

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE CORRECTIONS :
OFFICERS ASSOCIATION :
 :
 :
 v. : CASE NO. PERA-C-23-253-E
 :
 COMMONWEALTH OF PENNSYLVANIA :

PROPOSED DECISION AND ORDER

On October 31, 2023, the Pennsylvania State Corrections Officers Association (Union or PSCOA) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Commonwealth of Pennsylvania (Commonwealth or DOC) violated Section 1201(a)(1) of the Public Employe Relations Act (Act or PERA). In the charge, the Union specifically alleged that, while Union representatives toured SCI Phoenix on September 8, 2023, to investigate a grievance by speaking with bargaining unit members at their posts, management employes interfered with employe and Union rights.

On December 1, 2023, the Secretary of the Board issued a Complaint and Notice of Hearing designating a hearing date of January 24, 2024, in Harrisburg, which was continued to March 11, 2024. During the hearing on that date, both parties were afforded a full and fair opportunity to present documents and testimony and to cross-examine witnesses. On May 10, 2024, both parties filed separate post-hearing briefs in support of their respective positions.

The examiner, based upon all matters of record, makes the following:

FINDINGS OF FACT

1. The Commonwealth is a public employer within the meaning of Section 301(1) of PERA. (N.T. 8)
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 8)
3. Zachary Hammers (Hammers) is the full-time Grievance Chair for the statewide PSCOA. He was formerly a corrections officer. Hammers investigates grievances. He conducts a number of his investigations at times by touring various institutions to collect information and identify potential witnesses in preparation for grievance arbitration hearings. (N.T. 10-12, 16)
4. Brian Scott (Scott) is a Business Agent (BA) for the PSCOA assigned to Phoenix. (CX-1)
5. On January 30, 2023, Phoenix Local Union President, Edward Bogan (Bogan), filed class action Grievance No. PHX-23-038, alleging that management violated the parties' collective bargaining agreement (CBA) by not treating utility posts on the 6 am to 2 pm shift and the 2 pm to 10 pm shift as bid posts. (N.T. 71-72; UX-1)

6. A utility officer fills in when the jail needs more staffing, for example: running medication lines, yard movements, and pass movements. Generally, the utility officer ensures that specific operations are properly running. (N.T. 61)

7. In the bid-post Grievance, the Union was complaining that certain posts qualified as bid posts and that management was allegedly assigning officers to these posts without allowing members to bid on them based on seniority. (N.T. 37-39, 59-60)

8. Hammers wanted to interview members at their posts to learn about their duties and how much contact they had with inmates to determine whether the post assignment met the criteria for a bid-post designation. When the Union arbitrates bid-post grievances, it uses the members assigned to the post in question as arbitration witnesses. (N.T. 40-41)

9. On September 5, 2023, BA Scott emailed Deputy Superintendent for Facilities Management at Phoenix, Nathan Wynder (Wynder), Major Fitzgerald-Young and Major Mascellino, that he would like gate clearance for Friday, September 8, 2023, for himself and Hammers. The purpose of the visit was not provided in the email. Wynder approves Union tours and obtains further approval from Superintendent Joe Terra. Wynder did obtain approval from Superintendent Terra for the September 8, 2023 Union tour. (N.T. 13-14, 108-116; CX-1)

10. At Phoenix, prior to touring the jail on September 8, 2023, management informed Hammers that he could tour the Jail, but he could not speak to members. Hammers called Statewide PSCOA President John Eckenrode about the matter. President Eckenrode called Deputy Secretary of Corrections Tammy Ferguson with whom President Eckenrode had a prior working relationship when she was the Superintendent at SCI Benner. He told the Deputy Secretary that Hammers was at Phoenix to investigate a grievance. As a result, Hammers was permitted to speak to members on his tour.¹ (N.T. 50-54)

11. Hammers eventually participated in a management-approved tour of Phoenix on September 8, 2023, with BA Scott, President Bogan, Local Vice President Daniel Leary, and Local Union Executive Secretary Patricia Green, to investigate Grievance No. PHX-23-038. (N.T. 12-13, 15, 21-22, 57-60, 70-71, 81-83, 93)

12. The purpose of the tour that day was for Hammers to gather information, identify potential witnesses, and prepare for an upcoming grievance arbitration hearing for Grievance No. PHX-23-038. The arbitration hearing was scheduled to occur within a few weeks. (N.T. 13-15, 40-41)

13. Sometimes management personnel escort Hammers on Union tours of various institutions and sometimes they do not. Some facilities recognize that Hammers was a corrections officer and they do not require him to have an escort within the jail. Other institutions, like Phoenix, treat Hammers as a non-contact visitor which means that he is not to have contact with inmates. (N.T. 16)

¹ The record does not contain direct evidence of whether Deputy Secretary Ferguson contacted Superintendent Terra or other management personnel at Phoenix or that she directed them to permit Hammers to speak to members at their posts while on the tour.

14. When Hammers has toured jails in the past, he was permitted to speak with bargaining unit members while they remain working on post. He was also permitted to speak to them on the side without being heard, as long as the member remains on post. Typically, the security escort gives enough space so as not to listen in on any conversation between the member and Hammers. (N.T. 18-20)

15. On occasion, Hammers has had to ask the management escort to give him some space to talk privately with the member and the escort in the past has complied with his request. (N.T. 21)

16. On September 8, 2023, Hammers and the other Union representatives toured Phoenix with an escort from management, who was Lieutenant Jeffrey Aguiar (Aguiar). Aguiar is a CO-3, and he is permitted to have inmate contact. Aguiar is a non-housing Lieutenant at Phoenix attending to property, commissary, and completing reports. Management directed Aguiar to provide security escort for the tour and report to management where the tour went throughout the Jail in case of issues. There are cameras that record activities and movements throughout the Jail. (N.T. 21-22, 92-93, 119-123, 126, 130-133)

17. Also accompanying the Union representatives was Human Resources Analyst Jason Hadley (Hadley). Hadley has no security role and is not permitted to have inmate contact. Hadley handles grievances on behalf of management at Phoenix and Chester. Hadley helps management prepare its case and its presentations for 1st and 2nd step grievance meetings and arbitration hearings. (N.T. 22-23, 92-93, 157-158, 167)

18. After finishing a pre-disciplinary conference on the morning of September 8, 2023, Hadley saw Majors Mascellino and Fitzgerald-Young who informed him that Hammers and Scott were going on a Union tour of the Jail. Hadley had never toured Phoenix, and he asked the Majors if he could tag along, which they approved. (N.T. 158-159)

19. Sometime before the tour began on the East side of Phoenix, Hammers told Hadley that he was touring the prison to investigate the bid-post grievance. (N.T. 46-47, 168-170, 191)

20. Hammers did speak with individual members during his September 8, 2023 tour of Phoenix but Aguiar and Hadley did not give them privacy. Aguiar and Hadley remained physically close to the Union representatives while they were trying to speak to members at their post. The tour did not interfere with members' job duties. Hammers believes that Aguiar made an effort to prevent the Union representatives from speaking privately with members. (N.T. 24-25, 43, 62, 73-75, 78-80, 85, 88-89, 195-196, 204-205)

21. After talking to 2-3 members on the tour, Hammers noticed that Aguiar was taking notes in a notebook or on a note pad. Aguiar kept asking Hadley, in a loud voice, what time it was, and Aguiar wrote down the time. Aguiar verbally stated the members' names out loud so he could be heard identifying the member, even though he already knew the member and corrections officers wear their names on their uniforms. Aguiar recorded the member's name in his notebook. The members saw and heard what Aguiar was doing. Hadley and Aguiar were within 10 feet of Hammers and other Union representatives the entire tour, and they were within earshot of most conversations. (N.T. 25-28, 31-32)

22. Aguiar also took notes about the content of the conversations between Union representatives and the members. Hammers spoke with approximately 40 bargaining unit members during the tour. When Vice President Leary looked at Aguiar's note pad, he saw that Aguiar had recorded the names of members next to the comments and statements they made to their Union representatives. Bogan also observed Hadley taking notes. Aguiar took notes about "anything that the members were worried about," as he was directed by management. (N.T. 26-27, 30-32, 63-65, 78-80, 138-139, 141, 143-144, 149, 184)

23. Aguiar would not allow Union representatives to separate from Aguiar and Hadley or to walk away from them for privacy. Union Vice President Leary credibly testified that Aguiar and Hadley wanted to be able to hear any conversations. Aguiar told Union representatives that the group needed to stay together and that he needed to write everything down. When Leary asked Aguiar why he was writing everything down, Aguiar responded that he was directed to do so by the Superintendent. Leary also told Aguiar that the Union representatives were allowed to speak to the members privately and that Aguiar should not be writing down the members' comments. (N.T. 62-66, 73-75, 85)

24. Green asked Aguiar and Hadley: "When did we start writing people's names down?" Aguiar responded: "That's what we were told. We were told to write people['s] names down and jot down some of the things that were said." Green had not experienced this behavior during prior Union tours. During prior Union tours, with an escort Lieutenant, management did not seek to learn what the Union representatives and the members discussed. (N.T. 87-90, 197)

25. Hammers asked Hadley and Aguiar to be allowed to speak privately with the members. In the past, management escorts walked away and kept their distance; they would walk into an office or talk to someone else. There were instances where Bogan tried to speak to members, and he was not permitted to do so. (N.T. 26, 75, 78, 197)

26. Hammers observed that Aguiar's and Hadley's actions had a chilling effect on his conversations with members. He saw that members did not want to talk freely. The majority of the members told Union representatives that they were uncomfortable with Aguiar writing down their statements and asked why management was present while they were talking to the Union. Three officers in Yard 4 refused to speak at all to the Union representatives because of Aguiar and Hadley. (N.T. 28-29, 67)

27. Jordan Pecile is a CO-1 at Phoenix. He holds a bid post on 2nd shift in the Quad 3 compound. Pecile was working his bid post on September 8, 2023, and he spoke with Hammers about the duties of his position, during which time Aguiar and Hadley were within approximately 3-4 feet. Aguiar took notes of the Pecile-Hammer conversation which concerned Pecile. (N.T. 94-95, 97)

28. Pecile credibly testified that Aguiar's notetaking made him feel intimidated. He felt that he could not be completely open with the Union representatives because he believed his statements could be used against him later. Pecile felt that he could not provide details about his daily duties on his bid post. Pecile testified that he would have preferred to speak privately with the Union representatives. (N.T. 96-97)

29. Hammers informed Hadley during the tour that Hadley was Hammers' opponent in the upcoming bid-post grievance arbitration proceeding that Hammers was investigating and that Hadley was interfering with that investigation on the tour. Hammers also told Hadley that, in his opinion, his conduct was wrong and violated PERA. Aguiar and Hadley did not change their conduct thereafter. (N.T. 29, 43, 197-199)

30. At times, Aguiar spoke directly to members asking about the nature of their concerns and asking if the member reported those concerns to anyone before. Aguiar occasionally followed up with his own questions of the members when Hammers was finished talking to them. Aguiar testified that he tried his best to position himself where he could hear the discussions and record the employes' concerns. (N.T. 33-34, 67, 149-150)

31. During the tour, Hammers spoke with Corrections Officer Flippen as part of the bid-post grievance investigation. At the time Aguiar and Hadley had walked ahead, and they were not present during Hammers' conversation with Flippen. When Hammers had finished talking to Flippen, Aguiar approached Flippen and asked him what he told Hammers and what his concerns to the Union were. (N.T. 34-37, 67)

32. Sergeant John Peters works on the Capital Case Unit or P-Unit, also known as Death Row. On the day of the Union tour, Peters spoke with BA Scott about alleged payroll or paycheck issues and alleged increased violence in the Jail. Aguiar came close to Peters and Scott and began writing notes on a pad, which made Peters uncomfortable; he felt that he could not speak freely. When Peters and Scott attempted to move away from Aguiar, Aguiar moved closer and continued writing. (N.T. 99-103)

33. Peters spoke with BA Scott a 2nd time outside the housing unit gate when Aguiar approached and again started writing notes. Aguiar also told Peters and Scott to "keep things moving." Peters felt that he could not speak to BA Scott about his other issues. Peters felt that if he spoke freely to his Union representatives, there would be repercussions. (N.T. 102-106)

DISCUSSION

The Board addressed the very same issue on identical facts in Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania, Department of Corrections, Fayette SCI (Fayette), 38 PPER 4, (Final Order, 2007). In Fayette, PSCOA representatives were taking a tour of SCI Fayette during which they talked to Union members while on duty at their posts. The Major who was accompanying the Union representatives was taking notes. The Union claimed that the Major's surveillance interfered with employe rights in violation of Section 1201(a)(1), as claims the Union in this case. The Fayette Board opined as follows:

PSCOA's exceptions focus on the Examiner's failure to find a violation of Section 1201(a)(1) of PERA. Section 1201(a)(1) provides that it is an unfair practice for a public employer to interfere with, restrain or coerce employes in the exercise of employes' statutorily protected rights under PERA. Surveillance of employes at times and places where employes may lawfully be engaged in protected activities may constitute an unfair practice under

Section 1201(a)(1). Pennsylvania Labor Relations Board v. Western Pennsylvania Hospital, 3 PPER 221 (Nisi Decision and Order, 1973). PSCOA argues on exceptions that the Examiner failed to appreciate that Major Burns' presence with a notebook and pen gave the impression of employer surveillance, such that employees were hesitant to speak freely with the PSCOA representatives during the tour. However, the predicate for a claim under Section 1201(a)(1) is that there must be a protected activity that is being unlawfully monitored or interfered with by the employer. As aptly held by the Examiner, the PSCOA representatives, and bargaining unit employees, were not engaged in any statutorily protected activity when they conducted union business at the employees' assigned posts while employees were working. City of Philadelphia, supra [32 PPER 32009 (Final Order, 2000)]; Republic Aviation, supra [324 U.S. 793 (1945)]. Major Burns' use of a notebook and pen and taking notes while accompanying the PSCOA representatives on their tour, does not transform the union business, conducted on work time in work areas, into statutorily protected activity. Thus, SCI Fayette cannot be said to have unlawfully interfered with protected union activities. After a thorough review of the exceptions and all matters of record, SCI Fayette did not violate Section 1201(a)(1) of PERA, and the exceptions filed by PSCOA are dismissed.

Fayette, 38 PPER at 6.

As in Fayette, the Union officials and Union members in this case were not engaged in protected activity when Union representatives were talking to bargaining unit members while they were on duty at their post assignments on September 8, 2023. Therefore, Aguiar and Hadley's recorded surveillance of conversations between members and Union representatives may have interfered with Union business, but it did not interfere with protected activity in violation of Section 1201(a)(1), pursuant to Fayette, supra.

The Union argues that "there can be no reasonable argument that the PSCOA representatives and the bargaining unit members were not engaging in protected activity during the September 8th tour." (Union Brief at 11). The Union contends that this case is distinguishable from Fayette because the tour in this case was for the purpose of engaging in protected activity, i.e., investigating a grievance and preparing for arbitration. (Union Brief at 11). I find that this case is not at all distinguishable from Fayette.

The Union was certainly engaged in Union business by investigating the bid-post grievance. In another context, where the bargaining unit members interviewed by the Union representatives in an effort to investigate the grievance were off duty, this type of Union business could also be protected activity. However, the Union activity of investigating the bid-post grievance in this case lost the protection of the Act, under Fayette, when it was conducted on Commonwealth property, during work time at employees' workstations and assigned posts throughout Phoenix while they were on duty. Fayette, supra. As the Board stated in Fayette: "Major Burns' use of a notebook and pen and taking notes while accompanying the PSCOA representatives on their tour, does not transform the union business, conducted on work time in work areas, into statutorily protected activity." Id. at 6 (emphasis added).

Indeed, the Board has long held that management can prohibit conducting union business on work time altogether unless it is specifically negotiated

into the parties' collective bargaining agreement. Bensalem Township Police Benevolent Ass'n v. Bensalem Township, 30 PPER 30219 (Final Order, 1999). There is no evidence on this record that the parties' CBA provides for investigating grievances with on-duty officers at their assigned posts during work time. Also, in Ellwood City Police Wage and Policy Unit v. PLRB, 736 A.2d 707 (Pa. Cmwlth. 1999), the Commonwealth Court held that "the Board did not err in determining that on-duty grievance processing is not a protected activity under the PLRA and that accordingly, there was no independent violation of the Section 6(1)(a) of the PLRA." Id. at 710. The same result obtains under Section 1201(a)(1) of PERA. AFSCME, District Council 33, Local 1637 v. City of Philadelphia, 32 PPER 32009 (Final Order, 2000).

Accordingly, the Commonwealth did not violate Section 1201(a)(1) of PERA, and the charge is hereby 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 is a public employer under PERA.
2. The Union is an employe organization under PERA.
3. The Board has jurisdiction over the parties hereto.
4. The Commonwealth did not violate Section 1201(a)(1) of PERA.

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 and become final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this fifteenth day of May 2024.

PENNSYLVANIA LABOR RELATIONS BOARD

/S/ JACK E. MARINO

Jack E. Marino, Hearing Examiner