

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

---

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

vs.

**UNIVERSITY OF WISCONSIN HOSPITALS  
AND CLINICS AUTHORITY (Hospital), Respondent.**

Case 12  
No. 59953  
Ce-2211

**Decision No. 30202-C**

---

**Appearances:**

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

**Amy O. Bruchs**, at the hearing, and **Robert W. Mulcahy**, with her on the brief, Michael, Best & Friedrich, LLP., Attorneys at Law, One South Pinckney Street, P.O. Box 1806, Madison, WI 53701-1806, appearing on behalf of the Hospital UWHCA.

**Nancy J. Kaczmarek**, Staff Counsel, WEAC, 33 Nob Hill Drive, Madison, WI 53708-8003, submitted a brief amicus curiae on behalf of the Wisconsin Education Association Council.

**Frederick W. Fischer**, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, Eau Claire, WI 54702-1030, submitted a brief amicus curiae on behalf of the Wisconsin Counties Association.

**Diana O. Ceresi**, Assistant General Counsel, Service Employees International Union, 1313 L Street, NW, Washington DC 20005, and **Matthew R. Robbins**, Law Offices of Previant, Goldberg, Uelman, Gratz, Miller & Brueggerman, Attorneys at Law, 1555 North River Center Dr., Suite 202, Milwaukee, WI 53212, submitted a brief amici curiae on behalf of the Service Employees International Union and the Wisconsin State AFL-CIO.

**ORDER ON REVIEW OF EXAMINER'S DECISION**

On July 31, 2002, Examiner Daniel J. Nielsen issued Findings of Fact, Conclusions of Law and Order holding that the Respondent, University of Wisconsin Hospitals and Clinics Authority (Hospital), in blocking the Complainant District 1199W's (the Union's) ability to communicate with bargaining unit members through their Hospital e-mail addresses, had interfered with their rights under Sec. 111.04, Stats., in violation of Sec. 111.06(1)(a), Stats., and, by preventing the Union from corresponding individually with unit members and with Hospital management, had also unilaterally changed an existing condition of employment in violation of Sec. 111.06(1)(d), Stats. To remedy these violations, the Examiner ordered the Hospital to restore the Union's access to the Hospital's e-mail system. The Examiner dismissed the allegation that the Hospital had unilaterally changed a practice permitting the Union to send "broadcast" e-mail messages to bargaining unit members in violation of Sec. 111.06(1)(d), Stats., and also dismissed the allegation that the Hospital's action had breached an existing collective bargaining agreement in violation of Sec. 111.06(1)(f), Stats.

On August 20, 2002, the Hospital filed a timely petition for review of the Examiner's decision. Thereafter the Hospital submitted a brief in support of its petition for review, the Union filed a brief in response, and the Hospital filed a reply brief, the last of which was filed on February 6, 2003. Briefs amicus curiae were submitted on behalf of the Wisconsin Counties Association, the Service Employees International Union and Wisconsin State AFL-CIO, and the Wisconsin Education Association Council, joined by AFSCME Local 1942.

As set forth in our Order and Memorandum, below, we affirm the Examiner's holding regarding the interference and breach of contract claims; we partially affirm and partially reverse his holding regarding the unilateral change claims.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following:

**ORDER**

- A. The Examiner's Findings of Fact 1 through 4 are affirmed.
- B. The Examiner's Finding of Fact 5 is modified as follows:

5. The Hospital maintains an e-mail system. Prior to 1999, the e-mail system was less efficient and capable than the one in place at the time relevant to this case. In 1999, the system was upgraded and expanded, including the addition of mailboxes for the nursing staff.

Most bargaining unit members, in particular nurses, do not use computers for performing the majority of their Hospital work. 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. At that time, each mailbox was size-limited to 25 megabytes of disk space, but the Hospital was planning to upgrade its servers to increase the size of individual mailboxes. The Hospital's system handled approximately 2,400 incoming e-mail messages over the Internet (i.e., external to the Hospital's system) each week day, with the majority coming during the peak business hours of 8:00 a.m. to 6:00 p.m. As an example of the disk space consumed by an e-mail, the Union's broadcast e-mail of May 11, 2001, entitled "Urgent Union Bargaining Alert," was approximately one kilobyte in size. Under the e-mail system in place at the time of the events giving rise to this case, an e-mail sent to all individual employee e-mail addresses simultaneously would take "minutes" to distribute and might affect the system's ability to handle other incoming external e-mail arriving at the same time. E-mails sent to an e-mail list maintained by the Hospital would take longer for the system to distribute than individually-addressed e-mails.

- C. The Examiner's Findings of Fact 6 through 10 are affirmed.
- D. The Examiner's Finding of Fact 11 is modified as follows:

11. The Hospital interprets its policies to permit employees to e-mail each other regarding union matters, if such communications are "minimal" and/or "incidental." The Hospital's e-mail system is not set up so that the Hospital can monitor routinely the source of all external e-mails. However, the Hospital, 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, after the instant case arose. 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 has it in any other way limited the access of outsiders to the e-mail system.

- E. The Examiner's Findings of Fact 12 through 15 are affirmed.
- F. The Examiner's Finding of Fact 16 is modified as follows:

16. Sometime in early May, but prior to May 11, Pendergast directed 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 directed Schaefer to block Bonita Strauss's e-mail address, which prevented 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 Strube's in-coming e-mail with other managers and members of the Hospital's bargaining team.

- G. The Examiner's Finding of Fact 17 is affirmed.
- H. The Examiner's Finding of Fact 18 is modified as follows:

18. The Hospital did not inform the Union or Strauss that Strauss' e-mail was being blocked nor that Strube's e-mail was being intercepted, reviewed, and/or shared among management representatives. 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. However, Strauss learned from speaking with intended recipients that e-mail messages sent from the Union's e-mail address to employees' work addresses were not being received.

I. The Examiner's Finding of Fact 19 is modified as follows:

19. On May 11, Strauss attempted to send the following broadcast e-mail to unit members on behalf of the Union bargaining team:

This is a very special message from our Union Bargaining Team. Based on our discussions at the membership meeting on Wednesday night, our Bargaining Team is officially asking each and every one of our Union members to please withhold volunteering for any extra shifts, double shifts, or extra job duties. Volunteering is something we all do on a regular basis and management has grown too accustomed to this practice. In order to force management to want to settle a contract that is fair and equitable for all of us, we need to withhold our voluntary labor. Therefore, as of today, please do not volunteer to work any extra shifts, any double shifts or volunteer to do extra job duties. We will continue to withhold our voluntary labor until such time as we have the best contract possible. We need everyone's cooperation in order for this to be successful. Please inform management of your intentions and the reason for your decision.

In addition, please solicit the support of the physicians on your unit. Ask them to talk to upper management and/or write letters supporting our position. Some units have started this process already. We all need to follow.

Thanks to all of you for the support. Keep up the good work.

Because this message had been blocked, it did not go through to the work address of any unit member.

J. The Examiner's Findings of 20 through 22 are affirmed.

K. The Examiner's Finding of Fact 23 is modified as follows:

23. Hospital management also sent several simultaneous e-mails to all bargaining unit members during the negotiations crisis giving rise to this case. Some of those unit-wide e-mails utilized a saved list, rather than noting each e-mail address individually in the address field. The record does not establish that any of the Union's e-mails to bargaining unit members, whether individual or batch e-mails, had actually disrupted or delayed the Hospitals' system, or that e-mail messages from the Union posed any greater risk of transmitting a computer virus than e-mail sent from other sources outside of the Hospital.

- L. The Examiner's Findings of Fact 24 through 28 are set aside and the following Findings of Fact are made:

24. The Hospital did not monitor or take the initiative to block e-mail from any outside persons or entities other than the Union, and e-mail from the Union was the only external e-mail that unit members were prevented from receiving other than in response to employee complaints about pornographic or harassing e-mail.

25. Blocking the Union's access to the Hospital's e-mail system had a reasonable tendency to interfere with the ability of employees to communicate with their exclusive bargaining representative concerning collective bargaining and other matters of mutual aid and protection.

26. The Union's use of the e-mail system to communicate with representatives of management regarding grievances and/or negotiations was a regular and well-established practice that was known to and mutually accepted by the Hospital and primarily related to terms and conditions of employment.

27. The Union's use of the e-mail system to communicate with employees in the bargaining unit was not a regular and well-established practice known to and mutually accepted by the Hospital.

- M. The Examiner's Conclusions of Law 1 and 2 are affirmed.

- N. The Examiner's Conclusion of Law 3 is modified as follows:

3. By blocking, on the Respondent Hospital's own initiative, the Complainant Union's access to the Hospital's e-mail system to communicate with bargaining unit members, the Respondent Hospital interfered with the right of employees represented by the Complainant Union to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection guaranteed by Sec. 111.04, Stats., and thereby committed an unfair labor practice within the meaning of Sec. 111.06(1)(a), Stats.

- O. The Examiner's Conclusions of Law 4 through 6 are set aside and the following Conclusions of Law are made:

4. By terminating the practice of allowing the Complainant Union to use the Respondent Hospital's e-mail system to communicate with the Hospital regarding grievances and negotiations, the Respondent Hospital refused to bargain with the Complainant with respect to terms and conditions of employment, and thereby committed an unfair labor practice within the meaning of Sec. 111.06(1)(e), Stats.

5. By blocking the Complainant Union's ability to use the e-mail system to communicate with members of the bargaining unit, the Respondent Hospital 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), Stats.

6. By blocking the Complainant Union's ability to use the e-mail system to communicate with employees in the bargaining unit, the Respondent Hospital 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), Stats.

- P. The Examiner's Order is affirmed in part and reversed in part as follows:

1. It is ORDERED that the Respondent University of Wisconsin Hospitals and Clinics Authority shall immediately:

A. Cease and desist from:

1. Restricting the Complainant Union's access to the Respondent Hospital's e-mail system.
2. Refusing to allow the Complainant Union to use the Respondent Hospital's e-mail system to communicate with the Hospital regarding grievances and negotiations.

- B. Take the following affirmative action which the Commission finds will effectuate the purposes of the Wisconsin Employment Peace Act:
1. Upon request, negotiate with the Complainant Union in good faith to impasse or resolution before terminating the practice of allowing the Union to use the Respondent Hospital's e-mail system to communicate with the Hospital regarding grievances and negotiations.
  2. 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 Employee and Labor 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.
  3. Notify the Wisconsin Employment Relations Commission within twenty (20) days following the date of this Order of the steps taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin, this 12th day of April, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

---

Judith Neumann, Chair

Paul Gordon /s/

---

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

---

Susan J. M. Bauman, Commissioner



**APPENDIX "A"**

**NOTICE TO ALL UNIVERSITY OF WISCONSIN  
HOSPITALS AND CLINICS AUTHORITY EMPLOYEES REPRESENTED BY  
DISTRICT 1199W/UNITED PROFESSIONALS FOR QUALITY HEALTH CARE**

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

WE WILL NOT restrict the access of District 1199W/United Professionals for Quality Health Care, SEIU, AFL-CIO, CLC to the Hospital's e-mail system to communicate with bargaining unit employees.

WE WILL reinstitute the practice of allowing the Union to use the e-mail system to communicate with the Hospital regarding grievances and negotiations.

WE WILL, upon request, negotiate in good faith with the Union to impasse or resolution before terminating the practice of allowing the Union to use the e-mail system to communicate with the Hospital regarding grievances and negotiations.

UNIVERSITY OF WISCONSIN HOSPITALS AND CLINICS AUTHORITY

By: \_\_\_\_\_ Date: \_\_\_\_\_  
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 Hospitals and Clinics Authority**

**MEMORANDUM ACCOMPANYING ORDER**

The central issue in this case is whether the Hospital unlawfully interfered with its employees' right to engage in lawful concerted activity when it blocked the Union's access to the Hospital's e-mail system. The Examiner held that the Hospital violated the Wisconsin Employment Peace Act (WEPA) in two ways. First, the Hospital interfered with employees' exercise of their right to engage in lawful concerted activity by communicating with the Union; second, the Hospital unilaterally changed the status quo regarding a mandatory subject of bargaining, *viz.*, the Union's access to e-mail to communicate with individual employees in the bargaining unit. Subsidiary to the unilateral change holding, the Examiner concluded that the Union had not waived its right to bargain over this issue by proposing and then dropping certain language during negotiations for the predecessor collective bargaining agreement. The Examiner dismissed the Union's claims that the Hospital had violated WEPA by breaching the contract or unilaterally changing the status quo in blocking the Union from sending "broadcast" e-mail to employees in the bargaining unit at large.

We affirm the Examiner's dual conclusions regarding the collective bargaining agreement: on the one hand, that the agreement itself did not provide the Union with access to the Hospital's e-mail; on the other hand, that neither the agreement nor bargaining history waived the Union's right to bargain over the Union's access to the Hospital's e-mail system. Regarding the unilateral change allegation, we affirm the Examiner's Order but do so on a more limited ground. We do not find sufficient evidence to warrant a conclusion that the Hospital acquiesced in the Union's regular use of Hospital e-mail to communicate with bargaining unit employees, either individually or by "broadcast" messages to all employees. We hold more narrowly that the Hospital unlawfully unilaterally eliminated a practice of permitting the Union to use the Hospital's e-mail system to communicate with Hospital management, and we provide a correspondingly more limited remedy. These conclusions are addressed in Part D of the Discussion, below.

Regarding the central issue, the claim of unlawful interference, we affirm the Examiner's conclusion that the Hospital's action in blocking the Union's access to unit employees via the Hospital's e-mail system was unlawful. Our reasons largely parallel those set forth in the Examiner's thoughtful analysis. However, as this case has generated public interest and several *amicus* briefs, we take the opportunity to discuss the principles underlying our conclusion in some detail.

### **SUMMARY OF THE FACTS**

As noted in our Order, we have affirmed the Examiner's Findings of Fact with some exceptions. Our findings can be summarized as follows.

The Union represents a bargaining unit of some 1200 nurses and other professional employees of the Hospital. At all relevant times, and with some limitations, the collective bargaining agreement specifically permitted the Union to use the Hospital's internal mail system, telephone system, and certain designated bulletin boards to communicate with bargaining unit members. The Hospital also maintained an Internet use policy, stating that the system was "to be used for business purposes" and that management reserved the right to censor data, as well as a general policy regarding the use of Hospital facilities, stating that Hospital equipment "shall be used only to advance the interests of the hospital." However, the latter policy also provided that "it may be necessary to have some minimal personal use," including "incidental personal use of the Internet," so long as it was not excessive, against express orders, or an interference with hospital work. The Hospital acknowledged that employees could and did use the Hospital's e-mail system for incidental personal use, including union-related matters.

During negotiations for the 1998-2001 collective bargaining agreement, the Union proposed language that would allow the Union and its members to use the Hospital's computers and e-mail equipment "so long as the communication does not occur on work time." The proposal was dropped during negotiations and no similar proposal surfaced during negotiations for the 2001-04 agreement. Some time in 1999, the Hospital substantially upgraded and expanded its e-mail system, adding individual mailboxes for all employees in the bargaining unit. Most members of the bargaining unit, especially the nurses, did not spend a majority of their work time on the computer. Nonetheless, a practice developed such that the Union and its unit members regularly used the Hospital's e-mail system to send and receive messages from each other, both individual and group or broadcast messages. There is little evidence that the Hospital had knowledge of this practice, at least as it pertained to the Union. However, the Hospital itself communicated back and forth with the Union through the Hospital's e-mail on a regular basis.

Although the Hospital's Internet use policy stated that the Hospital's Information Systems Department (IS) "routinely logs web sites visited, files downloaded, and related information exchanges over the Internet," in practice the Hospital did not routinely monitor the use of the e-mail system or the access of outside entities to that system. On only two occasions prior to the rise of the present case did the Hospital block an outside e-mail address, both times in response to a complaint from an employee regarding an unwanted solicitation. On one occasion subsequent to the rise of the present case, the Hospital again blocked an outside address in response to a complaint about unwanted pornographic web site solicitation.

At relevant times the Hospital's e-mail system accommodated about 2,400 e-mails each day, most of them coming during peak business hours. Although both the Hospital and the Union had used the e-mail system to send several "broadcast" messages of varying lengths to bargaining unit members, there was no evidence that these messages interfered with the Hospital's e-mail system or operation in any meaningful way.

In January 2001, the Union and the Hospital began negotiations for the 2001-04 collective bargaining agreement. By April 2001, the negotiations had intensified and the Union began communicating more frequently with bargaining unit members, including some broadcast e-mail messages. Negotiations became protracted and increasingly heated, and, on May 1, 2001, the Hospital implemented its final offer. On May 4, 2001, the Union sent a broadcast e-mail deriding management's tactics as "union busting." This e-mail came to the attention of Hospital management, who on May 9 sent its own broadcast e-mail to unit members defending the Hospital's bargaining position.

At some point near the beginning of May, most likely after the May 4, 2001 "union-busting" e-mail, the Hospital directed its IS department to monitor the e-mail of bargaining unit member Peter Strube, a member of the Union's bargaining team. IS forwarded copies of Strube's e-mail from the Union to Hospital management, who then directed IS to block the Union's access to the Hospital's e-mail system. The Hospital did not notify the Union that its access was being monitored or blocked, but the Union eventually realized by word of mouth that its mail was not reaching its destination. Thereafter, the Hospital also blocked other e-mail addresses the Union used in an effort to evade the block, and ultimately the Union was unable to communicate with either the Hospital or bargaining unit members via Hospital e-mail.

On May 11, 2001, after the Hospital had implemented the block but apparently before the Union realized it, the Union attempted to send a broadcast message to unit members urging them to refrain from volunteering for extra shifts and other voluntary duties to bring pressure on the Hospital. Because it was blocked, the message did not reach any unit members via e-mail, although it was posted on bulletin boards and distributed on paper through the Hospital's regular mail system. On May 15, 2001, the Union filed the instant complaint.

## **DISCUSSION**

### **A. Blocking the Union's Access to E-mail as Unlawful Interference**

Under Sec. 111.04 of the Wisconsin Employment Peace Act (WEPA), Hospital employees have a right to engage in activities aimed at mutual aid and protection. As in any participatory enterprise, communication and information are elemental in the exercise of this right, both among employees and between employees and labor organizations. This right

includes communication within the work place itself where, after all, employees most commonly encounter each other. Cf. *BETH ISRAEL HOSPITAL V. NLRB*, 437 U.S. 483, 491 (1978) (applying this principle under the National Labor Relations Act (NLRA)). Of course, as noted by all parties and the Examiner, these rights may be restricted to the extent they interfere with the Hospital's bona fide prerogatives to operate its health care enterprise efficiently. Put conversely, the Hospital may interfere with its employees' lawful concerted activity to the extent justified by the Hospital's operational needs:

“[I]t is also well established that employer conduct which may well have a reasonable tendency to interfere with employee ... rights will generally not be found violative ... if the employer had a valid business reason for its actions.”

RACINE EDUCATION ASSOCIATION, DEC. NO. 29074-B (GRATZ, 4/98), AFF'D DEC. NO. 29074-C (WERC, 7/98), and cases cited therein.

In contrast to the increasingly arcane distinctions that have characterized the National Labor Relations Board's (NLRB's) case law in this area, 1/ the Commission's simple balancing test, weighing the employees' rights against the employer's needs, has served for nearly forty years to resolve cases where an employer's rules (or its implementation of those rules) are alleged to intrude upon employees' rights under parallel laws administered by the WERC. SEE *KENOSHA BOARD OF EDUCATION*, DEC. NO. 6986-C (WERC 2/66), AFF'D ON OTHER GROUNDS, 39 WIS.2D 196 (1968) (upholding an employer rule that prohibited meetings of outside organizations in school buildings). While all balancing tests carry some measure of unpredictability, that defect is more than offset by the simplicity of the analytical framework. Hence, we find it unnecessary to rely upon such conceptual distinctions as “solicitation” vs. “distribution,” “employees” vs. “non-employees,” “property rights” vs. “managerial rights,” “work areas” vs. “non-work areas,” “personal” vs. “real” property, or the sometimes confusing presumptions that accompany those distinctions. 2/ Whatever value these distinctions had for resolving disputes about other forms of communication, they have proven particularly ill-adapted to issues involving e-mail communication, as the Examiner discussed in his decision. 3/ As noted in the discussion below, even the issue of anti-union discrimination in the implementation of work rules can be considered as one of the factors within the balancing test, rather than a basis for a per se violation.

---

1/ See generally, “*Employer Rules Limiting Employee Use of Company Computers and E-Mail*,” *Report of the General Counsel* (NLRB, December 14, 2000); Rosen, Janus, & Kearney, *The Developing Labor Law* (BNA 2001) at 99-109, 114-125; 2003 Supplement at 29-38.

2/ *In its seminal decision in this area, KENOSHA BOARD OF EDUCATION, DEC. NO. 6986-C (WERC, 2/66), the Commission articulated its balancing test in terms of a presumption in favor of the validity of employer rules that regulate employee concerted activities on the employer's time and premises. Id. at 22-23. In both that decision and its progeny, however, the presumption itself has been of little analytical assistance, as the Commission's determination ultimately has depended upon balancing the degree of intrusion on employee protected activity against the employer's demonstrated need to regulate the activity. In this context, the presumption is more accurately stated as an assumption that employers have a valid interest in protecting the productivity and efficiency of their enterprises.*

3/ *SEE ALSO, THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, 2002 WL 31493320 (NLRB ALJ DECISION, NOVEMBER 1, 2002) (APPEAL PENDING), where the ALJ departed from some of these principles in invalidating an employer work rule prohibiting employees from using the e-mail system for union-related communication.*

---

Hence, we employ the Commission's traditional balancing test to determine whether the Hospital's action unlawfully interfered with employee rights under WEPA. Like any balancing test, this one requires us to consider both the nature and the weight of the parties' competing interests. We begin our analysis therefore with the question of whether prohibiting the Union from accessing the Hospital's e-mail system interferes with employee interests under WEPA and, if so, the extent or weight of that interference. 4/ It is virtually axiomatic that limiting the available means of communication between employees and their collective bargaining representatives would increase the difficulty of communicating about union matters at least in some measure. Because the Union is a major vehicle for bargaining unit employees to exercise their rights under WEPA, limiting the Union's ability to communicate with employees necessarily limits the employees' ability to exercise their rights. In this case, by blocking the Union's access, the Hospital not only prevented the Union from initiating e-mail to its unit members (which in itself interferes with employee rights to share information about union activity) but also prevented the Union from responding to e-mail from unit members. Since employees unquestionably have a protected right to ask the Union questions about contractual benefits, grievances, and the progress of negotiations, this "right" is of little utility if the Union cannot respond efficiently. Thus, for purposes of considering the interference with employee rights to communicate regarding union activity, we do not see a meaningful distinction between their ability to e-mail each other, their ability to e-mail the Union, and the Union's ability to respond to them by e-mail. In short, we find this case involves an interference with employee rights.

---

4/ *It bears noting that this case does not require us to determine the lawfulness of the Hospital's work rules regarding use of its e-mail and Internet equipment. While the rules are written in broad language, it appears that the Hospital has not interpreted or applied those rules to prevent employees from communicating with each other about union matters via e-mail.*

---

The more difficult question is whether the e-mail limitation is a significant or substantial interference with employee communication rights, in light of the many other means of communication available to the Union and the employees, such as home addresses and telephones, the U. S. Postal Service, home e-mail addresses, hand to hand leafleting, meetings, and even the Hospital's telephones, bulletin boards, and internal mail system. As the parties and the Examiner have pointed out, the U. S. Supreme Court has interpreted corresponding provisions of the National Labor Relations Act (NLRA) to permit excluding the union (at least during organizing campaigns) from the employer's premises, so long as the union has other effective means of communicating with employees, such as U. S. mail. *LECHMERE, INC. v. NLRB*, 502 U.S. 527 (1992). Leaving aside that neither the Court nor the NLRB itself have had occasion to determine whether the *LECHMERE* principle is properly extended to e-mail access, 5/ the principle itself is a function of the second part of the balancing test analysis, i.e., evaluating the employer's interests, including its property interests, against the extent of the intrusion on employee rights. At this point in the analysis, where we are examining the nature and weight of the employees' legal interests, it is relatively easy to conclude that Union access to Hospital e-mail would substantially enhance the employees' ability to communicate with each other and with their Union. E-mail's inherent advantages over other forms of communication (speed, accessibility, group-messaging, functionality, storage, retrieval, convenience, and inexpensiveness) are just as significant for lawful concerted activity as for other purposes. We conclude therefore that blocking the Union's access to the Hospital's e-mail system eliminated an efficient, effective method of communication, which is sufficient to conclude that it inhibited the employees' ability to engage in lawful, concerted activity, even in the context of other available forms of communication.

---

*5/ The issue has been the subject of several NLRB General Counsel Advice Memoranda and ALJ decisions, none of which has yet been the subject of Board decisions.*

---

The inquiry thus shifts to whether the Hospital has demonstrated legitimate countervailing interests that would justify the intrusion on the employees' rights. The most prominent interests that the Hospital asserts are rooted in property rights: on the one hand, the Hospital's right to keep outsiders "off" of its property (the e-mail system), and on the other hand the Hospital's interest in protecting its system from computer viruses or slowdowns caused by excessive mass e-mail or large-file attachments. The Hospital and the amicus Counties' Association also articulate concerns about employee productivity, use of work time for work purposes without undue distraction or disruption, especially in patient care areas, and the difficulty and expense of routinely monitoring personal e-mail usage and/or outsider access.

Unquestionably, the foregoing issues implicate legitimate business and operational interests. However, to justify interfering with employees' rights to communicate with each other and the Union, the Hospital must do more than articulate facially legitimate interests, but instead must persuade us that these interests are authentic and substantial enough to outweigh the employees' interests in effectuating their statutory rights. In this case, we conclude that the Hospital's asserted interests do not meet those criteria.

The legitimacy of the Hospital's interests is belied chiefly by the selective nature of its action, not only in blocking the Union's e-mail while evidencing little concern about other outside access, but in admittedly reacting to the content of the Union's e-mail and doing so at a time of heated negotiations. Where an employer claims an interest in safeguarding its property, but has only selectively or sporadically paid heed to that interest except where union activity is involved, doubt arises as to the genuineness of the asserted interest. In our view, this doubt largely accounts for the virtual maxim that a facially valid rule will be unlawful if it is discriminatory in application. 6/

---

6/ *The notion that discrimination in applying a facially valid rule amounts to per se unlawful interference has contributed to what we see as a tangential debate between the Board and the courts about what kinds of discrimination are unlawful. Thus the Hospital and the amicus Counties Association have cited, inter alia, CLEVELAND REAL ESTATE PARTNERS V. NLRB, 95 F.3d 457 (6<sup>th</sup> CIR. 1996) (holding that the relevant form of discrimination is not between "Girl Scout cookies" and union activity, but between employer-related information and union-related information) and GUARDIAN INDUSTRIES CORP. V. NLRB, 49 F.3d 317 (7<sup>th</sup> CIR. 1995) ("discrimination" requires differential treatment between similar entities). As we do not rely upon the proposition that discrimination is a per se violation, but rather examine selectivity as an element in considering the authenticity of the employer's asserted business interests, we see no need to parse the concept of discrimination as carefully as the courts have done in the cited cases.*

---

Other facts of this case support the inference that the Hospital was not genuinely concerned about its property rights in keeping outsiders from its e-mail system or that the Union's access to the system would undermine the system itself or work force productivity. The Hospital generally allowed employees to e-mail each other, presumably even with the Union's message, as long as such personal e-mail use was within the permissible bounds and did not interfere with work. The Hospital aptly notes that a total ban on employee personal e-mail may itself be an unlawful interference with protected activity, citing the NLRB General Counsel Advice Memorandum in PRATT & WHITNEY (2/98); the Hospital contends that complying with law in one respect (permitting personal e-mail messages) should not *ipso facto* require the Hospital to allow Union access, as well. This argument misconceives the applicable rationale for both PRATT & WHITNEY and our decision in the instant case. PRATT & WHITNEY does not stand for the proposition that an employer may impose no controls on



personal use of e-mail, but only that a total ban would unduly encroach upon employee communications that effectuate statutory rights. Similarly, we are not suggesting that the Hospital's tolerance of personal e-mail necessarily means it has abandoned any viable claim regarding productivity or system integrity. Rather, by generally permitting personal use of the e-mail system by employees without imposing routine controls or monitoring outside access, and by using the system with some frequency to send its own broadcast e-mails, the Hospital has evinced little *bona fide* concern that the Union's e-mail would disrupt the system or interfere with work. Indeed, as the Examiner noted in persuasive detail, the Hospital presented no reliable evidence that either its own or the Union's broadcast e-mails actually slowed the system, delayed Hospital operations, interfered with productivity, or otherwise created a functional problem. By choosing only the Union to block (and only a member of the Union bargaining team to monitor), the Hospital undermines the validity of its asserted legitimate business interests. Moreover, the timing of the Hospital's newfound interest in monitoring outside access, coming at a point of heated negotiations and heightened union activity, strongly belies the Hospital's asserted legitimate business interests. SEE, E.G., GALLUP, INC., 334 NLRB No. 52 (2001) (invalidating an employer rule against posting non-business materials because it was promulgated immediately after discovering the union's organizing efforts).

The Hospital argues, however, that the Union failed to establish discrimination, in that the record contains no evidence that outside entities actually e-mailed employees via the Hospital's system. We find this argument unpersuasive, since the Hospital does not deny that employees were permitted to use the system for non-business purposes (with appropriate caveats against abuse of the privilege), which necessarily permits outsiders to have access. While we do not conclude from this that the Hospital had a *carte blanche* policy regarding outsider access (at minimum, the Hospital showed a willingness to block outside e-mail upon complaint from employees), we do find it reasonable to infer that the Hospital tolerated outsiders accessing its e-mail system and that it was selective (i.e., discriminatory) when it blocked the Union. In addition, the manner in which the Hospital addressed its concern about Union access is not consistent with a genuine interest in limiting outsider access, but rather suggests animus towards the Union and the content of its e-mail. Thus, the Hospital did not forthrightly and directly request the Union to stop using the e-mail system, which would have fully addressed its ostensible legitimate concerns in a less offensive and invasive manner, but instead covertly monitored and blocked the Union's incoming e-mail. Thus, like the Examiner, we do not see the Hospital's asserted business interests as genuine or substantial.

The Hospital and its amicus also urge, somewhat more persuasively, that unless they are allowed to insulate their employees from union e-mail – which conceivably could assume siege proportions – employee productivity and patient care will be undermined. Moreover, they claim that it would be impractical, burdensome, and unduly expensive to require employers, especially small counties and municipalities, to impose general filtering or monitoring systems, rather than to simply exclude specific outsiders such as the Union. As

Examiner Gratz and the Commission articulated in RACINE UNIFIED SCHOOL DISTRICT, DEC. NOS. 29074-B (GRATZ, 4/98) AND 29074-C (WERC, 7/98), employee productivity can be a countervailing factor that justifies limitations on protected activity in the work place. In RACINE, the employer established that personal use of the employer's telephones by employees was disrupting the employer's "business," primarily by making the telephones less available for business purposes, but also, to a lesser extent, by distracting employees from their work. DEC. NO. 29074-C at 7 (quoting from the Examiner's decision). However, in that case the Commission found the employer's asserted productivity concerns genuine, in part because they were not restricted to union activity. Nor, in that case, did union activity appear to generate the employer's concerns. Furthermore, the Commission specifically noted that the employer's rule did not restrict use of the telephones for union activity where the union activity itself involved employer business. While the RACINE decision does not delineate the areas where union activity intersects with employer business, it is likely that initiating, scheduling, and making arrangements related to grievances would fall within this intersection. In contrast, the Hospital's action in the instant case, in blocking and monitoring the Union's incoming e-mail, allowed for no such exceptions. In that respect, the Hospital's action would be unlawfully overbroad even if the Hospital could establish that productivity concerns genuinely prompted its action.

However, we, like the Examiner, do not find the Hospital's proffered productivity concerns to be genuine or substantial on this record. In reaching this conclusion, we are cognizant of the importance of minimizing work place distractions, especially where the work in question involves patient health and safety. However, as the Examiner articulately explained, e-mail differs from telephones and other employer equipment in crucial ways. E-mail cannot disrupt an employee's work unless the employee chooses to open it, an event that can be delayed until a break or other respite from work. Unlike most business telephone systems (including the one in the RACINE case), e-mail discloses the name of the sender before it is opened or answered, making it easy to sort business from personal e-mail, and urgent messages from those that can wait. Nor does e-mail necessarily request or induce a response. Opening and reviewing a personal e-mail message is generally a brief and momentary distraction from work, even if done on work time, and does not necessarily undermine productivity. Thus, neither personal use of e-mail nor outsider access to an e-mail system is inherently destructive of legitimate business interests; indeed, as discussed earlier, the Hospital generally permitted personal use of its e-mail system. 7/ While the Hospital rightly protests that potential disruption is a sufficient business concern and that a showing of actual disruption should not be required, the potential for disruption must be more than purely speculative before we would feel comfortable concluding that it outweighs employee rights under WEPA. Nothing in this record suggests that the Hospital had any objective basis for its concern or that its concern was genuine and universal, rather than aimed largely at protected activity. The Hospital itself used the e-mail system to communicate with employees regarding contract negotiations – apparently without misadventure. To the extent the Hospital relies upon the

disruptive implications of the Union's May 11 e-mail regarding voluntary overtime, its concerns are belied by the fact that it had already acted to block the Union's e-mail prior to reviewing the May 11 message (since it discovered the message in monitoring Strube's e-mail and since it is undisputed that the message did not reach any unit members by e-mail). Moreover, the same message was distributed throughout the work place by other means, evidently without causing disruption. 8/

---

7/ *This point is explained at greater length in the ALJ's decision in THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, SUPRA N., AT 7.*

8/ *In connection with the instant petition for review, the Hospital also argues that it was justified in blocking the Union's e-mail because the Union was using e-mail to promote unlawful withholding of services by employees, citing the NLRB's decision in NEW YORK STATE NURSES ASSOCIATION, 334 NLRB 790, 167 LRRM 1313 (2001). In that case, a divided Board held that a nurses' union had violated Section 8(g) of the NLRA (requiring 10 days' notice before a "concerted refusal to work") when the union urged its members not to volunteer for and to refuse overtime assignments. WEPA contains a similar 10-day notice requirement governing work stoppages by Hospital employees, Sec. 111.115 (2), and it is an unfair labor practice for the Union to fail to provide such notice. Sec. 111.06 (2)(i). Since the Hospital had already acted to block the Union's e-mail prior to viewing the May 11, 2001 e-mail, this argument is somewhat disingenuous. In any event, we are reluctant to reach the merits of this defense, which raises an issue of first impression under WEPA, because it was not raised at or prior to hearing and thus lacks proper development in the record. Cf. VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC 11/03), at 18 (a claimed violation of law normally should precede the close of the hearing as a matter of due process, so that all parties have an opportunity to present relevant evidence). In this case, there is virtually no evidence in the record about whether bargaining unit employees regularly volunteered for overtime, whether patient care depended upon such volunteer services and would be disrupted in its absence, or how the parties have construed and implemented in practice the overtime provisions in the collective bargaining agreement – factual issues that were pivotal in the decision in NEW YORK STATE NURSES ASSOCIATION. We decline to address an issue of such significance, where it was raised for the first time on review and would have to be decided upon a record that is necessarily incomplete.*

---

Even assuming that productivity concerns were genuine and substantial enough to justify blocking outsiders from the e-mail system, with the attendant intrusion on employee rights, those general concerns could not warrant singling out the Union without calling their authenticity into question. The Hospital and the Counties Association respond to this flaw by citing the impracticality – if not impossibility – of blocking all outsiders or even all outside “solicitors.” They imply that singling out the Union makes sense, because the Union's access and address, unlike that of other outsiders, is known to the employer. The Hospital states that, if it became aware of other outsider “solicitors” accessing its e-mail to contact its employees, it would block their access as well. Moreover, as the Hospital asserts and the Counties emphasize, there is no practical way to monitor employee e-mail usage or block all outsiders; hence it is necessary and justified to single out the Union.

The technological underpinnings of the foregoing argument are debatable. 9/ More to the point, while it may be possible for another employer in another context to validate that claim – for example, with evidence that it has had cause for concern about outsider access beyond union activity and has made efforts to address that concern – the record in this case does not support the Hospital doing so. Apart from a few isolated instances in which the Hospital responded to individual employees requesting Hospital assistance in preventing unwelcome e-mail, the record evidences no real Hospital attention or concern about outside access to its e-mail system. As noted earlier, even the Union’s access did not provoke Hospital concern until the negotiating atmosphere had soured and the Hospital took offense at the Union’s May 4 “union-busting” e-mail message. The Hospital had long been aware that the Union had access to its system; after all, the Hospital itself communicated with the Union by e-mail until May 10 or 11. Yet the Hospital never advised the Union not to use the system to communicate with employees or otherwise evidenced any concern. It is apparent that it was the content of the Union’s e-mail during a period of turbulent negotiations that precipitated the Hospital’s monitoring and blocking. Hence, on this record, we cannot accept the argument advanced by the Hospital and amicus Counties Association that the difficulty of monitoring outside access warrants selective monitoring and blocking focusing only on the Union.

---

9/ See, e.g., Broder, “Networkers’ Rights: The NLRA and Employee Electronic Communications,” 105 YALE L.J. 1639, 1668-69 (1996) (discussing ways in which employers can protect their electronic communication systems without intruding upon employee rights).

---

Accordingly, we conclude that blocking the Union’s access to the Hospital’s e-mail system interfered with bargaining unit employees’ exercise of their rights to engage in lawful, concerted activity, without sufficient business justification, in violation of Sec. 111.06(1)(a), Stats.

#### B. The Unilateral Change Allegations.

The Union also claims that, prior to May 2001, the Hospital had acquiesced in an existing practice of permitting the Union to use the Hospital’s e-mail system to communicate with employees. The Union presented evidence that its current business agent, Bonnie Strauss, had regularly communicated with bargaining unit employees by e-mail and that the Hospital was aware of this practice because it knew that the Union collected employee e-mail addresses during Hospital orientation and because the Hospital itself communicated with the Union via e-mail. The Hospital denies knowledge of this practice, producing evidence that its officials were not specifically aware that the Union collected or maintained employee work e-mail addresses and noting that the Union did not meet its burden to produce specific evidence of

Hospital knowledge or acquiescence. The Hospital also mounts a waiver defense, arguing that the Union tried but failed to obtain e-mail access during negotiations for the predecessor collective bargaining agreement and hence has waived its right to bargain over the issue.

In addressing this issue, the Examiner rejected the Hospital's waiver defense on the ground that the record evinced no evidence about the purpose of the proposal or why it was dropped and hence was not "clear and unmistakable" evidence of waiver. Proceeding to examine the existence of any practices on this subject, the Examiner differentiated "broadcast" e-mails, in which the Union sent a single message to all or numerous bargaining unit members simultaneously, from individual e-mail messages sent to a single unit member. He concluded that the Hospital was aware of and acquiesced in the Union's practice of communicating individually with members about individual matters, such as grievances or scheduling meetings. Since the Hospital had unilaterally and completely blocked the Union's access to the system in May 2001, including the Union's ability to e-mail individual unit members, he concluded that the Hospital had bargained in bad faith in violation of Sec. 111.06(1)(d), Stats. However, the Examiner did not find evidence that the Hospital had acquiesced in the Union's use of the e-mail system to send "broadcast" or unit-wide messages and he dismissed the Union's unilateral change violation in that respect.

Unilaterally changing an existing condition of employment affecting a mandatory subject of bargaining (in this case, union access to the employer's facilities) is a *per se* refusal to bargain. CASWELL BLDG. CORP., DEC. NO. 2152 (WERC, 7/49); KRESS PACKING CO., DEC. NO. 5580 (WERC, 8/60); NOPAK, INC., DEC. NO. 5708 (WERC, 3/61); C.F. ST. CROIX FALLS SCHOOL DISTRICT V. WERC, 186 WIS.2D 671 (CT. APP. 1995). It is the Union's burden to establish that a change in practice occurred and that the practice was mutually understood and accepted. Sec. 111.07(3), Stats.; C.F. SAUK COUNTY, DEC. NO. 22552-B (WERC, 6/87). We view the evidence regarding the parties' practices differently than did the Examiner. In this case, the record shows that the Hospital was aware that the Union had access to the system, chiefly because the Hospital itself communicated regularly with the Union via e-mail. However, there is little evidence about the extent to which the Union actually or regularly used the e-mail system to communicate with employees – either by "broadcast" or individual messages. The Union's business agent testified that she routinely communicated in this manner, but her testimony was quite conclusory and underdeveloped. Moreover, while we suspect that the Hospital had some notion that such communications were occurring, there is virtually no evidence in the record to this effect, much less evidence that the Hospital acquiesced in any practices relating to such communications. Hence we reverse the Examiner's conclusion that the Hospital had unlawfully unilaterally changed an existing condition of employment when it prevented the Union from communicating with employees individually or as a group.

However, as noted above, it is apparent on this record that the Hospital itself regularly communicated with the Union via the Hospital's e-mail system. Allowing the Union this mechanism for quick and efficient communication is also a condition of employment; once mutually established, as here, such access cannot be withdrawn unilaterally without violating the duty to bargain under WEPA. We concur in the Examiner's conclusion and his analysis that the Union did not waive its right to bargain over this issue simply by advancing a proposal on the subject during predecessor negotiations. Hence, there is little question that the Hospital's unilateral decision to block the Union's access, without prior notice or opportunity to bargain, violated Sec. 111.06(1)(d), Stats.

Dated at Madison, Wisconsin, this 12th day of April, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

---

Judith Neumann, Chair

Paul Gordon /s/

---

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

---

Susan J. M. Bauman, Commissioner