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Email Communications: Management's View

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ELECTRONIC COMMUNICATION is ubiquitous in our society and has had a profound effect in the workplace. Public employers view email as a valuable tool to communicate work-related issues and increase productivity; labor unions use it to communicate, organize, and educate its members and staff. However, unions' desire to use public employers' email systems raises a number of concerns among employers. These include adverse affects on:

- Productivity, i.e., interruption of work time because employees are reviewing/responding to non-work-related emails;
- Staff resources;
- Computer systems, e.g., the need to protect computer bandwidth, avoid a burden on servers and other equipment, and guard against harmful viruses; and,
- Compliance with legal requirements regarding the use of public resources.

The tension between unions' desire to use employers' email systems and employers' need to insure that their systems are used properly has resulted in disputes and litigation over the past several years.[1] This article answers the following questions: What rights of access do unions have to an employer's email system? Is email a negotiable subject? Under what circumstances can the right to use email be lost? And finally, what legal restrictions exist regarding the use of an employer's email system?

Union Access Rights

Under California's public sector laws, labor organizations generally have the right of access at reasonable times to areas in which employees work. They also have the right to use institutional bulletin boards, mailboxes, and other means of

communication, subject to reasonable regulation.[2] Unquestionably, email qualifies as a means of communication. However, the Public Employment Relations Board and at least one court have ruled that an employer need not make all means of communication available to employee organizations.[3] Based on the statutory right to reasonable regulation, an employer may reserve some sources of communication for business use.[4] The key is whether these alternative means provide an adequate opportunity for communication. Access is determinative, not speed.

Neither PERB nor the courts has required a public employer to open its electronic mail system to labor organizations if the employer reserves its computer system for business purposes only. That is, if an employer wants to exclude an employee organization — or any other group or individual — from using its email system, it may do so by reserving the system for business purposes only. The rule in the private sector is the same.[5]

Nothing in the law demands that because some email use is provided for non-business reasons, a union is entitled to unfettered use of the system.

In contrast, if a public employer permits its system to be used for non-business reasons (e.g., social, recreational uses), a labor organization has an equal right to such use. An employer's failure to grant a union the right to use its system when it grants access for other non-business purposes would constitute unlawful discrimination and a denial of rights guaranteed to employees and employee organizations under the law.[6] For example, in *State of California (Department of Personnel Administration et al.)*,[7] PERB held that it was a violation of the Dills Act for the state to allow minimal personal communication by email but prohibited such communication by the labor organization.

While an employer may not discriminate against employee organizations in the use of email, nothing in the law demands that simply because some email use is provided for non-business reasons, a union is entitled to unfettered use of the system. Thus, even if an employer permits non-business use, it retains the ability to adopt reasonable time, place, and manner restrictions. For example, an employer may restrict access to non-work time or incidental use, or may prohibit the transmittal of voluminous email or burdensome attachments.

In the Dills Act case noted above, although PERB condemned the state's refusal to allow the California State Employees Association access to its email system (when it allowed access for other minimal personal communication), the state's action prohibiting the union from sending voluminous messages was lawful because there was no evidence that the state had ever permitted others to conduct, for personal reasons, frequent and heavy levels of email communication.

Unions' Right to Negotiate Email Policies

Each of the laws that PERB administers provides for a duty to negotiate regarding subjects within the scope of representation. In general, the scope of representation includes such matters as wages, hours, and other terms and conditions of employment. It excludes consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.[8]

Union access rights generally are considered to be within the scope of representation.[9] Furthermore, PERB has ruled that email and computer use policies are subject to the duty to negotiate.[10] Such policies are negotiable, according to PERB, because they affect employee organization access rights and constitute a new ground for discipline for employees who violate their provisions. As a result, a proposed change to a past practice regarding employees' use of agency-provided computers is subject to the obligation to negotiate. An employer that contemplates such a change therefore must either provide notice and a reasonable opportunity to negotiate prior to taking the action or otherwise have a valid defense to a unilateral action (e.g., clear and unmistakable waiver).

Loss of the Right to Use Public Agency's Email

Even in situations where a labor organization has a right to use the public agency's email system, such a right may be lost under certain circumstances. PERB has ruled:

> Speech which is related to employer-employee relations may nonetheless lose its statutory protection where it is found to be so "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice," [citations] as to cause "substantial disruption of or material interference with material interference with [the employer's] activities."[11]

For example, in *San Diego Community College Dist.*,[12] PERB upheld the dismissal of an unfair practice charge where the facts demonstrated that the district refused to distribute a document in which the union accused district officials of engaging in felonious conduct. The refusal to distribute the document was warranted, PERB ruled, because the defamatory speech had lost its protected status and the district had acted consistent with its retained authority under the parties' collective bargaining agreement

Logically, the same process should apply to situations involving the transmittal of email. Thus, union email communications that are so insulting, opprobrious, defamatory, insubordinate, or malicious as to create a reasonable likelihood of substantial disruption of or material interference with governmental services can be prohibited. The prohibition against sending such communication also can be incorporated into the parties' collective bargaining agreement. If such communications are sent by employees without the prior knowledge and consent of the public agency, the agency would be able to discipline employees for improper conduct.

Logic and reason also dictate that email communication that discloses confidential business information will lose its protected status. Thus, if a union officer divulges confidential terms of a potential agreement involving the dismissal of a public agency manager, the communication should be considered unprotected, thereby permitting the public agency to take disciplinary action. Indeed, a few years ago, the general counsel to the National Labor Relations Board provided advice on a case where an employee obtained an internal management memorandum that revealed the terms and costs of a special retirement program proposed by the employer. The general counsel opined that it was lawful for the employer to discipline the employee who posted the memorandum on the union's website because the employee's activity was not protected by Section 7 of the National Labor Relations Act.[13]

Laws throughout the country recognize that although employees are not prohibited from being politically active, certain activities are restricted....

Legal Restrictions on the Use of Email

Education Code Sec. 7054 provides that no school district or community college district funds, services, supplies, or equipment shall be used for the purpose of urging the support or defeat of any ballot measure or candidate including, but not limited to, any candidate for election to the governing board of the district. Government Code Sec. 8314 provides that it is unlawful for any elected state or local officer, including any state or local appointee, employee, or consultant, to use or permit others to use public resources for a campaign activity, or personal or other purposes that are not authorized by law.

These and similar laws throughout the country[14] recognize that although government officials and employees are not prohibited from being politically active, certain activities are restricted to protect the integrity of the government and the electoral process. Namely, these are laws created to safeguard public resources, ensure that government remains nonpartisan and neutral in election matters, and protect government employees from pressure to support or oppose candidates or ballot measures. Among these forbidden activities is the use of employer means of communication to dis-

seminate information supporting or opposing political candidates or ballot measures.[15] Since email is a means of communication, then logically its use by unions (or governing body members, managers, or employees) to support or oppose political candidates or ballot measures should be prohibited.

There are no cases directly holding that the use of email to support or oppose political candidates or ballot measures is prohibited. Thus, some uncertainty exists about the conclusion to be reached and some union advocates argue that this prohibition should not apply to email. An examination of the origin and purposes of the law, however, as well as a review of the statutory and constitutional issues raised by certain union advocates, leads to the conclusion that email should be treated no differently than any other form of (forbidden) communication.[16]

PERB held that Ed. Code Sec. 7054's prohibitions were not limited to board members or administrators but included employees and the union, as well.

The claims of union advocates have centered on Ed. Code Sec. 7054. The evident purpose of that section is found in the seminal case of *Stanson v. Mott*.[17] In *Stanson*, the director of the State Department of Parks and Recreation was accused of improperly expending public funds to promote passage of a park bond issue. In holding the expenditure of funds for that purpose to be unlawful, the Supreme Court cited potentially serious constitutional questions:

> A fundamental precept of this nation's democratic electoral process is that the government may not "take sides" in election contests or bestow an unfair advantage on one of several competing factions…the selective use of public funds in election campaigns, of course, raises the specter of just such an improper distortion of the democratic electoral process.[18]

Ed. Code Sec. 7054 was enacted a year after the *Stanson* case was decided and undoubtedly was designed to incorporate the holding of the court. Union attorney Martin Fassler has claimed that amendments to the section in 1995 reveal an intent to limit the section's provisions to elected officials and administrators (managers). Case authority, logic, and reason, as well as a careful review of the legislative history, show that no such restriction was intended. (For Fassler's opinion, see pp. 17-20.)

First, the clear focus of the statute — and the Supreme Court's concern in *Stanson* — is on the use of public funds and resources to support or oppose candidates or ballot measures, not on the identity of the speaker. The use of taxpayer money is proscribed, not the rights of individuals to engage in political activity. In addition, in PERB's *San Diego* ruling, the board held that Ed. Code Sec. 7054's prohibitions were not limited to board members or administers but included employees and the union as well. In that case, PERB concluded that a union's efforts to use the district's intersite mail system and photocopying services on a reimbursement basis were prohibited by the Education Code and thus, the district's refusal to allow the union to use its resources was not only permitted but mandated.[19]

If employees or others were entitled to use district funds or resources to support or oppose candidates or ballot measures, the purposes of the law would be undermined. Taxpayer money would be used to subsidize political speech. Government would be able to perpetuate itself by allowing third parties to act in its stead. For example, a governing board could allow district employees or the exclusive representative to urge coworkers to support the incumbents or their allies, or send mass email communications to the public urging support.

Second, the legislative history concerning Sec. 7054 makes clear that the focus was on the expenditure of public resources, not on the identity of the speakers (i.e., board members or administrators). A State Senate Committee staff analysis states that the bill "would prohibit district employees from using working hours or district facilities to solicit or receive funds to support or defeat ballot measures that affect their compensation or working conditions."[20] This same

analysis and one prepared for the Senate Rules Committee stated that the bill "would conform the rule on the use of public funds by school or community college districts with the rule on the use of public funds by a city, county, or state."[21] Furthermore, a staff analysis when the bill was ready for final action noted:

> A principal purpose of this bill is to prevent the use of taxpayers' money to support or oppose school bond measures. This bill recognizes the difficulty in prohibiting speech by school employees or officials while working regarding a bond…. [22]

The legislative intent, as set forth in Section 1 of the statute, continues the focus on the expenditures of public funds, while recognizing that its actions will have a limiting effect on the political activities of board members and employees. The language provides in pertinent part as follows:

> "(a) The Legislature hereby finds and declares that, in a democratic society, the use of public funds in election campaigns is unjustified and inappropriate. No public entity should presume to use money derived from the whole of taxpayers to support or oppose ballot measures or candidates." (b) However, it is not the intent of the Legislature, in enacting this act, to restrict the political activities of officers or employees of a school district or community college district except as provided in Article 2 (commencing with Section 7050) of Chapter 1 of Part 5 of the Education Code or as may be necessary to meet specified requirements of federal law.[23]

Another argument made by those favoring unions' use of district email systems is that the same legislation that adopted changes to Ed. Code Sec. 7054 added Sec. 7058. That section provides that "nothing in this article shall prohibit the use of a forum under the control of the governing board of a school district or community college district if the forum is made available to all sides on an equitable basis." Union advocates argue that email is a forum and that, therefore, the Education Code sanctions the use of a district's email system so long as all points of view may be expressed. That argument lacks merit.

First, the statutory language indicates that the decision to open up a forum is discretionary. Nothing in the language requires a district to offer a forum on political campaigns. Districts that do not want to avail their email systems to political commentary and advocacy thus are free to decide against that action. In addition, the concept of a forum almost certainly means something other than an email system, otherwise the exception would swallow up the rule. If an email system is considered a forum — indeed if any of the other forms of communication, such as mail systems and telephone systems are considered fora for purposes of Ed. Code Sec. 7058 — then a district could circumvent the prohibition simply by opening up these communication avenues to other groups and individuals. Surely, this cannot be the purpose of the legislation.

In Section 7058, the concept of a forum almost certainly means something other than an email system, otherwise the exception would swallow up the rule.

Instead, a more reasonable and likely interpretation of Ed. Code Sec. 7058 is that it authorizes a district to open up its premises to all sides of a political issue, so long as it does so on an equitable basis. Staff analysis of the 1995 legislation said the bill would "provide that public facilities may be used if the facilities are made available to all sides on an equitable basis."[24] Nothing in the language of the statute or its legislative history indicates that use of the term "forum" could be used to eviscerate the intention of the law to forbid the use of public funds or resources to support or oppose political candidates or ballot measures.

Potential constitutional claims by union advocates center on the argument that Ed. Code Sec. 7054's restrictions on the use of a district's email system constitute a violation of employees' freedom of speech. In support of such a claim, Fassler has argued that a district email system is a forum under California law. As such, argues Fassler, it must be judged by the standard as to whether the email communications are

compatible with the normal activity of a particular place at a particular time, and whether they are reasonable in light of the purpose served by the forum. Fassler also has claimed that even if an email system is a nonpublic forum under constitutional analysis, a public agency's regulation on its use must be "content neutral" and reasonable in light of the purpose served by the forum. In either case, according to Fassler, a court likely would conclude that restrictions on the use of email for political purposes were unconstitutional. A careful review of the law reveals, however, that no constitutional violation of the law would occur.

With respect to whether a forum exists, ample case law indicates that a public employer's email system is not a public forum.[25] The Supreme Court has identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum. Traditional public fora are those places that "by long tradition or by government fiat have been devoted to assembly and debate." Public streets and parks fall into this category. A public forum may be created also by government designation of a place or channel of communication. The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse.[26] If either a traditional forum or a designated forum exists, government must show a compelling state interest in order to limit free speech.

Public property that is not by tradition or designation a forum for public communication is considered a nonpublic forum. The government can restrict access to a nonpublic forum as long as the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's view.

Here, a district's email system clearly is a nonpublic forum. Email systems are not traditional public forums and have not been designated for public use.[27] The fact that unions and others may have access to the email system under limited circumstances does not convert it to a public forum. Thus, restrictions on a district's email system are appropriate so long as the district demonstrates that the restrictions contained in Ed. Code Sec. 7054 are reasonable in light of the purpose served by the forum and are viewpoint neutral.

Political restrictions on speech imposed by Ed. Code Sec. 7054 and implemented through a district's email system are reasonable and viewpoint neutral. The restriction against expending public funds or resources to support or oppose political candidates or ballot measures is reasonable because it is consistent with the district's purpose of preserving its property for the use to which it is dedicated, i.e., communications regarding district-related business. In addition, avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum.[28] Furthermore, the reasonableness of the limitations on political campaigning via a district's email system also is supported by the substantial alternative channels of communication that remain open for union communication. Such channels include direct mail, a union Internet website, and in-person solicitation.[29]

Avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum.

Second, it has long been recognized that a government agency has far broader powers in regulating the speech of its employees than in regulating the speech of the general citizenry.[30]

Finally, even if it were necessary to focus on whether the restrictions on political speech were "content neutral," as Fassler claims are necessary, the restrictions imposed by Ed. Code Sec. 7054 are content neutral. Section 7054 restricts all speech for or against a political candidate or ballot measure. It makes no distinction based on perceived support or lack thereof regarding a particular position. The fact that it is a union that wants to make a speech does not suggest that the government is seeking to limit a particular viewpoint.[31]

Conclusion

The use of email in the workplace is a valuable tool but a potentially contentious issue for labor and management. A public agency may restrict access to its email system by dedicating its use solely for business purposes. If a public agency opens up its system for non-business use then it must provide a labor organization with equal access. Certain speech by a union may be considered unprotected, which may result in the loss of the right to use the email system. California law prohibits the use of public funds and resources to urge the support or defeat of political candidates or ballot measures. Since email is a public resource (as a service or as equipment), its use in political campaigns by unions should be prohibited. ✱

1 Indeed, the genesis of this article stems from a recent disagreement between the author's clients and the clients of Martin Fassler, author of the accompanying article endorsing a labor union's use of a district's email system to support particular political candidates.

2 See Gov. Code Secs. 3507 (MMBA), 3543.1(b) (EERA), 3568 (HEERA), 71636(a)(7) (TCEPGA), 71823(a)(8) (TCIELRA) and Public Utilities Code Sec. 99563.2 (TEERA). The Dills Act, Gov. Code Secs. 3512 et seq., which regulates the collective bargaining rights for most State of California employees, does not contain a specific provision giving employee organizations the right to use the state's internal methods of communication. (See *State of California [Department of Personnel Administration et al.]* [1998] PERB Dec. No. 1279-S, 22 PERC par. 29148.)

3 *Regents of the University of California v. Public Employment Relations Board* (1986) 177 Cal.App.3d 648, 654, 223 Cal.Rptr. 127, 130; *Regents of the University of California* (1995) PERB Dec. No. 504-H, 9 PERC par. 16123.

4 *Regents*, *supra*, 177 Cal.App.3d at 655, 223 Cal.Rptr. at 131.

5 See *In re Adtranz*, (2000) 331 NLRB No. 40, 2000 WL 739735, partially vacated on other grounds, (D.C. Cir. 2001) 253 F.3d 19.

6 *State of California (Department of Personnel Administration et al.)*, *supra*. The rule in the private sector is the same. See *E.I. du Pont de Nemours & Co.* (1993) 311 NLRB 893, 897-98. In addition, in Wisconsin, an examiner has ruled that the University of Wisconsin Hospitals and Clinics Authority engaged in unlawful discrimination by blocking the union's ability to communicate with members through the office email system when it allowed use of such system for personal reasons. (*University of Wisconsin Hospitals and Clinics Authority*, Dec. No. 30202-B [Nielsen 7/02].)

7 *Ibid.*

8 See Gov. Code Secs. 3504 (MMBA), 3516 (SEERA), 3543.2 (EERA), 3562 (HEERA), 71634 (TCEPGA), 71816 (TCIELRA) and Public Utilities Code Sec. 99563.5 (TEERA).

9 See *Jefferson School Dist.* (1980) PERB Dec. No. 133, 4 PERC par. 11117; *Davis Joint Unified School Dist.* (1984) PERB Dec. No. 474, 9 PERC par. 16045.

10 *Trustees of the California State University* (2003) PERB Dec. No. 1507-H, 27 PERC par. 26; See also *State of California (Water Resources Control Board)* (1999) PERB Dec. No. 1337-S, 23 PERC par. 30136.

11 *Rancho Santiago Community College Dist.* (1986) PERB Dec. No. 602, 11 PERC par. 18021.

12 (2001) PERB Dec. No. 1455, 25 PERC par. 32099.

13 See NLRB General Counsel Feinstein's Report on Advice, Appeal, and Section 10j Cases Released Nov. 12, 1999, 212 DailyLab.Rep. E-1 (BNA) (Nov. 3, 1999) cited in 40 American Business Law Journal 827, Nancy J. King, "Labor Law for Managers of Non-Union Employees in Traditional and Cyber Workplaces" (Summer 2003)

14 See e.g., New York Constitution, Article VII, Section 8(1), *Schultz v. State of New York* (1995), 86 N.Y.2d 225, 630 N.Y.S.2d 978, Louisiana Constitution, Art. XI, Sec. 4, *Godwin v. East Baton Rouge Parish School Board et al.* (1979) 372 So.2d 1060, writ denied 373 So.2d 527.

15 *San Diego Community College Dist.* (2001) PERB Dec. No. 1467, 26 PERC 33014, rehearing denied, (2003) PERB Dec. No. 1467a, 27 PERC par. 55. See also Gov. Code Sec. 8314, which defines "public resources" to mean "any property or asset owned by the state or any local agency, including, but not limited to, land, buildings, facilities, funds, equipment, supplies, telephones, computers, vehicles, travel and state-compensated time." Unlike Ed. Code Sec. 7054, Gov. Code Sec. 8314 excludes from the definition of campaign activity "incidental and minimal use of public resources."

16 A written opinion prepared by the General Counsel to the Chancellor's Office of the California Community Colleges (September 16, 2004), and distributed to all of California's community colleges, indicates that use of a district's email system to

support or oppose political candidates and/or ballot measures is prohibited by Ed. Code Sec. 7054. As a result, the opinion urges community colleges not to distribute, nor allow others to distribute, political material advocating the support or defeat of a ballot measure or candidate via its email system. See also "The Public Trust," Newsletter of the Los Angeles City Ethics Commission, volume 8, issue 1 (Summer 2004); *Los Angeles Times*, "Election Emails Were Illegal, Councilman Says," November 3, 2004, California Metro section.

17 *Stanson v. Mott* (1976) 17 Cal.3d 206, 551 P.2d 1, 130 Cal.Rptr. 697

18 *Id.* at 217.

19 *San Diego Community College Dist.* (2001) PERB Dec. No. 1467, 26 PERC par. 33014, rehearing denied, (2003) PERB Dec. No. 1467a, 27 PERC par. 55.

20 Senate Committee on Criminal Procedure, S.B. 82 Bill Analysis, as amended April 24, 1995, April 25, 1995 hearing date.

21 *Id.* See also Senate Rules Committee, Office of Senate Floor Analyses, S.B. 82 Bill Analysis (May 30, 1995). Gov. Code Sec. 8314 explicitly refers to employees engaging in "campaign activity" through the use of public resources.

22 Senate Bill Analysis, Third Reading, S.B. 82, as amended August 29, 1995. Earlier bill analyses, when the legislation was pending in the State Assembly, continue to emphasize that the purpose of the bill was to "declare the use of public funds in election campaigns is unjustified and inappropriate." As support for the need to modify then-current statutory language, one bill analysis noted that in one school district, school funds were used to hire political consultants, set up telephone banks to contact potential supporters, pay bonuses to principals who achieved a certain level of electoral support, and distribute mailings urging the passage of the measure. Significantly, that same bill analysis noted that nothing in the proposed amendment to the statute was designed to affect the right of free speech of any member of a governing board or any employee thereof. (See Assembly Committee on Elections, Reapportionment and Constitutional Amendments, S.B. 82 Bill Analysis, hearing date June 26, 1995; Assembly Committee on Public Safety, S.B. 82 Bill Analysis, as amended July 1, 1995.

23 Stats. 1995, c 879 (S.B. 82), Sec. 1

24 Senate Rules Committee, Office of Senate Floor Analyses, S.B. 82 Bill Analysis, "Unfinished Business" (September 8, 1995).

25 *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.* (1985) 473 U.S. 788, 87 L.Ed.2d 567.

26 *Id.*

27 See *United States et al. v. American Library Assn., Inc.*, (2003) 539 U.S. 194 (Internet access in public libraries was neither a traditional nor a designated forum); *Perry Education Assn. v. Perry Local Educators Assn. et al.* (1983) 460 U.S. 37 (a school mail system is a nonpublic forum; as such the district could grant use to exclusive representative while denying such use to other labor organizations).

28 *Cornelius*, *supra*. See also *Education Minnesota Lakeville v Independent School Dist. No. 194* (2004) 341 F.Supp.2d 1070 (unions are not entitled to an injunction enjoining the school district from enforcing policy prohibiting the placement of political brochures in teacher mailboxes).

29 See *Education Minnesota Lakeville*, *supra*.

30 See *e.g.*, *Waters v. Churchill* (1994) 511 U.S. 661.

31 See *Lamb's Chapel v. Center Moriches Union Free School Dist. et al.* (1993) 508 U.S. 384. Cited as authority by Fassler, the decision concludes that the district violated the petitioner's constitutional rights by refusing the church's request to use school facilities for a religious-oriented film series on family values and child rearing solely because the film dealt with the subject from a religious standpoint (while the district had permitted other non-religious views on the subject to be presented). In this matter, however, there is no evidence that a district would prevent a union (or anyone else) from speaking based on the viewpoint of their message. Here, all political speech in support or opposition to political candidates or ballot measures is prohibited.