FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

OALJ 15-18

SOCIAL SECURITY ADMINISTRATION
BOSTON REGION
BOSTON, MASSACHUSETTS

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1164

CHARGING PARTY

Case No. BN-CA-12-0415

Gerard M. Greene
For the General Counsel

Terri-Ann Jones
For the Respondent

Martin R. Cohen
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7101-7135 and the revised rules and regulations of the Federal Labor Relations Authority (FLRA/Authority), Part 2423.

On August 8, 2012, the American Federation of Government Employees, AFL-CIO, Local 1164 (Charging Party/Union) filed an unfair labor practice (ULP) charge with the Boston Regional Office of the Authority, against the Social Security Administration, Boston Region, Boston, Massachusetts (Respondent/SSA). On January 31, 2013, the Regional Director of the Boston Region of the FLRA issued a Complaint and Notice of Hearing alleging that the Respondent violated § 7116(a)(1) of the Statute when it: (1) informed the Union on July 3, 2012, that its designated representatives were not allowed to solicit, take

applications or sign up employees for anything while on federal property; and (2) informed the Union on July 13, 2012, that its designated representatives were not allowed to sell insurance while on federal property. (G.C. Ex. 1(c)).

An Amendment to the Complaint was filed on February 6, 2013, correcting an error and changing the date for filing an answer. (G.C. Ex. 1 (d)). The Respondent timely filed an answer denying the allegations of the complaint. (G.C. Ex. 1(e)). On April 5, 2013, the Charging Party's Motion for Continuance of Hearing was granted and the hearing was rescheduled for May 7, 2013. (G.C. Ex. 1(h)). On April 22, 2013, the Respondent filed a Motion to Dismiss the complaint, arguing that the charge was not filed within the required time. (G.C. Ex. 1(i)). The Charging Party and the General Counsel filed briefs opposing the motion. (G.C. Exs. 1(k) & 1(l)).

A hearing in the matter was conducted on May 7, 2013, in Boston, Massachusetts. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The General Counsel, Charging Party and Respondent timely filed post-hearing briefs which I have fully considered.

Based upon the entire record created by the parties, I find that the Respondent committed unfair practices in violation of 5 U.S.C. § 7116(a)(1). In support of that determination, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The American Federation of Government Employees (AFGE), is the exclusive collective bargaining representative of certain employees at the Social Security Administration, Boston Region, Boston, Massachusetts, and is a labor organization within the meaning of § 7103(a)(4) of the Statute. (G.C. Ex. 1(c)). The Charging Party, AFGE Local 1164 (Union) serves as the agent of AFGE for purposes of representing bargaining unit employees at the Respondent. (*Id.*). The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. (G.C. Ex. 1(c)).

On May 12, 2011, David A. Borer, General Counsel for the AFGE, sent a letter to the former Regional Commissioner of the Social Security Administration in Chicago requesting that the agency drop its policy of refusing to allow insurance representatives to participate in nationwide events organized by the AFGE. (R. Ex. 5).

On June 23, 2011, Milt Beever, Associate Commissioner of SSA's Office of Labor-Management and Employee Relations, responded to Borer's letter, advising that while the Union could solicit for membership or dues on federal property and invite insurance representatives to make presentations to union members about available benefits, insurance representatives could not vend their merchandise nor engage in commercial business or otherwise, solicit from attendees at Union sponsored events on federal property, in accordance with 41 C.F.R. § 102-72.410. (R. Ex. 4).

Benefit Architects is a commercial enterprise established for the purpose of allowing AFGE to offer insurance benefits to AFGE members and to assist the Union with organizing. (Tr. 71). Joshua Silverman is the Regional Vice President of Benefit Architects for the northeastern United States. (Tr. 69-70). Thomas Leonard and Thomas Kienzler were two representatives of Benefit Architects in the Northeast region. (*Id.*). One must be a licensed insurance professional to offer the short-term disability insurance, life insurance and dental benefits provided by the Union to its members, and Benefit Architects processes applications for Union members. (Tr. 124). Benefit Architects representatives also conduct seminars at employee work locations referred to as Lunch and Learns to educate current and prospective AFGE members about the benefits of the insurance as a means of recruiting new members for AFGE. (Tr. 72). Benefit Architects has conducted Lunch and Learns at numerous agencies where AFGE represents employees, including the Social Security Administration, Veterans Administration, Department of Defense, Federal Bureau of Prisons, Department of Labor and the Environmental Protection Agency. (*Id.*). At these events, brochures and leaflets are distributed which promote benefits that are available exclusively to AFGE members. (Tr. 73-75; G.C. Exs. 2, 3, 4, 5 & 6).

One of the items distributed is a double-sided leaflet which, on one side lists various discounts available to AFGE members, and on the other side is an SF 1187 form Request for Payroll Deductions for Labor Organization Dues. (G.C. Ex. 6). Silverman and Leonard testified that they use this leaflet to recruit members for AFGE when making presentations. (Tr. 78, 121).

In May 2012, Patrick Quinn, the Union's Secretary-Treasurer, met with Benefit Architects representatives Leonard and Kienzler at the Respondent's Worcester Field Office. (Tr. 29). They gave Quinn an overview of the services that Benefit Architects offers, which included setting up an enrollment period for Union members to sign up for short-term disability and other benefits. (*Id.*). They showed Quinn the informational recruiting material used at such events. (Tr. 30-32; G.C. Exs. 2, 3, 4, 5 & 6).

After meeting with Leonard and Kienzler, Quinn decided to launch a pilot membership program and Benefit Architects was scheduled to visit 15 of the 18 field offices where the Union had a steward present to serve as the initial contact. (Tr. 28, 36). Quinn put together a schedule and sent an email on June 6 to the managers at each location to give advance notice that Benefit Architects representatives would be visiting their office to conduct a Lunch and Learns seminar. (Tr. 38-41, 54, 64-65; G.C. Ex. 8). Quinn received acknowledgement from management at a few of the offices. (Tr. 41). Benefit Architects sent leaflets to Quinn announcing, "AFGE members are eligible for a new voluntary benefit plan," with the dates when employees could meet with a benefit specialist to enroll for short-term disability insurance, to be posted at each location. (Tr. 38; G.C. Ex. 7). Quinn posted the leaflet on the Union's bulletin board in the break room at the Worcester Field Office. (Tr. 39). On June 12, Quinn sent an email to employees in the Worcester Field Office to inform them that Benefit Architects would be visiting on June 28, 2012. (Tr. 43; G.C. Ex. 9). Quinn also sent a template of the email to the Union stewards at the other offices so they could inform employees at their office location about the scheduled visit. (Tr. 43).

Leonard and Kienzler visited the four largest offices together as a team, and split up to visit the remainder. (Tr. 128, 154). Leonard followed the same procedures at each office visit. (Tr. 128). The Union steward or manager would escort him to the break room where he would setup a table to display the pamphlets describing the different benefits offered to Union members. (Tr. 129-30). Leonard would wait until employees approached him during their break and then he would talk about the various benefits, including insurance benefits, offered by AFGE. (*Id.*). Leonard handed out and received applications for life insurance at some of the Respondent's field offices. (Tr. 131).

On June 28, 2012, Quinn met Leonard and Kienzler when they arrived at the Worcester Field Office and escorted them to the break room. (Tr. 41-42). Quinn observed them in the break room over the course of lunch time, meeting with employees and saw employees filling out paperwork. (Tr. 42). Before Leonard and Kienzler left the office, they gave Quinn two signed SF 1187 forms, which Quinn sent to Respondent on July 3, 2012. (Tr. 43, 45; G.C. Ex. 10).

Near the end of their visit to the Springfield Field Office during the last week of June, Leonard and Kienzler were asked if they could return because some of the employees did not have a chance to talk to them. (Tr. 135-36). When Leonard returned to the office on July 3, the manager told him that he was not allowed to sell or offer insurance or handout brochures while he was in the office. (Tr. 136). The manager said that he was not allowed to hand anything out or receive anything from employees. (*Id.*). In response to this directive, Leonard left all his pamphlets in his car, including the SF 1187 forms. (Tr. 139-40).

It is stipulated by the parties that on July 3, 2012, the Respondent through Nancy Morales, the District Manager of the Springfield office, informed the Union that their representatives for the purpose of discussing insurance benefit plans were not allowed to solicit or take applications or sign up employees for anything while on federal property. (Tr. 7-10).

Leonard experienced a similar incident with management at the Warwick, Rhode Island, Field Office. (Tr. 137). He was told by a manager there that he could not solicit anything, he could talk to the employees but he could not handout or collect forms. (Tr. 137-38). The manager told Leonard they were issued a memorandum about the subject. (Tr. 155). The manager said that Leonard could take the brochures into the break room but could not use them to solicit employees. (Tr. 139).

Leonard called Quinn following the incidents and told him what happened. (Tr. 46-47). Quinn then called Paul Lucas, the Warwick manager and asked what was going on. (Tr. 47). Lucas replied that he had received instructions to advise Benefit Architects representatives that they could not sign employees up and could not fill out paperwork because it was considered solicitation on government property, which violated "some kind of regulation." (Tr. 48-49).

Following this conversation, Quinn sent an email to Larry Kelly, head of Labor-Management Relations at the Respondent's regional office. (Tr. 48; Jt. Ex. 1). Quinn received a response on July 13, when he was copied on emails sent to Union President Richard Couture. (Tr. 49; Jt. Ex. 1). Kelly stated in his first email that the Code of Federal Regulations, specifically 41 C.F.R. §102-74.410, did not allow "the selling of insurance

products." (Jt. Ex. 1 at 2). Kelly added that "although private insurance vendors invited by the Union can provide information about discounts or insurance plans offered to union members, they cannot, under any circumstance, sell their products on federal property." (*Id.*). In his last email, Kelly wrote, "when I say 'selling,' I mean actually enrolling the employee by having the employee sign a document that concludes a sale." (*Id.*).

There is no evidence that Kelly or anyone at the Social Security Administration contacted the General Services Administration or received guidance regarding the regulation cited in the Kelly email and the regulation is part of the Federal Property Management Regulations System. (Tr. 174). The only guidance Kelly received was a memorandum from Milt Beever and copies of two letters from Beever. (Tr. 169, 178, 190; R. Ex. 6). In June 2012, Kelly also spoke to Krista Ghelkin, Senior Adviser to the Associate Commissioner of Labor-Management and Employee Relations, who reaffirmed the guidance provided by Beever in 2011. (Tr. 190-91).

Before Leonard's experience in July at the Springfield and Warwick offices, he had never been told by management at any federal facility that he could not hand out forms or that he could not collect applications from employees. (Tr. 155). Silverman testified that he had never been told by management at any federal facility that he was not allowed to have insurance forms filled out during Lunch and Learns seminars. (Tr. 112-13).

POSITIONS OF THE PARTIES

General Counsel

With respect to the Motion to Dismiss, the General Counsel argues that the Respondent's motion must be denied because the charge was timely filed under the Statute. The General Counsel asserts that the Complaint, which was filed on August 8, 2012, was filed within six months of the Respondent's alleged unfair labor practice conduct in July 2012. Since the Complaint is based on overt conduct that allegedly interfered, restrained and coerced the exercise of § 7102 rights, which occurred within six months of the filing of the charge, the General Counsel contends that it was timely filed.

The General Counsel also argues that the Respondent has not presented evidence that the Charging Party had knowledge in 2011 of the correspondence between AFGE General Counsel Borer and Milt Beever, or the Respondent's policy. The General Counsel cites the Affidavit of Richard Couture as evidence that the Charging Party was unaware of such correspondence. (G.C. Ex. L, Attach. 1).

The General Counsel relies on *Corps of Engineers* for its contention that the factual allegations in the Complaint must be accepted as true and all reasonable inferences must be drawn in favor of the General Counsel in evaluating the merits of the Respondent's Motion to Dismiss. *U.S. Army Corps of Eng'rs, Waterways Experiment Station, ERDC, Vicksburg, Miss.*, 59 FLRA 835, 838-39 (2004) (quoting *Hoover v. Ronwin*, 466 U.S. 558, 565-66 (1984) (*Corps of Engineers*). The General Counsel adds that the Respondent did not present any additional evidence at the hearing in support of its argument that the charge was untimely filed.

The General Counsel further claims that the Motion to Dismiss should be denied because the Respondent's conduct in interfering with the Charging Party's 7102 rights can be viewed as a continuing violation. The General Counsel contends that the Respondent's actions are similar to the agency's actions in *Portsmouth* where the Authority found that the agency had committed a violation by continuing to maintain and enforce a rule that interfered with employees' statutory rights within six months before the charge was filed. *Portsmouth Naval Shipyard & Dep't of the Navy, (Wash., D.C.)*, 23 FLRA 475 (1986) (*Portsmouth*). The General Counsel asserts that the fact that Respondent relied on an interpretation of the regulation, which was communicated only to AFGE headquarters more than a year before the charge was filed, does not make the charge untimely.

Lastly, with regards to the timeliness of the charge, the General Counsel argues that there is no risk of the recollection of witnesses being clouded, the availability of witness being diminished, or an increase in the loss of documentary evidence. The General Counsel reasons that none of these risks exist because the conduct alleged in the complaint occurred within a month before the charge was filed.

With respect to the Complaint, the General Counsel asserts that the Respondent's statements and conduct constituted an overly broad no-solicitation/no-distribution rule and therefore interfered with, restrained and coerced employees in the exercise of their § 7102 rights. The General Counsel argues that by prohibiting Benefit Architects' representatives from handing out or receiving anything, from signing employees up for anything, and from selling insurance, the Respondent interfered with employees in the exercise of their right to join and support the union, and to learn the advantages of union membership. The General Counsel points out there is no evidence that Benefit Architects' representatives' presence or activity in the break room at Respondent's offices disrupted the Respondent's operations or that there were any unusual circumstances surrounding their presence or activity.

The General Counsel contends the rule in *HHS*, that an agency violates employees' § 7102 rights and thus § 7116(a)(1) of the Statute when it enforces overly broad no-solicitation/no-distribution rules, is an applicable standard for this case. *Dep't of HHS, SSA, Se. Program Serv. Ctr.*, 21 FLRA 748, 751-52 (1986) (*HHS*). The General Counsel asserts that access is not an issue here and the Respondent admits that the Benefit Architects representatives were the designated representatives of the Union for the purposes of discussing insurance plans and soliciting enrollment in the plans as a benefit of membership in AFGE. The General Counsel points out that the Respondent did not raise *Babcock & Wilcox* as a defense, therefore the identity of the union's representative as a non-employee is not an issue. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) (*Babcock & Wilcox*). The General Counsel asserts that since the Union here is the designated agent of the exclusive representative, AFGE, the Union's right to solicit membership is derived from the bargaining unit employees' § 7102 rights.

The General Counsel argues that the Benefit Architects representatives' activity in distributing material promoting union-only benefit plans and in accepting applications for benefits was part and parcel of membership solicitation and in effect, was no different from the union's activity in *Ogden. U.S. Dep't of the Treas., IRS, Ogden Serv. Ctr.*, 42 FLRA 1034, 1050-52 (1991) (*Ogden*). The General Counsel asserts that Union's activity in this case served the same purposes as the fundraising in *Ogden*, which included soliciting the

assistance and membership of employees, obtaining significant status for the union in the minds of employees, and showing the union's interest in all employees. The General Counsel contends that since the benefits offered by the Union could only be discussed by licensed insurance professionals, Leonard and Kienzler were performing vital roles in the Union's membership drive. The Respondent's restrictions upon their interactions with employees deprived them of the opportunity to learn the advantages of AFGE membership and join the Union to obtain the benefits of membership.

The General Counsel contends that the Respondent committed a violation when the Springfield District Manager told the Union's representative that Leonard and Kienzler were not allowed to solicit or take applications or sign employees up for anything on federal property. The General Counsel claims the evidence shows that Leonard was told by a manager at the Springfield Office that he could not sell insurance, handout anything or receive anything from employees while he was there. The General Counsel contends the manager's directive prohibited Leonard from distributing promotional material or signing up employees for union membership and was thus a violation in the form of an overly broad no-solicitation/no-distribution rule.

The General Counsel also argues that the Respondent committed a similar violation when its Field Office Manager in Warwick, Rhode Island, informed Leonard that he could not solicit anything, hand things out or collect anything.

The General Counsel contends that the Respondent also committed a violation by telling the Union that Benefit Architects representatives could not sell their products on federal property under any circumstances. The General Counsel asserts that the practical effect of the emails from Kelly, as the Respondent's representative, was to deter the Union from expanding its membership drive and to deprive employees of the opportunity to join AFGE and learn the advantages of union membership from licensed insurance professionals designated by the Union. The General Counsel claims there is no evidence that the presence or activity of the Benefit Architects representatives caused disruption to the Respondent's operations.

Further, the General Counsel asserts that the defense asserted by the Respondent is not valid because the Respondent's interpretation of the regulation at issue was not supported by any authoritative interpretation or guidance and is inconsistent with the plain language of the regulation. The General Counsel points out that the General Services Administration has not published any guidance or interpretation of the regulation and that nothing prohibited the Respondent from requesting interpretation or guidance related to this matter. The General Counsel argues that the Authority applies principles of statutory construction to give effect to all provisions and avoid internal inconsistencies. The General Counsel contends that the Benefit Architects representatives were not "vending merchandise" under the regulation. The General Counsel points out that the representatives were in the break room during their visit and did not approach employees. They also did not accept payment for insurance plans and did not commit an insurance carrier to issue a policy. The representatives also did not make any public statements and interacted with employees on a one-on-one basis. The General Counsel also argues that because the regulation addresses solicitation of union

membership or dues under the Civil Service Reform Act of 1978 and the Respondent has interpreted the regulation as requiring it to restrict the activity of the Union's designated representatives, then the Authority must give effect to both the regulation and the Statute and harmonize them if there is an apparent conflict.

The General Counsel asserts there is only an apparent conflict because the Respondent has misinterpreted the regulation as prohibiting activity that is part and parcel of lawful union membership solicitation. The General Counsel cites *GSA* where the Authority held that GSA could not rely on its regulations to prohibit or restrict employees from distributing brochures promoting union membership benefits in a public area in a federal building and emphasized that employees' right to engage in protected activity flows from the Statute. *Gen. Serv. Admin.*, 29 FLRA 684 (1987) (*GSA*). The General Counsel also contends that the activity of Benefit Architects representatives in this case was less commercial and involved less vending than that sanctioned by the Authority in *Ogden*. The General Counsel reasons that it would be illogical to protect the solicitation of an SF Form 1187 but to permit prohibition of collecting benefit and direct deposit forms related thereto. The General Counsel argues that the conduct of Benefit Architects representatives falls within the regulation's exception for solicitation of labor organization membership. Lastly, the General Counsel points out the inconsistency of the Respondent's regulatory interpretation because the regulation actually permits commercial activities that are sponsored by recognized Federal employee associations and on-site child care centers.

Charging Party

The Charging Party also asserts that the charge was timely filed and contends that the Motion to Dismiss should be denied. The Charging Party maintains that the charge was timely because AFGE Local 1164 was not a recipient of the letter sent to the General Counsel of AFGE in Washington, DC and there is no evidence that Local 1164 knew of the letter. The Charging Party asserts that the ULP was filed by Local 1164 well within six months of obtaining knowledge of the SSA's restrictions on its union organizing activities in July of 2012.

Like the General Counsel, the Charging Party cites *Portsmouth* in support of its contention that the Respondent's conduct is a continuing violation and not time-barred by § 7118(a)(4)(A) of the Statute because the Respondent continues to impose the restriction upon its organizational activity. The Charging Party asserts that the policy articulated by SSA in its June 2011, letter to the AFGE General Counsel was an unlawful infringement of the Union's right to solicit membership and that the actions of local management in July 2012 represents enforcement of an unlawful policy. The Charging Party also relies on *Dep't of the Interior* to argue that the fact that the head of the labor relations office of SSA had earlier advised the national office of AFGE of its policy may have relevance to the ULP proceedings but it does not render the charge untimely. *Dep't of the Interior, Lower Colo. Dams Project, Water & Power Res. Serv.*, 14 FLRA 539, 543 (1984).

The Charging Party contends that the Respondent has misread the GSA regulation. It states that promoting the various financial benefits and advantages of union membership is an inherent and long-standing component of AFGE's solicitation of membership and dues at SSA offices during non-duty time in non-work areas. The Charging Party claims that

exception (c) to the regulation allows the Union to engage in the type of membership solicitation at issue in this case. 41 C.F.R. § 102-74.410(c). The Charging Party asserts that the SSA violated § 7116(a)(1) and § 7102 by curtailing the organizing activities by AFGE designated representatives from Benefit Architects at the Springfield, MA and Warwick, RI offices and by sending an email articulating the policy on July 13, 2012. The Charging Party adds that the GSA regulations specifically indicate that none of its provisions should be read in a way that conflicts with or overrides any other law or regulation.

The Charging Party also looks to section (f) of the regulation, which permits "commercial activities" at SSA offices by "recognized federal employee associations," and states that it would be illogical and discriminatory to labor organizations to exclude them from the exception as they are the one association whose recognition is required by the Statute, whereas other employee associations are only voluntarily recognized by an agency. The Charging Party contends that this makes the regulation unlawful as written.

Respondent

The Respondent argues that the complaint should be dismissed because the charge was not timely. It contends that the general counsel for AFGE was notified in 2011 that the Respondent did not allow insurance representatives to vend or otherwise solicit their products on federal property. The Respondent contends that the notice given to AFGE should be imputed to its agent and that the Charging Party/Union waited more than a year later to file the ULP and argues that since it was filed more than six months after AFGE was informed of the policy, the charge is not timely and should be dismissed.

The Respondent rejects the General Counsel's argument that the Union is excluded from the time limitation because the Respondent is enforcing an "unlawful rule." The Respondent contends that the Charging Party has not presented any evidence that the agency's policy is unlawful. The Respondent asserts that the Charging Party has the burden of proof to show that the agency is interpreting the GSA regulation improperly. It also states that the Charging Party's witnesses did not speak to the regulation in question, only to the question of selling. The Respondent asserts that neither the General Counsel nor the Charging Party made a genuine attempt to disprove the Respondent's position that the GSA regulation prohibits commercial activity on federal property.

The Respondent contends that the "overt conduct" that the General Counsel alleged as occurring within six months of the charge, involves behavior prohibited by a policy that was communicated to the Charging Party in 2011. The Respondent argues that any charge should have been filed within six months of Borer receiving the letter from SSA.

The Respondent rebuffs the General Counsel's argument that the Motion to Dismiss should be denied because the agency notified the AFGE's national office and not Local 1164. Respondent points out that the Charging Party is represented by counsel in this case from AFGE's national office and that Borer, who received the initial letter from the agency, submitted a request to postpone the hearing. The Respondent asserts that these facts go against the argument that notifying the AFGE national office was not sufficient notice to Local 1164.

The Respondent also rejects the Charging Party's contention that it did not have knowledge of the letter or the Respondent's policy. The Respondent points out that Silverman, the General Counsel's own witness, knew about the policy. The Respondent also claims the judge does not need to accept the General Counsel's allegations that the Union did not know of the policy as true because the evidence now in the record reveals otherwise and the motion is not being resolved on the pleadings alone.

The Respondent argues that evidence of its management prohibiting insurance representatives from handing out brochures and enrolling bargaining unit employees in union membership should be stricken from the record because it was not presented to the Respondent before the hearing. The Respondent contends that the Charging Party claimed, for the first time during the hearing, that the agency prohibited the insurance representatives designated by the Union from handing out documents and enrolling interested bargaining unit employees into the Union.

The Respondent argues that the email exchanges in Joint Exhibit 1 do not support this allegation. The Respondent also asserts that the testimony of Leonard and Quinn was conflicting. Leonard testified that he couldn't "sell" anything or hand out anything and Quinn testified that it was not clear whether they were not allowed to enroll employees into the Union. The Respondent contends there is a discrepancy between statements made in the General Counsel's pre-hearing disclosure and Leonard's actual testimony. The General Counsel proposed Leonard would testify that the manager told him he could not sell insurance and accept applications from employees. However, during the hearing he testified that he could not hand anything out to employees. The Respondent also looks to testimony from Quinn where he stated that Leonard told him he was limited by managers to talking to employees and providing information. The Respondent also asserts that it was unlikely Quinn would have left out the fact that Leonard was not allowed to hand anything out on agency property from his email to Kelly, which he wrote right after talking to Leonard.

The Respondent further argues that Leonard's testimony conflicts with the stipulated testimony of agency witness Nancy Morales who stated that, insurance "representatives for the purposes described in paragraph 9 of the complaint were not allowed to solicit or take applications or sign employees up for anything while on federal property." (Tr. 7-8). The Respondent contends that this statement only referred to signing up for insurance and not for union membership. The Respondent contends that the General Counsel's witness' testimony to the contrary should be stricken from the record. The Respondent asserts that it would not have agreed to the stipulated testimony if it knew the Union witness would testify to something different than stipulated. The Respondent requests that testimony alleging that it prevented union representatives from signing up employees for the Union should be stricken from the record.

The Respondent contends that it did not commit a ULP because it was only enforcing a government-wide regulation and did not interfere with the Union's statutory rights. The Respondent cites the language of the Regulation, which states that, "All persons entering federal property are prohibited from . . . vending merchandise of all kinds . . . ." (R. Br. at 16). The Respondent asserts that exception (c) to the regulation only allows labor unions such as AFGE to solicit membership and dues. It adds that the exception does not allow the

union to have a private party "vend merchandise" for profit at a union event, which the Respondent asserts is activity outside the scope of that exception. The Respondent argues that the authors of the Regulation could have clearly extended commercial activity rights to labor organizations were that the intent.

The Respondent argues that to allow an insurance representative, coming in under the guise of union membership solicitation, to sell insurance on agency property would open up the gate for any private organization invited by the union to vend merchandise on agency property and the Respondent maintains that this was not the intent of the regulation's authors. The Respondent cites *Prisons* where the Authority found that an agency's interpretation of its own regulation carries much weight if it is publicly articulated prior to litigation over the disputed provision and contends that here there is no doubt it made its policy public well before the charge was filed. *U.S. DOJ, Fed. BOP, Med. Facility for Fed. Prisons*, 51 FLRA 1126, 1136 (1996) (*Prisons).* The Respondent states that it provided its interpretation of the regulation in writing to the Charging Party and published it in the form of guidance to its internal labor relations staff.

The Respondent contends that neither the General Counsel nor the Charging Party have produced evidence that the agency interfered, restrained, or coerced the union or bargaining unit employees in the exercise of their rights under the Statute. The Respondent points out that the Union still held their sponsored events and there was no evidence that management denied employees the right to attend the events or that insurance representatives were prohibited from handing out brochures, applications and providing information about insurance benefits during the events.

The Respondent asserts that the General Counsel did not present any evidence that the agency's interpretation of the Regulation was contrary to law. It adds that the General Counsel spent most of its presentation at the hearing trying to prove that that the Benefit Architects representatives were not selling insurance. The Respondent reasons that the General Counsel would not have dedicated so much time to the issue of selling if it believed that the insurance representatives were free to engage in commercial activity while on federal property.

The Respondent asserts that its interpretation of the regulation is reasonable in light of the plain language. The Respondent contends that the GSA regulation clearly and plainly prohibits commercial activity on federal property and clearly outlines the exceptions. The Respondent asserts that the regulation clearly defines the scope of its limited exception to the prohibition of commercial activity and therefore the Union's right to commercial activity is limited to solicitation of membership and dues. The Respondent cites the Authority's holding that where a statute's language is plain, the only function of the courts is to enforce it according to its terms. *Nat'l Air Traffic Controllers Ass'n, MEBA, AFL-CIO*, 51 FLRA 204, 207 (1995) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917). The Respondent also cites *Air Traffic Controllers'* holding that judicial inquiry is complete when the terms of the statute are unambiguous unless there is an exceptional circumstance and asserts that there no evidence of an exceptional circumstance in this case.

The Respondent disputes the General Counsel's assertion that the Benefit Architects' representatives' actions in informing employees about member only benefits and accepting applications was part and parcel of membership solicitation. The Respondent contends the instant case is significantly different than what occurred in *NTEU*, which was cited by the General Counsel. *Nat'l Treasury Employees Union*, 19 FLRA 224 (1985) (*NTEU*). The union in *NTEU* was just passing out information whereas here the Respondent argues that the Union wanted to go a step further.

The Respondent argues that *Ogden* does not support the General Counsel's contention that, because the insurance enrollment solicitation occurred in non-work areas during non-work hours the Respondent's prohibition of these activities violated employees' § 7102 rights. The Respondent argues that *Ogden* is not applicable because the issue in that case was whether the agency violated the statute by prohibiting union fundraising activities and the issue here is whether private insurance professionals can sell insurance for which they receive commissions. The Respondent asserts that the Authority has not found this type of commercial activity protected by the Statute. The Respondent reasons that if the General Counsel's position were accepted, then the Union and employees could engage in any type of activity on agency property as long as they were on break, in non-work areas, and call it membership solicitation, including booking rental cars using a union discount or selling flowers with a discount for union members. The Respondent states that it would be ridiculous to allow any company to sell goods on agency property just because they have an affiliation with the union. The Respondent asserts that this could not have been the General Services Administration's intent and cites *GSA*, where it challenged union employees' right to distribute union literature on government property, as support for its assertion. *GSA*, 29 FLRA at 692. The Respondent reasons that if the GSA wanted to prohibit a lesser activity such as handing out union literature, the enrolling of employees in insurance plans here is certainly outside of the type of commercial activity the GSA permits on federal property.

The Respondent argues that the facts in this case show that the Benefit Architects representatives were selling insurance and thus engaged in commercial activity. The Respondent points out that the representatives collected applications and direct deposit information to activate employee enrollment in the products offered. The Respondent asserts that Leonard's testimony contradicts the General Counsel's claim that the representatives' actions were non-commercial in nature. It points to statements made by Leonard that he was not allowed by management to sell insurance and that he had to be licensed to sell insurance products offered to AFGE members. The Respondent reasons that if the representatives were not engaged in selling insurance at the Union's Lunch and Learns, then those making the presentations would not need to be licensed insurance agents. The Respondent asserts that the act of accepting signed applications for insurance offered by a private, for-profit company is commercial activity and thus prohibited by the GSA regulation.

The Respondent rejects the General Counsel's and Charging Party's argument that the union is excluded from the regulation's exceptions because it should be considered an employee association as referenced in subsection (f). Respondent states that subsection (f) is inapplicable because a union is not a "Federal employee association" as contemplated by the regulation and is instead a "labor organization" as referred to in subsection (c). Title 41 C.F.R. § 102-71.20 defines a "Recognized labor organization" as, "a labor organization

recognized under [T]itle VII of the Civil Service Reform Act of 1978 (Pub. L. No. 95-454, as amended, governing labor-management relations." The Respondent also notes that Congress observed in House Report No. 104-230, August 4, 1995, Congressional Record Vol. 141 (1995), that Federal employee associations included credit unions, child care centers, health and fitness organizations, recreational organizations and professional associations. The Respondent emphasizes that subsection (f) of the regulation includes child care centers among employee associations and if the authors of the regulation intended to include labor organizations in subsection (f) it would have noted both labor organizations and Federal employee associations. The Respondent concludes that the exclusion of labor organizations from subsection (f) indicates that it is inapplicable to unions.

The Respondent asserts that the General Counsel did not meet its burden of proof that it violated the Statute and thus the complaint should be dismissed. The Authority's Regulations require that the burden of proving allegations in a complaint must be by a preponderance of the evidence, which is defined as "the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. (5 C.F.R. § 1201.56(c)(2)). The Respondent contends that the General Counsel has not shown that it is more than likely true that the Respondent is enforcing an illegal policy. The Respondent also observes that the only witnesses called by the General Counsel were the local union representative and those with a financial stake in the dispute, who cannot be trusted to give unbiased, professional opinions.

The Respondent also argues that a remedy which would allow Benefit Architects representatives to continue operating in the same manner as before is improper because the agency never allowed them to engage in commercial activity. The Charging Party is still allowed to invite insurance representatives to agency property to give presentations, answer questions and handout information. Further, Respondent requests that if a violation is found, that notice be limited to postings in the Springfield, MA and Warwick, RI field offices, signed by the Area Manager.

ANALYSIS AND CONCLUSIONS

Section 7118(a)(4)(A) of the Statute provides, in pertinent part, that: "[N]o complaint shall be issued based on any alleged unfair labor practice which occurred more than six months before the filing of the charge with the Authority." Where an agency continues to maintain and enforce a rule that violates employees' rights under the Statute, there is a continuing violation. *Portsmouth.* A continuing violation will not be time barred by § 7118(a)(4)(A) of the Statute where the Respondent continues to maintain and enforce an unlawful rule within six months preceding the filing of the unfair labor practice charge. *Portsmouth*, 23 FLRA at 479.

Here the complaint alleges that the Respondent enacted a rule that interfered with employees' rights in violation of § 7116(a)(1) of the Statute. The complaint further alleges that the Respondent committed violations of the Statute when it acted to enforce this policy at its Warwick and Springfield Field Offices in July 2012. The Respondent's actions, as

alleged, in July 2012, constitute a continuing violation and thus occurred well within the six month period preceding the charge filed in August 2012. The complaint is therefore not time-barred by 7118(a)(4) (A) of the Statute and the Respondent's Motion to Dismiss is denied.

Statements Made by the General Counsel's Witnesses Are Not Stricken From the Record

The Respondent contends that witnesses for the General Counsel asserted for the first time during the hearing that the agency prevented the Benefit Architects representatives from handing out anything or signing up employees for union membership. The Respondent further argues that the evidence does not support the statements by the General Counsel's witnesses and that the witnesses gave conflicting testimony. The Respondent argues that the statements should be stricken from the record; however, the Respondent's position is without merit.

The Respondent had notice of the assertions made by Leonard before the hearing. The General Counsel alleged in paragraph 11 of the complaint that the Respondent "informed the Charging Party that Leonard and Kienzler were not allowed to solicit or take applications or sign employees up for anything while on federal property." The wording of this allegation did not limit it to enrolling employees in insurance plans and corresponds with Leonard's testimony at the hearing that he was "not allowed to hand anything out or receive anything from employees." (Tr. 136). The synopsis provided by the General Counsel in its pre-hearing disclosures in which Leonard would testify that he was told by management that he could not sell insurance and could not accept applications does not contradict this allegation either. Further, Leonard's testimony at the hearing was not at odds with the stipulated testimony of Respondent's witness Morales. The Respondent also did not object to Leonard's testimony on the subject during the hearing. Therefore Leonard's statements that he was not allowed to hand out anything or receive anything from employees are not stricken from the record.

The Respondent's Policy and Conduct Violated Section 7116

Section 7102 of the Statute protects employees in the exercise of the right to form, join, or assist a labor organization, or to refrain from any such activity, without fear of penalty or reprisal. Section 7116(a)(1) provides that it is an unfair labor practice for an agency to interfere with, restrain, or coerce any employee in the exercise of their § 7102 rights. Section 7102 protects employees' rights to meet and talk with non-employee union representatives in non-work areas where members of the public are allowed free access, and an agency violates § 7116(a)(1) by prohibiting employees from meeting with representatives of a union in those areas. *Dep't of Commerce, Bureau of the Census*, 26 FLRA 719, 721-22 (1987) (*Commerce*). Section 7102 also gives employees the right to solicit membership on behalf of a union in non-work areas. *Okla. City Air Logistics Ctr. (AFLC), Tinker AFB, Okla.*, 6 FLRA 159 (1981). Lunch and learns seminars conducted by a union constitute an exercise of forming, joining or assisting a labor organization within the meaning of § 7102 of the Statute and attendance at such seminars is an exercise of the right protected under § 7102 to solicit membership. *U.S. Dep't of the Navy, NAS, Pensacola, Fla.*, 61 FLRA 562 (2006). Solicitation of union membership protected by the Statute includes fundraising on an

agency's premises through baked goods and used book sales by employees in non-work areas during non-work time. *Ogden*, 42 FLRA at 1050-52. The Authority has held that employees have the right to distribute literature on behalf of a union in non-work areas during non-work time. *Internal Revenue Serv., N. Atlantic Serv. Ctr., Andover, Mass.*, 7 FLRA 596 (1982).

The Respondents violated the 7102 rights of bargaining unit employees by imposing limitations upon the Union's designated representatives' interaction with employees on non-work time in non-work areas. There was no evidence that Benefit Architects representatives' actions in the break room of signing up employees for union membership and insurance disrupted the Respondent's operations. There also was no evidence of any unusual circumstances related to their presence on Respondent's property. The Respondent's Springfield District Manager informed the Union representative that Leonard and Kienzler were not allowed to solicit or take applications or sign up employees for anything while on federal property. Leonard complied by leaving his promotional materials and SF 1187 forms in his car before meeting with employees. Leonard and Kienzler, as the Union's designated representatives, were therefore prevented from distributing union promotional material or signing up employees for AFGE membership. The Respondent did not produce any evidence to rebut these claims. The promotional materials that Leonard and Kienzler sought to hand out were the same type that the Authority held were within the scope of activity protected under § 7102 in *GSA*. The Respondent thus violated § 7116(a)(1) because its actions prohibited distribution of these materials and interfered with employees in the exercise of their § 7102 rights to learn about the advantages of union membership and join the union. In the same manner, the Respondent violated § 7116(a)(1) when the Warwick, Rhode Island Field Office Manager told Leonard that he could not solicit anything, hand forms out or collect anything while he was meeting with employees.

The Respondent also committed a violation by sending emails to the Union prohibiting the Union's designated representatives from "selling" insurance in connection with the Union's solicitation for membership. The Authority has held that an agency violates the protected rights of employees under § 7102 when it enforces overly broad no-solicitation/no-distribution rules, absent a showing of disruption of agency operations or unusual circumstances. *HHS*, 21 FLRA at 751-52. If an agency applies its regulations so as to prohibit unit employees from exercising rights under § 7102 of the Statute, such action constitutes unlawful interference with those rights in violation of § 7116(a)(1). *See U.S. Dep't of the Navy, Naval Aviation Depot, Naval Air Station Alameda, Alameda, Cal.*, 38 FLRA 567 (1990). It is clear from the record that the Union utilized Benefit Architects as its representative at the Respondent's offices to solicit membership on the Union's behalf. (Tr. 33-37, 43-45, 50-52). There is also evidence that the enrollment of bargaining unit employees for union membership and union-only insurance programs was an important aspect of the Union's membership solicitation effort. (Tr. 46, 49-50, 64, 67). As a result of the emails from the Respondent to the Union, the Union was forced to put the pilot program to solicit new members on hold. The effect of the Respondent's policy was that the Union missed out on opportunities to recruit new members and current union employees missed out on a chance to take advantage of union membership benefits. The Respondent enforced an overly broad non-solicitation policy that interfered with the 7102 rights of employees. The Respondent admits that subsection (c) to 41 C.F.R. § 102-74.410 allows the Union to solicit

membership on agency property. The question in this case is whether the Respondent was justified in interpreting the regulation in a way which interfered with employees' 7102 rights to interact with the Union's designated representatives during their solicitation activities.

As an initial matter, the Respondent is not entitled to deference of an agency's interpretation of its own enabling statute because the regulation at issue here was promulgated under the GSA's statutory authority, not the Respondent's. *U.S. Dep't of the Air Force, 436th Airlift Wing, Dover AFB, Dover, Del.*, 57 FLRA 304, 307 (2001) (quoting *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). In another case involving the Federal Property Management Regulations, the Authority held the GSA could not rely on its own regulation to restrict employees from distributing brochures promoting union membership benefits in public areas of a federal building. *GSA*, 29 FLRA at 692. The Authority in that case emphasized that an employee's right to engage in protected activity flowed from the Statute, and GSA could not subject the activity to scrutiny under the federal property management regulations. *Id.* at 690. The GSA regulation in question, 41 C.F.R. § 102-74.410, does not require the Respondent to prohibit commercial activities sponsored by the Union, contrary to the Respondent's assertion although it is undisputed that the regulation applies to the Respondent's Field Offices.

The GSA regulation, in relevant part, prohibits "vending merchandise" by persons on federal property. 41 C.F.R. § 102-74.410. I agree with the Respondent that when "vending merchandise" is given a broad interpretation, Benefit Architects representatives were engaged in "vending merchandise" under 41 C.F.R. § 102-74.410, when they explained the benefits of and enrolled employees in union-only insurance plans. However, the regulation also provides exceptions to this prohibition that must be interpreted equally broadly. These exceptions include subsection (f), which provides an exception for "[c]ommercial activities sponsored by recognized Federal employee associations and on-site child care centers." 41 C.F.R. § 102-74.410(f). Neither the regulation nor the legislative history defines "recognized Federal employee associations," therefore the terms in the provision are understood to have their ordinary meaning, which includes dictionary definitions. *Am. Fed'n of Gov't Employees, Local 446*, 59 FLRA 461, 463-64 (2003). The term "association" is defined as "a group of people organized for a joint purpose,"[1] and "an organization of persons having a common interest."[2] As a labor organization representing federal employees, a union fits squarely within this definition. The Respondent's interpretation that "Federal employee associations" under the regulation would only include organizations such as, "credit unions, child care centers, health and fitness organizations, and professional associations," but not labor unions is not reasonable as labor organizations are specifically authorized by law under the Federal Service Labor-Management Relations Statute. I find

[1] "Association". Oxford Dictionaries. Oxford University Press. http://www.oxforddictionaries.com/us/definition/american_english/association (Accessed September 16, 2014).

[2] "Association." Merriam-Webster.com. http://www.merriam-webster.com/dictionary/association. (Accessed September 22, 2014).

that the activity of the Benefit Architects representatives' activity of "selling" insurance in connection with the Union's membership solicitation efforts falls under subsection (f) of the regulation for "commercial activities sponsored by recognized Federal employee associations. . . ."

The Respondent's position is further undermined by the testimony of Silverman who indicated that he has never been prevented from enrolling employees for such insurance at other federal agencies that are subject to the same regulation as the Respondent. It is important to note that the Respondent never attempted to contact the General Services Administration to request an interpretation of the regulation and thus, never received any confirmation that their narrow interpretation was proper. To the extent that the Respondent seeks to interpret the regulation in a manner that infringes upon the Union's membership solicitation activities, such a position cannot be validated absent an authoritative opinion from the General Services Administration indicating such, which should also explain how such activity is authorized on other federal properties.

REMEDY

The General Counsel seeks a posting and electronic dissemination of the Notice in this matter. In accordance with the Authority's recent decision that unfair labor practice notices should, as a matter of course, be posted on bulletin boards and electronically whenever an agency uses such methods to communicate with bargaining unit employees, such postings are ordered. *See U.S. Dep't of Justice, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014).

CONCLUSION

I find that the GSA regulation cited by the Respondent as justification for its infringement of the Union's right to solicit membership did not require or support the prohibitions it imposed and therefore the Respondent violated the Statute. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the Social Security Administration, Boston Region, Boston, Massachusetts, shall:

1. Cease and desist from:

(a) Prohibiting the American Federation of Government Employees, AFL-CIO, Local 1164 (AFGE/Union), acting through the Benefit Architects as its designated representative for the purpose of informing employees about insurance benefit plans available to the AFGE members, from soliciting membership in the AFGE and enrollment in benefit plans while meeting in non-work areas with bargaining unit employees during the employees' non-work time.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

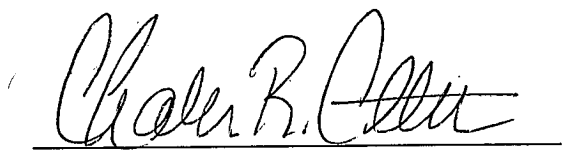
(a) Permit designated representatives of the AFGE Local 1164, to solicit membership in the Union and enrollment in benefit plans, and to distribute literature and to accept applications for benefits, while meeting in non-work areas with bargaining unit employees during the employees' non-work time.

(b) Post at its Field Offices and other facilities in the Boston Region where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Regional Commissioner, Boston Region, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Send, by electronic email, the Notice to all AFGE Local 1164 bargaining unit employees at Social Security Administration, Boston Region. The Notice will be posted by email on the same day that the Notice is physically posted.

(d) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Boston Region, Federal Labor Relations Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., February 24, 2015



CHARLES R. CENTER
Chief Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF

THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Social Security Administration, Boston Region, Boston, Massachusetts, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere, restrain, or coerce employees in the exercise of the right under § 7102 of the Statute to form, join, or assist a labor organization, or to refrain from forming, joining, or assisting a labor organization, freely and without fear of penalty or reprisal.

WE WILL NOT interfere with the right of employees under § 7102 of the Statute to join the American Federation of Government Employees, AFL-CIO, Local 1164 (AFGE/Union), during their non-work time and in a non-work area when they meet with a representative from the Benefit Architects, a firm authorized by the AFGE to offer insurance plans to AFGE Local 1164 members.

WE WILL NOT deny employees the opportunity during their non-work time to meet with a representative designated by AFGE Local 1164, in a non-work area of our offices to learn about the benefits of membership in the AFGE and to apply for benefits that are available only to AFGE Local 1164 members when they meet with a Benefit Architects representative designated by the Union.

WE WILL, permit Benefit Architects, the designated representative of the Union to solicit membership in the AFGE and to distribute literature about the benefits of AFGE Local 1164 membership during meetings in non-work areas with employees on their non-work time, and to accept from employees' dues authorizations and applications for benefits offered exclusively to the AFGE members.

_____

(Agency/Activity)

Dated: _____ By: _____

(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Boston Regional Office, Federal Labor Relations Authority, whose address is: 10 Causeway Street, Suite 472, Boston, MA, 02222, and whose telephone number is: 617-565-5100.