DANE COUNTY WISCONSIN

BEFORE THE IMPARTIAL HEARING OFFICER

In the Matter of the Determination of a Grievance by:

AFSCME Dane County Employees Associations 65, 705, 720, 895, 1871 and 2634.

Appearances:
Amy B. F. Tutwiler, Assistant Corporation Counsel and Mary Kasparek, Assistant Corporation Counsel, for the County.
Sweet and Associates, Attorneys-at-Law by Mark A. Sweet and Neil Rainford, AFSCME Representative, for the grievant.

IMPARTIAL HEARING OFFICER'S DETERMINATION

The above-captioned parties selected the undersigned Impartial Hearing Officer (IHO) to determine a dispute arising out of a grievance submitted on December 19, 2019, over access by Employee Group Representatives (EGR'S) to certain e-mail address lists maintained by the County.

This proceeding is pursuant to the Grievance Process provisions of the Dane County Employee Benefit Handbook (EBH). A hearing was held in Madison, Wisconsin on October 1, 2020, November 6, 2020 and November 20, 2020 and transcribed by a Court Reporter. Post-hearing briefing was completed on February 20, 2021. The parties waived the thirty-day time limit on the issuance of IHO determinations specified in the EBH.

THE ISSUES TO BE DETERMINED:

The parties agreed at the hearing herein that the issues to be determined by the IHO are: Whether the Employer's policy stated in the May 15, 2020 email from Greg Brockmeyer that restricts the Employee Group Representatives' right to send mass emails violates the EBH; and, if so, what is the appropriate make-whole remedy?

PERTINENT COUNTY ORDINANCES:

18.04 DEFINITIONS ...

(17) *Employee groups*. Employee group is defined as a group consisting of represented or non-represented employees identified in wage schedules adopted by the County Board as part of the Employee Benefit Handbook.

(18) *Employee group's representative*. Employee groups representative is defined as an organization or individual that represents a majority of employees within an employee group.

(19) *Handbook.* Handbook is defined as the Employee Benefit Handbook described in this chapter.

18.06 EMPLOYEES RIGHT TO SELF ORGANIZATION.

(1) Subject to state law, and pursuant to Wis. Stats. 111.70, all 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 have the right to refrain from any and all such activities.

(2) To the extent that the collective bargaining process results in an agreement, the terms of which vary in whole or in part with the provisions of this ordinance, or the Employee Benefit Handbook, the wages and other subjects as allowed by law and specified in the collective bargaining agreement shall govern.

(3) All employees, within an employee group, shall also have the right, without interference, restraint, coercion or domination, of self organization and to form, join or assist in the creation and maintenance of one employee group's representative, that is not a labor organization and that does not collectively bargain, for the purpose of engaging, as interested stakeholders(s) and subject to the applicable provisions of this ordinance and the Employee Benefit Handbook, the County regarding the adoption, amendment or termination of the provisions contained in this chapter, or the Employee Benefit Handbook as it related to themselves or their employee group.

(4) All employees, within an employee group, shall also have the right to refrain from any and all such activities including the expectation of any aid, assistance or representation that an employee group's representative provides to its members. ...

(7) To the extent that the Employee Benefits Handbook contains provisions that are in conflict with this ordinance, the provisions of this ordinance shall govern.

18.24 EMPLOYEE BENEFIT HANDBOOK

(1)*Purpose*. The County Executive and County Board have the responsibility and authority to establish the terms and conditions of employment for County employees. The purpose of the Employee Benefit Handbook ("Handbook") is to establish the terms of employment for County employees.

(2) Procedure. The Employee Benefit Handbook shall be developed by the Division in accordance with the provisions of this section, subject to review and approval by the County Board of Supervisors. The County Executive through his or her designee and department heads is responsible for interpretation and implementation of the Employee Benefit handbook, subject to the grievance procedure specified therein.

(3) *Notice*. The County shall provide fifteen (150 days advance written notice to interested stakeholders of any proposed revision to the Employee Benefit Handbook.

(4*) Adoption – Annual Review.*

(a) At least annually, the Division shall seek policy guidance from the Committee regarding any adoption, amendment or termination of provisions in the Employee Benefit Handbook.

(b) At least annually and more frequently if requested, the Division shall meet with interested stakeholders to comprehensively review, discuss and obtain input concerning proposed changes to the Employee Benefit Handbook. Interested stakeholders shall be given the opportunity to provide verbal or written input.

(c) After receiving input from the Committee and interested stakeholders, the Division shall prepare a draft containing any proposed revisions and shall share the draft the interested stakeholders. Interested stakeholders shall have an opportunity to offer input concerning any pertinent issues.

(d) Proposed revisions shall be presented to the County Executive for review and advice. The County Executive or designee may meet with interested stakeholders to discuss proposed revisions.

(e) Following review and advice with interested stakeholders, the Division shall prepare a draft resolution with interested stakeholders.

(f) The Division or an interested stakeholder may engage the independent consultant to assist in recommending revisions to Employee Benefit Handbook provisions. The independent consultant shall have

the authority to work with the Division and interested stakeholders, gather all pertinent information, and make final recommendations pursuant to the process set forth in the Employee Benefit Handbook.

(g) At the conclusions of steps (a-e) the Committee and Board shall vote on any such resolution as a whole. However, if any party has engaged the independent consultant under (f), the Committee and Board shall vote to accept, reject, or modify the final recommendations of the consultant. If the Committee votes to modify, the Board shall vote to accept, reject or modify the recommendation of the consultant only after a thirty (30) day notice to interested stakeholders.

(h) Pertinent written communication provided by the Division, interested stakeholders or the independent consultant under paragraphs (b), (c), (d), (e), (f), and (g) shall be posed to the Division's website.

(i) Meetings under paragraphs (b), (c), (d), (f) and (g) between the Division and interested stakeholders shall be noticed and open to the public.

PERTINENENT EMPLOYEE BENEFIT HANDBOOK PROVISIONS:

SUBJECT: BULLETIN BOARDS

Section 1:

a.The county shall provide the following for the purposes of employee information dissemination by an Employee Group's Representative or interested stakeholder:

1.Use of bulletin board space in convenient places in each workarea;

2.Reasonable use of the county electronic mail system, and;

3.The posting of notices shall be by Employee Group Representatives stewards, or his/her designee, or an interested stakeholder.

SUBJECT: EMPLOYEE GROUP REPRESENTATION AND WORK RELATED ASSOCIATIONS

Section 1:

Work Related Associations

a. It is the policy of Dane County to encourage employees to participate in work-related associations and activities. Reasonable time spent in the conduct of these activities with notice to the employee's supervisor shall not be deducted from the employee's pay.

Section 2:

Employee Group's Representatives ...

b.Reasonable time spent in the conduct of Employee Group representational activity during the workday, including but not limited to the posting of notices, the investigation and processing of grievances and participation in discussions related to personnel relations shall not be deducted from the pay of the stewards or other officials. ...

SUBJECT: EXISTING BENEFITS

Section 1:

a.Existing Benefits

So long as the services of the Employee Group are continued by the County, the County shall continue existing benefits (including, but not limited to coffee breaks, car allowance and/or mileage payments), or other amenities not mentioned herein that are primarily related to wages, hours and conditions of employment, but established by practice with the knowledge and tacit consent of the County, for the life of this Handbook. Prior to effectuating any changes in the foregoing existing benefits and other amenities that are primarily related to wages, hours and conditions of employment. Any proposed changes shall be subject to the process set forth in D.C. 18.24 (3) and (4).

SUBJECT: GRIEVANCE PROCESS

Section 1:

a.Grievance. A grievance is defined to be a controversy between the Employer and any Employee or Group of Employees Groups as to:

1.A matter involving the interpretation or application of the Employee Benefits Handbook, or

2.Any matter involving an alleged violation of the Employee Benefits Handbook in which an Employee or Group of Employees, or Employee Group's Representative maintain that any of their rights or privileges of an Employee or Group of Employees have been impaired in violation of the Employee Benefits Handbook.

3.Any matter involving employee terminations, employee discipline or workplace safety as prescribed in Section 66.0509 Wis. Stats.

b.Process. Grievances shall be processed in the following manner: (Time limits set forth shall be exclusive of Saturdays, Sundays and holidays.)

c.Number of Representatives. The number of representatives attending the meeting(s) will be kept to the minimum necessary to adequately represent each party. The number of attendees will be discussed in advance with the goal of facilitating this paragraph and to keep the number attending from each party relatively equal. ...

Section.3.

Impartial Hearing.

a.The grievance shall be considered settled in Step 3 above, unless within ten (10) days after the last response is received, or due, the dissatisfied party (either the grievant, representative authorized by the employee, or the County) shall request in writing to the other that the dispute to be submitted to an impartial hearing before an impartial hearing officer.

b.A panel of Impartial Hearing Officers (IHO) has been established from which the IHO will be selected. The IHO shall, if possible, be mutually agreed upon by the parties to the grievance. If agreement on the IHO is not reached within ten (10) days after the date of the notice requesting an impartial hearing, then the IHO shall be selected by the parties within five (5) days from the panel using an alternate strike process or other agreeable means. Each party shall pay one half (1/2) of the cost of the impartial hearing.

c.The IHO shall have the authority to determine issues concerning the interpretation and application of all Sections of the Employee Benefits Handbook and any matter concerning employee terminations, employee discipline or workplace safety. He/she shall have no authority to change any part of the Employee Benefits Handbook; however, he/she may make recommendations for changes when in his/her opinion such changes would add clarity or brevity which might avoid future disagreements.

d.If the aggrieved party is proceeding without a representative, the Employee Group Representative shall be timely notified of the hearing and shall have a right to provide input in the hearing as allowed under this policy. The Employee Group Representative shall provide written notice to the aggrieved party and the County of its intent to participate in the impartial hearing within 10 days of receiving notice of the hearing. If the Employee Group participates, the IHO shall provide it with an opportunity to be heard and to otherwise participate in the hearing equal to that of the other parties.

e.The IHO will conduct a hearing on the grievance in a manner that ensures that a record of proceedings is created and preserved. In grievances resulting from an employee discharge, the hearing will be scheduled within thirty (30) days of the notice of selection. The IHO shall have the authority to administer oaths, issue subpoenas at the request of the parties, and shall determine if a transcript of proceedings is necessary. The IHO may require the parties to submit documents and witness lists in advance of the hearing. The burden of proof at the hearing shall be the "preponderance of the evidence" standard. The IHO shall admit all testimony having reasonable probative value, but shall exclude immaterial, irrelevant or unduly repetitious testimony or evidence that is inadmissible under s. 901 .05 of the Wisconsin statutes. The IHO shall give effect to the rules of privilege recognized by law. Basic principles of relevancy, materiality and probative force shall govern the proof of all questions of fact. Objections to evidentiary offers and offers of proof of evidence not admitted may be made and shall be noted in the record.

f.The written determination of the IHO, in conformity with his/her jurisdiction, shall be implemented unless reversed upon appeal to the County Board as set forth below in subsection 3. The determination shall be rendered within thirty (30) days following the final day of hearings or receipt of briefs, whichever is later. In grievances resulting from an employee discharge, briefs will be due within thirty (30) days following the final day of hearings. Any brief not postmarked on or before the date set by the parties at the conclusion of the hearing as the date for submission of briefs shall not be considered or accepted by the IHO and shall be returned to the party submitting same with a letter of transmittal. The other party shall receive a copy of the letter of transmittal.

Section 4:

Appeal of Impartial Hearing Officer (IHO) Decision

a.The aggrieved party, his/her authorized representative, or the County may appeal the written decision of the IHO to the County Board ("the Board"), which may delegate authority to review same to the Personnel & Finance Committee. Notice of appeal must be made in writing within thirty (30) days after the receipt of the written determination. A copy of the notice of appeal must be furnished to the other parties, at the same time it is submitted to the Board.

b.The County Board or, if delegated by the Board, the Personnel & Finance Committee, shall consider the full record of proceedings conducted before the IHO. The Board or Personnel & Finance Committee shall accept and consider a written brief of the appealing party that identifies the grounds for overturning or modifying the written determination of the IHO. The Board or Personnel & Finance Committee shall also provide the other party an opportunity to respond in writing to the appealing party's written brief. The Board or Personnel & Finance Committee shall permit the appealing party to file a written reply in support of its appeal to the written responses, if any, of another party.

The Board may, overturn the IHO's decision only upon determining that:

1.The decision was procured by corruption, fraud or undue means;

2.There was evident partiality or corruption on the part of the IHO;

3.The IHO was guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of any party have been prejudiced; or...

SUBJECT: MANAGEMENT RIGHTS

Section 1:

Management Rights:

a. The County shall operate and manage its affairs in all respects in accordance with its responsibility and powers or authority which the County has not officially abridged, delegated, or modified by this Handbook and such powers or authority are retained by the County. These management rights include, but are not limited to the following: The rights to plan, direct and control the operation of the work force, determine the size and composition of the work force, to hire, to lay-off, to discipline or discharge for just cause, to establish and enforce reasonable rules of conduct, to introduce new or improved methods of operation, to contract out work, to determine and uniformly enforce minimum standards of performance, all of which shall be in compliance with and subject to the provisions of this Handbook.

THE ADMINISTRATIVE PRACTICES MANUAL:

The County also maintains an Administrative Practices Manual (APM) that pertains to all employees covered by its Civil Service System, which includes employees within employee groups and employees represented by EGR's. This document is replete with specific references to EGR's. The following provision precipitated the instant grievance.

2.3.5 EGR's may not use the County email system to conduct the business of their association. EGR's may not send mass mailings to members, including using distribution lists, among other activities. (6/20)

PRE-HEARING PROCEDURAL BACKGROUND:

The undersigned was advised of his selection as IHO in this matter on June 16, 2020 and replied with suggested hearing dates on June 18, 2020. The County replied on July 3, 2020 that it planned to submit a motion and supporting brief in favor of resolving the dispute without a hearing, and requesting that the IHO specify a briefing schedule. On July 9, 2020 the grievant replied that, "The agreement between the parties does not provide for pre-hearing motions to dismiss". On July 9, 2020, the undersigned replied, "It is my determination that we should schedule a conference call to discuss proceeding in this matter, including setting a hearing date unless we adopt

a non-hearing approach". On the same date the County responded, "there is no restriction on motion practice in the IHO hearings process". That response, *inter alia*, also stated:

> The title Mr. Rainford uses (in the grievant's objection to pre-hearing motions) implies and encourages, unconsciously or otherwise, that the labor arbitration standards that applied in the past era of collective bargaining laws continue to apply, as you know those laws no longer govern.

A conference call was conducted on July 15, 2020. The undersigned's e-mail of the same date stated as follows.

> This is to confirm the procedure in the above matter that was agreed upon in our conference call this morning.
>
> You will jointly submit to me (1) a stipulation of facts, (2) an agreed upon statement of the issues to be determined, and (3) a briefing schedule, by the close of business on August 5, 2020. The briefing schedule may provide for reply briefs.
>
> This procedure is mutually intended to make a hearing unnecessary. If you are unable to complete this procedure a hearing will be scheduled promptly.
>
> Thank you for your cooperation.

On August 5, 2020, the County advised the undersigned that the parties had failed to arrive at a stipulation of facts and contended *inter alia* that the County's proposed facts were therefore undisputed. On the same day, the undersigned declined to rule and requested a response from the grievant; and the grievant replied and requested that a hearing be scheduled as indicated in the summary of the conference call, above. The undersigned responded as follows, also on August 5, 2020.

> Having received this day the messages from both parties shown below, and in consideration of the intention expressed in my confirming message of 7/15/20, it is my determination that a hearing should be scheduled in this matter. In that regard, I refer to the following provision of the County's Employee Benefits Handbook.
>
> > *The IHO will conduct a hearing on the grievance in a manner that ensures that a record of proceedings is created and preserved. ....The IHO shall have the authority to administer oaths, issue subpoenas at the request of the parties, and shall determine if a transcript of proceedings is necessary.*
>
> Accordingly, it is requested that the parties confer and advise me by the close of business on Friday, 8/7/20 as to a few mutually convenient hearing dates. (I am extremely reluctant to set a hearing date not knowing whether either party will be unable to participate on that date. My calendar is relatively open and it is my presumption that yours' are less open.)
>
> Secondly, on the presumption that the hearing will be conducted by video-conference due to public health related restrictions, it is also requested that the County engage a Court Reporter to provide a transcript and to provide a platform for video-conferencing.
>
> Finally, I recognize that the messages received from both parties today, while they were not *ex parte*, contained allegations and contentions that might be regarded as untimely. Please be assured that (1) I will not open any attachments to those messages, (2) relevant evidence will be presented only in the hearing, and (3) I will only consider arguments that are presented when they are timely.
>
> Of course, I remain open to an in-person hearing if that is allowed and to telephone conferencing with both of you should that be your joint request.

Having received replies from both parties on August 6, 2020, the undersigned advised them on that date as follows.

> This is in reply to your messages of earlier today. I am standing on my message to you of yesterday. I do not believe it is appropriate to litigate in an exchange of e-mail messages the substantive or procedural matters that you have raised to date. Facts that are not explicitly stipulated should be presented at a hearing and, likewise, arguments should be presented at a hearing or in briefs. While the Employee Benefits Handbook IHO procedure is not traditional arbitration such as is conventional under a collective bargaining agreement in my view it is not intended to replicate court litigation by always providing for pleadings and motion practice as a preliminary to a hearing on the merits.
>
> The County's motion to compel the Grievant to respond to the County's proposed stipulated facts is denied. I continue to hope that you may voluntarily arrive at a stipulation.
>
> As stated in my message, I request that you confer and agree upon a few possible hearing dates. All of the dates specified in Mr. Rainford's message are presently available to me as well. Of course, I remain open to the possibility that you may avoid or cancel a hearing by agreeing to stipulations and briefing procedures.

The County's response to which this message replied provided no proposed hearing dates, demanded that the grievant indicate before proceeding to hearing which of the County's proposed fact stipulation were disputed; and despite having received the instant grievance, "why they contest the policy directing all employees not to send mass emails".

The undersigned replied:

> This is in reply to your messages of earlier today. I am standing on my message to you of yesterday. I do not believe it is appropriate to litigate in an exchange of e-mail messages the substantive or procedural matters that you have raised to date. Facts that are not explicitly stipulated should be presented at a hearing and, likewise, arguments should be presented at a hearing or in briefs. While the Employee Benefits Handbook IHO procedure is not traditional arbitration such as is conventional under a collective bargaining agreement, in my view it is not intended to replicate court litigation by always providing for pleadings and motion practice as a preliminary to a hearing on the merits.
>
> The County's motion to compel the Grievant to respond to the County's proposed stipulated facts is denied. I continue to hope that you may voluntarily arrive at a stipulation.
>
> As stated in my message, I request that you confer and agree upon a few possible hearing dates. All of the dates specified in Mr. Rainford's message are presently available to me as well. Of course, I remain open to the possibility that you may avoid or cancel a hearing by agreeing to stipulations and briefing procedures.

Later that day the County advised that the grievant had rejected all of the County's proposed stipulations and requested that no hearing be scheduled until the County "had a chance to evaluate (the grievant's response." The undersigned replied:

> I look forward to the County's response next Tuesday. (August 11, 2020)
>
> As to the clarifying the issue(s) in dispute I believe it can be done in a hearing without prejudice to either party's position, or perhaps in a conference call with me, if the party's are open to scheduling such a call.

On August 11, 2020 the following message was received from the County.

I write in response to our exchange on August 6. The County has made every effort to work with Grievants to develop a set of stipulated facts. Below is an exchange the parties have had that documents that process. You'll see that our efforts include *following Grievants' suggested process*. Yet, in response to that effort, instead of responding on the merits, I am met with baseless accusations and a resolute refusal to engage. This behavior is unprofessional, unproductive and needs to stop.

The process to negotiate stipulated facts has been productive, to a point. In the parties' submissions to one another, I genuinely do not see any disputed facts. I stand by my point to Mr. Rainford that objections such as relevance or duplication, etc. do not provide grounds to maintain a fact is in dispute. Also, many of the facts Grievant opposes as inaccurate are based on documents, copies of which the County provided. It is wholly reasonable for the County to expect an explanation why Grievants believe such facts are inaccurate. Put another way, it's wholly unreasonable for the Grievant to obstruct and refuse to answer with any substance.

Clearly, the parties are struggling to complete this exercise without an intermediary. I therefore ask, as you offered in your August 6 email, that we convene a conference call with you to work through the proposed facts and have you determined whether in fact there are any genuine disputes of fact. I am open tomorrow except for a conference call at 8:30. On Thursday, I have time in the morning from 10 to noon. Next week I'm open Monday, Tuesday after 10, Wednesday and Thursday after 10.

I truly believe the proposed conference process can get us to a much more productive place than if we simply proceed to hearing. I urge that we take this next step to try to get there. Even if we don't succeed, it will still be helpful for you to learn more about each parties' position.

On August 12,2020, the undersigned replied:

I am available to conduct a meeting of the parties any time after 10:00 AM on Monday, Tuesday Wednesday or Thursday of next week. Mr. Rainford should respond to this by the end of business tomorrow.

I am also willing to set a hearing per the terms set forth in my email message of 9:14 PM on 8/5/20, paragraph four.

I am not willing to schedule a hearing not knowing whether the County will participate.

Be reminded that should this matter not proceed to hearing the parties will be billed for the time that I have spent on preliminary matters.

On August 13, 2020 the grievant replied, *inter alia*, as follows.

Finally, the parties have long agreed in the language of the Employee Benefit Handbook,

e. The IHO will conduct a hearing on the grievance in a manner that ensures that a record of proceedings is created and preserved.

In the face of the COVID-19 issues that we face, we have made extraordinary efforts and spent an inordinate amount of time trying to find a way to avoid a hearing. Unfortunately, after good faith attempts, those efforts have not been successful and a hearing is needed. Fortunately, a remote, video-based hearing is possible to ensure everyone's safety. The County's efforts to advance motions, to further delay the parties in pre-hearing discussions, to advance their claims to you prior to a hearing, and to involve you as an intermediary to attempt to reach pre-hearing stipulations are nowhere provided for in the agreements between the parties or in your directives. We ask that they continue to be set aside.

At long last our request, respectfully, is that you would please schedule a hearing based on the availability offered. If a conference call is necessary for the purposes of scheduling, I am available next week Wednesday and Thursday after 10:30 AM.

A conference call was conducted on August 19, 2020. The following summary was sent by the undersigned later that day.

This is to confirm the arrangements that we made in this matter during a conference call this morning.

A hearing is scheduled for 9:00 AM on October 1, 2020.

At my request, the County will arrange for a Court Reporter and video conferencing capacity.

On or before September 25, 2020, the parties will submit to me electronically all proposed exhibits and other documents that they wish considered. I will, in turn. exchange those documents. (Witness lists were added to these items later on the same day.)

If any pre-hearing motions are submitted, I will respond to them promptly.

Jurisdictional and procedural issues, if any, will be addressed, at the hearing and in any determination in accordance with common practice.

Thank you for your cooperation.

On September 25, 2020, the parties submitted their witness lists and proposed exhibits. The County also submitted the following.

MOTION IN LIMINE

INTRODUCTION

The Latin phrase "in limine" means "on the threshold, preliminary." Miriam -Webster online Dictionary. These in limine motions request judicial notice of facts that are relevant to and explain the County's reasoning for the grieved decision. The governing legal standard is a statutory (and ordinance) requirement that the County maintain uniform employment standards. In an opinion to which the parties agreed to be bound, retired Judge Maryann Sumi found that standard requires the County to maintain standards that ensure equal treatment of its employees, including use of the email system (Exhibit 1). The grieved email decision effectuates that change.

MOTION

The County requests that the IHO take judicial notice of the facts set forth in this paragraphs1 through 32 below. The request for the IHO to take judicial notice simply means that the County asks that the IHO agree that the proposed facts are not subject to reasonable dispute. As a source of reference, the judicial notice doctrine is set forth in Wis. Stat. § 902.01 and a copy is attached The County requests judicial notice of two kinds of facts: (1) facts that are common knowledge; and (3) facts that are beyond dispute because of supporting documentation.1 The County's position is not that these facts may be the only relevant facts. *Thus, taking judicial notice of the proposed facts in no way limits the evidence Grievants may present.*

1 Note that Wis. Stat. § 902.01(5) provides that judicial notice is mandatory when the necessary information is provided. Such information is provided in this motion through exhibits.

The County hereby moves the IHO to take judicial notice of the following facts. For those facts supported by documentation, the document is cited and a copy is being provided through submission of the County's exhibits:

1. In 2015, retired Judge Maryann Sumi issued an opinion that had been jointly requested by the AFSCME-affiliated EGR Associations ("EGAs" or "Associations") and the County to obtain definitive answers regarding interpretation of the EBH and County Ordinances. (County Exhibit 1)

2. AFSCME hired an attorney to represent the Associations. Both the County and AFSCME Associations agreed to abide by the responses. See email dated May 29, 2015. (common knowledge and County Exhibit 2)

3. One of the questions was whether "County resources such as work time or email [may] be used to communicate Employee Association activities." (County Exhibit 1, p. 17) The judge distilled that and other questions to answer "under what circumstances may the County authorize use of paid time and County resources by its employees?" (Id.) (County Exhibit 1)

4. At the time of Judge Sumi's involvement, the County was continuing to allow most activities as it had when there were collective bargaining agreements in place. (common knowledge)

5. Under labor law, prior to the passage of Act 10, AFSCME union representatives were legally entitled to use county resources for a broad range of representational activities. (common knowledge)

6. One issue briefed by the parties was whether, if the AFSCME-affiliated Associations were no longer labor organizations and did not represent all employees, the County could legally continue to allow them to use County resources as when they were labor organizations. In their submissions, the EGAs argued that the judge should not answer the question at all. At the time, they argued to the judge that "[b]ecause the Associations do not contend they enjoy the same privileges and benefits that municipal labor organizations enjoyed before Act 10, there is no reason to pose or consider this question, or any other question that suffers from the misplaced assumption that the Associations claim pre-Act l0 privileges or benefits." (County Exhibit 3, p 3)

7. In this matter, the Associations are claiming they and their representatives have the same right to use email distribution lists like they had as labor organizations. (County Exhibit 4 , p. 1)

8. On January 11, 2016, Judge Sumi responded. Citing Wis. Stat. § 59.52(8)(a), she answered that, although the County has discretion to make policies regarding benefits to its employees, "[t]he key . . . is that the provisions must be *uniform*." (County Exhibit 1, p. 18) (italics in the Judge's decision)

9. In other words, Judge Sumi found that the County may not pay the EGRs for any activity or give them any other benefit if all employees do not enjoy equal benefits. (County Exhibit 1, p. 18)

10. County Ordinance § 18.24(6), regarding the Employee Benefit Handbook, reads as follows: "Nothing in this section shall prevent the County or its Elected Officials from acting to fulfill any duties, responsibilities or deadlines imposed by law, including the powers and duties set forth in Wis. Stats. Chs. 66, 111, 118 and 119." (County Exhibit 5)

11. County Ordinance § 18.24(6), requires the County's to act consistent with all state and federal law, including decisions interpreting Act 10. (Exhibit 1, p. 8)
12. Judge Sumi also noted that the EGAs acknowledged that the Associations "do not enjoy any of the benefits or conditions that are associated with certified labor organizations." (County Exhibit 1, p. 10)

13. The County has been gradually reviewing and revising workplace policies as it applies Judge Sumi's opinion, including making changes needed to more fully conform policies and practices to the uniformity standard. (common knowledge)

14. On December 18, 2019, the Corporation Counsel's office issued an opinion to the Department of Administration ("DOA"), to answer the question "how to implement Judge Sumi's opinion that the provisions of the County's civil service system be uniform." (County Exhibit 6, p. 1)
15. DOA had asked the specific question "How does the uniformity standard govern the use of County resources. . . [including] County email system and distribution lists maintained by Information Management to distribute EGR emails to their membership." (County Exhibit 6, p. 1)

16. The short answer to the question of use of County resources is that "county resources may not be used for non-work-related activities, except for incidental use." (County Exhibit 6, p. 1)

17. In regard to the question about use of the county email system, the Corporation Counsel's office instructed that "EGRs may not use the County's email system to conduct the business of their association. The practice violates the requirements that employee have equal access to resources and that the County maintain viewpoint-neutral practices." (County Exhibit 6, p. 6)

18. That day, December 18, 2019, the Director of Administration ordered removal of the Employee Group Association ("EGA") email distribution lists ("EGA lists") from the County electronic mail system, which was scheduled to occur the next day. (common knowledge)

19. Also on December 18, 2019, the Director invited the Associations' representatives (EGRs and their AFSCME representative) to a meeting the next day as a courtesy for the purpose of explaining the reasoning for the decision. The AFSCME representative, responding for himself and all EGRs, declined the invitation on the grounds they were not available. (County Exhibit 7)

20. Removal of the EGA lists went forward as scheduled and were removed on December 19, 2019. (common knowledge)

21. The EBH section titled "Bulletin Boards" provides that "The county shall provide the following for the purposes of employee information dissemination by an Employee Group's Representative or interested stakeholder: . . .2. Reasonable use

of the county electronic mail system. (County Exhibit 8)

22. The EBH does not define what constitutes "[r]easonable use of the county electronic mail system." (County Exhibit 8)

23. The EBH section titled "Employee Group Representation and Work Related Associations," subsection 1.a., provides in relevant part that: "It is the policy of Dane County to encourage employees to participate in work-related associations and activities. . . ." (County Exhibit 9)

24. The EBH does not define the terms "work-related associations" or "work-related activities." (County Exhibit 9)

25. In the December 18, 2019 opinion, Corporation Counsel proposed definitions for the terms "work-related associations," and "work-related activities" in order to allow for a uniform interpretation and application of the EBH. (County Exhibit 6, pp. 5-6)

26. The Management Rights section of the EBH provides in relevant part: "The County shall. . . manage its affairs. . . in accordance with its responsibility and powers or authority which the County has not officially abridged, delegated or modified by this Handbook . . . [or] retained. . .The management rights include, but are not limited to . . . [t]he rights to plan, direct and control the operation of the work force. . . . to establish and enforce reasonable rules of conduct, to introduce new or improved methods of operation, . . . [and] to determine and uniformly enforce minimum standards of performance." (County Exhibit 10)

27. County management has adopted and is currently applying the definitions of "work related activities" and "work-related associations" similar to the ones recommended in the Corporation Counsel opinion to effectuate uniformity. (County Exhibit 6, pp. 5-6 and County Exhibit 11, p. 1)

28. The term "Work-Related Activities" is defined to mean "paid Civil Service Activities and those activities an employee does to fulfill their job description, including training and participation in Work-Related Associations. The term 'Work-Related Activities' does not include Employee Group representational activities that are not also paid Civil Service Activities." (County Exhibit 11, p. 1)

29. The term "Work-Related Associations" is defined as "bona fide professional organizations that relate to the profession for which the County employs an individual. The term does not include labor organizations or associations related to labor organizations." (County Exhibit 11, p. 1)

30. County management sets standards for what constitutes reasonable use of the county electronic mail system through adoption of policies external to the EBH, which apply to all employees. (County Exhibit 12 and County Exhibit 13)

31. The electronic mail system policy directs that County equipment and systems should only be used for official county business and that only limited and occasional personal use is permitted. (County Exhibit 12, p, 3, § 3.1)

32. County policy also prohibits mass emailing for non-work-related purposes.

(County Exhibits 12, 13 and 14)

On the same day the undersigned acknowledged receipt of said documents, indicated that a ruling on the motion would be issued promptly and indicated that the grievant had until Noon on September 29, 2020 to respond to the Motion. A response in opposition was timely filed. Also, on that day, the undersigned issued the following.

ORDER DENYING MOTION IN LIMINE

IHO PROCEEDING – EMAIL ACCESS GRIEVANCE

In a telephone conference on August 19, 2020, representatives of the grievant and the County agreed *inter alia* that a video-conference hearing in this matter would be scheduled for October 1, 2020; that proposed exhibits, witness lists and other documents would be submitted to the undersigned on or before September 25, 2020; and that if any pre-hearing motions were submitted, the undersigned would respond to them promptly.

On September 25, 2020 the County submitted the instant motion. It includes the contention that an opinion issued by Maryann Sumi "effectuates" the change in County practice that is the subject of the instant grievance, and proposes thirty-two matters of fact and argument that should be matters of "judicial notice" by the undersigned. None of such matters are proposed for exclusion from the record.

Twenty-seven of those matters are represented by County exhibits that have not been offered or received into evidence. The remaining five are characterized as "common knowledge," Many of the thirty-two may be the subject of stipulations or offered as joint exhibits at the hearing.

The grievant submitted its opposition to the instant motion on September 29, 2020.

The undersigned concludes that all of the matters specified in the instant motion should be subject to cross-examination, conventional procedure for entering exhibits, and rebuttal. It is also observed that whether the Sumi opinion is dispositive of the grievance begs the ultimate question raised by the grievance and should be subject to the presentation of evidence and argument.

On these grounds, and others, the instant motion is denied.

DISCUSSION:

Knowing that in December, 2014, collective bargaining agreements that existed between the County and certain unions would expire; and to comply with revisions to the Wisconsin Municipal Employment Relations Act that are generally referred to as Act 10, representatives of the County and those unions worked together to draft and enact pertinent ordinances and the Employee Benefit Handbook (EBH), quoted above. The intent of that effort was compliance with the revised statute and substantial replication, where proper, of certain arrangements that existed under collective bargaining agreements between the County and those labor organizations.

The grievant herein is a group of work-related associations acting as Employee Group Representatives, as defined above, all of which have chosen to be represented for certain purposes by The American Federation of State, County and Municipal Employees (AFSCME) as allowed by pertinent ordinances, the EBH and the APM.

On May 29, 2015, Travis Myren , then the County's Director of Administration , wrote as follows to Maryann Sumi, a retired Dane County District Court Judge.

I am writing to ask if you could help Dane County come to closure on certain questions presented by the formation of employee groups following the implementation of Act 10.

In the wake of Act 10, Dane County created a system to continue employee engagement in discussions about wages, hours, and conditions of employment. This system relies on interactions with employee groups. These groups mirror the former collective bargaining units in terms of composition, but the ordinance specifies that these groups are not a labor organization under the law. Final decision making authority with respect to wages, hours, and conditions of employment is retained by the County as any changes are subject to approval by the County Board.

Under the ordinance, the employee groups were also allowed to elect a representative to work with the County on labor issues, including proposed modifications to wages and benefits. At the time the ordinance was adopted, the employee groups had not formed, and they had not designated a representative since collective bargaining agreements remained in place during 2014.

In December of 2014, the collective bargaining agreements expired. This necessitated the creation of employee groups under the ordinance, and these groups proceeded to elect a representative to work with the County on labor issues. The County also facilitated the collection of voluntary contributions from employees who are willing to financially support the employee group's representative. The groups have established independent entities under the tax code to receive those contributions.

In creating the employee groups, employees chose to affiliate with the American Federation of State, County and Municipal Employees (AFSMCE), and the County is aware that certain monies collected voluntarily from employees are being distributed to AFSCME. This affiliation as well as other elements of the representative system have raised concerns as the groups have continued to operate much as they have in the past when they were collective bargaining units. The County's legal counsel has raised certain objections while the employee groups, but(sic) their legal advisor(s) maintain that the relationship established with AFSCME and the County comports with current law.

Given this general disagreement, we have proposed to submit a list of issues to an independent third party. Under this model, we would outline the areas of disagreement and submit briefs on each issue detailing each parties' position. Although we recognize that the decision would not be legally binding, we would also agree that the decisions serve as the basis for our interactions into the future.

We are hoping that you would be interested and able to help decide these questions. I see that you may be connected to Midwest Mediation LLC, so I am assuming that some standard rates are in place for this type of service. Thank you for your consideration. Please contact me if you have any questions.

On the same day, Judge Sumi replied that she was interested in assisting the parties as described by Myren and that, "The proposed project sounds creative and collaborative". She confirmed her professional affiliation and provided her fee rate. As to the process that followed, the instant record includes only a letter brief from legal counsel for the employee associations which implies that the process was an exchange of briefs.

Greg Brockmeyer began employment by the County in February, 1997 and assumed his present position, Director of Administration and Chief Administrative Officer, in June, 2017. In that position he reports directly to the County Executive and is the County's highest ranking nonelected official with authority over and responsibility for all departments, policy analysis, and planning. His authority includes the issuance of county-wide policies.

In his testimony Brockmeyer related that once in his current position he participated in meet-and-confer processes with employee groups and learned that under Act 10, "bargaining was now illegal." Conferring with Corporation Counsel staff he was told about the "Sumi decision or opinion." Studying that twenty-one page document, which was issued on January 11, 2016, he found the following passage pertinent to the instant matter interesting.

I have grouped these four questions together because they ask essentially the same question: under what circumstances may the County authorize use of paid time and County resources by its employees? The question arises because the Handbook, p. 38, 'Employee Group Representation and Pay,' states: representatives shall be known as stewards...Reasonable time spent in the conduct of Employee group representational activity during the workday, including but not limited to the posting of notices, the investigation and processing of grievances and participation in discussions related to personnel matters shall not be deducted from the pay of the stewards or other officials...

The County's position is that it can only authorize Employee Associations' of paid time resource for activities 'directly related to employee discipline'...The Associations contend that paid time to EGR's facilitates a representative voice with whom the County can meet, and the County's choice of a reasonably efficient way of getting any input it seeks.'

It is certainly true that the County has wide latitude under §59.52(8) (a), Wis. Stats., to establish 'uniform provisions in respect to...hours of work, tours of duty or assignments...'The key, however, is that the provisions must be *uniform*. If the County chooses to exercise its discretion to allow the use of paid time and resources for certain activities, it must make that opportunity available to other employees as well. To be consistent with the Ordinance's emphasis on protecting 'interested stakeholders,' the Handbook's provision for paid time and use of County resources cannot fairly be limited to one category of employee.

I recommend that the Handbook develop a rule of general application for authorizing the use of paid time and resources.

In August, 2019, the EBH that was placed in evidence herein was adopted.

On December 18, 2019 Assistant Corporation Counsel Amy Tutwiler sent a nine-page memorandum, plus attachments, to Brockmeyer entitled "Uniformity and Paid Time for Employee Work-Related Activities." According to the testimony of Director Brockmeyer, he requested that memorandum be reviewed by all of the attorneys in the Office of the Corporation Counsel and was advised that there was unanimous concurrence. The memorandum began as follows.

INTRODUCTION

Question Asked: You requested a legal opinion on how to implement Judge Sumi's opinion that the provisions of the County's civil service system be uniform. You also provided examples of certain practices and asked for an opinion how each comports with the uniformity standard. The issue requires interpretation of a section of the Employee Benefit Handbook ("EBH") allowing pay for "reasonable time spent" engaging in "work-related associations and activities." (EBH, Topic: Employee Group Representation and WorkRelated Associations) The topic has many effects, including answers to the following ongoing questions, among others:

- What are permitted activities during work hours that take employees away from their job assignment?
- What are permitted activities by Employee GroupRepresentatives ("EGRs") during work hours?
- How does the uniformity standard govern the use of countyresources, and particularly the following current resource uses by EGR's:

- Office space in County buildings.
- County email system and distribution lists maintained byInformation Management to distribute EGR emails to their membership.

Short Answer: In order to ensure uniformity, work-related activities must be interpreted to be limited to those an employee does to fulfill his/her job description and to participate in civil service activities. During work time, EGRs may engage in only those activities allowed for all employees. Work-related activities do not include Employee Group Association activities that are not also civil service activities because such time away from work duties is not available to all employees.

Similarly, access to resources needs to be the same for all employees. Pursuant to county policies, county resources may not be used for non-work-related activities, except for incidental use. It follows that EGRs may not use county resources except where they are available to others on the same terms, including for employee group business. Thus, EGRs may not have exclusive use of office space and must comply with the same terms and rates required of the public to access space. Further, EGRs may not use the county email system to conduct the business of their association; and therefore, may not send mass mailings to members, including using distribution lists. A further response to these and other questions is addressed below.

Apparently, later that day, or on the next day, December 19, 2019, Brockmeyer issued an order adding the following provision to the Administrative Practices Manual.

2.3.5 EGR's may not use the County email system to conduct the business of their association. EGR's may not send mass mailings to members, including using distribution lists, among other activities. (6/20)

Director Brockmeyer testified, with a very minor exception, entirely on direct examination. In his testimony, he indicated that this APM provision was one of a number of modifications that he was making to relations with the EGR's to which they had objections. In fact, as he recalled, "They went to the County Executive, I think, as well as the County Board. That was a real contentious time."

When asked why the order was not proposed as a revision of the EBH, Brockmeyer testified,

I work in a very difficult, highly political environment. I report to the County Executive, but I also work with the County Board. I work closely with the employees, employee groups, Employee Group Representatives, County Board personnel and Finance Committee. It's a very political environment that I work in.

Elaborating on this, and addressing relations with associations, such as AFSCME, that represent EGR's, he testified as follows.

But typically, while we do work on, you know, some of the same issues, some of our goals are the same, right? I mean they represent employees and try to do the best for them, you know, what's best for employees and, of course, we do as well. Frequently we are adverse on a number of issues. I guess I could use this hearing as one, right? I mean, a very simple change to the email system....But yet here we are, right? This is day two of the hearing, and certainly they have a right to grieve it. But as you can see, we don't always see eye-to-eye. T

When asked the same question again, he added the following,

Because I knew that it would be extremely difficult, you know as was witnessed when I made those changes to the meet and confer process.

He added,

Well, as I alluded to earlier, this is a very political job of –making changes while working with the employee group is extremely difficult. They do not like change. They're very comfortable the way things are. I don't fault them for that. But getting them to change is extremely difficult, and I think the Directors of Administration previously didn't want to engage in a political battle, which is what it has been. It has been a political battle.

> When the Democratic Party is engaging in – I mean, you get a number of people from outside our organization that are involved. When you get AFSCME leadership or ... International involved. These changes, while rather small are a big deal.

When asked whether EGRs work on matters "outside of the County Civil Service System for the purposes of serving their members," he replied, "yes, I think that they do," and cited as an example how, despite the presence of County staff assigned to administer insurance programs, EGR staff advise employees or will represent employees in such inquiries.

When asked if he agreed that EGR's "have won benefits for all employees," he replied,

> No, that is not accurate.... Frequently they will take credit for different changes. Like, for example increasing the wage, changes in health care a variety of things like that. All of those things come down to decisions that relate to the budget. You know, when we can afford to get a three-percent raise to our employees and if it's within the budget and that's what other units of government are doing across the state, then that's what we do.

When asked about meetings with EGR's regarding the matters pertinent herein, Brockmeyer recalled that there was a meeting with "employee groups" at some time, apparently in the Fall or Winter of 2019, to talk about "uniformity and pay time standards" and to ask them what they thought the activities were "that they should be paid for." On December 18, 2019, an email directed, apparently, to EGR's among others, stated,

> Corporation Counsel would like to meet regarding paid time and uniformity standards. This meeting has been scheduled for tomorrow (Thursday, 12/19) at 1:30 PM. ... We are sorry for the short notice. With the holiday season, it's hard to find time that works for everybody. We hope that you can attend.

A representative of the grievant replied within a few minutes as follows. "We are not available to meet t tomorrow. We look forward to considering additional dates that may be available in the future".

Also on December 19, 2019, the instant grievance was filed. It reads as follows.

DRAFT Step 3 Grievance

Section of Employee Benefit Handbook Violation

- Bulletin Boards
- Existing Benefits
- Employee Group Representation And Work Related Associations
- Any other provisions that may apply.

Statement of Circumstances

FOR MANY YEARS, DANE COUNTY MAINTAINED E-MAIL LISTS OF EMPLOYEES REPRESENTED BY, FIRST, UNIONS UNDER COLLECTIVE BARGAINING, AND MORE RECENTLY, BY EMPLOYEE GROUP REPRESENTATIVES. SUCH E-MAIL LISTS WERE ACCESSIBLE TO UNION/ EGR STEWARDS AS A MEANS OF FACILITATING COMMUNICATION OF WORK-RELATED ACTIVITIES TO REPRESENTED EMPLOYEES.

ON DECEMBER 19, 2019, DANE COUNTY INFORMATION MANAGEMENT DELETED ALL EGR E-MAIL LISTS FROM THE COUNTY SERVERS, WITHOUT NOTICE TO, OR DISCUSSION WITH, EMPLOYEE GROUP REPRESENTATIVE STEWARDS OR OTHER OFFICERS. HOWEVER, E-MAIL LISTS FOR "UNREPRESENTED EMPLOYEES" CONTINUE TO BE MAINTAINED. (ATTACHMENT I).

THE EMPLOYEE BENEFIT HANDBOOK ALLOWS GRIEVANCES RELATED TO THE INTERPRETATION OF THE HANDBOOK TO BE STARTED AT STEP 3.

VIOLATIONS OF THE EMPLOYEE BENEFIT HANDBOOK

THE BULLETIN BOARDS SECTION OF THE EG 1871 EMPLOYEE BENEFIT HANDBOOK READS (EMPHASIS ADDED):

SUBJECT: BULLETIN BOARDS

SECTION 1:

A. THE COUNTY SHALL PROVIDE THE FOLLOWING FOR THE PURPOSES OF EMPLOYEE INFORMATION DISSEMINATION BY AN EMPLOYEE GROUP'S REPRESENTATIVE OR INTERESTED STAKEHOLDER:

1. USE OF BULLETIN BOARD SPACE IN CONVENIENT PLACES IN EACH WORK AREA;

2. REASONABLE USE OF THE COUNTV ELECTRONIC MAIL SYSTEM. AND,·

3. THE POSTING OF NOTICES SHALL BE BY EMPLOYEE GROUP REPRESENTATIVES STEWARDS, OR HIS/HER DESIGNEE, OR AN INTERESTED STAKEHOLDER.

PROVISION OF E-MAIL LISTS EMPLOYEES WHO HAVE SIGNED MEMBERSHIP CARDS FOR THE EMPLOYEE GROUP REPRESENTATION IS CLEARLY "REASONABLE USE" OF THE COUNTY ELECTRONIC MAIL SYSTEM.

EGR 1871'S USE OF THE ELECTRONIC MAILING LISTS TO ALL MEMBERS HAS BEEN TRADITIONALLY RELATIVELY SPARSE, TYPICALLY ONE MESSAGE PER MONTH OR SO, ALL DIRECTLY RELATED TO WORK-RELATED ACTIVITIES OF THE EGR ITSELF. EGR 1871 HAS NOT RECEIVED ANY COMPLAINTS OR CONCERNS ABOUT ITS USE OF THE COUNTY'S E-MAIL SYSTEM TO DATE. THE COUNTY'S UNILATERAL DECISION TO ELIMINATE E MAIL LISTS OF EGR MEMBERS, PARTICULARLY WHILE RETAINING SIMILAR LISTS FOR MANAGEMENT AND OTHER UNREPRESENTED EMPLOYEES CLEARLY VIOLATES THE PLAIN LANGUAGE OF the EBH, and appears discriminatory in nature.

The Existing Benefits section of the EG 1871 Employee Benefit Handbook reads:

SUBJECT: EXISTING BENEFITS

Section I:

a. Existing Benefits. So long as the services of the Employee Group are continued by the County, the County shall continue existing benefits (including, but not limited to coffee breaks, car allowance and/or mileage payments), or other amenities not mentioned herein that are primarily related to wages, hours and conditions of employment, but established by practice with the knowledge and tacit consent of the County, for the life of this Handbook. Prior to effectuating any changes in the foregoing existing benefits and other amenities shall be that are primarily related to wages, hours and conditions of employment. Any proposed changes shall be subject to the process set forth in D.C.O. 18.24(3) and (4).

Dane County Information Management has consistently provided e-mail lists, with posting access to 1871 union and EGR designated stewards, since the formation of the original 1871 collective bargaining unit in 2004. This was clearly done with the county's tacit understanding and consent, as over time, county management has periodically asked the EGR to communicate important information to its members. The county has not brought concerns about EGR 1871 steward access to EGR-represented employee mailing lists to any of the annual Employee Benefit Handbook amendment sessions under ss. 18.24 (3) and (4), Dane County Code.

The Employee Group Representation and Work Related Associations section of the EG 187 l Employee Benefit Handbook reads:

SUBJECT: EMPLOYEE GROUP REPRESENTATION AND WORK RELATED ASSOCIATIONS

Section 2: Employee Group's Representatives.

a. Employees selected by an Employee Group's Representatives to act as employee and group representatives shall be known as stewards. Employee Group 's Representatives shall notify the County, from time to time of the names of stewards and the names of other officials who may represent employees on behalf of the Employee Group 's Representative..

b. Reasonable time spent in the conduct of Employee Group representational activity during the workday, including but not limited to the posting of notices, the investigation and processing of grievances and participation in discussions related to personnel relations shall not be deducted from the pay of the stewards or other officials. The number of employees who may receive pay under this provision shall continue as in the past while engaging in discussions with the County during scheduled duty hours.

After each Executive Board election, EGR 1871 has informed the Department of Administration of the names and responsibilities of all its designated stewards. Stewards have used the county's membership lists solely to post notices and to communicate with its members about work-related activities of the EGR. Denial of access to membership e-mail lists would frustrate the ability of designated stewards to complete posting of notices, processing of grievances or participation in discussion related to personnel relations.

Request for Settlement of Corrective Action

EGR 1871 requests that:

I. Dane County Information Management and the Department of Administration immediately restore the EGR 1871 membership list (#Dane County Pros) to the status as it existed on December 9, 2019.

2.Dane County Information Management continue to grant designated EGR 1871 stewards send, write and edit access to the #Dane County Pros e-mail list, as has been done in the past.

3.Any further changes to permissions to, or deletions of the #Dane County Prose mail list must be brought to the county's annual Employee Benefit Handbook amendment process, as required by the Employee Benefit Handbook.

The evidence indicates that there were some attempts to discuss this matter during the Spring of 2020. On April 6, 2020, a representative of the grievant sent to Brockmeyer a "responsive approach to the issues we last discussed in March." Brockmeyer replied on the same day as follows.

Thank you for the email response. As mentioned at our last meeting, the County is unable to enter any agreements with the Employee Associations that could be interpreted as bargaining. I have attached the County's answer to the concerns that you brought up with regards to my draft memorandum of dated 12/3/19. It is our belief that the attached memorandum adheres to the Corporation Counsel opinion on Paid Time Standards as well as provides employees and managers with guidance in adhering to and managing those processes.

The pertinent item on the attached memorandum stated:

The Associations will maintain their membership email lists on non-county servers and the County will not purposefully block emails from the Associations as long as the email(s) Follow the Dane County policy: proper use of Computer Equipment, Software and Connectivity.

On April 15, 2020, Director Brookmeyer issued the following.

RE: Decision on Step 3 Grievance of Elimination of EGR Email Distribution Lists

This grievance contests the decision to prohibit EGR access to and use of county employee email distribution lists. Allowance of the EGRs' use of county distribution lists was discontinued based on the civil service uniformity standard and the opinion of the Office of Corporation Counsel on what that standard requires. For the reasons set forth below, the Step 3 grievance is hereby denied.

The grievance argues that the County needs to provide EGRs access and the right to use county email distribution lists comprised of those employees who pay dues for membership in the Employee Group association ("EGA"). I disagree. The County's obligations are to treat comparable categories of employees uniformly and to maintain a viewpoint-neutral position on EGA membership. See Wis. Stat.§ 59.52(8) and DCO §§ 18.03, 18.06(3) and (4). Allowing the EGRs to use the county email system to communicate with only those employees in their groups who pay dues conflicts with both these obligations. Within the county system, those employees who elect not to pay dues are in the same category as the EGA members. The County defines this group as "Interested Stakeholders." Both groups are subject to and receive the protections of the Employee Benefit Handbook (EBH). Neither the EGA nor the non-EGA employees have the right to use county email

distribution lists for non-county business. Thus, the County's emafl/distribution lists policy is treating all employees in this category the same.

The grievance takes issue with the fact that email lists for management and distinguishing other "unrepresented employees" continue to be maintained. It characterizes this fact as a form of discrimination. What the grievance fails to recognize is that these groups are not comparators to the Interested Stakeholders. They constitute different categories of employees. What these groups have in common that set them apart from Interested Stakeholders is the fact that they are not subject to and do not receive the benefits of the EBH. Further, there are county business reasons to maintain these distribution lists, such as coordinating management on county practices. There is no county business reason to maintain distribution lists between dues- and non-dues paying Interested Stakeholder.

Nor does the EGRs' use of the county distribution lists constitute reasonable use of the county electronic mail system under the terms of the EBH and the APM Policy on Proper Use of Computer Equipment and Connectivity. The Policy determines what constitutes reasonable use. The Policy provides that use of Dane County equipment and systems is to be limited to conducting county business. (Policy§ 3.1) The grievance comments that EGRs have used the county system to send emails that are "all directly related to work-related activities of the EGR itself." Work-related activities are limited to those that are done by an employee to fulfill their Job description and participation in civil service activities. The EGRs' activities, other than paid civil service activities, do not constitute county business.

The Policy does allow for use of the email system for occasional and limited personal use. (Policy§ 3.2) The distribution of emails to large groups of employees, no matter how infrequent, for a purpose other than county business, does not fit within this exception. Occasional use of the email system to schedule time for a group to meet outside of the workplace is acceptable.

The grievance argues that the change in practice violates the existing benefits clause of the EBH. It is questionable that use of the county email system for non-county business constitutes a condition of employment. More to the point, the existing benefits clause does not and cannot preserve benefits that violate the law. This limit is inherent in all county activities and is incorporated in the ordinances. See DCO §§ 18.06(7) and 18.24(6).

Finally, the grievance maintains that this change in practice violates the EBH section entitled "Employee Group Representation and Work Related Associations." I do not agree. The grievance argues that it has used the email lists to post notices and "to communicate with Its members about work-related activities of the EGRs," and that elimination of the lists frustrates stewards' ability to post notices, process grievances or participate in discussions related to personnel relations. As noted, EGR activities that are work-related are limited to those that are paid civil service activities, such as participation in the EBH review and grievance and committee processes. Work-related activities do not include Employee Group representational activities that fall outside of those processes. There is no reason the EGRs need use of county email distribution lists to engage in those processes. To the extent EGRs are reporting to the EGA membership about civil service developments, that is an EGA membership service, not a civil service activity per se. Thus, those communications are not work-related.

On May 15, 2020, Director Brockmeyer, issued the following.

> TO ALL EMPLOYEES:
>
> Recently, the Division of Information Management has detected an increase in Dane County employees using our email system to distribute mass emails to hundreds of other employees. Such use causes significant operational problems by reducing productivity, potentially slowing down our email system, and increasing the likelihood that malicious phishing attacks will slip through. Because of these problems, the use of a Dane County email account to distribute a mass email has long been prohibited by the County's Policy on the Proper Use of Computer Equipment, Software and Connectivity. Occasional and limited personal use of email is acceptable particularly in the cases of an emergency. Further, certain managerial employees have been specifically authorized to send mass emails to provide important notices to the workforce
>
> Outside of these limited exceptions, the prohibition against sending mass emails applies to all, including the distribution of mass email by Employee Group Representatives. Under our civil service ordinance, the County is obligated to treat all employees equally and fairly. Consequently, the County cannot provide Employee Group Representatives with any special privileges that other employees do not enjoy.
>
> Accordingly, all employees are reminded that using email in this way is not allowed and must cease.

The record indicates that during the pertinent period the County's information communications systems underwent at least two substantial upgrades at least in part in response to a phishing incident and to limit stresses on the system's efficiency possibly caused by mass mailings. Director Brockmeyer testified that these factors, as well as cost considerations, precipitated this all-employees memorandum. In view of the undersigned's conclusions stated below, evidence regarding usage by EGR's prior to the December policy revision and whether it was peculiarly responsible for any of those stresses is not evaluated herein.

On May 20, 2020, the grievant sent the following message to Director Brockmeyer.

> As you know, EGR 1871, along with our co-grievants, EGRs 65, 705, 720, 895, 1871 and 2634 have a grievance pending at Step 4 related to EGR access to the county e-mail system. We have concluded that this latest unilateral directive from you is part and parcel of the same issue as our pending grievance. We contend that the policy of denying reasonable access to the county e-mail's system to the EGRs for the conduct of their work related activities and dissemination of information to employees is an additional, clear violation of the "Bulletin Board" section and other sections of the Employee Benefit Handbook.
>
> This e-mail is to notify you that we intend to add this latest violation into our currently pending Step 4 grievance on email access, and we will seek redress and reversal of this latest policy from the Independent Hearing Officer. Please respond directly to me with any questions, comments or concerns.

ANALYSIS AND CONCLUSIONS:

The Impartial Hearing provisions at subsection c., above, authorize IHO's, such as the undersigned, 'to determine issues concerning the interpretation and application of all Sections of the Employee Benefits Handbook...". The undersigned understands that this proceeding is governed by those provisions and is not arbitration under a collective bargaining agreement, a contract or a statute. Neither is it litigation consistent with criminal or civil practice. It is the creature of, and defined by, the EBH and the above-quoted ordinances.

From the inception of the EBH, the EGR's that constitute the grievant herein had access to mailing lists maintained by the County which allowed the EGR's to send mass mailings to members of the employee groups that they

represented. (This arrangement also existed with Unions under collective bargaining agreements.) Typically, before the County's grieved action the EGR's sent three to five such mailings each month and some, if not all, of those mailings consisted of messages related to employee wages, hours and benefits, and associated EGR activities. Such lists were also available to, and utilized by, external organizations, such as professional associations to which employees might belong; and to internal groupings of employees who were associated with a common project or interest.

The instant grievance, above, quotes the EBH existing benefits provision in its entirety and alleges that the County did not comply with the procedural requirements of that provision when it modified its policy as described above. The April 15, 2020 response by the County, quoted above, does not deny that allegation.

Both parties assert that the IHO must respect and apply the clear and unambiguous terms of the governing documents that are pertinent to the issues to be determined. The grievant's principle contention, with which the undersigned agrees, is that such plain language appears in (1) the Bulletin Boards section of the EBH where it provides for "reasonable use of the county electronic mail system" "for the purposes of employee information dissemination by an Employee Group's Representative...", (2) the EBH existing benefits provision, including that "Any proposed changes shall be subject to the process set forth in D.C.O.18.24(3) and (4);" and (3) in those ordinance provisions. The grievant also makes a number of alternative contentions and responses to various County contentions.

The County's initial brief herein also does not assert that the County followed the process specified in the EBH existing benefits provision, but contends that the action that is the subject to the instant grievance was warranted under the law as explained in the Sumi opinion and opined in the Corporation Council's memorandum. It also makes extensive references to the EBH's above-quoted management rights provision. While it recognizes that provision's clear statement that it does not retain for the employer's discretion matters that are, "officially abridged, delegated or modified by this Handbook...", it argues on various grounds that the pertinent terms of the EBH existing benefits provision are not covered by this exception. The undersigned concludes that such reading is also contrary to thr "plain language" standard for interpretation that both parties seem to support.

The County also contends in that brief that "The grievant's claims are estopped by their assent to abide by the mutually-solicited opinion of Judge Sumi." The County's reference to the legal doctrine of estoppel seems at variance with its numerous admonitions that the instant proceeding is before a hearing officer under a handbook and not an arbitration or a judicial proceeding interpreting a contract or the law. (That inconsistency was also present in the County's attempt at motion practice during the pre-hearing period described above.) The precedential authority of the Sumi opinion is addressed below.

The County's rebuttal brief replies to some of the alternative arguments put forth in the grievant's brief, but does not directly address the contention that it failed to comply with the procedural requirements of the EBH existing benefits provision. It does argue that,"no change to the EBH section allowing email use is necessary or appropriate," because the particular practices that the County determined to prohibit were specified in a provision of the Administrative Procedures Manual (APM) which is separate from the EBH. While the superiority of statutes and ordinances to the EBH seems obvious, the relative status of the APM does not. The fact that the APM applies to all Civil Service employees, while the EBH applies to a subset of employees, does not necessarily determine such status. Once again, it is the judgement of the undersigned that following the plain language of the EBH existing benefits provision was the clearly intended opportunity

to address the modifications of policy and practice in issue. (While this brief restates the County's support for applying the plain language of the EBH, it also asserts that "consideration of parties' intentions" is not allowed because the terms were not "negotiated." The understanding of the undersigned is that plain language is a preferred standard of interpretation because it is presumed to represent the drafters' best effort to communicate underlying intentions.)

The rebuttal brief also maintains the aforementioned confusion regarding the interpretation of statutes by the IHO by arguing that, "the existing benefits clause cannot preserve past practices that conflict with the law," and that the question, raised by the grievant, regarding whether the County's grieved action violated Wisconsin labor law must be determined by the Wisconsin Employment Relations Commission. It also urges that certain National Labor Relations Board decisions are instructive, but cautions that labor law in general is inapposite because the EBH is not the outcome of negotiations or collective bargaining.

In the judgement of the undersigned, the Sumi opinion is problematic. The record herein is not clear as to the underlying agreement that was the genesis of this opinion. The Myren May 29, 2015, message, above, speaks of a "basis for our interactions into the future." The opinion, in its introductory paragraph refers to itself as a "jointly requested ", "advisory opinion", "addressing conflicting interpretations of 2011 Wisconsin Act 10" regarding whether certain provisions of County Ordinances and the EBH comply with that Statute.

That is not to imply any criticism of its content, or the process that preceded it, but to observe that it is not within the conventional categories of authorities cited by contesting parties. It is not a judicial or administrative ajudication with the precedential weight appropriate to such issuances. It doesn't have the persuasive capacity sometimes found in contractual and statutory arbitration decisions. It is more in the nature of "non-binding arbitration," or "binding mediation," which many would find to be self-contradictory concepts; or a joint request for a legal opinion. It is not a decision based upon specified facts and context leading to conclusions and a holding.

While the undersigned recognizes that Judge Suni has a distinguished reputation which should not be discounted, the great respect that she has earned does not provide her with any official authority in her role as a private practitioner.

However, The Sumi opinion does refer to the matter of revising the EBH at length before getting to the above-quoted portion found most pertinent by Director Brookmeyer. It recognizes that ordinance Section 18.24 "establishes a procedure for review and modification of the Handbook," and very thoroughly discusses those provisions, as well as the EBH existing benefits provision, in terms of their legality and implementation. It does not conclude that there is any basis for non-compliance with the plain meaning of either the ordinances or the EBH provision. Nor does it suggest any alternative approach.

The Corporation Counsel's December 18, 2019 opinion also does not specifically address the prescribed process for revising the EBH.

As indicated above, the genesis of the EBH and some of the pertinent ordinances was the anticipation of Act 10 and the determination of the County's elected authorities who promulgated them to maintain, within a new legal framework, some aspects and features of the employment relations policies and practices that preceded Act 10. Apparently, they valued the role that labor organizations had played in their interactions with County administration and the services that unions had provided to County employees. Under the EBH, employee groups substantially mirror former bargaining units. Employee Group Representatives (EGR's), which may be represented by labor organizations, and are sometimes referred to as associations, represent employees

in those groups much as in the past; and other conditions of employment and features, such as grievances and stewards have been largely retained.

As elected officials they may have also valued the roles that unions played in elections, in state and county legislative process and in the general community. In any case, they enacted the pertinent ordinances and promulgated the EBH pursuant to their judgement, their intentions and their authority. It was inherent in their responsibilities, appropriate, and to be expected, that "political" considerations would be influential. Government without politics would have been an unlikely aspiration.

Unelected County administrators, and the IHO, are bound to implement the enacted intentions of the elected authors of those ordinances and the EBH even if, for example, the judgements of the elected officials seem unwise, or make administration awkward and costly. it is violative if the IHO or administrators circumvent the enacted requirements to which they object.

In the present matter, the County Director of Administration, in his direct testimony admitted that he determined not to implement the procedural requirements clearly specified in the existing conditions provision of the EBH and Ordinance sections18.24(3) and (4) in order to avoid EGR objections and interactions of a political nature that the enactors of the pertinent ordinances and EBH very likely anticipated. Instead, he placed the policy modification in issue in the APM.

The undersigned does not accept with the contention of the County that it was not required to follow the processes specified in the pertinent EBH section and ordinances because, "No change to the EBH section allowing email use is necessary or appropriate," and that section allows "reasonable use of the county's electronic mail system," a matter also covered in the APM. That contention might have been appropriate had the County given the required fifteen days advance written notice and moved on to the specified "adoption" procedure.

The County demonstrated also demonstrated a preference for avoidance of EGR interactions in the instant IHO proceeding by its extraordinary and extensive litigation-like pre-hearing objections and motions to avoid a hearing. Indeed, Director Brockmeyer's attitude toward the remaining roles of unions in County administration was made clear by his direct testimony, some of which is quoted above.

The grievant's contention that the County's actions constituted a prohibited practice under the Municipal Employment Relations Act is also not ruled upon. Such a conclusion would require an examination of facts arguments related to the County's substantive contentions which should occur in the process required by the EBH and the pertinent ordinances.

That procedure provided the proper forum for the presentation of the County's substantive contentions based on the Sumi opinion and the memorandum from the Corporation Counsel, and for the examination of its position as stated in the above-quoted grievance answer, its pre-hearing correspondence, its post-hearing-briefs and elsewhere herein. The "merits" of the instant matter are not ruled upon herein because, in the opinion of the undersigned, the EBH and the above-cited ordinances clearly and unambiguously required and specified the notice and process for such discussions; and those requirements have not been met.

IHO DETERMINATION

On the basis of the foregoing, particularly the failure of the County to comply with the process requirements of the EBH existing conditions provisions, and the record as a whole, it is the determination of the undersigned Impartial Hearing Officer that the County's policy stated in the above-quoted May15, 2020 email from Greg Brookmeyer that restricts the Employee Group Representatives' right to send mass emails violated the EBH, and that the instant grievance is sustained; and that the appropriate make-whole remedy is that the County should immediately restore the mass email policy and practice that was in place preceding the adoption of the above-quoted APM section 2.3.5.

Signed at Madison, Wisconsin, this 29th day of March, 2021.

Howard S, Bellman

Impartial Hearing Officer