

IN THE MATTER OF ARBITRATION

between

THE STATE OF WASHINGTON

Employer

and

**WASHINGTON FEDERATION OF STATE EMPLOYEES
AFSCME, COUNCIL 28**

Union

OPINION AND AWARD

OF

**M. ZANE LUMBLEY,
ARBITRATOR**

Grievances: Distribution of Union Information

AAA Case No. 75 390 00453 05 LYMC

Date Issued: September 5, 2006

OPINION

PROCEDURAL MATTERS

The Arbitrator was selected by mutual agreement of the parties pursuant to Article 29 of their July 1, 2005, to June 30, 2007, collective bargaining agreement (hereinafter "Agreement"). A hearing was held before the undersigned on May 23, 2006, in Tumwater, Washington. The State of Washington (hereinafter "Employer" or "State") was represented by Washington State Assistant Attorney Mitchel R. Sachs, Esq. Washington Federation of State Employees, AFSCME, Council 28 (hereinafter "Union" or "WFSE") was represented by Gregory M. Rhodes, Esq. of the law firm of Younglove Lyman & Coker, P.L.L.C.

The parties stipulated to the substantive and procedural arbitrability of the dispute and agreed that the controversy was properly before the Arbitrator for decision. At the hearing, the testimony of witness was taken under oath administered by the Arbitrator. The parties presented documentary evidence and were afforded full opportunity to examine and cross-examine witnesses and to argue their respective cases. No court reporter was present.

The parties agreed to file posthearing briefs on or before July 7, 2006, and subsequently agreed to postpone them to July 21, 2006. Timely briefs were received by the undersigned via the American Arbitration Association on July 24, 2006, and the record was closed. Thereafter, the parties granted the Arbitrator's request for a nine-day extension of time to decide the matter to September 6, 2006.

ISSUE

The parties were unable to agree on a statement of the issue to be resolved.

The Union proposed the following:

1. Under the collective bargaining agreement and all relevant laws and precedents, should staff be given the right to distribute information via email, electronic bulletin board and intra-office mail?
2. Is the denial of the right to distribute information via email, electronic bulletin board and intra-office mail an unfair labor practice?
3. Is either of the questions above is answered in the affirmative, what is the appropriate remedy?

The Employer suggested the following statement of the issues:

1. Was the collective bargaining agreement violated by not allowing bargaining unit members to distribute Union information in the workplace through email or the electronic bulletin board or to distribute hard copies of information to employees?
2. If so, what is the appropriate remedy?¹

Having now had the opportunity to consider the entirety of the record before me,

I believe the following fairly characterizes the parties' dispute:

1. Did the Employer violate the Agreement by refusing to allow bargaining unit members to distribute Union information in the workplace via any method other than the tangible bulletin boards provided by the Employer for that purpose?
2. If so, what is the appropriate remedy?

¹ On brief the Employer changed its proposed statement of the issues to the following:

- A. Did the union prove that DSHS violated the CBA because the union proved that the CBA authorizes the union to place union communications in places other than the designated bulletin boards, to specifically include union communication in employee mailboxes, cubicles, staff desks and websites?
- B. May the union use the grievance process to bypass limits in the CBA and gain privileges requested but denied during the negotiation of the CBA?

RELEVANT PROVISIONS OF THE AGREEMENT

The relevant provisions of the Agreement are:

ARTICLE 29 GRIEVANCE PROCEDURE

...

29.4 Filing and Processing – Departments of Corrections and Social and Health Services Employees (Non-Panel Process)

...

D. Authority of the Arbitrator

1. The arbitration will:

- a. Have no authority to rule contrary to, add to, subtract from, or modify any of the provisions of this Agreement.

...

ARTICLE 39 UNION ACTIVITIES

...

39.4 Use of State Facilities, Resources and Equipment

A. Meeting Space and Facilities

The Employer's offices and facilities may be used by the Union to hold meetings, subject to the agency's policy, availability of the space and with prior authorization of the Employer.

B. Supplies and Equipment

The Union and its membership will not use state-purchased supplied or equipment to conduct union business or representational activities. This does not preclude the use of the telephone for representational activities if there is no cost to the Employer, the call is brief in duration and it does not disrupt or distract from agency business.

C. E-mail, Fax Machines, the Internet, and Intranets

The Union and its members will not use state-owned or operated e-mail, fax machines, the internet, or intranets to communicate with one another. However, employees may use state operated e-mail to request union representation and shop stewards may use state owned/operated equipment to communicated with the Union and/or the Employer for such exclusive purpose of administration of this Agreement. Such use will:

1. Result in little or no cost to the Employer;
2. Be brief in duration or frequency;
3. Not interfere with the performance of their official duties;
4. Not distract from the conduct of state business;
5. Not disrupt other state employees and will not obligate other employees to make personal use of state resources; and
6. Not compromise the security or integrity of state information or software.

The Union and its shop stewards will not use the above-referenced state equipment for union organizing, internal union business, advocating for or against the Union in an election or any other purpose prohibited by the Executive Ethics Board. Communication that occurs over state-owned equipment is the property of the Employer and may be subject to public disclosure.

39.5 Bulletin Boards

The Employer will maintain bulletin board(s) or space on existing bulletin boards currently provided to the Union for union communication. In bargaining units where no bulletin board or space on existing bulletin boards has been provided, the Employer will supply the Union with adequate bulletin board space in convenient places. Material posted on the bulletin board will be appropriate to the workplace, politically non-partisan, in compliance with state ethic law, and identified as union literature. Union communications may not be posted in any other location in the agency.

BACKGROUND

The parties commenced negotiation of the 2005-2007 statewide Agreement in early 2004. Both submitted numerous proposals beginning on February 25, 2004, and a Tentative Agreement was signed off on August 10, 2004. The Agreement subsequently was signed on June 24, 2005. One of the agencies covered by the Agreement is the Department of Social and Health Services (hereinafter "DSHS").

A major area of discussion during was the right of the Union and its members to communicate with each other and the right of the Union to distribute information to its

members. The Union initially sought to be able to use not only the tangible bulletin boards located on the walls of the Employer's premises but also the on-line bulletin boards and email on the Employer's computer system and its telephone for these purposes. During negotiations, the Union expanded its demand to include use of all communication systems, including telephones, email, facsimile, internet and intranet, by its local officers, stewards and members of committees established by the Agreement for representational activities, as well as the physical bulletin boards provided. The Employer resisted that proposal from the outset, arguing instead for no use of State-owned email, facsimile, internet or intranet and limited telephone use except for shop stewards needing to communicate with the Union and/or the Employer for the exclusive purpose of administration of the Agreement, eventually adding the ability for employees to use email to request union representation, as well. The Employer also continually proposed a revision regarding bulletin boards stating, "Union communications may not be posted in any other location in the agency."² Both the Tentative Agreement and the Agreement contain the provisions sought by the Employer.

The parties also negotiated over a meeting space provision. The Employer suggested in its first counter-proposal, "The Employer's office and facilities may be used by the Union to hold meetings, subject to the Agency's policy, availability of the space and with prior written authorization of the Employer."³ The Union sought instead the more permissive language, "The Employer's office and facilities may be used by

² Employer Exhibit No. 1, Employer's May 17, May 27, June 8, July 26, July 29 and August 10, 2004, proposals.

³ Employer Exhibit No. 1, Employer's May 17, 2004, proposal at 2.

the Union to hold meetings, subject to the Agency's policy and availability of the space."⁴ The Tentative Agreement and the Agreement eventually contained the Employer's proposal.⁵

On July 19, 2005, Division of Child Support (hereinafter "DCS") employee McCasland assigned to the Tacoma, Washington, office of DSHS requested of District Manager Seaholm via email that the Union be allowed use of a conference room so that Union Field Representative Dannen could meet with employees to answer questions with respect to the new Agreement. McCasland also requested permission to place flyers in the mail station mailboxes to make employees aware of the meeting. Eventually, after a further exchange of emails, Seaholm gave authorization on July 25 for the Union to use the conference room with the understanding Dannen would only be answering questions and not circulating a petition to address an Employer schedule decision as she had been told he had done the week before in a similar meeting. However, Seaholm denied McCasland's other request, stating, ". . . I cannot authorize putting flyers in the mail slots. CBA 39.5 limits posting of union communications to the Union Bulletin Board."⁶

At approximately the same time as the denial of McCasland's request to disseminate flyers to employees via their mail slots in Tacoma, Acting District Manager Johnson in the Fife, Washington, DSHS office sent all DCS staff an email on July 22, 2005, advising, insofar as is relevant here, that the Union bulletin board in the

⁴ Employer Exhibit No. 1. Union's May 26, 2004, proposal at 5.

⁵ See Employer Exhibit No. 1. Tentative Agreement at 3-4, and Joint Exhibit No. 1, respectively.

⁶ Employer Exhibit No. 2 at 3.

lunchroom was the only location Union information could be posted in that office, that Union flyers and literature could not be distributed by leaving them on employees' desks or via the in-office mail cart and that meeting space and facilities may be used for Union meetings only if space was available and his prior approval was obtained. Johnson also advised that petitions may not be solicited in the office during work time. Although the Union noted that it was Johnson's email which led directly to the grievance in the Fife office, it also took issue with the May 19, 2006, denial of the Union's request to place Member Action Team (hereinafter "MAT") meeting notices on the Employer's electronic events calendar.

Grievance No. 1253 addressing Seaholm's action in the Tacoma office was filed on August 3, 2005. The record does not reflect the date on which Grievance No. 8702 was filed with respect to the controversy in the Fife office. However, there is no dispute that both were timely filed and that both were denied at each step of the contractual grievance procedure. The parties also are in agreement that the two grievances were consolidated before the demand for arbitration was filed with the American Arbitration Association and that both are properly before the undersigned for decision.⁷

DISCUSSION AND ANALYSIS

The Union asserts that, although both parties placed evidence of the parties' bargaining history in the record, the plain language of section 39.5 of the Agreement should control. In its view, what that language says is merely that, when information is

⁷ By the time of the hearing, all aspects of the two grievances except the distribution issue had been resolved by the parties.

posted, i.e. put up in some public place, as on a placard, that posting must be limited to the designated bulletin boards. Thus the Union argues that provision says nothing about the dissemination of information through a medium such as an employee mailbox or direct delivery to an employee's desk or chair. Moreover, while recognizing the language of Section 39.4 of the Agreement, the Union contends that language cannot be used to discriminate against Union members or treat them disparately from other organizations in violation of their legal right to communicate with each other. Accordingly, it seeks a finding that the Employer's actions here would amount to an unfair labor practice which, in turn, causes it to violate the Agreement.

The Employer defends its actions on the basis of what it views as the clear language of the Agreement, as well. Accordingly, it argues that Section 39.5 of the Agreement describes the only way in which the Union and its members may communicate with the use of state-owned resources, namely via the physical bulletin boards designated for that purpose, since that provision limits posting, i.e. mailing or announcing as if by use of a placard, to those boards. The Employer contends that all other dissemination is strictly prohibited to Section 39.4, with only limited exceptions for shop stewards and employees requesting representation which are spelled out in the Agreement. According to the Employer, even if the Agreement were found to be ambiguous by the Arbitrator, the unrebutted testimony of State Chief Negotiator McLain demonstrates it was made clear to the Union in negotiations that adoption of the language in Section 39.5 prohibited all other methods of communication with the use of Employer resources. In the Employer's opinion, neither the fact that other State-sponsored communications are given additional access nor the changes in the law

occurring since signing of the Agreement can affect the accord reached between the parties. Finally, the Employer contends Arbitrator is limited to applying the terms of the Agreement and has no authority to decide whether an unfair labor practice has been committed.

Having now had the opportunity to study carefully all the evidence in the record as well as the parties' posthearing briefs and the citations contained therein, I have determined to agree with the Employer that it did not violate the Agreement by refusing to allow bargaining unit members to distribute Union information in the workplace via any method other than the tangible bulletin boards provided by the Employer for that purpose. While I have considered each argument raised by the parties, the following discussion will address only those I found controlling.

Initially, I agree with the parties that the Agreement is clear and unambiguous as concerns one of the matters in dispute here. Thus I agree with the Employer that Section 39.4 prohibits any communication between the Union and its members by State-owned email, facsimile, internet and intranet except for the two stated purposes of employees using email to request representation and shop stewards using State-owned equipment to communicate with the Union or Employer on administrative matters. In my view, that language could not be more clear. Indeed, the Union does not argue otherwise, contending for other reasons addressed below that the language should not be enforced.

However, I believe the language of Section 39.5 is ambiguous as to the limitation of Union communications to only the bulletin boards provided by the Employer. That section begins, "The Employer will maintain bulletin board(s) or space on existing

bulletin boards currently provided to the Union for union communication.” That sentence suggests the parties intended to limit “union communication,” not just posting, to the bulletin boards so provided as the Employer argues. However, the third sentence in Section 39.5 states, “Material posted on the bulletin board will be appropriate. . . .” That seems to show that the parties’ intended the term “posted” to refer only to materials placed on the bulletin board as the Union contends. Of course, it could also be argued that the third sentence was merely a reference to one kind of posting, namely the kind intended for public viewing, and that the last sentence, the one noting that “Union communications may not be posted in any other location in the agency” was intended to cover all kinds of postings, including mailings, as the Employer asserts. In this connection, I believe the Union’s effort to narrow the definition of posting to the act of exhibiting something in a public place, like placing a placard on a wall, is too restrictive since the mailing of an object was always listed as a definition of posting, as well, in the several commonly-used dictionaries I examined. Unfortunately, that does not resolve the dispute; it merely shows there is more than one definition of the word “posted.” Thus I must find that Section 39.5 is ambiguous as to the question posed.

In order to determine the parties’ intent behind ambiguous language, arbitrators commonly look to bargaining history and the practice of the parties. See, generally, the discussion in Elkouri and Elkouri, How Arbitration Works, BNA (6th Ed., 2003), at 453-454, 623-626. Although there is no practice to examine since the language at issue is new to the present Agreement, I was provided some insight into bargaining history. Thus the Employer Chief Negotiator McLain testified he made clear to Union Chief Negotiator Lutz in a private sidebar discussion at which Spiegel was not present near

the end of negotiations just before 11:00 p.m. on August 10, 2004, that agreeing to the language now appearing in Section 39.5 of the Agreement meant that Union communications would be limited to the bulletin board. McLain testified he then added, by way of example, “You understand you can’t distribute information to people’s desks” and Lutz stated she understood. Lutz was not called by the Union to contradict McLain’s testimony. Instead, the Union placed in evidence through Union Senior Filed Representative Spiegel the two Council Grievance Committee Report Forms signed by Lutz and attesting to Lutz’s agreement with the Committee’s view of these two grievances that management was “using Article 39 inappropriately to interfere with the Union’s ability to communicate with and properly represent our members.”⁸ The Union argues Lutz’s signature on these two documents should be taken to confirm that she contradicts McLain’s testimony. For his part, although Spiegel testified that he was present at most sidebar discussions, he conceded that there were “rare occasions” on which McLain and Lutz had private sidebars and that it is possible they discussed Section 39.5 during one of these.

I cannot agree with the Union that Lutz’s signature on the Grievance Committee forms contradicts McLain’s testimony. Those forms merely stand for the proposition that the Union disagrees with management’s interpretation of Section 39.5 of the Agreement, a fact already evident from the existence of the grievances. Neither form gives any hint of what McLain said to Lutz or of any response by her. Nor is Spiegel in a position to testify conclusively that McLain and Lutz did not say what McLain claims they said. Accordingly, McLain’s testimony stands unrebutted and, since there is

⁸ Union Exhibits No. 14 and 15 addressing the Tacoma and Fife grievances, respectively.

nothing else in his testimony or the record as a whole which requires discrediting him, his recollection will be adopted. Thus, I find the parties intended for the language of Section 39.5 of the Agreement to limit the communication between the Union and its members, except as noted elsewhere, to the tangible bulletin boards provide by the Employer for that purpose.⁹ To find otherwise would be, as the Employer argues, to permit the Union to obtain in arbitration that which it failed to gain in negotiations, a result to be avoided.¹⁰

This intent is also consistent with chapter 42.52 RCW, the Ethics in Public Service Act then in effect which prohibited the use of State resources to benefit a private entity which, at the time, included the Union and was a stated concern of the Employer in negotiations. As the Employer notes, the fact that SHB 2898 was enacted in February 2006, long after signing of the Agreement, thereby amending 42.52 RCW by enabling state employees to distribute “communications from an employee organization or charitable organization to other state employees if the communications do not support or oppose a ballot proposition or candidate for federal, state, or local public office,” cannot serve to retroactively invalidate terms of the Agreement.

Johnanson v. DSHS, 91 Wn. App. 737 (1998). Since the many vehicles other than the bulletin boards by which the Union seeks to distribute information, including the mail

⁹ While the Employer is correct that the Union has made proposals in recent bargaining for a successor contract which would change the language of Section 39.5, I cannot agree that such proposals amount to a concession by the Union that the language does not say what it alleges in this proceeding. As the Union responds, the Employer, too, has suggested changes to Section 39.5. Indeed, both parties have made proposals to change Section 39.4 as well as Section 39.5 in the successor contract. The Union is correct that both parties merely are attempting to strengthen their own positions in the disputed areas. Thus I have given no weight to this consideration in reaching my decision herein.

¹⁰ See Elkouri, *supra*, at 454.

boxes, slots and carts, as well as employee desks and chairs, are all State resources, denying use of those resources when the parties negotiated the Agreement was consistent with the version of the Ethics in Public Service Act then in effect. The same intent is evident in the language of Section 39.4(B) of the Agreement which provides that, with exception of brief, no-cost, non-disruptive, non-distracting use of telephones for representational activities, the Union and its members “will not use state-purchased supplies or equipment to conduct union business or representational activities.”

As concerns Section 39.4, as already noted, while the language is clear and unambiguous, the Union believes that using it to prevent WFSE and its members from communicating with each other is an unfair labor practice and thus violates the Agreement. The Employer contends the Agreement authorizes me only to interpret its terms and not to rule on whether an unfair labor practice has been committed, the latter authority being reserved to the Washington Public Employment Relations Commission (hereinafter “PERC”). I agree with the Employer.

Article 29, Section 29.4 of the Agreement, pursuant to which Employer Exhibits No. 8 and 10, the Union’s request for a Step 2 hearing and demand for arbitration, respectively, state the grievances were filed,¹¹ provides that I have “no authority to rule contrary to, add to, subtract from, or modify” any provision of the Agreement. I am of the view that to decide whether the Employer’s action amounted to an unfair labor practice which in turn violated the Agreement as the Union would have me do clearly

¹¹ Although Section 29.4 states it is to be used for Department of Corrections and DSHS employees to pursue “[g]rievances appealing an employee’s disability separation or disciplinary reduction in pay, demotion, suspension, or discharge,” and Section 29.5 is intended for Department of Corrections and DSHS employees to pursue [a]ll grievances other than disability separations or the disciplinary actions described in Section 29.4,” the Employer does not contend the grievances were inappropriately filed.

could lead to a ruling “contrary to...the provisions of this Agreement” and thus would exceed my authority. If the Union believes the continuing interpretation of Section 39.4 constitutes an unfair labor practice either because it impermissibly impinges on employee rights or amounts to discriminatory disparate treatment, it may pursue that allegation before PERC.¹²

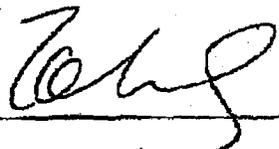
Accordingly, I shall dismiss the grievances.

A W A R D

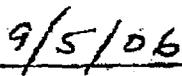
I. It is the Award of the Arbitrator that the Employer did not violate the Agreement by refusing to allow bargaining unit members to distribute Union information in the workplace via any method other than the tangible bulletin boards provided by the Employer for that purpose.

II. It is therefore Ordered that the grievance be, and it hereby is,

DISMISSED.



M. Zane Lumbley, Arbitrator



Date

¹² Thus I shall not decide whether the Employer's decision to permit use of its various resources by other entities amounted to discrimination.