

MEMORANDUM

To: Greg Brockmeyer
From: ACC Amy Tutwiler
Date: December 18, 2019
Re: Uniformity and Paid Time for Employee Work-Related Activities

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 Work Related 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 Group Representatives ("EGRs") during work hours?
- How does the uniformity standard govern the use of county resources, and particularly the following current resource uses by EGRs:
 - Office space in County buildings.
 - County email system and distribution lists maintained by Information 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.

ANALYSIS

1. What is the Civil Service System and who does it apply to?

The County has adopted a Civil Service System (“CSS”) pursuant to its authority to do so in Wis. Stat. § 59.52(8). The CSS is set forth in Dane County Ordinance (“DCO”) Chapter 18 and is comprised of the provisions in that ordinance and the Employee Benefit Handbook (“EBH”), which is adopted and amended in accordance with Chapter 18. The EBH establishes “the terms and conditions of employment for County employees.” DCO § 18.24(1).

The CSS includes several mechanisms for employee participation in the workplace. These include: (1) the process for review of the EBH; (2) the discipline process and grievance system to review disputes; and (3) participation in the committees set forth in the EBH and otherwise sanctioned by the County.

Thus, the CSS, including the EBH, encompasses the topics on which employees have been invited to provide input. Instead of collectively bargaining, which is severely restricted for most municipal civil service employees pursuant to 2011 Wis. Act 10, the County has granted employees the right to advocate for the terms and conditions of their employment through the CSS. Those rights are defined and necessarily limited by the CSS.

Chapter 18 defines the group of employees subject to the CSS. It does so through two provisions, the definition of “employee” in DCO § 18.04(16) and section 18.05(1), which lists covered employees. Through those provisions, CSS employees are defined to be the those employees subject to the EBH, referred to as “interested stakeholders,” confidential employees and employees who supervise others, i.e. those subject to the Management Pay Scale in the Administrative Practices Manual (“APM”). “Interested stakeholders” are defined as those “employees covered by the Employee Benefit Handbook, employee groups and their representatives engaged with the County in discussions regarding adoption, amendment or termination of provisions contained in this chapter, or the Employee Benefit Handbook.” DCO § 18.04(23) Employees subject to the CSS are collectively referred to in this memo as “CSS Employees.”

2. What is the uniformity standard and what did Judge Sumi opine?

The uniformity standard is a standard set forth in both the enabling statute, Wis. Stat. § 59.52(8), and DCO Ch. 18 . The statute refers to a series of uniform civil service provisions. See Wis. Stat. § 59.52(8). The County Board adopted into the Dane County CSS all the provisions set forth in the statute, including the commitment to uniform CSS provisions. See DCO 18.03 (Policy and Purpose).

In a mediation decision issued in January 2016, Judge Sumi invoked the uniformity standard in response to the question, “under what circumstances may the County authorize use of paid time and County resources by its employees?” (Sumi Decision p. 18) Judge Sumi opined that while the County has “wide latitude”, i.e. discretion, to establish civil service terms, those terms must be uniform. She reasoned that:

[i]f the County chooses to exercise its discretion to allow 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.

(Sumi Decision p. 18)

Judge Sumi recommended that the County develop a rule of general application for authorizing the use of paid time and resources. (Sumi Decision p. 18)

Judge Sumi’s analysis raises two general points of note and one that is specific to paid time standards. The first is that whether and what activities to pay for and resources to make available for an employee’s use are decisions within the County’s discretion.¹ The Employee Group Associations acknowledged the County’s ultimate decision authority. (Sumi Decision p. 9) This fact is incorporated into the EBH under the topic “Management Rights.” That section reads:

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.

With regard to the statement about management powers that have been officially abridged, delegated or modified, as the section states, such limitations are defined by the terms of the EBH. Note, however, that the EBH must be interpreted and applied in a manner that ensures county officials comply with state and federal laws as well as its

¹ Note that policies and procedures governing workforce management, most notably those in the Administrative Practices Manual, are not a component of the CSS and instead are an exercise of management rights and powers. (See EBH Topic: Management Rights.) As such, good practice is to not routinely invite employee input into APM and other management tools.

own ordinances. This limitation is inherent in all county activities and is also specified in the CSS through DCO § 18.24(6) (stating that nothing in the EBH ordinance section shall prevent the county or its officials from fulfilling any legal duties) and DCO § 18.06(7), recently amended to provide that in the event of a conflict between the EBH and the Ordinance, the Ordinance controls.

The second point of note is that the County's authority is not limitless; but rather, is bound by the requirements of the Civil Service Ordinance. As Judge Sumi opines, the CSS must be uniform. The County ordinance adopts this standard. See DCO § 18.03. Thus, the County must exercise its discretion in a manner that ensures uniform, i.e. equal, standards for all employees who are covered by the CSS.

Judge Sumi's third point is that the standards must apply to all employees subject to the County's CSS, not just one category of employees such as EGRs. In other words, the opportunities for paid time and use of resources defined by the standards need to be made available to all CSS Employees.²

3. What does a commitment to uniformity specifically require?

As noted, Judge Sumi identifies that uniformity requires that standards apply equally to all employees. (Sumi Decision p. 18) For paid time standards, this requires that paid activities are those that all CSS employees have a right to engage in, not ones that are unique to EGRs, or any other group of employees for that matter. Similarly, resource use standards need to provide the same level of access to resources for all employees. No category of employees should have more or different access than other CSS employees, unless there's a work-related reason for the difference.

Another element of a uniform civil service system is adherence to the adopted system. On this point, the law requires that the County follow its CSS. See *e.g.* 54 Op. Atty. Gen. 107 (opining that employees determined to be covered by a county's civil service system must receive vacation benefits only as prescribed by that system). The consistency and fairness objectives of a civil service system are undercut by practices that operate outside the system.

A third element required in the existing CSS is a viewpoint-neutral approach on the subject of whether employees should or should not pay to join their Employee Group Associations. The County ordinance adopts this approach, including provisions recognizing both the right to self-organize and the right to refrain from association membership. See DCO § 18.06(3) and (4). Activities to solicit or advocate for paid membership should not occur on county time or with the use of county resources. For

² It is recommended that the paid time and use standards be adopted through the APM since they are standards being developed by and are subject to management discretion.

the same reason, the county system should not be used to conduct Employee Group Association business.

4. What are representational activities and work-related activities and associations?

In order to establish uniformity through standards of general application, there needs to be a clear definition of terms, particularly what are “work-related” activities and use of resources.

One of the questions Judge Sumi’s opinion on uniformity addressed was whether EGRs may use paid time to conduct representational activities. (Sumi Decision, p. 17, Question 9). Judge Sumi answered by stating that whatever activities the County chooses to pay for should be decided by developing a rule of general application. (Sumi Decision p. 18) In other words, her opinion was that it is up to the County to decide what activities it will pay for; provided that its decision applies to all employees, not just EGRs.

This part of Judge Sumi’s opinion illustrates a vagueness in the EBH that needs to be refined. The term “representational activities” is not defined in the EBH. The term is used in a variety of sections but is most directly addressed in the section entitled “Employee Group Representation and Work Related Associations” within a subsection entitled “Employee Group’s Representatives.” The EGR reference in both titles suggests that “representational activities” means only activities in which EGRs engage. It also begs the question whether the term encompasses activities EGRs do as a service to their paying members, such as email updates sent to paying members only.

In order to be uniform, “representational activities” must be interpreted to mean only those activities done to represent employees in the CSS processes. Thus, for example, representing an employee in a Step 1 grievance meeting would be a representational activity. But calling a member employee’s manager to discuss the manager’s treatment of the employee would not be. The difference is that, unlike the grievance meeting, the call to the manager is not part of a CSS process.

The purpose of the noted EBH section is “to encourage employees to participate in work-related associations and activities” and to pay for “reasonable time spent” engaged in those activities. [EBH Topic: “Employee Group Representation and Work Related Associations,” section 1] A succinct way to establish uniform standards is to define work-related activities in reference to civil service activities in which all CSS employees are invited to engage. To facilitate consistency, they should only be activities for which the employee is entitled to be paid. The following definitions accomplish those objectives:

“Work-Related Activities” means those activities an employee does to fulfill his/her job description and civil service activities. The term “Work-Related Activities” does not

include Employee Group representational activities that are not also paid civil service activities.

“Work-Related Associations” means 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.

“Representational Activities” means only those activities for which an employee is paid to represent other employees in a civil service process.

5. Application of Uniformity Standard Generally and to Specific Practices

You asked about the application of the uniformity standard to the EGR’s use of the county email system and email distribution lists, the EGR’s use of county office space and allowing EGRs paid time for presenting at orientation about Employee Group Associations. This section addresses those questions and provides some other examples that are illustrative.

a. General Application

To administer the uniformity standard, paid time and resource use standards should be developed based on the above interpretations of work-related activities, associations and representational activities. In addition, the CSS must be applied in a uniform manner to fulfill the stated purpose of Ch. 18. While much of the EBH can be interpreted to provide a uniform application, it may be that some terms cannot, in which event those terms are invalidated by the uniformity requirement in the ordinance. See DCO § 18.06(7)(finding in the event of a conflict with the EBH, the Ordinance controls); and See DCO § 18.24(6) (stating that nothing in the EBH ordinance section shall prevent the county or its officials from fulfilling any legal duties).

b. Use of county email system and distribution lists maintained by Information Management to distribute EGR emails to their membership

EGRs may not use the county email system to conduct the business of their association. The practice violates the requirements that employees have equal access to resources and that the County maintain viewpoint-neutral practices. Thus, the EGRs may not send mass mailings to members, including using distribution lists.

The answer to this question is also based on the County’s computer use policies, which restrict all employees’ use of the county email system for their personal business, i.e. any business other than county business.

There appear to be various forms of the computer use policy. Attached are two different copies of the policy. The general interpretation that has been applied is that the policy allows for only incidental personal use. This understanding is reflected in the highlighted language in what appears to be an older version of the policy entitled “Use Policy for Information Technology and Communication Resources.” That policy allows “occasional and limited personal use” with a list of exceptions. Use of distribution lists to

communicate among employee group members does not reasonably fall within that standard because, by definition, it is not limited. In addition, depending upon the content of the emails, one or more of the specific prohibitions may apply, including email use that “denigrates the credibility or reputation of the County,” or “relates to political causes not related to County business,” or “is intended for personal monetary gain.”

The more recent policy, dated August 2018, is currently posted online and is the version now signed by new employees. It sets bounds on personal use in a more indirect manner but with the same overall effect. The policy states (see, highlighted language on p. 3) that personal use is governed by Dane County Ordinances. DCO § 9.27 prohibits use of county property for partisan and non-partisan political activity. In addition, the policy gives management discretion to find other uses impermissible through the language of the next section, which lists inappropriate uses that include but are not limited to the uses listed.

There is also a precedent for not allowing use of distribution lists. Employees are not allowed, for example, to sell personal items using county-wide distribution lists.

Individual employees may use email for personal business with their EGR, such as communicating about grievances, so long as that use does not exceed the limitations of the County’s computer use policies.

c. Use of Office space in a number of County buildings

EGRs may not have exclusive use of office space and may only use any county space for Employee Group business on the same terms and rates such space is made available to the public.

The Employee Benefit Handbook provides for use of space for EGs 705 and 720. Here’s the language:

Badger Prairie Health Care Center will include a room designated as an office for its Employee Group’s Representative, if any, to conduct Employee Group business. The Employee Group’s Representative shall pay rent for the use of the room.

And

The City County Building will include a room designated as an office for its Employee Group’s Representative, if any, to conduct Employee Group business. The Employee Group’s Representative shall pay rent for the use of the room.

These EBH terms give the EGRs the right to use county space for their business. In order to be uniform, that right must be interpreted to require that EGRs access and rent space on the same terms as the general public

d. Presentations about the Employee Group Associations

The EBH allows most EGRs 25 minutes to present and distribute information about the employee groups. The EBH language reads:

SUBJECT: ORIENTATION OF NEW EMPLOYEES Section 1: a. The employee groups will be given twenty five minutes during new employee orientation, generally held every third Wednesday, to orient new employees to the employee group and to distribute employee group-related information.

The EBH for EG 1199 uses different language and provides relevant part that,

one representative of the Employee Group shall be granted up to fifteen (15) minutes for Employee Group orientation during departmental new hire orientation that involve Employee Group positions. . . [t]he representative conducting the Employee Group orientation shall do so without loss of pay or benefits if held during the Employee Group representative's regular work hours.

These provisions must be interpreted to allow EGRs to present viewpoint-neutral materials and to not solicit memberships during orientation or on other county time. If this approach is not used, then, to ensure uniformity, the County would need to invite non-member employees to also present and to express their opinions on whether to join employee group associations.

The County should provide viewpoint-neutral handouts on basic work-related information about employee groups, i.e. how the EGRs participate in grievances, committees and the EBH revision process. Also, EGRs should not be allowed to use county resources to prepare their own materials and should not be allowed to solicit memberships on county time. Those activities are employee group business, not county business. Finally, there should be no restrictions on who can attend the presentation.

e. Routine or exclusive meetings between EGRs and Administration

Routine and/or exclusive meetings or other communications between EGRs and administration officials about the terms and conditions of employment are not consistent with the uniformity standards in the CSS. Such meetings are not a practice in the CSS and may have the effect of being an end run around the CSS. This is particularly true because the EGRs routinely espouse that they represent only those who pay dues, which gives one category of interested stakeholders (EGRs and those they represent) more access, and likely more influence, than other CSS Employees. This includes weekly meetings between the Director of Administration and EGRs.

f. Other discussions about the terms and conditions of employment outside the CSS processes.

Meetings between EGRs or other employees and county decision makers about interpretation of or changes to terms and conditions of employment that occur outside the grievance or EBH revision processes in the CSS have the effect of undercutting those processes. This includes discussions about EBH interpretations or proposed changes, disciplinary matters and topics addressed in committees outside established committee processes.

g. Meetings about disputes outside grievance process

The EBH directs use of the grievance process for: (1) interpretation or application of the EBH; (2) alleged violation of the EBH; and (3) disciplinary and safety matters. (See EBH Topic: Grievance process.) County decision makers must decline to communicate with EGRs or other employees about these topics outside of the grievance process.

The one exception is that managing staff are at liberty and should attempt to resolve a particular issue by communicating with the employee(s) directly affected. Management must not communicate with EGRs unless and until a grievance is filed and the EGR is serving as a representative in that process, and then only in the context of the appropriate grievance step. To do otherwise undermines the grievance process and amounts to the County giving represented employees a benefit it does not also confer on unrepresented employees, i.e. favoritism.

Conclusion

The essential point to remember and apply in the ongoing effort to treat all employees fairly is to follow the CSS. As further explained above, that system provides a robust system for employee engagement and consists of: (1) EBH review under DCO § 18.24; (2) the EBH grievance processes; and (3) employee participation in EBH committee processes. When properly and consistently administered, these CSS procedures provide a uniform and orderly system for hearing and considering employees' interests. Consistently following these established practices is the means to fulfill a primary objective for the EBH, "to provide for fairness and equity in the treatment of employees." (EBH Topic: Introduction) On the contrary, interactions about topics governed by the CSS outside of the CSS processes undermine those fairness objectives.

In addition, the development and maintenance of countywide standards defining paid time and resource use that are equally applicable to all CSS Employees will be an important step toward ensuring uniform treatment.

Finally, please be advised that this memo was peer-reviewed.