

California Public Employee Relations Journal

Issue 171

April 2005

Email Communications: A Union Perspective

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WE KNOW THAT the government of China aggressively blocks its citizens' access to certain websites, and that the government of Saudi Arabia does the same to prevent its people from gaining full access to the Internet.¹ Of more immediate interest to some of us who work in California public sector labor relations, is this question, which a union client asked us to consider last fall: Can a community college district legally prevent its faculty employees from sending or receiving email messages endorsing a political candidate?

Consider the facts. Shortly before the November 2004 election, the president of a union that represents the employees of a California community college district sent an email to the union's members, addressed to the employees' workplace email addresses. The email described the endorsements of the local central labor council, including the Democratic Party's candidates for president and vice president, and of a series of candidates running for federal, state, and local offices. A district administrator quickly warned the union president that the distribution of the email was in violation of the district's page-long email policy, which includes the following statements, among others:

The Email system shall be used for District business and only incidentally for personal use which does not violate District policies or restrictions....

[The policy does not define "incidentally"].

Use of District Email shall not be for communications that:

Constitute political campaigning for or against any candidate for public office or any ballot proposition, or constitute lobbying any federal, state or local official (elective or non-elective) with respect to any matter not involving official District business.

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A district administrator told the union that the district believes it is required to adopt this prohibition on email political campaign messages by Education Code Sec. 7054, which provides, in relevant part:

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....

Our firm does not agree with the district administration. We believe Sec. 7054 does not require adoption of the prohibitive district policy quoted above.

Instead, we believe that Sec. 7054 was intended by the legislature to restrict only the conduct of the small number of people who control the district's facilities and funds — the governing board and the district's administrators. We believe that the simultaneous enactment of Sec. 7058 as part of the same bill supports our conclusion because Ed. Code Sec. 7058 and (pre-existing) Sec. 82537 protect the rights of the public, including school and community college district employees, to use the email system for the distribution of political campaign messages.

Aside from statutory considerations, California constitutional law regarding free speech and the use of public facilities militates against an interpretation of Sec. 7054 that would prevent the use of the email system to circulate election endorsement messages. Finally, we believe that federal constitutional law would bar an interpretation of the law to prevent use of the email system to circulate endorsement messages.

Sections 7054 and 7058

Sections 7054 through 7058 were part of a bill adopted by the legislature in 1995, introduced by Sen. Quentin Kopp of San Mateo, and amended several times before its passage. Section 7058 provides:

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.

“Forum” is not defined in the code section or elsewhere in the bill. What is a “forum?” These definitions appear in widely used dictionaries: (1) “an assembly for the discussion of public matters or current questions;” (2) “a public meeting place for open discussion;” (3) a “medium of open discussion or voicing of ideas, such as a newspaper or radio or television program;” (4) “a public meeting or presentation involving a discussion, usually among experts and often including audience participation.”

Is a community college district's email system a “forum”? It sure is.

Several of the definitions above would apply to an email system operated by a community college district, (and to email systems operated by many organizations, public and private). Certainly,

the primary use of the system is to communicate information or instructions, or to discuss district policy or implementation of those policies. But certainly, the same system also is used regularly for distribution of information that is of interest to a significant number of district employees, although unrelated to official district business. As examples (taken from a review of email messages that were circulated on the district's email system last fall), we know the system was used to provide information about fundraising events, the availability of tickets for cultural and recreational events, public service announcements unrelated to the district, and celebrations of employees' “life-cycle” events, such as weddings and births.

We know that college faculties include instructors in government, economics, politics, psychology, and sociology. We know that these faculty members send and receive email about their areas of interest from students, colleagues, and members of the public — some of them course-related, some of them not. Even more, we know that email systems generally serve as a forum for the exchange of information and opinion among the users — about job-related subjects

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and about non-job related questions — everything from current movies and music to the comparative merits of politicians, or the prospects of the local sports teams. And all of us who have worked for large organizations know that this use of email systems is widespread, perhaps universal. Email systems are a combination of public address system, official and unofficial bulletin board, employee lounge and water-cooler humor-exchange center, and free speech area. An email system is a veritable street-corner, a high-tech Hyde Park — a public forum.

In addition to Sec. 7058, pre-existing provisions of the Education Code require school districts to allow their facilities to be used for civic gatherings of all kinds. Education Code Sec. 82537 (enacted prior to 1976) requires community college districts to make their facilities available to community groups “formed for recreational, educational, *political*, economic, artistic or moral activities...,” and where they may “meet and discuss...as they may desire, any subjects and questions which in their judgment appertain to the educational, *political*, economic, artistic and cultural interests of the citizens of the communities in which they reside.” [Emphasis added.] This law remained unchanged when Secs. 7054 and 7058 were enacted in 1995. K-12 school districts are covered by an identical law: Ed. Code Secs. 38130-38131.

Because of these “civic center” laws, it is commonplace for auditoriums at community colleges and at elementary and high schools to be used by community groups for a wide range of purposes, including political meetings. But, if read literally, Sec. 7054 would prohibit the use of an auditorium on a college campus as a setting for a public political meeting because the language of Sec. 7054 would prohibit the use of the supplies and equipment within the auditorium — like the auditorium’s stage, seats, and public address system. That literal reading of Sec. 7054 would be incorrect because it is inconsistent with both Sec. 7058 and with Education Code Sec. 82537, which recognizes and protects the public’s right to use of school district facilities for public discussion, including political discussion. Similarly, Sec. 7054 cannot

be read in a way that would prevent members of the public, including employees, from using a district’s email system. After all, an email system is another “forum” — a place for discussion and debate — that is made available to all sides on an equitable basis.

Court Decisions: California Law

California courts interpreting the free speech provisions of the California Constitution (Art. I, Sec. 2) view the “public forum” concept as a continuum, with public streets and parks at one end of the continuum, and other government institutions, like prisons and hospitals, where limitations on access are essential, at the other end. As one Court of Appeal decision held:

The basic thrust of these cases is to limit regulation to that which proscribes expression that is “basically incompatible with the normal activity of a particular place at a particular time.”²

Another court used the same “continuum” approach and wrote:

The touchstone for evaluating these distinctions [regarding various uses of public facilities] is whether they are reasonable in light of the purpose which the forum at issue served.³

Where would a school district or community college district’s email system fit into the continuum? The email system is a fabulously open forum. District employees are able to send and receive messages from all over the world, about virtually any subject under the sun.

Applying this analysis of California constitutional protections, we believe that a prohibition on the distribution of political campaign messages through a district’s email system would violate the California Constitution. Distribution of such messages is “reasonable in light of the purpose which the forum at issue served” because the messages are “basically compatible with the normal activity of a particular place

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at a particular time.” For an email system that frequently is used for personal messages from one employee to another, including comments about political issues, California courts would not allow Sec. 7054 to justify a local public agency’s adoption or enforcement of a rule that would prevent distribution of a political endorsement message.

Federal Freedom of Speech Protections

In defense of the prohibition of circulation of political endorsement messages, lawyers for public agencies probably would rely on federal court decisions that refer to traditional public forums (e.g. streets and parks) and areas of public agencies that are “designated forums” (physical areas that public agencies designate for public discussions). They would argue that while the email system occasionally may be used for political messages, the district has not designated its system for completely unfettered political discussions because its policy excludes political endorsements.

Indeed, some federal court decisions do refer to these formal categories in analyzing certain free speech issues (although there is room for debate on these categories and where to draw the dividing lines). However, federal cases hold that even in the matter of a non-public forum, under the constitutional analysis, a public agency’s regulation on the use of the forum must be “content neutral” and reasonable in light of the purpose served by the forum.⁴

Email is a substitute for in-person or telephone communication, intended to allow a free exchange of ideas. A district’s email system allows use for writings produced for college courses. Community colleges offer courses on rhetoric, persuasive writing, politics, government, history, and ethics. Presumably, this would allow distribution (student to teacher, teacher to student, student to student) of political essays related to classes. This would include essays supporting or opposing limits on abortion, essays supporting or opposing immigration policy, a commentary about the film *Fahrenheit 9/11*, or about the influence of evangelical Chris-

tians in the presidential election in Ohio, or the strength of the Social Security system.

Thus, numerous messages with political content (political analysis, commentary, and advocacy) are allowed. Only when an individual — or union — distributes an email indicating candidate endorsement (even reporting an endorsement by another group), would a district seek to suppress the speech. This suppression would be designed to quash the point of view of the speaker on an otherwise permissible subject (e.g. politics, government, ethics). We believe that such a restriction would be unconstitutional under federal law.

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A PERB Decision That Might Support the Opposing View

But, you might ask, hasn’t the Public Employment Relations Board already decided that Sec. 7054 prohibits its use of school district facilities for distribution of political endorsements? In *San Diego Community College Dist.*,⁵ PERB held that Sec. 7054 allows a district to prohibit a union from distributing political endorsement flyers in individual boxes in the campus mailroom.

We believe that case is factually distinguishable from the situation described here, and the decision in *San Diego* should not dictate the result in a case involving an email system. Certainly, while an email system fits easily within the meaning of “forum,” as in Sec. 7058, a mailroom, with an inherently and obviously limited purpose, and with access restricted to a limited number of district employees, is not at all easily described as a forum. And, *San Diego* gave no consideration to the significance of Sec. 7058. Adding that section to the analysis would compel a different conclusion.

Perhaps most importantly, PERB, as an administrative agency created by statute, has no authority to consider the constitutionality of legislation. Thus, the *San Diego* decision did not contemplate a reading of Secs. 7054 and 7058 that would protect free speech, rather than restrain it.

The primary decision relied on in *San Diego* is *Stanson v. Mott*.⁶ That decision held that a state agency could not use

\$5,000 of public funds to promote the passage of a bond issue. That decision, while constitutionally correct, cannot properly be extended to allow a district to prohibit speakers, other than government agency managers or employees taking direction from them, from distributing information about a political endorsement in a way that does not require the expenditure of government funds to finance the communicative process. *

Conclusion

In light of this analysis, it is our belief the district may not constitutionally bar email messages that include endorsement of political candidates or ballot propositions.

1 See *Empirical Analysis of Internet Filtering in China*, by Jonathan Zittrain and Benjamin Edelman: cyber.law.harvard.edu/filtering/china/ and cyber.law.harvard.edu/filtering/saudi Arabia/.

2 *Prisoners Union v. California Department of Corrections* (1982) 135 Cal.App.3d 930 at 935, 185 Cal. Rptr. 634, quoting from *United States v. Douglass* (9th Cir. 1978) 579 F.2d 545 and *Grayned v. City of Rockford* (1972) 408 U.S. 104, at 116, 92 S.Ct. 2294.

3 *U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory* (1984) 154 Cal.App.3d 1157, 201 Cal.Rptr. 837.

4 *Lamb's Chapel v. Center Moriches Union Free School Dist.* (1993) 508 U.S. 384 at 392-394.

5 (2001) PERB Dec. No. 1467, 152 CPER 86.

6 (1976) 17 Cal.3d 206, 130 Cal.Rptr. 697.