

In the Matter of

Arbitration between)	
)	
City of Winona, Minnesota,)	ARBITRATION AWARD
(Employer),)	
and)	<u>Greg Olson Grievance</u>
)	
American Federation of State, County, and)	
Municipal Employees, AFL-CIO, Council 65,)	
(Union).)	

BMS Case No. 07-PA-0610

Appearances

For the Employer:
 Brandon Fitzsimmons, Esq.
 Flaherty & Hood
 525 Park St., Ste. 470
 St. Paul, MN. 55103

For the Union:
 Teresa L. Joppa, Esq.
 Staff Attorney
 AFSCME Council 65
 3911 - 7th Street South
 Moorhead, MN. 56560

Jurisdiction

On October 6, 2006, **the American Federation of State, County, and Municipal Employees, AFL-CIO, Council 65**, (Union) presented to the City of Winona, Minnesota (Employer) a grievance protesting the Employer’s written reprimand and directive to Greg Olson (Grievant) regarding his communications with coworkers and committee attendance. The grievance was brought under the Collective Bargaining Agreement in effect between the Employer and the Union from January 1, 2006 to December 31, 2007. The parties were not able to resolve the matter through their grievance procedure and have submitted the dispute to final and binding arbitration before Arbitrator Sara D. Jay, who was jointly selected by the parties.

The arbitration hearing was held in Winona, Minnesota, on March 26, 2007. At the hearing, both parties were given a fair and equal opportunity to present their respective cases. The arbitrator accepted exhibits into the record; witnesses were sworn or affirmed and testimony was subjected to

cross-examination. Closing argument was made in the form of post-hearing briefs, timely received on April 25, 2007, on which date the record is deemed closed.

Issues

The issues in this case are:

Did the Employer have just cause to issue a written warning to the Grievant? If not, what shall the remedy be?

Relevant Contract Provisions

Article XV - Discipline and Discharge

Section A. - Discipline

Disciplinary action may be taken against an employee only for just cause....

Article XVII - General Provisions

....

Section B.

- 1) The Employer agrees that during working hours, on the Employer's premises and without loss of pay, Union representatives shall be allowed to:

... Transmit communication authorized by the local Union or its officers or other Union representatives concerning the enforcement of any provisions of this Agreement.

- 2) Bulletin Boards: The Employer agrees to maintain space on departmental bulletin boards to be used by the Union for Union business only. The Union shall limit its posting and notices to such spaces and the Employer shall have no approval over the materials to be posted on such boards except notices of a political or libelous nature.

Section C.

The Employer agrees that accredited representatives of [AFSCME], representatives or international representatives, shall have full and free access to the premises of the Employer during working hours to conduct Union business for a reasonable period of time so as not to disrupt departmental operations.

Other Relevant Provisions

Minn. Stat. §179A.13. Unfair Labor Practices

....

Subd. 2. Employers. Public employers, their agents and representatives are prohibited from:
(1) interfering, restraining, or coercing employees in the exercise of the rights guaranteed in sections 179A.01 to 179A.25;
(2) dominating or interfering with the formation, existence or administration of any employee organization

Factual Background

The basic facts of this grievance are not in dispute. Greg Olson, the Grievant, is a Building Inspector II for the Employer, a southeastern Minnesota city. The Grievant is also president of the local. The former president now serves as vice president and Union steward for the AFSCME bargaining unit, which includes approximately 50 employees. Because there are only two Union officers for the unit, the President also represents employees as a steward.

The Employer has a Health Insurance Committee with representatives from different City departments. The Law Enforcement Labor Services unit, which is the other organized unit and represents police employees, does not participate in the Employer's health insurance plan. The AFSCME unit was invited to designate a representative to the Committee. The Grievant asked the bargaining unit for volunteers to serve on the committee as the AFSCME representative. When no one volunteered, he took on the task himself. The payroll coordinator, who is an AFSCME bargaining unit member, attends the meetings at the request of the Finance Director. The payroll coordinator has not been authorized by AFSCME to represent the bargaining unit at meetings or in any capacity, nor has any other bargaining unit employee.

Health insurance plan structure and costs were changing for 2007. All members of the committee attended the May 1, 2006 meeting. According to minutes from that meeting, there had

been problems with health reimbursement (HRA) and flexible spending accounts (FSA), and consideration was being given to whether the City would look elsewhere for services. The health plan anticipated being up to \$100,000 short of budget. The minutes note that plan design options had been discussed at a previous meeting, and other suggestions in altering plan structures to "ease the cost increase for 2007" were described. An August meeting was scheduled. Bids were not taken for the 2007 insurance. If bids are taken, that process happens no later than June of the preceding year.

The Grievant was on vacation at the time of the next meeting on August 29, 2006. He was unable to locate a volunteer to substitute for him. He had the following exchange of e-mail with the benefits coordinator on his last day of work before vacation, August 26:

11:09 From Grievant:
Deb, Nobody has stepped up yet.

11:30 From Benefits coordinator
AFSCME needs representation at this meeting. Do what you can to get someone to come.
Deb

1:26 From Grievant:
Deb, Sorry but nobody has stepped up and there is nothing I can do. I will convey your plea to our membership once again. Respectfully, Greg Olson

1:27 From benefits coordinator:
Try calling individual people that have been active in the membership. I don't think any e-mail will cut it. Deb

12:03 From Grievant:
Deb, I will not call anyone and pressure them to go to a meeting and pretend that they can make a difference. I remember all too well the response I received to my well intentioned question. Let's just be adults and admit that management will be willing to pay x amount and employees will make up the difference. Greg

Minutes from the meeting were distributed by the benefits coordinator, along with cost comparison sheets and slides. The e-mail distributed by the benefits coordinator to all health insurance committee members concludes by asking members to "[p]lease use this week to study the plans and think about what you want to see for options in 2007." The Grievant asked the benefits coordinator what the expected shortfall would be, and she responded that it would be approximately

\$200,000. On September 7, 2006, the benefits coordinator e-mailed revised cost comparison sheets to the Grievant and other health insurance committee members. That cover e-mail reads:

Attached is a revised cost comparison sheet. A suggestion was made to include the current plans at the top as a baseline comparison. You will see the current plan 3 and 4 with current cost structure. Please be sure to talk to your groups this week and next about the upcoming changes. Bring inquiries and/or suggested solutions to the September 19th meeting.

After reviewing the information, the Grievant sent an e-mail to bargaining unit members which included the revised cost comparison sheets. The benefits coordinator later objected to this distribution, testifying that the cost comparison sheets were intended for the insurance committee members only. The e-mail was sent to those employees whose e-mail addresses the Grievant had, comprising about 60% of the bargaining unit, who were encouraged to share the information with bargaining unit members without e-mail.

One bargaining unit member responded to the Grievant's e-mail by asking whether insurance coverage would remain the same, although with higher premiums and a larger deductible, and what changes were expected. The Grievant responded, prefacing his analysis with the phrase: "As I understand it..." He stated less coverage and more cost would be involved, and that there was likely to be a gap between the health reimbursement account and the deductible, concluding by suggesting that the employees "Look at the chart under exposure. That pretty much spells it out."

On Monday, September 11, 2006, the Grievant sent an e-mail to same bargaining unit members regarding the insurance. The e-mail stated:

I trust you all have had a chance to review the insurance proposals. Current family plan costs are proposed to increased by at least 100% or more. If you participate under the family plan #3 and actually use the plan for a chronic illness you are looking at a minimal increase of \$3864.00 or more out of your pocket for 2007. If you participate under plan #3 single coverage and have a chronic illness you will see your costs rise by a minimum of \$1716.00.

Call your councilperson and let them know that the health insurance proposals are not acceptable! We have to go to the top with this. Sitting around quietly and doing nothing will take money directly from our pockets. Take the time to study the proposals.

Premium increase 100% or more.

Overall out of pocket costs increase 100% or more in most instances.

Can you afford this plan?

The e-mail is signed: "AFSCME."

On September 19, 2006, after the insurance committee meeting, the Grievant sent an e-mail to a group of bargaining unit members:

Here are the results of the latest/last proposal for 2007 plan year:
Please sit down.

New plan 3 – recommended for high users

\$83.00 per month individual - \$34.00 per month increase

\$235.00 per month [family] - \$96.00 per month increase

Family HRA reduced to \$1000.00 per year from \$2000.00 per year, higher deductible and about double the maximum out of pocket

Single HRA reduced to \$500.00 from \$1000.00 per year, higher deductible and higher out of pocket by \$1000.00

New plan 4 - See plan B4 on previous excel spreadsheet – recommended for those with a large HRA account. The official cost/coverage will be forthcoming. It ain't good.

New plan 5 - for those on a spouse's better plan or with absolutely no health issues.

No cost - no HRA contribution! Maximum out of pocket up by \$4000.00 for family and \$2000.00 per individual.

There will be no bidding process this year. Comments at the meeting were made that nobody has made a fuss about this to the[ir] supervisors. It['s] way too late to fuss, but now would be a good time to cry to your supervisor, councilperson, mayor, manager, coworkers etc.

As an attachment to that e-mail, the Grievant sent the benefits coordinator's September 7, 2006, e-mail with the revised comparison sheet. The Grievant intended the "crying" to be about the cost increases; the benefits coordinator later read the e-mail as referring to the lack of bidding.

The benefits coordinator began meeting with various employee groups to discuss the new plans for the open enrollment period. AFSCME and other groups were critical of the plan, and in her

view, were negative toward management. Some employees misunderstood the options available, and the benefits coordinator needed to explain the plans to them. The deductible increased for the plans. According to the benefits coordinator, employees would not necessarily have to spend more on their health insurance, because they could use health reimbursement account money. However, employees who did not have HRA dollars available would have to spend more on their deductibles.

In approximately September, 2006, the human resources coordinator received an e-mail from the then-assistant senior center director (JS), which forwarded an e-mail from the Grievant and asked for further information. JS was involved in a conflict with management, and a string of e-mail messages were sent on April 3 regarding her being called into a disciplinary meeting. The first e-mail from the Grievant was sent at 10:55 a.m. on April 3, to Jim Dahling, who is the AFSCME staff representative. Approximately eleven messages were exchanged that day among Mr. Dahling, the Grievant and JS, making arrangements for the Grievant to be represented at the disciplinary meeting, a meeting held on short notice which needed to be postponed. Later e-mails between JS and the Grievant dealt with JS's employment issues. Most were sent in April through June, all advising JS with regard to her employment issues. The e-mails were sent and received on the Employer's intra-net, during the Grievant's work day. In September, the Union negotiated a resolution for JS which included her resignation. No grievance was filed prior to the negotiated resolution. The Grievant has access to the Internet at home, and had also communicated with JS in person.

Management also noticed that the Grievant had sent e-mail regarding the insurance plan. The Grievant's e-mail account was pulled and reviewed. The Employer's computer usage policy notifies employees that the intra-net is not private, and that e-mail may be reviewed. The Grievant's e-mail with JS and the AFSCME staff representative notes that fact. In reviewing the e-mail, the benefits coordinator found several statements made by the Grievant which she believed to be inaccurate and misleading.

On October 4, 2006, the Employer gave the Grievant a written reprimand. The reprimand is eleven pages long. It recites the process preceding the reprimand, which is not in issue, and recites

the reasons for the reprimand “in general” to be:

(1) your repeated and unauthorized misuse of [City] computers and e-mail for conducting unauthorized and/or Union business in violation of the Employee Handbook, the City Administrative Manual..., and the Labor Agreement ... (2) repeatedly conducting unauthorized personal and/or Union business while on duty ...; and (3) neglect of your duties and obligations as a member of the City’s Health Insurance Committee in violation of the Employee Handbook.

The reprimand goes on to make 22 “Findings of Fact,” many of which are not in dispute. Among those statements which are in dispute, either as to fact or as to significance, are:

6. The [JS] e-mails were not related to any grievance submitted on JS’s behalf as neither you nor her submitted any grievances.
7. The [JS] e-mails were not communications authorized by AFSCME to be transmitted concerning the enforcement of any provision of the Labor Agreement.
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9. You are not authorized to practice law in the State of Minnesota.....
11. You did not confirm the information in the Health Insurance E-mails [sent to bargaining unit members regarding the health insurance plans] with either ... the benefits coordinator or ... the human resources coordinator....
19. Despite not attending the August 29, 2006 meeting of the Health Insurance Committee, you stated numerous personal opinions in the Health Insurance E-mails regarding the City’s health insurance plans for 2007 and made statements on selected portions of the plans without providing all details of the plans. Based on these personal opinions and statements on selected portions of the health insurance plans, you encouraged AFSCME Unit Employees to contact City Council members to complain.

The reprimand continues by stating under the heading of “Conclusions” the documents upon which the Employer is relying. The Employer repeats that the collective bargaining agreement permits disciplinary action only for just cause, and recites the Employee Handbook’s definition of just cause. There was no evidence that the Employee Handbook had been negotiated with the Union, and

evidence supports a conclusion that the Handbook was unilaterally created and promulgated by the Employer.

The Employer found just cause based on the JS e-mail as “conduct which falls below the expected standards of performance of integrity for the position,” describing the Grievant’s acts as “submission of personal e-mails and providing legal advice without a license to practice law” as jeopardizing the integrity of his position as Building Inspector II. This last allegation is apparently based in part on a particular e-mail, and the Grievant’s quotation of the unemployment compensation statute’s standard for receipt of unemployment compensation benefits. JS had characterized her work environment as being “hostile,” a term of art in discrimination law. The Grievant had responded to her questions on June 30 in part as follows:

Jim [the AFSCME staff representative] asked that you provide him with your phone # so that he can call you. Do you have documentation with times and dates and witnesses showing a hostile work environment? Do the actions at the Senior Center fall under the definition of Hostile? Without documentation of actual hostility as defined by Labor Law you are up against a wall. I am not an attorney nor do I pretend to be, but unless you have actual proof ... and the actions fit into a definition of Hostile, our Union attorney will not be of any help... Again, this is just my opinion. I feel for you and agree that it isn’t right to single out someone and treat them differently but it doesn’t sound illegal to me.

The reprimand states that the computer was not being used for City business, a violation of expectations of supervisors under the Handbook. The reprimand states that the JS e-mails are not within the Grievant’s job description, and did not relate to any grievance. The reprimand states that the Grievant’s communications with JS “impacts negatively the quality of the City’s inspection services and demonstrates a blatant disregard and neglect of your duties and obligations as a building inspector. Further, your unwarranted criticisms and baseless legal advice ... impacts negatively the morale and wellbeing of [JS] and casts the City in a negative public light ... [and] is clearly adverse to the interests of the City and the public.”

The Employer also found just cause based on the Employee Handbook definition because the health insurance e-mail included personal opinions, were “misleading” and violated integrity standards as well as disobeying directives not to use e-mail for personal purposes, using City time for personal purposes and misinforming employees because the Grievant had not attended the August 29 insurance meeting. The Employer stated that morale had been negatively affected, and that:

This is especially concerning as you encouraged such employees to contact City Council members and complain about the proposed health insurance plan based on your misleading opinions and statements and you were the one who failed to address the issue of bidding for health insurance plans at the Health Insurance Committee meeting.... All future e-mails submitted by you to employees of the City in relation to the City’s health insurance plan using the City’s equipment and e-mail address must contain complete information, must not contain subjective statements or opinions, and must be approved by the City as described in paragraph 5 on page 9 of this reprimand.

The reprimand finds additional cause for discipline in the Grievant’s failures to attend the Health Insurance Committee meeting on August 29, to find a substitute, to “become fully informed of all details of the City’s proposed health insurance plans for 2007,” and “distributing baseless and misleading information” on the plans to the unit.

The reprimand concludes by giving seven directives as a “Course of Action” to include:

1. This written reprimand will be placed in your personnel file.
2. During your work day, you may only conduct City business.
3. You may only use City equipment, materials and resources to conduct City business. City business does not include providing advice to employees on handling work related complaints they may have and therefore you are prohibited from using City equipment, materials, and resources to provide such advice. You may only assist employees with work related complaints using your City e-mail address and/or a City computer if you submit a grievance on their behalf or transmit communication authorized by AFSCME concerning the enforcement of a provision of the Labor Agreement.
4. You must read and understand all of the information discussed and distributed by and through the Health Insurance Committee. If you do not understand some or all of the

- information, you must contact [named] benefits coordinator or [named] Human resources coordinator, to get clarification on the information.
5. You must distribute all information you receive as a member of the Health Insurance Committee to all AFSCME Unit Employees. If you [use City intranet] you must choose to do one of the following: (1) not make any of your own statements regarding the information in the e-mail; or (2) state all of the information you receive directly in the e-mail. In all e-mail distributed to the AFSCME Unit Employees involving Health Insurance Committee information, you must add a sentence that states: "If you have any questions regarding this information, you may contact ... benefits coordinator personally at her office in ..., via phone at [number], or via e-mail at [address.]"
 6. During your term as a representative of the AFSCME Unit Employees on the Health Insurance Committee, you must either: (1) attend all meetings; or (2) actively seek another AFSCME Unit Employee to attend the meeting and honor the request of the first AFSCME Unit Employee who desires to attend the meeting.
 7. You are not to have any same or similar violations of the Employee Handbook, Administrative Manual or Labor Agreement. Consequences for such violations will include further disciplinary action up to and including termination.

The Union filed a grievance protesting this reprimand. The Grievant believed that all of the correspondence was permissible under the contract and was within his role as Union president and steward. The grievance was processed and the parties were unable to agree. The matter thereupon proceeded to final and binding grievance arbitration.¹

Other employees have been disciplined for misuse of City equipment. The earliest instance, in 2002, involved an AFSCME member who used a City computer to write and edit a "lengthy offensive" document of unknown and unrecorded nature. The employee was given a written reprimand. In 2004, an AFSCME Building Inspector II was given a written warning for using a City

¹ One of the requests for subpoena mistakenly referred to this matter as "interest arbitration." Interest arbitration refers to arbitration of contract terms for a future collective bargaining agreement, while grievance arbitration covers contract interpretation issues, including just cause. The arbitrator assumes the reference to this case as "interest arbitration" was a clerical error.

vehicle to travel to a rental property which he owned as a private business, and then to travel to pick up his daughter. In 2006, an AFSCME member was given a one-day suspension for misuse of supplies, by using City paint to create a business sign for the employee's private business. All three involved community development employees. In 2007, a police secretary was given a verbal warning for using the computer for Internet surfing. Also in 2007, a Teamsters employee in the central garage was given a written warning for misuse of the central garage, to repair and work on private equipment.

Employees are permitted to use the City's intranet for personal e-mail. Entertaining video clips, personal hunting success pictures, Thanksgiving messages, New Year good wishes, solicitations for the American Cancer Society by the human resources coordinator, news about babies and solicitations for Catholic Charities have been posted and sent to City employees not only by other employees, but by members of management. No evidence was presented that reprimands have been given to any employee other than the Grievant for use of e-mail.

The Assistant City Manager felt that there was whispering going on in the office which she related to the written warning. She had no specific information which led her to that belief, but she was uncomfortable, and felt that the atmosphere in the office was strained following the Grievant's receipt of the written reprimand.

Positions of the Parties

Position of the Union

The Union takes the position that the Employer violated the Grievant's rights by reprimanding him. According to the Union, the eleven-page reprimand is unwarranted based on the facts, based on the collective bargaining agreement, or based on Employer policies on computer usage. The Union further asserts that the reprimand and its instructions violate state statutes and the Grievant's Constitutional right to free speech, and impinge on employees' rights to engage in

collective bargaining activities. Additionally, in the Union's view, the reprimand constitutes disparate treatment, as no other allegedly personal e-mail exchanged or sent by other City employees resulted in discipline. The Union objects to punishing the Grievant based in part on his non-attendance at a voluntary meeting. The Grievant's criticism of the Employer's changes in health insurance coverage is expected from a person in the role of Union steward or president, and should not be restrained by discipline, the Union states. The Grievant specifically told JS in e-mail that he was not an attorney, and advised her to seek advice from an attorney. The Union notes these statements in denying that there is any basis for suggesting that the Grievant was engaged in the "unauthorized practice of law."

In support of its position, the Union cites presenters from a recent Minnesota State Bar Association CLE entitled "Labor Law for the Employment Lawyer," in particular the materials written by Brendan and Justin Cummins of the Miller O'Brien firm, and materials by Paul Zech of Felhaber, Larson, Fenlon & Vogt, P.A., as well as other treatises and cases, including *Pickering v. Board of Education*, 391 U.S. 563 (1958). The Union suggests that the Grievant's e-mail was protected, concerted activity under labor law statutes. The Union asks that the discipline be reversed, and that the Employer's directives as to future conduct be ordered rescinded, or be found null and void, and such other remedy as may be deemed fair and just.

Position of the Employer

The Employer takes the position that there was just cause to discipline the Grievant. According to the Employer, the e-mail which the Grievant sent to JS violated policies and directives because the e-mail did not involve the Grievant's work duties. The Employer states that the Grievant provided legal advice without a license² when incorporating excerpts from Minn. Stat. §268.095,

² One e-mail string among the Grievant, JS and the AFSCME staff representative asked whether the staff representative could ask management whether JS's conduct was "misconduct or ... simply inefficiency, inadvertence, simple unsatisfactory conduct, a single incident that does not have a significant adverse impact on the employer, conduct an average reasonable employee would have

subd. 6. According to the Employer, the e-mail exchanges with JS do not concern enforcement of the collective bargaining agreement because they do not involve a term or condition of employment in the collective bargaining agreement, no grievance was submitted, and the e-mail contained negative opinions of other City personnel despite the Grievant's "lack of personal involvement." The Employer further objects to the frequency of the e-mail, and states that the Grievant had alternative means for communicating with the Grievant.

The Employer further states that the discipline was justified because the e-mails sent by the Grievant were misleading, inaccurate and uninformed. The Employer objects that the Grievant included his personal opinions. The Employer alleges that the e-mails were intentionally misleading as only selected portions of the health insurance plans were described, and not all details were provided. The Employer asserts that the Grievant made uninformed and inaccurate statements because the Grievant sent the e-mail after failing to attend a meeting of the health insurance committee. The Employer points to specific examples of statements which the benefits coordinator found inaccurate by omission of details as described at hearing, describing the inaccuracies or other information which should have been included in detail. The Employer objects that the Grievant "failed to inquire about or confirm the accuracy of his opinions or statements with the City." The Employer objects that the e-mail "caused other employees to complain to the City's benefits coordinator about the proposed health plans," and that it did not relate to the Grievant's job duties.

engaged in under the circumstances, poor performance because of inability or incapacity, good faith errors in judgment if judgment was required, ... are not employment misconduct." The subject of that string of e-mail was "Unemployment language defining misconduct - interesting."

As to all of the e-mail, the Employer states that the Grievant should have expended his time in performing his work as a Building Inspector II. The Employer further finds fault with the Grievant for failing to attend or assign someone else to attend the August Health Insurance Committee meeting as the AFSCME representative, for “Failing to become fully informed of all details of the City’s proposed health insurance plans for 2007,” and for “Distributing uninformed personal opinions and misleading and inaccurate information on the City’s health insurance plans to the AFSCME Bargaining Unit.”

The Employer denies that the e-mail were “authorized” by AFSCME, as required by the collective bargaining agreement, or were supported by documentation of the Grievant’s role as president of the local. The Grievant had no authority to execute an agreement on behalf of JS, the Employer asserts, and he had no authority to bind the bargaining unit to any health plan. The Employer states that the e-mails did not concern Union business, were inflammatory and negative and defamatory and disloyal.

The Employer then asserts that the matter is not substantively arbitrable, to the extent that the Union has raised the potential unfair labor practice involved in the Employer’s actions here. Rather, the Employer maintains that the Union is committing an unfair labor practice by attempting to cause the Employer “to pay ... money ... for services which are not performed or not to be performed” by expecting the Employer to pay the Grievant for the time he spent engaged in e-mail to JS and to employees regarding the health insurance plans, citing Minn. Stat. §179A.13, subd. 3(10). The Employer asserts that the grievance is vague and unsupported. The Employer denies that any of the Grievant’s actions are protected by the First Amendment and denies that such claim would be substantively arbitrable. The Employer asserts that its enforcement of its e-mail policy was fair and objective, and non-discriminatory. In support of its assertions, the Employer cites several cases and treatises. The Employer asks that the grievance be denied.

Discussion

The grievance in this case has raised issues under the collective bargaining agreement, as well as statutory and constitutional questions. This case involves discipline, and the burden is thus on the Employer to demonstrate that the discipline was appropriate under the Agreement. The Agreement in this case, as in almost all collective bargaining agreements, requires that discipline be issued only for “just cause.” Defining “just cause” has been the subject of many publications, from articles to books, since the phrase came into common industrial use. Debate over the famous “Seven Tests” developed by Carroll Daugherty and other substantive measures of just cause need not be repeated here. It is sufficient to state that the contention here does not involve procedural defects in the Employer’s investigation of the matters on which discipline was based. Rather, the contention here is that the conduct is not a proper basis for discipline, being permitted under the Agreement as well as being statutorily and constitutionally protected.

The first source for determining whether the conduct was protected is the language of the contract itself. That language states:

The Employer agrees that during working hours, on the Employer’s premises and without loss of pay, Union representatives shall be allowed to: ... Transmit communication authorized by the local Union or its officers or other Union representatives concerning the enforcement of any provisions of this Agreement.

Article XVII.B.4. There is no dispute that the conduct to which the Employer has objected took place on the Employer’s premises during working hours. The Union believes that the e-mails involved Union business, while the Employer has characterized the e-mails as personal, and has asserted that the e-mails do not fit under the communications permitted by the contract.

In general, Union representatives have protection from discipline for acts relating to Union activity. *Discipline and Discharge in Arbitration*, ed. Norman Brand, (BNA, 1998), at 330-331. While not all conduct is permissible, expression of opinions about employee benefits and assistance offered to an employee under threat of discipline fall within the normal conception of Union business, relating to potential grievances and administration of the contract. *Id.*

The Employer has stated that the e-mail to JS and the e-mail to various bargaining unit members was not “authorized” within the meaning of the collective bargaining agreement. However, the communications were authorized by the Grievant, who is the highest officer of the local Union. He is also a Union representative, as he also serves as Union steward. There was no evidence that any additional authorization was required by the Agreement, or by any custom or practice limiting the plain language of the Agreement. In fact, the Grievant testified that he had previously been involved in a situation similar to that of JS, had engaged in identical conduct in terms of e-mail, and his conduct was accepted by the Employer without comment. Thus, it is concluded that the e-mail was “authorized” within the meaning of Section B.4.

Question has also been raised about whether the e-mails to JS were “concerning the enforcement of any provisions of this Agreement.” As noted, the Agreement contains a “just cause” provision. The chain of e-mails with JS began with JS’s e-mail to the Grievant stating that “My meeting with Eric [the City Manager, her supervisor] is set for Wednesday, April 5th at 10:00 a.m.” It was followed by an e-mail from the Grievant to the AFSCME Council 65 staff representative, stating in pertinent part, “Management has asked her into a formal meeting and have advised her of her rights to have union representation.” Once JS had been advised that her right to Union representation³ at the meeting was in effect, it was obvious that the purpose of the meeting was investigatory, and preparatory to discipline. The Grievant was engaged in Union business when advising JS on how to proceed, with participation of the AFSCME staff representative. Those activities related to the just cause provision of the Agreement.

The Employer has expressed a belief that “enforcement of any provisions” of the Agreement does not take place unless a written grievance has been filed. This view is unduly narrow, and unworkable; there was no evidence that the parties intended such an usually narrow reading of the

³ Commonly known as *Weingarten* rights. See discussion in Elkouri & Elkouri, *How Arbitration Works*, 6th Ed., (BNA), at 233-240.

phrase. Enforcement of the provisions of a collective bargaining agreement occurs, for example, when a Union steward asks the payroll department to correct a miscalculation of overtime, or when a steward reminds a foreman of vacation rights under a contract or advises an employee whether to protest discipline. Many potential disputes can be resolved informally, often without need for filing a grievance. It is doubtful that the parties intended to exclude such discussion from contractual protection. That interpretation would also significantly interfere with Weingarten rights, discussed above, by prohibiting the Union representative from talking with an employee called into a disciplinary investigatory meeting prior to the meeting. Informal discussions often save time and trouble for both parties. Requiring formal grievances to be filed would make the process more litigious, and less likely to lead to informed resolutions such as JS's resignation. Enforcement of the collective bargaining agreement takes place whenever the provisions come in issue, permitting discussion of problems between Union representatives and the bargaining unit prior to the filing of a grievance. Further, it may be in the Employer's interest to have a well-informed Union grievance representative participating in the process as early as possible, so that resolutions such as a voluntary resignation can be reached. *See, How Arbitration Works, supra*, at 256. Even if that were not true,

The Employer has further objected to the Grievant's advising JS as "unauthorized practice of law." This objection is unfounded, being directly contradicted by the Grievant's statements to JS that he is not a lawyer and does not pretend to be one. As Union president, however, he could be expected to at least be aware of laws which might affect his bargaining unit members, such as unemployment compensation laws and laws prohibiting discrimination, particularly in the form of anti-union animus or creation of a hostile work environment. In some administrative hearings, a party may choose to be represented by a layperson, at the party's option. In any event, a Union steward or representative including the Grievant would be expected to understand what information would be important in defending the employee in a disciplinary action, such as knowing the conduct for which the employee is under threat of discipline. Additionally, it appears that the e-mail which quotes and discusses statutory language was between the Grievant and the staff representative, not to

JS. The e-mail in which the Grievant emphasizes that he is not an attorney advises JS that without actual proof of a hostile work environment, “our Union attorney” will not be able to help her. The Grievant was clearly differentiating his advice from the advice which could be received from an attorney. It is also noted that the Grievant ultimately assisted JS in negotiating her resignation, not by giving legal advice, but by acting as her duly elected Union president, and advocating on her behalf along with the Council staff representative.

Management has emphasized the amount of time which it took to exchange these e-mails with JS, citing the number and the Grievant’s testimony that he did take time to read the e-mail he received, to think about his response, and possibly to research his response, all during working hours. First, it is noted that the contract does not place any limit on the amount of time during the work day for a Union representative to conduct Union business. Second, there was no complaint about the Grievant’s productivity or work performance. Had it not been for the e-mail review, the Employer would never have noticed that the Grievant had been helping JS via intra-net, in his capacity as her representative. From that evidence, it appears that the Grievant was not distracted from his work by taking time to e-mail JS. Third, looking solely at the number of e-mail messages does not establish any particular length of time taken from the Grievant’s work. Approximately 33 e-mails were exchanged, over a five-month period. A few were a paragraph long, and one was longer; many others consisted of one sentence, or even one word (“Yep” in response to inquiry about availability for a meeting time). Review of the e-mail demonstrates that the time taken to read and respond were not so long as to constitute abuse of the Union’s right to communicate with its member, in context of this contract and these facts.

The Employer has also objected that the Grievant should not have used the City’s intra-net for any non-City purpose. However, as noted above, the Grievant had done so in a prior instance, without objection. Moreover, it is difficult to see how using the intra-net for this purpose is different from using the City-owned telephone to speak with JS personally, which has not been prohibited, nor could it reasonably be. In order to respond to requests for meetings and help his member prepare, the

Grievant needed to be able to speak to Union members during business hours, as is specifically permitted by the contract. E-mail is often used as today's equivalent of the telephone.

The Employer emphasizes that its policy states that the intra-net and the computers should only be used for City business. However, the City has not enforced that policy as to many other e-mail communications, ranging from hunting "brag" photographs to solicitations for charities and personal announcements. The arbitrator believes that the language of the contract permitting the Union to transmit communications to its members during the working day and on the work premises specifically exempts the Grievant's communications with JS and with the unit about health insurance from the general computer usage guidelines. Even if that were not the case, the Employer has engaged in selective enforcement of the computer rule, singling out the Union president's communications in that capacity for discipline while permitting personal messages of many other varieties from other employees. Such discriminatory treatment is not permissible. *See, How Arbitration Works, supra*, at 999-1000.

The Employer presented evidence to show that it had disciplined other employees for "misuse of City equipment." However, a majority of those instances involved use of city equipment for personal profit in an employee's separate for-profit business, what lawyers might describe as "conversion." The instance in which an employee was disciplined for use of a computer for internet surfing may or may not have been purely personal; no further explanation was given, and there is no claim that that employee was a Union representative. In the other computer-related warning, the nature of the "offensive" document was not explained. "Offensive" in context of employee discipline for a computer document has most often meant lewd or obscene. It would not ordinarily encompass legitimate Union communications such as those at issue here, even if management disagrees with the opinions expressed therein.

As to the content of the e-mails relating to the health insurance plan, the Employer proposes a general rule restricting content of Union communications, quoting a summary from *How Arbitration Works, supra*, at 1179. Those quoted content restrictions applied to Union bulletin boards. The

parties here have agreed to restrictions on the Union bulletin board, *i.e.*, that messages may not be political or libelous. However, no limitations were placed on the content of communications between the Union and its members during work hours on work premises, except that they be authorized by the local or its officers, which these communications were. Where parties have agreed to a limitation in one part of a contract and not in a provision dealing with similar subject matter, it is presumed that the omission is deliberate. Thus, management does not have any approval rights on content of the Union's communications with its members under Article XVII, Section B(1) which are not on the bulletin board.

Moreover, even if the content were not protected by the contract, the content of the health insurance e-mails meets the content prescription in *How Arbitration Works*. Union business would include health insurance; the Employer has acknowledged as much by asking the Union to send a representative to the committee meetings. Thus, the e-mail concerning health insurance does not "stray in subject matter from the reasonable concept of what constitutes union business at the particular plant." *Id.* While the Employer claimed that the e-mail had a detrimental effect on employee morale, no objective evidence supported that claim. It is questionable whether the cases can be interpreted so broadly as to prohibit any criticism of an employer by a union, which appears to be the interpretation offered here. Communication does not become inflammatory or defamatory because an employer is uncomfortable with the content, or because it may cause employees to ask questions about the unfavorable aspects of a benefit plan. A Union must be given wide latitude in what information it conveys to its members. *Common Law of the Workplace*, 2nd Ed., ed. T. St. Antoine (BNA, 2005) at 114-115; *see also, How Arbitration Works, supra* at 1172-79.

While the Employer here referred to the Grievant's understanding and opinions about the health insurance plans as "misleading" and incorrect, it did not claim that the statements were defamatory, "patently detrimental or disloyal to the employer." *How Arbitration Works, supra* at 1179. Alleged errors and misstatements in the e-mails were described in detail by management. However, upon cross-examination, it was evident that the errors seemed to be largely objections to

the Grievant's having failed to agree with management's analysis of the plan. The Grievant was criticized for providing the bargaining unit with management's analysis of the application of the plan, because management said that spreadsheet was a "worst case scenario." However, the bargaining unit is entitled to know the worst case scenario, not just the best. The Grievant was also criticized for failing to provide copies of a power point presentation to the bargaining unit, and for including his "personal" opinions of the plan. However, there was no demonstration that lack of the power point somehow misled those members of the bargaining unit who received the e-mail. Further, the bargaining unit elected the Grievant as their president, and was entitled to receive his opinion of the health insurance plan. If management did not intend to permit the Grievant to communicate with the bargaining unit as their representative on the Committee, there was no point to inviting the Union to participate. The Employer specifically requested that members of the Committee distribute information to their respective groups, and discuss the information with them. Management cannot dictate that the Grievant concur in their opinions about the plans, nor that the Union president portray the plans only in the positive manner which management prefers. If only management-formulated information is to be provided to the bargaining unit, it may structure the Committee in that way. However, the Union cannot be required to present that information as its own opinion.

The Employer has also disciplined the Grievant for not attending a meeting, and for not obeying its instructions as to how a substitute representative should be selected. Selection of representatives is a right belonging solely to the Union members; there is no place for the Employer in that process. *See*, Minn. Stat. §179A.13, Subd. 2(2); *see also*, Preamble to the Agreement, "This Agreement is pursuant to and in compliance with the Minnesota Public Employment Labor Relations Act of 1971 as amended." Uncontradicted testimony established that participation in the health insurance committee is voluntary. Nothing in the collective bargaining agreement obligates the Union to participate in voluntary health insurance committee meetings. Without a contractual obligation, the Employer has no basis for requiring Union participation, nor for punishing a Union

officer for the lack of it. Discipline of a Union officer for failing in his obligations to the Union is a matter to be handled by the Union in its own procedures, if such failure takes place. In short, it was improper to discipline the Grievant based on the internal Union matter of whom to send to the Health Insurance Committee meeting to represent the Union, and improper to direct the manner in which Union representatives should be chosen.

The conduct for which the Grievant was disciplined was protected by the collective bargaining agreement, and does not provide just cause for discipline. The Grievant's actions took place within his role as Union president and steward. Because those activities were intra-Union, rather than directed at the general public, First Amendment protection is not directly in issue here. *See, Pickering v. Bd. of Education*, 391 U.S. 563 (1968); *see also, Racine Unified School District*, 122 Labor Arbitration Cases (BNA) 423 (2005) (cited as L.A.). Had the bargaining unit members or the Grievant as local President contacted the mayor, city council members, or other public officials, or spoken out at a public meeting, *Pickering* and progeny would be considered, along with the collective bargaining agreement.

This is not a deferral case, in which an unfair labor practice charge has been filed and the administrative body has decided to defer decision until after the arbitration award has been rendered. Nonetheless, the parties expressed an intent to comply with the Public Employment Labor Relations Act (PELRA) in their contract. Thus, it is proper for the arbitrator to consider that Act in the course of these proceedings. It is unnecessary for the arbitrator to consider whether PELRA violations took place. However, PELRA provisions support a finding that the Employer was not entitled to inject itself into the Union's selection of its Health Insurance Committee representative, nor to attempt to limit the Grievant's communications with a member being considered for discipline, nor to dictate the Grievant's opinions or communications about the health insurance plans. Even if such statements and opinions were not protected by PELRA, the Agreement in this case explicitly protects that such assistance, on work premises and during working time, without limitations as to time or content. It is that Agreement which the arbitrator has been asked to interpret and apply to this

dispute. The Employer violated the Agreement.

Award

The parties to this collective bargaining agreement have provided specific rights for Union officers and representatives in communicating with the bargaining unit members, on work premises during working hours. The communications at issue here fall squarely within those rights as afforded to the Grievant, who is the Local Union president and acts as one of its stewards. As to the individual member, the Grievant's communications with her were in enforcement of the "just cause" requirement of the Agreement, by providing her with informed Union representation during the disciplinary process. As to group communications, the Grievant was providing his bargaining unit members with his analysis and understanding of the health insurance plans. It is for just that purpose that the Union elects its own representatives, rather than permitting the Employer to appoint them. To any extent the Employer disagreed with that interpretation, the Employer is entitled to present its views and beliefs about the plan to Union members, but it is not entitled to silence the local officials of the Union on any contract-related subject. As to the Health Insurance Committee, nothing in the collective bargaining agreement requires the Union to choose a member to serve on the committee, nor to attend meetings. The Employer is not entitled to require the Union to be present, nor to dictate how and when the Union shall select its representative or substitute. Accordingly, the Employer is not entitled to discipline the Union president for what is essentially an internal Union matter.

The grievance is sustained. The Employer is ordered to remove the reprimand from the Grievant's records, and to rescind any direction to the Grievant as an individual and as a Union officer regarding the content of communications to Union members collectively or individually, and to permit the Union to freely communicate with employees as provided in the collective bargaining agreement as interpreted by this Award.

Date: May 21, 2007

*City of Winona & AFSCME 65
BMS Case No. 07-PA-0610
Olson Grievance*

Sara D. Jay, Arbitrator