitation services who were headquartered in their homes instead of an office continued to be headquartered in their homes and that by letter dated September 20, 2006, the deputy executive director of the office of vocational rehabilitation (Mr. Washic) explained that the Commonwealth's disparate treatment of the employes in the bureau of blindness and visual services and of the employes in the bureau of vocational rehabilitation services was "largely attributed to the fact that [the bureau of rehabilitation services] does not have portal-to-portal."

PSSU contends that proof of a discriminatory motive on the part of the Commonwealth may be found in its disparate treatment of employes in the bureau of blindness and visual services and of employes in the bureau of vocational rehabilitation services after it attempted to eliminate portal-to-portal benefits for employes in the bureau of blindness and visual services. As PSSU points out, after the Commonwealth attempted to eliminate portal-to-portal benefits for employes in the bureau of blindness and visual services, it changed the alternative headquartering program for all but two of them. As PSSU also points out, employes in the bureau of vocational rehabilitation services, who do not enjoy portal-to-portal benefits, continued to be alternatively headquartered.

The record shows, however, that the Commonwealth's attempt to eliminate portal-to-portal benefits for employes in the bureau of blindness and visual services occurred in 2003 (finding of fact 4). The record also shows that the Commonwealth did not change the alternative headquartering for employes in the bureau of blindness and visual services until 2005 (finding of fact 5. The two-year passage of time between the Commonwealth's attempt to eliminate portal-to-portal for employes in the bureau of blindness and visual services and its change to the alternative headquartering program for all but two of them militates against a finding that the Commonwealth was discriminatorily motivated. See Cameron County School District, supra (no union animus found where the employment action occurred two years after the employe's protected activity); Milton Regional Sewer Authority, 37 PPER 112 (Proposed Decision and Order 2006)(no union animus found where the employment action occurred eighteen months after the employe's protected activity). Thus, PSSU's contention is without merit.

PSSU also contends that proof of a discriminatory motive on the part of the Commonwealth may be found in Mr. Washic's explanation that the Commonwealth did not change the alternative headquartering program for employes in the bureau of vocational rehabilitation services because they "do[] not have portal to portal." A close review of Mr. Washic's explanation, however, does not show that it was coercively phrased or that he attributed the change to the Commonwealth's attempt to eliminate portal-to-portal benefits for employes in the bureau of blindness and visual services. To the contrary, it appears to be nothing more than a statement of economic reality. As such, it provides no support for the charge. See City of Williamsport, supra (a nondiscriminatory explanation for an employer's action will not support a finding of union animus); City of Easton, supra (same). Thus, PSSU's contention is without merit.

In addition, PSSU contends that Mr. Washic's testimony that the Commonwealth changed the alternative headquartering program for employes in the bureau of blindness and visual services for economic reasons provides no defense to the charge because his testimony was not credible. Mr. Washic only testified in defense of the charge after PSSU

concluded its case-in-chief, however. Evidence presented in rebuttal to the charging party's case-in-chief is not to be considered in deciding whether or not the charging party has presented a case-in-chief. Temple University, supra. Thus, whether or not Mr. Washic's testimony was credible is irrelevant.

The charge under section 1201(a)(1)

An employer commits an unfair practice under section 1201(a)(1) if it engages in conduct that under the totality of circumstances would have a tendency to coerce employes in the exercise of their rights under the Act. Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI, 35 PPER 97 (Final Order 2004). An employer's nondiscriminatory explanation linking an employment action to a protected activity is not violative of sections 1201(a)(1). City of Williamsport, supra; City of Easton, supra.

Based on the facts it presented in support of the charge under section 1201(a)(3), PSSU would have the Board find that the Commonwealth violated section 1201(a)(1) because its change to the alternative headquartering program for all but two employes in the bureau of blindness and visual service was coercive if not discriminatory. As noted above, however, the record shows that two years passed from the time the Commonwealth attempted to eliminate portal-to-portal benefits for the employes in the bureau of blindness and visual services and the time it changed the alternative headquartering program for them. As also noted above, Mr. Washic's explanation for the change was not coercively phrased. Thus, under the totality of circumstances, there is no basis for finding the Commonwealth in violation of section 1201(a)(1).

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 Act.

2. PSSU is an employe organization under section 301(3) of the Act.

3. The Board has jurisdiction over the parties.

4. The Commonwealth has not committed unfair practices under sections 1201(a)(1) and 1201(a)(3) of the Act.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the complaint is rescinded and the charge dismissed.

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 twenty-fifth day of July 2007.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner