

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**DISTRICT 1199W/UNITED PROFESSIONALS FOR QUALITY
HEALTH CARE, SEIU, AFL-CIO, CLC, Complainant.**

and

UNIVERSITY OF WISCONSIN HOSPITALS AND CLINICS AUTHORITY, Respondent.

Case 12
No. 59953
Ce-2211

Decision No. 30202-B

Appearances:

Cullen Weston, Pines & Bach, LLP., by **Attorney Gordon McQuillen**, at the hearing and **Attorneys Linda L. Hartfst** and **Shana R. Lewis** on the brief, 122 West Washington Avenue, Suite 900, Madison, WI 53703, appearing on behalf of the Complainant District 1199W.

Michael, Best & Friedrich, LLP., by **Attorney Amy O. Bruchs**, One South Pinckney Street, P.O. Box 1806, Madison, WI 53701-1806, appearing on behalf of the Respondent UWHCA.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Daniel Nielsen, Examiner: The above-named Complainant, District 1199W/United Professionals for Quality Health Care, SEIU, AFL-CIO, having filed with the Commission a complaint, alleging that the above-named Respondent, University of Wisconsin Hospitals and Clinics Authority have violated the provisions of Ch. 111, WEPA, by blocking the Union's ability to communicate with members of the Union through their office e-mail addresses; and the Commission having appointed Daniel Nielsen, an Examiner on its staff to conduct a hearing and to make Findings of Fact and Conclusions of Law, and to issue appropriate Orders; and a hearing having been on held on the complaint on November 12, 2001, at the Commission's offices in Madison, Wisconsin, at which time all parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute; and the parties

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having submitted post-hearing briefs and reply briefs, the last of which was received by the Examiner on March 2, 2002; and the Examiner being fully advised in the premises, now makes and issues the following Findings of Fact, Conclusions of Law and Order.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

FINDINGS OF FACT

1. The Complainant, District 1199W/United Professionals for Quality Health Care, SEIU, AFL-CIO, CLC (hereinafter referred to as either the Complainant, the Union or District 1199W) is a labor organization maintaining its principal business offices at 2001 West Beltline Highway, Suite 201, Madison, Wisconsin. The Union's Executive Director is Lenore Wilson. Bonita Strauss was hired in August of 2000, and is a business agent for the Union. David O'Connell, Diane Palmer, Gene Linkmeyer, Bob Wingwood, John Horn and Sally Sticks are or have been staff members of the Union.

2. The Respondent University of Wisconsin Hospitals and Clinics Authority, (hereinafter referred to as either the Respondent, the Authority or the Hospital) is an employer which operates a large health care and medical research facility in and around Madison, Wisconsin. Attorney James Pelisek is the Chairman of the Authority's Board. Donna Sollenberger is the President and CEO of the Authority, Sharon Trimborn is the Vice-President of Human Resources, James Pendergast is the Director of Employee and Labor Relations and Judy Broad is the Senior Vice-President - Nursing.

3. The Union is the exclusive bargaining representative for a bargaining unit comprised of approximately 1200 nurses, dieticians and therapists employed by the Authority.

4. The Union and the Authority have been parties to a series of collective bargaining agreements. The 2001-2004 agreement contains, *inter alia*, provisions concerning the Union's rights to communicate with employees and have access to the Hospital's facilities. In the mark-up of the agreement following negotiations, newly bargained provisions were underlined:

Section 4 Union Activity

Bargaining unit employees, including officers and representatives shall not conduct any Union activity or business on work time except as specifically authorized by the provisions of this Agreement.

. . .

Section 6 Bulletin Boards

A. The Employer shall provide bulletin boards at mutually agreed upon locations for use by the local union to enable employees of the bargaining unit to see notices posted thereon.

B. Bulletin Boards shall be placed at the following locations:

University Hospitals	2
University Station	1
<u>East Clinic</u>	<u>1</u>
<u>West Clinic.</u>	<u>1</u>

The normal size of these bulletin boards shall be eight square feet.

C. All bulletin boards, which the Union currently enjoys, shall be maintained. All notices shall be posted by an authorized Union Representative and shall relate to matters listed below:

1. Union recreational and/or social affairs;
2. Union appointments;
3. Union elections;
4. Results of Union elections;
5. Union meetings;
6. Rulings or policies of the International Union or other Labor Organizations with which the Union is affiliated;
7. Reports of Union standing committees;
8. Any other material authorized by the Employer or his/her designee and the local Union; and,
9. Official Union publications.

D. No political campaign literature or material detrimental to the Employer or the Union shall be posted. The bulletin boards shall be maintained by the local Union.

E. The location, size, type and number of additional bulletin boards shall not be subject to the grievance procedure in Article IV.

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Section 11 Distribution of Notices/Institutional Mail

A. The Union shall be allowed to use the existing inter-departmental and/or intra-departmental mail system(s) for a maximum of two membership mailings per month to members of the Union. Such mailings must be of a reasonable size and volume and prepared by the Union in accordance with prescribed mail

policy. The Employer shall be held harmless for the delivery and security of such mailings. The contents of such mailings shall be related to the matters listed below:

1. Union recreational and/or social affairs;
2. Union appointments;
3. Union elections;
4. Results of Union elections;
5. Union meetings;
6. Rulings or policies of other Labor Organizations with which the Union is affiliated;
7. Reports of Union standing committees; and,
8. Any other material authorized by the Employer and the Union.

B. No political campaign literature or material detrimental to the Employer or the Union shall be distributed. Union (District 1199W/United Professionals) publications may, however, contain informational stories relative to endorsements by the Union and/or other organizations.

C. Union use of the mail systems involved shall not include any U.S. Mails or other commercial delivery systems used by the Employer as a part of or separate from such mail systems.

Section 12 Telephone Use

Existing telephone facilities may be used by Union officers and representatives for Union business providing such use does not interfere with or disrupt normal operations of the facility. Such use shall not obligate the Employer for payment of long distance or other charges. The Employer will not charge the Union or individual employees for local calls made for the purposes described in this section.

Section 13 Visitations

A. The Employer agrees that non-employee officers and representatives of the Union shall be admitted to the Employer's premises during working hours by giving 24 hours advance notice to the appropriate Employer representative. The Union Representative shall, upon arrival, check in through the Human Resources Department.

B. Such visitations shall be for the purpose of conferring with the Employer, designated Union Representatives and/or employees and for the purpose of administering this Agreement. The Union agrees that such activities shall not interfere with the normal work duties of the employees. Under these conditions the Employer agrees to provide for the release of employee(s) from their normal work duties to meet privately with the representative for a

reasonable amount of time as soon as necessary arrangements can be made. The Employer has the right to designate a meeting place and/or to provide a representative to accompany the Union Representative if operational requirements do not permit unlimited access to that part of the premises where the meeting is to take place.

Section 14 Orientation

A. A representative of the Union shall be granted up to thirty (30) minutes for Union orientation during scheduled group orientation meetings involving new District 1199W/UP represented employees. The Employer retains the right to prohibit or terminate any Union orientation presentation that contains political campaign information or material detrimental to the Employer. Attendance at Union orientation presentations shall be voluntary. Representatives conducting Union orientation shall do so without loss of pay during their scheduled hours of employment.

B. In the absence of such group orientation meetings, or individual employee orientation meetings, the Employer agrees to distribute to new employees represented by District 1199W/UP a packet of informational material furnished to the Employer by the Union. The Employer retains the right to review the materials and refuse to distribute any political campaign literature or material detrimental to the Employer.

. . .

5. The Authority maintains an e-mail system. In 1999, the system was upgraded and was expanded, including the addition of mailboxes for the nursing staff. The current system utilizes two servers for mailboxes and two routing servers. Each server can accommodate approximately 3,000 mailboxes and in November of 2001, the Hospital had approximately 4,700 mailboxes assigned for its personnel. Each mailbox is size-limited to 25 megabytes. The Hospital's system handles an average of 1,000 e-mails per hour, with the majority coming during the peak business hours of 8:00 a.m. to 6:00 p.m.

6. During contract negotiations in 1997, the Union proposed contract language granting it use of the Authority's e-mail system and computers: ". . . the union and its bargaining unit employees may use the e-mail system on work unit computers to communicate between and among each other so long as the communication does not occur on work time." This proposal was dropped during negotiations, and no similar proposal was made during the 2001 negotiations.

7. The Union maintains a database of members at the Hospital. The membership cards distributed by the Union at new employee orientation have a space for home and work

e-mail addresses, though at the time of orientation most employees have not yet been assigned work e-mail addresses. At the time of the hearing in this matter, the Union's database included approximately 125 personal e-mail addresses and 800 work e-mail addresses for the 1200 members of the Hospital bargaining unit.

8. Prior to May 10, 2001, the Union made use of the e-mail system to communicate with its members at the Hospital. A few of the communications were sent to all bargaining unit members for whom the Union had e-mail addresses (this type of message is hereinafter referred to as a "broadcast"), and largely contained information that was also communicated through the Hospital's internal mail system, on bulletin boards, through the U.S. mail and in the Union's newsletter. Most of the Union's e-mails were individual communications, concerning such matters as pending grievances. Hospital management was not formally notified of the Union's use of the e-mail system, but Hospital representatives themselves routinely used e-mail to correspond with Union representatives and received responses via e-mail.

9. Since August of 1998, the Hospital has had a Policy and Procedure on the use of the internet by employees. The policy contains provisions restricting internet access to business purposes, and allowing Hospital management to monitor internet usage and censor postings on the Hospital's system:

. . .

4. UWHC Information Systems are to be used for business purposes.

5. UWHC Information Systems routinely logs web sites visited, files downloaded, and related information exchanges over the Internet. Department managers can receive reports of such information and use it to determine which types of Internet usage are appropriate for their department's business activities.

Management reserves the right to censor any data posted to UWHC computers or networks. These facilities are private business systems, and not public forums, and as such do not provide First Amendment free speech guarantees. UWHC Information Systems retains the right to remove from its Information Systems any material it is viewed as offensive or potentially illegal.

. . .

10. The Hospital also has a policy setting forth "Standards for Use of Hospital Facilities [sic] and Personnel for Outside Activities." This policy addresses, *inter alia*, personal use of e-mail and describes the conditions for such personal use:

. . .

Hospital facilities, equipment, supplies, and personnel shall be used only to advance the interests of the hospital. This includes all hospital property, such as computers, computer network, Internet, telephones, copiers, stationary, postage, etc.

It is understood that because of the hours that staff work, it may be necessary to have some minimal personal use, such as local phone calls, personal e-mail messages, and the like. Some incidental personal use of the Internet is also permitted. There are settings and times when this can be done without interfering with hospital work. It should never be done at times when it interferes with hospital work. Usage of hospital facilities as described above is a privilege, not a right. If it is done excessively or when you have been told not to do it, discipline can result.

. . .

Any use permitted by these standards can be prohibited or limited in individual cases by supervisory or management personnel.

11. Management, through its Information Systems department, has the ability to prevent incoming e-mails from being distributed by blocking the address of the sender. Once the address is blocked, any e-mail sent from that address will not be delivered to any address on the system. Prior to the events giving rise to this case, the only two instances in which any outside e-mail address was blocked were a case in which an employee complained about receiving solicitations for pornographic websites, and a case in which an employee's ex-husband was harassing her through the Hospital e-mail. In both cases, the affected employee asked the Hospital's Information Systems Department for help, and the senders' addresses were blocked from using the e-mail system. A third case, again involving solicitations for pornographic websites, occurred in the Fall of 2001. That sender's address was also blocked. Aside from the Union's e-mail which is the subject of this complaint, the Information Systems Department has never blocked an address except in response to an employee complaint nor in any other way regulated the access of outsiders to the e-mail system.

12. In the winter of 2000-2001, the Authority and the Union were engaged in collective bargaining over a new contract. The parties elected to use a form of interest based bargaining referred to as the "Resolve process." The bargaining teams were trained in the process in October of 2000. Ground rules, criteria for judging solutions, and overall goals for the bargain were discussed in December, and the parties met in January to discuss what issues would be negotiated.

13. In April, 2000, the Union perceived negotiations as less productive than it wished, and started sending more frequent communications to members, including broadcast e-mails, using both personal and work e-mail addresses.

14. On May 1, 2001, the Authority implemented its final offer. Neither party had a proposal on the table at that point regarding Union access to e-mail, and the final offer did not include any change in the contract related to e-mail.

15. On May 4, Bonita Strauss sent a broadcast e-mail to the members of the bargaining unit, setting forth the Union's view of the final offer implementation and the progress of negotiations. In her e-mail, Strauss characterized the actions of the Authority's negotiators as union busting.

16. In early May, Pendergast asked Senior Systems Analyst Matt Schaefer, the Hospital's e-mail administrator, to monitor the mailbox of employee Peter Strube, a member of the Union's bargaining team. Pendergast also asked Schaefer if he could block Bonita Strauss's e-mail address, in order to prevent her from sending e-mail to anyone on the Hospital's system. Schaefer blocked Strauss's address, and forwarded copies of Strube's incoming mail to Pendergast. Pendergast reviewed the content of the messages and where it appeared that Strauss was again communicating using a different e-mail address, he had Schaefer block that address as well. Pendergast also shared the content of some of Strauss's in-coming e-mail with other managers and members of the Hospital's bargaining team.

17. On May 9, Sollenberger sent an e-mail to all members of the bargaining unit, criticizing Strauss and the Union for Strauss's May 4th e-mail. The content of Sollenberger's e-mail reviewed the status of bargaining and explained management's reasons for having implemented its final offer on May 1st.

18. On or about May 10, 2001, Strauss became aware that e-mail messages sent from the Union's e-mail address to employees' work addresses were not being received. Over the following week, she sent several test messages, and confirmed that her messages were not going through to the employees' in-boxes on the Hospital's system. Strauss did not receive any notice from the Hospital's administration that Union e-mails would be blocked, nor did she receive any error messages or returned mail messages. She became aware of the problem by speaking with some of the intended recipients and being told that the messages had never arrived.

19. On May 11, Strauss attempted to send a broadcast e-mail urging unit members to refuse to volunteer for extra shifts, double shifts or any other voluntary duties, as a means of bringing pressure to bear on the Hospital. This message did not go through to the work address of any unit member.

20. After Strauss's ability to send e-mail to the Hospital's system was blocked, some Hospital managers, including Pendergast, continued to send her e-mails related to Union-Hospital relations. Strauss was unable to reply by e-mail, and eventually asked Hospital representatives to use fax, phone or mail for communications.

21. On May 15th, the Union filed the instant complaint of unfair labor practices, alleging 13 specific acts or course of conduct by the Authority which it asserted violated Chapter 111. The Authority filed a complaint against the Union on August 18th, asserting bad faith bargaining and dilatory tactics by the Union. The matters were consolidated for hearing. A pre-hearing conference was held on October 8th at the Commission's offices in Madison. Following the pre-hearing conference, the parties engaged in settlement discussions concerning the complaints and the labor contract and reached agreement on the terms of a new collective bargaining agreement. They also resolved all of the claims of unfair labor practices except the Union's complaint about the Authority's having restricted its e-mail access to its members. A hearing was held on that aspect of the complaint on November 12, 2001.

22. The blockage of the Union's access to the e-mail system has a reasonable tendency to interfere with the ability of members to communicate with their exclusive bargaining representative concerning collective bargaining and other matters of mutual aid and protection.

23. The usage of the e-mail system by the Union has not impaired the operation of the e-mail system, and the receipt of e-mail messages from the Union does not pose any greater risk of transmitting a computer virus than does the receipt of e-mail from other sources outside of the hospital.

24. The Union is the only outside entity whose access to the e-mail system has been blocked except in response to a specific employee complaint about patently offensive e-mail content.

25. The Authority's decision to block the Union's access to the e-mail system was discriminatory, in that it continued to allow all other outside persons and entities to send e-mail to addresses on its system.

26. The Union's use of the e-mail system for correspondence with specific individuals, including representatives of management, concerning grievances and other matters was a known practice in which management participated and acquiesced, and was primarily related to terms and conditions of employment.

27. As of May 10, 2001, the Union's use of the e-mail system for broadcast e-mails to all members of the bargaining unit was not regular and well established, and was not known to management.

28. The Union's withdrawal of its proposal for a contractual right to access to the Authority's e-mail system was not intended as a waiver of bargaining over the topic of access to e-mail in general.

On the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. The Complainant, District 1199W/United Professionals for Quality Health Care, SEIU, AFL-CIO, CLC is a labor organization and a “representative” of employees, within the meaning of Sec. 111.02(11), WEPA.

2. The Respondent University of Wisconsin Hospitals and Clinics Authority, is an “employer” within the meaning of Sec. 111.02(7), WEPA.

3. By the acts described in the above and foregoing Findings of Fact, specifically by blocking the Complainant’s access to the Authority’s e-mail system, the Respondent Employer interfered with the Complainant’s right to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection guaranteed by Sec. 111.02, and thereby committed an unfair labor practice within the meaning of Sec. 111.02(13) and 111.06(1)a, WEPA.

4. By the acts described in the above and foregoing Findings of Fact, specifically by terminating the practice of allowing the Union to use the Authority’s e-mail system for individual correspondence regarding grievances and other matters and to reply to correspondence from representatives of management, the Respondent Employer refused to bargain with the Complainant with respect to representation or terms and conditions of employment, and thereby committed an unfair labor practice within the meaning of Sec. 111.06(1)e, WEPA.

5. By the acts described in the above and foregoing Findings of Fact, specifically by blocking the Union’s ability to use the e-mail system for broadcasting messages to all members of the bargaining unit, the Respondent Employer did not refuse to bargain with the Complainant with respect to representation or terms and conditions of employment, and did not commit an unfair labor practice within the meaning of Sec. 111.06(1)e, WEPA.

6. By the acts described in the above and foregoing Findings of Fact, specifically by blocking the Union’s ability to use the e-mail system for broadcasting messages to all members of the bargaining unit, the Respondent Employer did not violate the terms of a collective bargaining agreement, and did not commit an unfair labor practice within the meaning of Sec. 111.06(1)f, WEPA.

On the basis of the above and foregoing Conclusions of Law, the Examiner makes and issues the following

ORDER

It is ORDERED that the Respondent University of Wisconsin Hospitals and Clinics Authority will immediately:

a. Cease and desist from blocking the Complainant's access to the Respondent's e-mail system.

b. Notify all employees, by posting in conspicuous places in its offices and buildings where employees are employed, copies of the Notice attached hereto and marked "Appendix A." This notice shall be signed by the Respondent's Director of Human Relations, and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for a period of thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to insure that this Notice is not altered, defaced or covered by other material.

c. Notify the Wisconsin Employment Relations Commission within twenty (20) days following the date of this Order of the steps taken to comply herewith.

Dated at Racine, Wisconsin, this 31st day of July, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/

Daniel Nielsen, Examiner

ATTACHMENT "A"

**NOTICE TO ALL UNIVERSITY OF WISCONSIN
HOSPITAL AND CLINICS EMPLOYEES**

Pursuant to an order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employees that:

WE WILL NOT REFUSE to allow District 1199W/United Professionals for Quality Health Care, SEIU, AFL-CIO, CLC access to the e-mail system.

UNIVERSITY OF WISCONSIN HOSPITAL AND CLINICS

By James Pendergast, Director of Employee and Labor Relations

THIS NOTICE WILL BE POSTED IN THE LOCATIONS CUSTOMARILY USED FOR POSTING NOTICES TO EMPLOYEES FOR A PERIOD OF THIRTY (30) DAYS FROM THE DATE HEREOF. THIS NOTICE IS NOT TO BE ALTERED, DEFACED, COVERED OR OBSCURED IN ANY WAY.

UNIVERSITY OF WISCONSIN HOSPITAL AND CLINICS AUTHORITY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The facts are largely undisputed. In the midst of difficult negotiations over a successor contract, the Authority ordered its e-mail administrator to block the Union's e-mail address on its system, thereby preventing the Union from sending e-mails to anyone on the Authority's system. The administrator also monitored the mailbox of a Union activist to determine whether the Union was trying to use alternate addresses to communicate with members and, where it was, blocked those addresses as well. The Union remained blocked out of the e-mail system after the negotiations were concluded. There is no provision in the labor agreement expressly allowing Union access to employees' work e-mail.

ARGUMENTS OF THE PARTIES

The Complainant

The Complainant argues that WEPA guarantees employees the right to join and assist labor organizations, and that impeding the Union's ability to communicate with its members constitutes illegal interference under the statute. Granting that the use of e-mail to communicate is a new and untested area, the Union argues that existing principles make obstruction of electronic communication every bit as much an unfair labor practice as interference with more traditional verbal solicitation and literature distribution.

Citing WISCONSIN DELLS SCHOOL DISTRICT, DEC. NO. 25997-C (WERC, 8/90), the Union argues that consideration of new legal questions under WEPA is traditionally guided by the rulings of labor boards in other jurisdictions, principally the National Labor Relations Board. The NLRB has developed presumptions applicable to Employer efforts to regulate solicitation and distribution:

- (1) Rules barring union solicitation during employees' non-working time are presumptively invalid even if limited to working areas, while rules forbidding such solicitation during working hours are presumptively valid.
- (2) Rules prohibiting distribution of literature in non-work area during non-working time are presumptively invalid, while rules forbidding such distribution in work areas are presumptively valid even if they cover both working and non-working time.

EMPLOYEE AND UNION MEMBER GUIDE TO LABOR LAW, NATIONAL LAWYERS GUILD, VOL. 1, SEC. 1.08, AT PAGE 1-80.1 (2001) (HEREINAFTER CITED AS "GUIDE TO LABOR LAW").

The NLRB rationalizes the stronger restrictions on distribution on the basis of factors not presented by solicitation, "the threat of litter and other risks to productive order." THE DEVELOPING LABOR LAW, 3RD ED., VOL. 1, PAGE 90 (BNA, 2001).

The right of non-employee Union organizers to access employer property for union activity has been recognized by the Board and the courts as an adjunct to the employees' right to discuss representation and organize [CENTRAL HARDWARE CO. v. NLRB, 407 U.S. 539 (1972)], but this right is not unlimited. Where Union access is restricted, the Board has balanced the "statutory right of employees to organize themselves for collective bargaining purposes and the employers' Fifth Amendment and common-law rights to control their private property and to maintain production and discipline." GUIDE TO LABOR LAW, SUPRA, AT PAGE 1-80. An employer may bar non-employee Union representatives from the premises if (1) reasonable efforts through other available channels of communication are available and (2) the employer does not discriminate against the Union by allowing distribution or solicitation by other non-employees [NLRB v. BABCOCK & WILCOX, 351 U.S. 105 (1956), AT PAGES 112-113; LECHMERE, INC. v. NLRB, 502 U.S. 527 (1992) AT PAGE 534]. The NLRB's General Counsel has determined that these same principles apply to non-employee access to e-mail [PRATT & WHITNEY, NLRB OFFICE OF GENERAL COUNSEL ADVICE MEMORANDUM, NOS. 12-CA-18446, 12-CA-18722, 12-CA-18745, 12-CA-18863 (1998)] and that for purposes of classifying e-mail as either solicitation or distribution, the critical question is whether the message is intended to elicit a response or a reciprocal conversation, in which case it is solicitation, or is one-sided, simply intended to convey information to the recipient, in which case it is distribution. The Union here asserts that this distinction is not critical to this case, since all Union e-mail was blocked, without regard to its intent. The Union does, however, argue that the rules regarding distribution are the most appropriate ones to apply to the e-mails in this case, since Strauss was generally using the system to provide announcements and updates to members, rather than conducting individualized communications.

Applying these principles to the facts of this case, the Union asserts that the Authority's ban on Union access to e-mail is (1) overly broad; (2) discriminatory, (3) a unilateral change in a mandatory topic of bargaining and (4) a unilateral change in a binding past practice. The policy is overly broad because in completely banning non-business use of e-mail it does not take into account the possibility that some messages may be protected by Section 2 of WEPA. Neither does it distinguish between e-mail usage on non-work time and e-mail usage on work time. Indeed, it does not recognize the fact that employees can access the e-mail system from computers away from the work site. Employees have the right to engage in protected concerted activity on non-work time without employer interference [DER (CORRECTIONS), DEC. NO. 29448-B, ET. SEQ. (WERC, 3/00)] and rules which make no distinction between work time and non-work time are presumptively overbroad and thus invalid.

The Union asserts that the discriminatory nature of the Authority's ban on Union e-mail is clear. The Authority claims to have a policy against non-employee access to the e-mail system, but there is no evidence that any such policy exists. The written policy actually states that the Authority understands that there will be some personal use of e-mail, and that necessarily means receiving e-mail from outside of the hospital as well as sending e-mails. The law is clear that an employer which allows personal use of systems – even phone systems or bulletin boards – cannot then claim they are restricted to business use when the purpose of usage is union organizing and communications. The Employer does not have the right to pick and choose, opening its e-mail system to some outside users while excluding the Union. Yet, that is precisely what they have done. The Hospital's e-mail administrator conceded that he had never blocked an address before, except where an employee complained of receiving harassment or pornographic messages. The Union's e-mail is the only case in which the Hospital itself initiated a block on an address to prevent communications with willing recipients. The block on the Union's communications regarding collective bargaining was based purely on the Authority's displeasure at the content of the messages, and a desire to turn its e-mail system into a forum for its own captive audience e-mail messages about negotiations.

The Union argues that, given that it has historically had access to the e-mail system over a period of years, and has regularly and openly used it to communicate with the members, the block on its access also represents a unilateral change in a mandatory topic of bargaining and a violation of the collective bargaining agreement. The contract is silent about e-mail, but the conduct of the parties over the years has created a binding past practice of allowing the Union access to the e-mail system. The Authority never tabled a demand to bargain a change in the *status quo* regarding e-mail, and never even formally acknowledged that it had blocked Strauss's address. The Authority's claim that it was unaware of the Union's use of e-mail is not credible. The membership cards distributed to new employees during orientation have a space for e-mail addresses. The Authority's own representatives regularly use e-mail to communicate with the Union, and prior to the block on Strauss's address, regularly received replies via e-mail. The record is clear that both the Union and the Authority knew that the Union was using the e-mail system, and concurred in that usage. The Authority cannot unilaterally terminate that understanding simply because it dislikes the content of the Union's messages.

The Union disputes the Authority's claim that it somehow waived its right to continue using the e-mail system when it made and withdrew a proposal about e-mail usage in the 1997 negotiations. Waiver of a right must be clear, voluntary and unmistakable. A Union which makes a proposal to codify an existing practice and withdraws the proposal without comment cannot be said to have waived its right to maintain the practice. The proof of this is that the practice was maintained after that set of negotiations and in fact was expanded when the new e-mail system was implemented in 1999. The ambiguous evidence of the 1997 proposal cannot overcome the clear evidence of the practice for four years after that set of negotiations.

Finally, the Union disputes the Authority's claim that it had legitimate business reasons for terminating the Union's access to the e-mail system. Valid business reasons may be raised as a

defense to an interference claim if the employer proves the business justification. The business justifications raised in this case are speculative and, in some cases, pretextual. The claim that the Union's e-mails might slow down or disrupt the system was effectively rebutted by the Employer's own computer expert, who conceded that Strauss's e-mail messages were small and would take only a matter of minutes at the most to clear through the system. The Union notes that Strauss used individual addresses for her e-mails, rather than the more technically problematic listserv system. She also generally sent her messages during off peak hours to minimize any impact on the system, and that the only concrete example of a message affecting the e-mail system was the Hospital's own internal newsletter. Despite requests from the Information Systems professionals, Hospital administrators declined to send that publication during off-peak hours. This undercuts the administration's claim that it had an urgent concern that the Union's e-mails might interfere with the smooth operation of the e-mail system.

Neither is there any evidence that the Union used the e-mail system to disparage or damage the Authority's business operations. Certainly, Strauss was critical of their stands in bargaining, and urged employees to engage in lawful concerted activity, but nothing in her messages threatened any disruption of production or discipline at the Hospital. Given that the messages were private, they could not be overheard by members of the public or otherwise damage the Hospital's reputation. Indeed, the content of the e-mail messages was the same as that in messages posted on the bulletin boards and distributed through the internal mail system, without objection by the Hospital. Given the lack of any evidence that there was some compelling business justification behind the Hospital's decision to block Strauss from the e-mail system, the Examiner should conclude that the reasons offered are pretextual, and are evidence of anti-Union bias.

For all of these reasons, the Examiner should conclude that the Hospital violated WEPA by denying the Union continued access to the e-mail system, and should order the Hospital to cease and desist from its unlawful conduct.

The Respondent

The Respondent argues that there has been no unfair labor practice committed and that the complaint should be dismissed. The Authority concedes that it blocked the Union's access to its e-mail system, but asserts that this was consistent with its general, non-discriminatory policy against such access. The policy is supported by valid business reasons, and is in no way a change in past practice or prior understandings.

The Authority argues that, while this is a case of first impression, the question of non-employee access to e-mail for organizing purposes is governed by well established principles. Access by non-employee union representatives to real property has been sharply limited to "the rare case where 'inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels.'" *LECHMERE V. NLRB*, AT

PAGE 537. This principle is accepted by the WERC in its interpretation of the state labor laws. KENOSHA BOARD OF EDUCATION, DEC. NO. 6986-C (WERC, 2/66). Here, the servers represent the property of the employer, the Union concedes that it has numerous other means of communicating with its members, and there are valid business reasons to bar the Union from the e-mail system. The Authority notes a series of cases allowing employers to bar Union access to personal property, based on valid business reasons. Thus access to bulletin boards may be restricted, as may the use of public address systems, phone systems and facsimile equipment. RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 29074-B (GRATZ, 4/98) AFF'D 29074-C (WERC, 7/98). The record in this case convincingly demonstrates that the speed and integrity of the e-mail system can be compromised by allowing third party access for global messages, and this provides ample business justification for the Authority's policy. Even if the delay occasioned by the Union's use of the system is a matter of minutes, there is no particular reason to burden the Employer's property even to that extent, and there is no guarantee that the Union's use will be limited to small messages. The Authority also notes the testimony of its e-mail administrator that outside messages pose a far greater risk of spreading computer viruses than do those generated internally, and the Union can offer no assurances at all that its use of the e-mail system will not expose the entire system to grave hazards.

The Authority points the Examiner to two recent cases in which courts have recognized that the owners of e-mail systems have as much right to block trespassers from their servers as they do from their physical premises. In EBAY, INC. V. BIDDER'S EDGE, INC., CASE NO. 99-1200 (5/00) the District Court ruled that eBay was entitled to exclude as trespassers outside companies from its internet auction site. In INTEL CORP. V. HAMIDI, 2001 CAL. APP. LEXIS 3107, the California Third Circuit Court of Appeals ruled that a fired employee who inundated Intel with thousands of e-mail messages had trespassed on Intel's private property. These cases make clear the property right of the Authority in its servers and its right to exclude outsiders from those servers. Accepting that the property right exists, and applying the established principles from past cases involving third party access to property, the Examiner must conclude that the Authority's exclusion of the Union from the e-mail system was consistent with the requirements of WEPA.

The Authority denies that it had any discriminatory motive in excluding the Union, or that it has treated the Union differently than other third parties. There is no evidence that the Authority has blocked out the Union while allowing other third party solicitors to use its e-mail system for global messages to employees. The policy limits the use of the systems to the Authority's business purposes, except for incidental personal use of employees, and it makes no distinction between the Union and any other outsider. Thus, nothing about the policy itself suggests discrimination. Neither is there anything in the application of the policy to support an inference of hostility towards the Union or the concerted activity of employees. There is no evidence of any attempt to interfere with protected communications of employees or limitation of their right to incidental use of the system, even if that use is for communicating about Union matters. The only issue here is non-employee use, and the rights of non-employees are far less extensive than those of employees. As to the timing of the block, certainly the parties were

engaged in difficult bargaining, but the credible testimony of the Authority's witnesses was that the blocking of the Union was in response to the employer first learning that the Union was using its e-mail system for global messages, not in response to the posture of negotiations. Moreover, the Authority has consistently rejected the Union's requests for access to the e-mail system, dating back to the 1997 negotiations. Thus, its actions in May of 2001 were the continuation of a clear and well known policy pre-dating the difficult 2001 bargaining. There is simply no evidence at all from which the Examiner could find any act of discrimination.

The Authority rejects the Union's attempt to portray access to the e-mail system as some sort of past practice. There can be no past practice absent evidence of prior occurrences and mutual consent. In this case, there is scant evidence that the Union tried to send global messages to unit members in the past, and no evidence that the Authority knew about it. Nurses, who form the largest part of the unit, have only had access to e-mail since September of 1999, and Strauss has only been with the Union since August of 2000. The only proof of prior global messages across the e-mail system is Strauss's unsupported and vague claim that she had sent such messages and had been told that her predecessors had. She was not able to provide any examples. Even if she had provided examples of past global messages, there is no reason to think the Authority knew about them. Mutual knowledge and mutual consent are core requirements of a past practice. The only evidence here is that the Authority rejected the Union's bid for a contractual right to use the e-mail system in 1997. Having withdrawn that proposal, the Union cannot now seek in litigation what it failed to achieve in bargaining. The history of bargaining shows that bargaining over e-mail access has been waived by the Union, since it withdrew its only proposal and never resubmitted the issue.

As there is no legal theory which supports the claim of unfair labor practices, the Authority asks that the instant complaint be dismissed in its entirety.

DISCUSSION

This case presents the issue of whether the Authority had to the right to cut off the Union's access to its e-mail system. The Union argues that it did not, arguing that (1) the blocking of the Union's e-mail address was an act of interference; (2) the use of e-mail was an established practice regarding terms and conditions of employment that may not be changed without bargaining; and (3) the right to access e-mail was a past practice under the collective bargaining agreement. Each of these contentions is addressed in turn.

INTERFERENCE – Sec. 111.06(1)a

The Regulation of Union Communications in the Workplace in General

Section 111.04 of WEPA guarantees employees the right to engage in concerted activity:

111.04 Rights of employees. Employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employees shall also have the right to refrain from any or all of such activities.

Section 111.06(1)a, forbids employer actions which are likely to interfere with the exercise of Section 4 rights:

111.06 What are unfair labor practices. (1) It shall be an unfair labor practice for an employer individually or in concert with others:

(a) To interfere with, restrain or coerce the employer's employees in the exercise of the rights guaranteed in s.111.04.

. . .

Among the employer actions that have been cited as acts of interference are rules limiting the ability of employees to communicate with one another about union organizing and union affairs at the workplace. In recognition of the statutory protections of employee activity under the parallel provisions of the NLRA, the U.S. Supreme Court held in *REPUBLIC AVIATION CORP. v. NLRB*, 324 U.S. 793 (1945) that “[n]o restriction may be placed on the employees’ right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline.” In the case of verbal solicitation, the Court struck a balance between the employees’ right to communicate and the employer’s right to expect that working time would be devoted to work, and extended a presumption of validity to a non-discriminatory rules barring solicitation by employees during working time. The NLRB subsequently explained that because littering and different techniques of communication might be involved, distribution of literature could be regulated as to both time and location, and that a non-discriminatory rule limiting distribution by employees to non-working time and non-working areas would enjoy a presumption of validity [see, *STODDARD-QUIRK MFG. CO.*, 138 NLRB 615 (1962)].

The hallmark Commission case on the regulation of the use of Employer time and premises is *KENOSHA BOARD OF EDUCATION*, DEC. NO. 6986-C (WERC, 2/66). There the Commission announced a balancing test, with the balance tipped in favor of the validity of nondiscriminatory regulation of the use of Employer time and premises:

Rules established by a municipal employer in effectuation of its public function, which regulate, on a nondiscriminatory basis, the activities of its employees and their representatives on the employer’s time and premises, and which may arguably limit the rights and protected activities of employees, as established in

Section 111.70, Wisconsin Statutes, shall be presumed valid. Whether said rules constitute prohibited practices, will depend on the facts in each case. The rights of the employees and their representatives must be balanced with the obligation and duties of the municipal employer. . . ID. at 22-23.

KENOSHA SCHOOLS has been interpreted to provide the same presumption of validity to nondiscriminatory rules against verbal solicitation during working time under SELRA as are established under NLRB precedent [DEPARTMENT OF CORRECTIONS (WAPCO), DEC. NO. 29497, ET. SEQ. (BURNS, 3/00) at 96-99] and the Commission has interpreted KENOSHA SCHOOLS to encompass the STODDARD-QUIRK presumption of validity for time and location limitations on literature distribution under WEPA [ACME DIE CASTING CORP. DEC. NO. 8704-B (WERB, 5/69)].

The rights guaranteed by the NLRA and WEPA are those of employees, and courts interpreting the NLRA have not extended the same rights of access to non-employee union representatives for soliciting, distributing and communicating with employees as have been extended to employees themselves. While recognizing that interactions with non-employee union representatives might play a necessary role in the employees' ability to effectively exercise Section 7 rights, in *NLRB v. BABCOCK & WILCOX Co.*, 351 U.S. 105 (1956), the Supreme Court held that there were differences of substance in the right of employees to engage in protected activity on employer premises and the right of non-employees. Noting that employees were invitees, while non-employees were not, the Court held that the property rights of employers could predominate over the employees' interest in having non-employee union organizers come onto the premises. Specifically, the Court held that a non-discriminatory rule barring non-employees from the premises would be presumed valid when enforced against union organizers, so long as employees were not "beyond the reach of reasonable union efforts to communicate with them." 351 U.S. at 113. The Court has more recently held that this exception is quite narrow, and that the presumption is in favor of non-discriminatory rules against non-employee access to the premises. See, *LECHMERE, INC. v. NLRB*, 112 U.S. 841 (1992).

The Union's Right to Use Personal Property of the Employer for Communications

The Authority argues that, just as it has a right to exclude non-employees from its physical premises, so it has the right to exclude them from its personal property – in this case, servers. Clearly, the NLRA allows employers to regulate the use of their personal property. In *MID-MOUNTAIN FOODS, INC.*, 332 NLRB 19 (2000), a three member panel of the National Labor Relations Board considered a Union's claim that it should have been allowed to bring a VCR into the break room and use the Employer's televisions to show a pro-union video. In rejecting the Union's claim, the majority of the panel recited prior Board cases finding that the Employer's property interests in its equipment predominated over Union requests to use telephone systems [*UNION CARBIDE CORP.*, 259 NLRB 974 (1981)], bulletin boards [*HONEYWELL, INC.*, 262 NLRB 1402 (1982)], and public address systems [*THE HEATH COMPANY*, 196 NLRB 134 (1972)] to

communicate with employees. The majority of Chairman Truesdale and Member Hurtgen disagreed with Member Liebman's dissenting view that access to the television sets should be allowed under the Board's SPRINT/UNITED MANAGEMENT Co., 326 NLRB 397 (1998) decision, a case that found an Employer could not bar union literature distribution in areas (locker rooms) it had ceded to employee's personal use. The majority found that MID-MOUNTAIN had not ceded personal use of its television sets to employees, since they were permanently set to CNN and were not "subject to the control and personal use of employees."

Wisconsin law likewise allows employers to restrict access to their equipment. Thus, in RACINE UNIFIED SCHOOLS, DEC. NO. 29074-B (GRATZ, 4/98), AFF'D 29074-C (WERC, 7/98), a case arising under MERA, the employer was allowed to prohibit the use of its telephones and facsimile machines for union business as part of its overall ban on personal use. While the Examiner in that case found that the "the District policies at issue in this case appear reasonably likely to cause some teachers not to engage in some communications with the association office which would constitute protected activities" he also noted that the analysis "does not end there." ID. at 15. Specifically he observed that there are circumstances in which MERA allows for some acts having a reasonable tendency to interfere with protected rights:

The Association correctly asserts that violations of Sec. 111.70(3)(a)1, Stats., occur when employer conduct has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights. WERC v. EVANSVILLE, 69 WIS. 2D 140 (1975). If after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and even if the employe(s) did not feel coerced or was not in fact deterred from exercising Sec. 111.70(2) rights. BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84); JUNEAU COUNTY, DEC. NO. 12593-B (WERC, 1/77). However, exceptions to that general rule have been recognized by the Commission in prior cases

. . . .

In addition, and of particular significance to this case, it is also well established that employer conduct which may well have a reasonable tendency to interfere with employe exercise of Sec. 111.70(2) rights will generally not be found violative of Sec. 111.70(3)(a)1, Stats., if the employer had a valid business reason for its actions. E.g., BROWN COUNTY, DEC. NO. 28158-F (WERC, 12/96); CITY OF OCONTO, DEC. NO. 28650-A (CROWLEY, 10/96), AFF'D BY OPERATION OF LAW, 28650-B (11/96); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 27867-B (WERC, 5/95); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC.

NO. 27484-A (BURNS, 7/93), AFF'D BY OPERATION OF LAW, 27484-B (WERC, 7/93); CITY OF MILWAUKEE, DEC. NO. 26728-A (LEVITAN, 11/91), AFF'D ON REHEARING, 26728-D (WERC, 9/92); CEDAR GROVE-BELGIUM SCHOOL DISTRICT, DEC. NO. 25849-B (WERC, 5/91); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC 2/84); see generally, WAUKESHA COUNTY, DEC. NO. 14662-A (GRATZ, 1/78) AT 22-23, AFF'D 14662-B (WERC, 3/78) ("some municipal employer actions that, in the broadest and most literal senses of the terms, "interfere with" or "restrain" municipal employes' exercise of Sec. 111.70(2) rights have been held not to violate Sec. 111.70(3)(a)1. [citations omitted] Rather, the traditional mode of analyzing whether a violation of those quoted terms as used in the applicable statute has occurred has involved a balancing of the interests at stake of the affected municipal employes and of the municipal employer to determine whether, under the circumstances, application of the protections of the interference and restraint prohibitions would serve the underlying purposes of the act. [citations omitted] ID. AT 22-23."); and KENOSHA BOARD OF EDUCATION, DEC. NO. 6986-C (WERC, 2/66)

RACINE UNIFIED SCHOOLS, AT PPS. 14-15.

Examiner Gratz determined that the municipal employer had relied on a valid business reasons for its ban on personal telephone and fax use, because it proved that the widespread personal use of phones was creating difficulties for those wishing to make and receive calls about District business. He also found that a great deal of protected activity would be encompassed under the heading "District business" and could still be conducted on District phones under the policy as written.

While MID-MOUNTAIN FOODS and RACINE UNIFIED SCHOOLS are persuasive statements of the law, and do generally stand for a presumption of validity for non-discriminatory rules regulating the use of employer premises and equipment, I find that they do not dictate dismissal of this complaint. I conclude this for three reasons. First, the burdening of the employer's property rights is much slighter in the case of e-mail than it is in the cases of physical entry onto the premises or physical use of the equipment. Second, but related to the first, the business reasons cited for blocking the Union are far less compelling than in the cited cases. Both of these factors affect the balancing of interests required by KENOSHA SCHOOLS. The third reason, sufficient in and of itself to find that the Authority's action was invalid, is that the evidence demonstrates that the decision to block the Union's address was not a non-discriminatory application of the rule.

A. The Burdening of Property Rights

KENOSHA SCHOOLS presumes the validity of non-discriminatory rules regulating activities on the employer's premises and during working time. However, it also calls for a balancing of

interests [“The rights of the employes and their representatives must be balanced with the obligation and duties of the municipal employer. . .” ID. at 23]. The employer’s interest in excluding the Union from its e-mail system is not at all the same as the interest in excluding union organizers from the premises. As argued in MALIN AND PERRITT, THE NATIONAL LABOR RELATIONS ACT IN CYBERSPACE: UNION ORGANIZING IN ELECTRONIC WORKPLACES, UNIVERSITY OF KANSAS LAW REVIEW, NOVEMBER 2000, (HEREINAFTER CITED AS “MALIN”), the degree of intrusion onto or into the property of the employer where e-mail systems are involved is materially less than in the typical cases involving physical access to employer premises:

. . .

Nevertheless, employers may promulgate rules restricting the use of their electronic communications systems to business purposes. Such rules often will prove impossible to enforce because in electronic workplaces, e-mail often becomes the dominant mode of communication for business and personal matters. Even if the employer succeeds in enforcing the rule, the validity of the rule must be analyzed in terms of the nature of the employer’s property rights. [Id at 53-54]

. . .

Employers, however, may bar nonemployees from trespassing on the property. As discussed previously, it is conceptually problematic whether a nonemployee who sends a union solicitation to an employer’s employee over the Internet is trespassing. It is just as reasonable conceptually to regard the solicitor as sending the electronic solicitation to the boundary of the employer’s property, to have it drawn across the boundary line by the recipient by opening the message, as it is to regard the solicitor as having trespassed on the employer’s property. However, even if we assume that the sending of such electronic solicitations is trespassing, the nature of the property rights at stake differs significantly from the Babcock-Lechmere line of authority.

At issue in Babcock and Lechmere was the employer’s naked property right to exclude trespassers for no reason whatsoever. That property right is very strong. At common law, damage from a trespass to land is presumed and no specific damage need be shown. The harm the law remedies is interference with the possessor’s interest in excluding others from the land. If the sending of an unauthorized e-mail message over the Internet is a trespass at all, it is not a trespass to land. Courts have given relief to Internet service providers who have sued to restrain commercial solicitors from spamming their customers. Courts have grounded such relief in trespass to chattels rather than land. In trespass to chattels, however, damage is not presumed. A plaintiff must make a showing of actual damage to obtain relief. Accordingly, an employer should be required to

prove injury before excluding union solicitations by nonemployees. The employer should not be allowed to exclude such solicitation merely because the employer is opposed to the message being communicated. . .

[Id at 54-55, footnotes omitted]

Just as there is a difference of substance between physically intruding on the premises and virtually intruding, so there is a substantial difference between allowing the use of a server to receive and deliver e-mail, and the use of bulletin boards, telephones, faxes, public address systems and televisions. In each of those cases, the use of the property by the Union denies the Employer the use of the property for the duration of the use. In RACINE SCHOOLS, for example, the use of the telephones for union business meant that District business could not be conducted using those phones for the duration of the call. The use of the server to receive an e-mail does not deny others the use of the computers, and does not significantly affect the flow of e-mail through the system. Matt Schaefer testified that a broadcast message to all members of the bargaining unit might delay delivery of other messages for a matter of a few minutes. This is not to say that there is no effect at all, but it is a tiny effect, and in striking the balance between Sec. 111.04 rights and the legitimate interests of the employer, the impairment of the employer's rights is far slighter in the case of e-mail than in a case involving other types of equipment. 1/

1/ The Authority argues that it has the same right to prevent trespassers in its system as does eBay [EBAY, INC. v. BIDDER'S EDGE, INC. CASE NO. 99-1200 (5/00)] or Intel [INTEL CORP. v. HAMIDI, 2001 CAL. APP. LEXIS 3107], and asserts a general right to prevent use of its system by outside entities. By way of example, Pendergast testified that if a local furniture store, Steinhafel's, tried to use its system to solicit business, he would have them blocked too. I do not disagree that there is a property right implicated when another entity accesses the e-mail system. The issue here is the balancing of legitimate competing interests, not the vindication of one set of interests and the extermination of the other. The difference between the examples cited and the Union is that communicating with Steinhafel's does not serve a critical role in the exercise of protected legal rights.

As more fully discussed below, it also bears noting that the sending of an e-mail to employees does not have the same potential for workplace disruption that physical distribution of literature or in-person solicitation can pose. Delivery of e-mail does not require any response, any interruption of work, any impairment of the employer's right to regulate the events in the working areas of the Hospital. It is an event that, in and of itself, goes essentially unnoticed. This reinforces the conclusion that union access to e-mail does not represent a substantial practical burden on the employer.

B. Valid Business Reasons

As noted in RACINE SCHOOLS, a non-discriminatory rule which burdens the exercise of protected rights may nonetheless be lawful if prompted by valid business reasons. The Authority cites what it believes are two valid business reasons for banning the Union from the

e-mail system. The first is that the Union's use of the e-mail system may disrupt it. Granting that the delay in the system caused by the Union's sending e-mail messages may be slight, the Authority argues that it is not required to tolerate any delay, and that there is no guarantee that the messages will remain small or that they will be sent during off peak hours. The assertion that the Authority is not required to tolerate any delay in the e-mail system is simply a reassertion of the absolute property rights argument in a somewhat different form. Any access to the system must mean a delay of some sort, even if it is only a matter of less than a fraction of a second, since the message must be received and distributed. It must be borne in mind that a valid business reason is cited to overcome an impairment of employee rights. In order to be given any weight in striking that balance, the cited reason must be more than simply theoretical.

It is true that allowing the Union access to the e-mail system could result in it sending large, cumbersome messages at peak hours, thereby substantially slowing the operation of the e-mail system. The answer to that, though, is that an abuse of the right of access would permit an appropriate employer response, just as if the Union started sending the type of break messages (messages that required all users to immediately read the message and superceded all other messages) that were the subject of appropriate sanctions in *WASHINGTON ADVENTIST HOSPITAL*, 291 NLRB 95 (1988). In that case, the Board upheld the firing of an employee who, although engaged in concerted activity, lost the Act's protections by abusing and disrupting the e-mail system.

The second business reason cited by the Authority is the possibility that the Union will send e-mail that infects the system with a virus. The Authority does not allege that the Union would do this deliberately, but argues that the use of the system by outsiders necessarily increases the possibility of infection. This argument is true as far as it goes, but it does not explain why the Union's e-mails pose a greater risk than e-mails sent by other outsiders, or why this risk increased in May of 2001 when bargaining turned difficult. As discussed below, with two very narrow exceptions, the Authority has taken no steps to block other outside users from sending e-mail to the system. Moreover, until the Union's address was blocked, the Authority's labor relations personnel regularly used e-mail to communicate with the Union, apparently without regard to whether the Union's responses might contain viruses. Thus, while this may be a valid reason to block all outside e-mail access, the threat of a virus is not a valid reason to block only the Union's e-mail access.

C. The Requirement of a Non-Discriminatory Rule

Central to the rules enunciated in *REPUBLIC AVIATION*, *BABCOCK & WILCOX*, *LECHMERE* and *KENOSHA SCHOOLS* is the proposition that the rules barring union access must be non-discriminatory. There may not be a different rule for the Union representatives than for other non-employees. In this case, it is apparent that a different rule in practice exists for the Union than for other outside users of the e-mail system. The Authority's rules allow

incidental personal use of the e-mail system, and by definition, this includes sending and receiving messages from addresses outside of the Hospital e-mail system. Thus, employees are allowed to receive non-business messages at their work e-mail addresses. Yet the evidence in this case shows that the Union is the only entity that has ever been blocked from the e-mail system on management's initiative. The only other two cases of an address being blocked were in response to employee complaints. Further, in those cases, the communications that were being blocked were patently offensive – in one case unsolicited pornography and in the other harassing communications from an employee's ex-spouse. The Union's communications were not at all of the same character.

The Authority argues that there is nothing discriminatory in its blockage of the Union's address because it is the only case in which it became aware of an outside entity sending "global" messages to employees. Were this a case involving telephone solicitation or some other use of equipment where the breadth of distribution had a bearing on the employer's ability to make meaningful use of its resources or to maintain production or discipline in the workplace, this distinction would have more force than it does here. It also bears noting that Authority did not simply block broadcast messages from the Union. It blocked all messages from the Union, including the individual communications that were the greatest portion of the Union's usage, many of which were arguably business related within the meaning of the policy. 2/ The Authority also attempts to distinguish this from other personal e-mail communications to and from employees by characterizing the Union as an outside business trying make business use of its facilities. However, that distinction does not hold up under scrutiny either. Schaefer testified about all of the cases where e-mail access was restricted, and he did not claim that any system was in place or contemplated to prevent business entities from communicating with employees.

2/ One factor considered by the Examiner in RACINE SCHOOLS was that the ban on personal calls still allowed a great deal of phone usage for Union business that was also properly characterized as District business: "While the District's policies as written and interpreted to date would prohibit employee use of District telephone resources for those MERA-protected activities that do not involve District business, the District and its witness Keri Paulson have acknowledged that the policies permit the use of those District telephone resources for the wide range of MERA-protected activities that do involve District business." Id, at page 15. The fact that the labor relations personnel of the Authority routinely communicated with the Union using e-mail, and the fact that Sollenberger used a broadcast e-mail to brief employees on the status of bargaining both suggest that the Authority recognizes many of these WEPA-related matters as legitimate Authority business and proper topics for e-mail use under the policy.

The e-mail system here is, in essence, open to outside communications from all comers except the Union. While there is no question that the system exists and is maintained principally for the business purposes of the Authority, a portion of its use has been ceded to employees for other purposes. [See SPRINT/UNITED MANAGEMENT CO., 326 NLRB 397 (1998) at 399: "Here,

however, the Respondent has already ceded the locker space to the personal use of the employees to whom the lockers are assigned. Thus, the Respondent's conduct is not analogous to circumstances involving an employer's assertion of its right to prohibit employees from using its bulletin board. Rather, it is analogous to circumstances where the posting of union materials is prohibited on bulletin boards used by employees for other purposes."] Given that the ban on Union access to the e-mail system discriminates against statutorily protected communications, it follows that the Authority violated Section 111.06(1)a, when it blocked Strauss's various addresses from the system. 3/

3/ The Authority retains the right, of course, to make and enforce a uniform ban on all non-business use, in which case it would have the right to block the Union's access. As the MALIN article points out, however, such a ban is probably impossible to enforce and still have a useful e-mail system. [MALIN AT 53-54].

D. Is The Cutoff Subject to Analysis as a No-Distribution Rule?

Under the general balancing test of KENOSHA SCHOOLS, the Union must be given the right to access the e-mail system. Citing the Advice Memorandum of the NLRB General Counsel in PRATT & WHITNEY, NOS. 12-CA-18446, 12-CA-18722, 12-CA-18745, 12-CA-18863 (1998), 1998 WL 1112978, the parties here argue that the e-mail cutoff should be evaluated under the more specific presumption of validity given to rules regulating the distribution of literature. ACME DIE CASTING CORP., SUPRA.. In the PRATT & WHITNEY memo, the General Counsel distinguished between e-mails that could "reasonably be expected to occasion a spontaneous response or initiate a reciprocal conversation" and those which are "one-sided." The former he considered to be verbal solicitations, which must be allowed in all areas in the absence of an overriding employer interest. The latter he would classify as distributions, which may be prohibited in work areas unless employees have no available non-work area. The Union concedes that Strauss's broadcast messages were not intended to elicit a response, and thus argues that they should be evaluated under the presumptions applicable to literature distribution. The Authority agrees that this case is governed by distribution rules.

I have previously observed that, in complaint cases as opposed to grievance arbitrations, the contentions of the parties as to the applicable law are not controlling: "...the Examiner begins by noting that he is not bound to the interpretations of the record argued by the parties in their briefs. .. A complaint case is not an arbitration case, and the application of MERA is not controlled by the theories of the parties in the same way that the interpretation of a bilateral contract may be. While the Examiner does not assume the role of an advocate, making the case for one party or the other, it is his duty to analyze the record before him in light of the law and draw the appropriate conclusions, no matter how the parties themselves may have characterized the evidence in their written arguments." NORTHEAST WISCONSIN TECHNICAL COLLEGE, DEC. NO. 28954-B (NIELSEN, 8/98) AT PAGE 23, AFF'D. AS TO THE DISCRIMINATION CLAIM DEC. NO. 28954-C (WERC, 3/99). In the instant case, I cannot agree that the rules governing literature distribution are the appropriate rules for evaluating restrictions on e-mail. First, I would

observe that the test proposed by the NLRB General Counsel is very difficult to apply in a meaningful way. Second, the implications of e-mail communications to workers bear little relationship to the original purpose for the more restrictive rules on literature distribution.

The distinction drawn by the NLRB General Counsel between e-mails which are “distribution” and those that are “solicitation” poses considerable difficulty for those who make and administer the rules intended to govern e-mail access, as well as for those who must abide by those rules. To say that the intent of the sender or the likely response of the recipient governs gives no guidance to the recipient or the employer. The recipient cannot know whether the e-mail is more like a verbal solicitation or a literature distribution until he or she opens it and reads it. By then, it is too late to apply some different set of rules to handling the message. Likewise, the employer cannot block only the e-mails that are like literature distributions, while allowing the ones resembling verbal solicitations to go through, unless the Union closely cooperates in enforcing the policy. The address is either blocked or it isn’t. Moreover, some messages may fall into both categories. A message to the bargaining committee, copied to all members, may be reasonably expected to elicit responses from the bargaining committee, but be merely informative for the membership. It is nonetheless the same message sent at the same time. If it is blocked, it is blocked for both purposes.

While correct as a matter of technical definition, the General Counsel’s distinction between solicitation e-mails and distribution e-mails bears little practical relationship to the impact of the activity in the workplace. This disconnection between the definition and the purpose of the rules results from trying to categorize e-mail communication as being the same as verbal solicitation and written distribution, when in practical terms it is vastly different. Those two traditional means of communication are tangibly different from one another and the difference is easily apparent to the employer, the employee and the non-employee union representative. The tangible difference between receiving and reading a written piece of material and listening to a spoken communication in large part underlies the greater latitude given employers to restrict distribution. An e-mail message arriving on a desktop computer does not pose the same problems of litter and distraction as a brochure handed out in a work area, and it is difficult to understand why quietly reading an e-mail at one’s desk on non-work time is a greater threat to production and order than is carrying on a conversation about Union matters in the same setting. As noted above, the arrival of the e-mail is a non-event. Indeed, an e-mail which is a solicitation under the General Counsel’s definition, arguably has more potential to disrupt workflow than one which is distribution, since the recipient is expected to reply to the solicitation, while no action is expected from the recipient of a distribution e-mail.

The General Counsel recognizes that e-mail does not pose the usual litter problem, but quotes STODDARD-QUIRK, SUPRA, for the proposition that litter is only one side of the equation in determining the protections to be extended to distribution. This leads to his examination of the employee interests in receiving literature, which he notes are satisfied as long as the literature is received [PRATT & WHITNEY, SUPRA] and can be read and re-read later. Again, this is valid as far as it goes, it does not easily apply to e-mail. Literature distribution may be restricted to non-work areas unless no non-work areas are available [STODDARD-QUIRK, SUPRA, AT 621]. Employees can access their e-mail from computers off-site if the computer is part of the

Hospital's network or if they have special programs available. However, that goes to where the material may be accessed, not to where it is distributed. The material is distributed on the network, and automatically appears on the employee's workplace computer. By definition, the computers are part of and located in work areas. If e-mail is covered by the rules governing literature distribution, and may not be made available in work areas, as a practical matter it may not be used. Trying to graft the rules designed for the physical act of distributing literature onto the virtual distribution of e-mail results in rules that make very little sense from the standpoint of those who will have to live by them.

Given that e-mail communication does not pose the problems of litter and disruption underlying the stricter rules against literature distribution and is more closely akin to verbal solicitation, and since the nature of e-mail is such that attempting to apply the usual distinctions in the solicitation and distribution rules to e-mail would be impractical for the union, the employee and the employer, I conclude that e-mail is most properly classified as a form of solicitation, subject to regulation as to the time of the activity, rather than time and location. 4/ As the complete cutoff of the Union's e-mail access prevents communications on non-work time, it follows that the rule as applied is overly broad as a means of regulating solicitation, and is presumptively invalid.

4/ Even if e-mail is treated as a form of solicitation, its nature gives rise to practical problems for regulating it in the traditional manner. Since the solicitor is not physically present, the Employer cannot effectively limit the "solicitation" to non-working time. This is particularly the case at the Hospital, which is a seven day a week, 24 hour per day operation. A broadcast e-mail message is sent and delivered to the same recipients at the same time, whether they are working, on break or off duty, and all times will be working times for at least some recipients. In practical terms, this means switching the focus from the sender to the recipient and regulating in a non-discriminatory way the times at which the recipient may open and read the message, rather than the times at which the message may be sent. The existing "Standards for Use of Hospital Facilities" [sic] addresses this, providing, inter alia: "There are settings and times when this can be done without interfering with hospital work. It should never be done at times when it interferes with hospital work."

Having concluded that e-mail is more akin to solicitation than to distribution, I must further note that the distinction is not critical to the conclusion that the Authority has violated Sec. 111.06(1)a. The rule as applied blocks both the broadcast messages, which the NLRB General Counsel would consider distribution, and the individual messages which would generally be considered solicitation, and which were the bulk of the e-mail messages sent by the Union. Thus, even under the General Counsel's mode of analysis, both the solicitation and distribution standards come into play and the complete cutoff is overly broad as to each. Moreover, both the distribution and solicitation standards require that the rule be non-discriminatory, and this rule has been applied to the Union in a discriminatory fashion. It would not pass muster under either mode of analysis. Most importantly, as found in preceding sections of this Discussion, the application of the Authority's policy in this case is an act of interference under the general balancing of interests test enunciated in KENOSHA SCHOOLS.

UNILATERAL CHANGE – Sec. 111.06(1)d

Section 111.06(1)d, makes it an unfair labor practice for any employer “[t]o refuse to bargain collectively with the representative of a majority of the employer’s employees in any collective bargaining unit with respect to representation or terms and conditions of employment.” The parties concede that this prohibits either party from making unilateral changes in mandatory topics of bargaining, and further concede that access to e-mail is a mandatory topic of bargaining. This is consistent with the Commission’s finding in SCHOOL DISTRICT OF SCHULLSBURG, DEC. NO. 20120-A (WERC, 4/84) that proposals to use employer facilities and property are primarily related to wages, hours and conditions of employment where the purpose of the proposal is related to the union’s statutory responsibilities as the exclusive bargaining representative. ID. at 18. The parties disagree, however, over whether the Union’s access to e-mail was an existing practice which was changed by the Authority, and the Authority further argues that the Union has waived bargaining over access to e-mail.

The Union argues that it has long made use of e-mail to communicate with employees and with the Employer. Strauss testified that she had regularly used e-mail since starting with the Union, and that files she reviewed indicated that her predecessors also made use of e-mail to communicate with hospital employees and with hospital management. The Authority argues that it was not aware of any such practice and thus cannot be held to have agreed that e-mail access was permissible. The evidence in the record persuades me that there was a clear practice of allowing the Union to use e-mail for correspondence about specific matters such as grievances. However, the evidence does not establish that broadcast e-mails to the entire membership were a practice that was known and agreed to by the Authority.

Strauss’s testimony about the use of e-mail to send broadcast messages was general in the extreme. She was not able to cite any specific example prior to the Spring of 2001 in which such a broadcast e-mail was sent, and the Authority’s witnesses testified credibly that they were not aware of any such broadcast e-mails before May. The Union bears the burden of proving that the right to broadcast e-mails to the entire membership was an existing condition of employment, and the evidence does not suffice for that purpose. On the other hand, Strauss testified that e-mail was regularly used for grievance processing, and presented unrefuted testimony that the labor relations office routinely communicated with her via e-mail, even after her address was blocked in May and she could not reply. She also testified that her review of files showed the same usage of e-mail by her predecessors. The Authority cannot, and does not, argue that it did not know of this usage of e-mail, and the fact that its own labor relations office participated in these exchanges indicates its acquiescence in the practice.

The Authority argues, however, that the Union waived bargaining over any use of the e-mail system when it proposed, during the 1997 negotiations, contract language expressly allowing use of the e-mail system: “. . . the union and its bargaining unit employees may use the e-mail system on work unit computers to communicate between and among each other so long as the communication does not occur on work time.” This proposal was dropped. There is no evidence of what was said regarding this proposal or the reasons that it was withdrawn. A waiver of the right to bargain over mandatory topics must be “clear and unmistakable.” CITY OF

BROOKFIELD, DEC. NO. 11406-A (BELLMAN, 7/73) AFF'D 11406-B (WERC, 9/73), AFF'D (CIR. CT. WAUKESHA, 6/74). Here, it is not clear whether the proposal was intended as a codification of existing practice, as the Union claims, or was an effort to secure entirely new rights, as the Authority claims. Further, the withdrawal of this proposal is ambiguous as it regards the practice of using the e-mail system for individual communications about specific cases and issues. The proposal on its face is much broader than that, and the Union's use of the system continued after the 1997 negotiations were concluded. This strongly indicates that, whatever the parties intended by their conduct in the 1997 negotiations, it was not a cutoff of the Union's right to use the e-mail system for individual communications about specific matters.

The record does not support the Union's claim that the right to use the e-mail system for broadcast messages to the entire membership was an existing condition of employment that was unilaterally changed in May of 2001. There is, however, clear and convincing evidence that use of the e-mails system for individual communications between the Union's staff, employee representatives and management officials was a well established fact at that time. The cutoff of that degree of access in May, 2001, constituted a unilateral change in terms and conditions of employment, and thus a violation of Sec. 111.06(1)d.

Given the conclusion that the right to access the e-mail system for broadcast messages to unit employees was not sufficiently established as a past practice at the time the policy was enforced against the Union, it follows that the Union has not borne its burden of proof that the Authority violated Sec. 111.06(1)f, by violating the terms of a collective bargaining agreement, and that portion of the complaint is dismissed.

REMEDY

The blocking of the Union's e-mail access was an act of interference, and the appropriate remedy for that unfair labor practice is a restoration of the Union's ability to use the system. The refusal to bargain results from the prevention of the Union's ability to send a narrower category of messages, and the restoration of the *status quo ante* on that violation is encompassed in the broader remedy for the interference. Thus, no separate remedy is ordered for the unilateral change.

Dated at Racine, Wisconsin, this 31st day of July, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/

Daniel Nielsen, Examiner