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**AMERICAN ARBITRATION ASSOCIATION
BEFORE ARBITRATOR PAUL M. GRACE**

OFFICE OF THE ATTORNEY GENERAL
LABOR & PERSONNEL DIVISION

In the Matter of Arbitration)
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Between)
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Washington Federation of State Employees)
And Helen Pressley)
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And)
)
Washington State Department of Ecology)
)
)
Helen Pressley Union Representation Grievance)
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**ARBITRATOR'S
DECISION AND
AWARD**

Representatives

For the State of Washington:

Ronald A. Marshall, Assistant Attorney General

For the Union:

Gregory M. Rhodes

March 19, 2007

Paul M. Grace
Labor Arbitrator

I. INTRODUCTION

This dispute between the Washington State Department of Ecology (Employer) and the Washington Federation of State Employees (Union) concerns the timely filed grievance of Helen Pressley (Grievant) pursuant to Article 29 of the parties' 2005-2007 collective bargaining agreement (CBA). The grievance alleged that the Employer violated employees' right to union representation in Article 39 when the labor relations and personnel operations manager concluded that an employee's e-mail to a shop steward was not a request for union representation and therefore an impermissible use of the Employer's e-mail system. The parties were unable to resolve the grievance pursuant to the dispute resolution provisions of the agreement and submitted the dispute to arbitration pursuant to Article 29.4.

At an arbitration hearing on January 4, 2007 at the Employer's offices in Olympia, Washington, the parties had the opportunity to make opening statements, submit documentary evidence, examine and cross-examine affirmed witnesses, and argue the issues in dispute. At hearing, the parties stipulated that the dispute was properly before the Arbitrator and that he had jurisdiction to issue a final and binding award. They also stipulated to a number of joint exhibits and to the issue. After one day of hearing and submittal of posthearing briefs by both parties, the hearing was declared closed on February 22, 2007 and the case stood fully submitted for decision.

II. SUMMARY OF THE EVIDENCE

The use of the State's e-mail system for union-related matters was the subject of numerous proposals and counterproposals between the Employer and numerous unions representing State employees, including the Washington Federation of State Employees. The final agreement focused the employees' right to union representation "on any matter adversely affecting their conditions of employment" and narrowed employees' permissible use of the e-mail system on union-related matters to one: "to request union representation." (J1)

After the conclusion of contract negotiations, grievances were filed concerning annual salary increases (termed periodic increments, or PIDs) for State employees not at Step K, the top step of the salary ranges. The Employer and unions representing State employees

reached a settlement on October 31, 2005, which would result in some employees having to reimburse the State due to salary overpayments. On November 7, Labor Relations Manager Michael South e-mailed an "Official Notice" to Department of Ecology employees, including employee Shawn Hopkins, outlining the terms of the settlement that had been reached. (E2)

Mr. Hopkins was aware of the settlement before Mr. South's e-mail and of its negative impact on his salary. He had been talking with Department fiscal staff on a separate payroll issue when they informed him that he was among the employees who had been overpaid and who would have to make restitution to the State. (T-88)

On November 17, Mr. Hopkins sent to e-mail to Union shop steward Helen Pressley, with a copy to Mr. South, complaining of the terms of the settlement and asking that he be removed as a union member. (E2) Ms. Pressley sent a one-line response to Mr. Hopkins an hour later. Mr. South responded to Mr. Hopkins that same morning with an explanation of the overpayments and terms of union membership under the CBA. Concluding that Mr. Hopkins' e-mail to Pressley was not a permissible request for union representation, Mr. South told Mr. Hopkins that the CBA "does not permit employees to use state e-mail to communicate with the Union" and directed him to "refrain from such use." (E1)

The Union filed a grievance, alleging that Mr. Hopkins' e-mail was a permissible request for union representation under the terms of the CBA. Its initial requested remedy was that management allow all employees to use e-mail for union-related matters. (E1) At hearing, it clarified that it was not attempting to expand the use of state-owned e-mail beyond requests for union representation enumerated in Article 39.

III. ISSUE

The parties stipulated to the following issue for decision:

Whether or not the e-mail sent by Mr. Shawn Hopkins to Ms. Helen Pressley, the Shop Steward, was a request for union representation under Article 39.1 and 39.4C of the CBA, and whether or not Mr. Michael South's directive to Mr. Hopkins violated Article 39.4C.

IV. RELEVANT CONTRACT PROVISIONS

Article 39.1

Upon request, employees will have the right to representation at all levels on any matter adversely affecting their conditions of employment. The exercise of this right will not unreasonably delay or postpone a meeting. Except as otherwise specified in this Agreement, representation will not apply to discussions with an employee in the normal course of duty, such as giving instructions, assigning work, informal discussions, delivery of paperwork, staff or work unit meetings, or other routine communications with an employee.

Article 39.4C

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 station owned/operated equipment to communicate with the Union and/or the Employer for the 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 and 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 a 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.

V. POSITION OF THE PARTIES

Position of the Employer

The Employer argues that Mr. Hopkins' e-mail was not a request for union representation because he neither made a specific request nor cited issues for which union representation might be needed. According to the Employer, the issue of union membership is an internal Union matter, not an issue between the Union and the Employer for which union representation would be needed. On the HD settlement, the Employer argues that the matter had been resolved and that while Hopkins might have been upset over its terms, the Union could not negotiate different terms for a single employee. The Employer did agree that Hopkins' e-mail would have been a permissible request for union representation had he cited specific issues adversely affecting his employment, followed by a request such as "I would like you to represent me." (T-63-64)

Position of the Union

The Union argues that the Hopkins' e-mail contained several issues calling out for union representation, namely withdrawal from union membership and salary repayment. It argues that the latter issue in particular fits the contractual scope as a "matter adversely affecting ... conditions of employment" since money would actually be withdrawn from Hopkins's paycheck. The Union did not argue that a dialogue back-and-forth between employee and shop steward was permissible under the CBA. (TR20)

VI. DISCUSSION AND ANALYSIS

A. Did Hopkins' E-mail relate to matters that adversely affected his employment?

1. PID settlement

Looking closely at Mr. South's November 7th e-mail, it appears that he expected that employees would have questions about the effects of the settlement:

If you have any questions, you can contact your Union representative http://aww.ecology/services/es/WFSE_RegionReps.pdf, a Union steward <http://aww.ecology/services/es/StewardsList.xls>, or the Human Resource Consultant for your program. (E2)

Further, Mr. South testified that he read more into Mr. Hopkins' e-mail than the complaint about the union's role in the settlement:

When I read Mr. Hopkins' e-mail, there were a couple of things that stood out to me, part of it being his concern or issue of backpay and whether or not — and as I read this, that somehow whether or not you were a union member might lead you to be treated differently. (T-53)

He testified further that if Hopkins had been overpaid and "takes issue at the amount or the date," he had the right to representation at that point. Mr. South would have recognized Mr. Hopkins' e-mail as a legitimate request for representation if he sent "an e-mail to Helen [Pressley] saying, this is going on, I would like you to represent me on it." Had the e-mail had that level of clarity, "it wouldn't have been an issue." (T-64) What Mr. South did not know at the time of his November 7th e-mail was that Mr. Hopkins "had an actual event that was occurring to him that was potentially adverse." (T-63)

As noted earlier, Mr. Hopkins was aware of the possible adverse impact the settlement would have on his salary before Mr. South's November 7th e-mail. As he testified, he was resolving a separate matter with Ecology's fiscal staff when he was informed that he would be on the repayment end of the settlement. He was even asked to sign a release at that time. He refused and within a week of receiving Mr. South's e-mail, contacted a shop steward with whom he was familiar, Ms. Helen Pressley. As he testified, he knew he would have to make a repayment of approximately \$500. (T-87)

Based on the documentary evidence and witness testimony, the Arbitrator finds that the Hopkins' e-mail was a request for union representation under the terms of the Article 39. The PID settlement would clearly have an economic impact on many employees. For Mr. Hopkins, it was a negative or adverse effect, the type at the heart of the parties' negotiated agreement.

2. Union Membership and the Request for Union Representation

The second issue Mr. South refers to in his e-mail to Mr. Hopkins is union membership. Mr. South described the role membership played or did not play in the grievance settlement. He also testified that one purpose of his e-mail to Mr. Hopkins was to clarify the role of union membership. He termed the whole "implementation of the Union security provision" as "a high profile issue." (T-55) He also testified that Mr. Hopkins'

request to be removed from active union membership was "an overly simplistic request, given the actual parameters of what it means under the collective bargaining agreements." (T-65)

Article 40 of the CBA details the parties' agreement over union membership as a complex interplay between Union, Employer and employee. As Mr. Hopkins testified, one purpose of his e-mail "was to let Helen know I was considering terminating my membership." (T-87) He further testified that he "had no idea ... what it meant or what needed to be accomplished to remove [his] name from membership rolls." (T-89) He considered Ms. Pressley's explanation of union membership "part of her representational duties to [him]." (T-90)

The Arbitrator cannot agree with the Employer that in the circumstances surrounding the grievance settlement and Mr. Hopkins' e-mail, union membership is solely an internal union matter outside the realm of issues envisioned in Article 39 for which an employee might request union representation.

As this case highlights, requests for union representation are not always crystal clear.¹ While some CBA's have a specific request form, none is provided here. Nor was there employee training on the proper procedure to use for a request for representation. The only reference in the evidence was a recitation of the entire Article 39 in the Union's December 19, 2006 newsletter. (E-9) It may be in the parties' interest to develop a more defined process or educate bargaining unit employees about the process to request union representation and avoid having to shift through similar-less-than-perfectly-stated requests for union representation.

¹ Although this case does not address an employee's Weingarten right to union representation in disciplinary matters, both the Public Employment Relations Commission (PERC) and the National Labor Relations Board (NLRB) have recognized that oftentimes the request for representation is not perfectly stated:

In Southwestern Bell Telephone Company, 338 NLRB 552 (2002), an employee's question of "Would it be okay to have a Union steward present?" and the request of someone to be present at a meeting to explain what was happening both sufficiently invoked the Weingarten right. In Bodolay Packaging Machinery, 263 NLRB 320 (1982), the Weingarten right was triggered by the employee asking whether he needed a witness.

Lewis Public Transportation Benefit Area, Decision 9275 (PECB, 2006)

VII. Conclusion

Mr. Hopkins' e-mail to shop steward Pressley, although not perfectly stated as such, was a permissible request for union representation under the terms of Article 39. His pay had been adversely affected by the PID settlement, and he was inquiring of the shop steward about how his union membership was related to his payroll predicament. It also met the definition of union representation provided by Mr. South: "an event that occurs when an employee is either involved in or is expecting an interaction" with the employer. (TR55) Mr. Hopkins' request met the further criteria enumerated in Article 39.4.C that such uses of the state-owned e-mail be exclusively related to the administration of the Agreement; be brief and infrequent; of little or no cost to the Employer; and not interfere with the performance of employee's official duties.

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For the reasons set forth in the foregoing discussion and analysis, the Arbitrator finds that the e-mail sent by Shawn Hopkins to Shop Steward Helen Pressley was a permissible request for union representation under Article 39 of the CBA, and that Mr. Michael South's directive to Mr. Hopkins to refrain from such use of the state e-mail system violated Article 39.4C.

Therefore, the grievance is sustained

March 19, 2007



Paul M. Grace, Labor Arbitrator

EXHIBIT LIST

Joint Exhibits:

1. 2005-2007 Collective Bargaining Agreement, signed 10/31/05

Employer Exhibits:

1. Grievance ECY05-018, dated 12/8/05; Department response, dated 1/24/06
2. South's e-mail to department employees, dated 11/7/05; Hopkins' e-mail to Pressley and South, dated 11/17/05; Pressley's e-mail to Hopkins, same date
3. South's e-mail to department employees, dated 11/7/05; grievance settlement, dated 10/31/05
4. Grievance ECY05-015; Department response, dated 12/21/05
5. Ethics Board Advisory Opinion 02-01A on use of state facilities to conduct union business
6. RCW 42.52.010 (Definitions); RCW 42.52.160 (Private Gain)
7. Proposals and Counterproposals on Union Activity, dated 2/25/04-8/10/04; includes tentative agreement dated 8/10/04
8. Proposals and Counterproposals on Union Activities, dated 4/14/06-7/31/06
9. WFSE newsletter with Article 39, dated 12/19/06
10. Arbitration decision of Zane Lumbley (AAA 75-390-00453-05 LYMC), dated 9/5/06

Union Exhibits:

1. South's e-mail to department employees, dated 11/7/05; Hopkins' e-mail to Pressley and South, dated 11/17/05; South's response to Hopkins, same date
2. Proposal on Union Activities, dated 7/29/04
3. Proposal on Union Activities, with notes, dated 7/29/04
4. Tentative Agreement on Union Activities, dated 8/10/04
5. Hand-written notes, dated 7/29/04
6. Hand-written notes, dated 7/29/04

WITNESS LIST

For the Employer:

1. Ecology Labor Relations Manager Michael South
2. Ecology employee Shawn R. Hopkins
3. State Labor Relations Director Steve McLain

For the Union:

1. Shop Steward Helen Pressley
2. Union Representative Joanne McCaughan
3. Union Representative Deborah L. Brookman