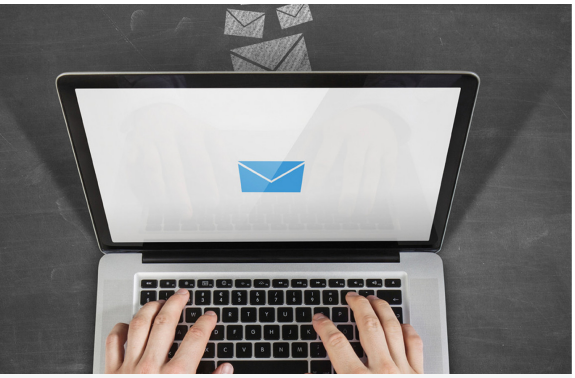

Public Employees Can Use Employer E-Mail for Protected Communications During Non-Work Time

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On May 25, 2018, the Public Employment Relations Board ("PERB") in *Napa Valley Community College District*[1], expanded the rights of public employees to use their employer's e-mail system for "protected communications" and disapproved of prior precedent on this point. PERB held that public "employees who have rightful access to their employer's e-mail system in the course of their work have a right to use the e-mail system to engage in [Educational Employment Relations Act] EERA-protected communications on nonworking time."[2] Although the case was decided under the EERA and involved a Community College District employer, this ruling is also applicable to other public sector employers including cities, counties and special districts subject to the Meyers-Milias-Brown Act ("MMBA").

Background:

In 2014, Eric M. Moberg applied for a temporary position as a part-time adjunct instructor with the Napa Valley Community College District ("the District"). The District's employment application asked for prior teaching experience. In his application, Mr. Moberg made one misrepresentation and one omission. First, he misrepresented his reason for separation from the San Mateo County Office of Education ("SMCOE"). Mr. Moberg stated that he left SMCOE to "move out of area," when in reality, his resignation from SMCOE was a condition of his settlement agreement. Second, he entirely omitted his employment with the Monterey Peninsula United School District ("MPUSD"). The District hired Mr. Moberg based on the information in his employment application.

In September 2015, the faculty association president sent an e-mail to all full-time and part-time faculty members reminding them of an association meeting. The following day, a part-time faculty member responded to all faculty and offered an analysis of the discrepancy in pay between full-time and adjunct faculty. A few days later, Mr. Moberg responded in the same e-mail thread to all faculty stating "How about we take some money from the bloated Pentagon budget that funds death and destruction instead of education and enlightenment." Another faculty member responded directly to Mr.

Moberg stating that she was disturbed by his e-mail. Mr. Moberg responded to her stating "Thank you for joining our discussion. I stand by my suggested solution to low pay for educators, which is a working condition that I find both unsatisfactory and remediable." The following day, the department chair asked Mr. Moberg to exclude politics from the conversation and referred him to the District's e-mail use policy. The association president sent a follow-up e-mail to all faculty members clarifying that the e-mail chain was not sanctioned by the association, that official business should be conducted through off-campus e-mails, and that District e-mails are to only be used for reminders and general information.

Mr. Moberg subsequently filed a grievance alleging that the directive to refrain from using the e-mail system to discuss pay issues violated the collective bargaining agreement ("CBA") between the District and the association. The acting dean declined to respond to Mr. Moberg's grievance because he was not a "unit member" as defined by the CBA. Thereafter, in October 2015, Mr. Moberg sent an e-mail disputing the acting dean's response titled "Moberg UN-AMERICAN OPPRESSION CONSPIRACY GRIEVANCE Level Three."

In January 2016, the District rescinded Mr. Moberg's offer of employment for the spring 2016 semester because the District discovered that Mr. Moberg included misrepresentations and omitted material facts in his employment application.

Unfair Practice Charge Before PERB:

Mr. Moberg filed an unfair practice charge alleging that the District violated the EERA by withdrawing his offer of employment in retaliation for his protected activity. PERB's Office of the General Counsel found that Mr. Moberg's e-mail messages and grievance were not "protected activity" under the EERA. The General Counsel did find that Mr. Moberg engaged in protected activity when he filed PERB charges against SMCOE. However, the General Counsel ultimately determined that there were no facts establishing that the District was aware that Mr. Moberg filed those PERB charges against SMCOE when it made the decision to withdraw the offer of employment. Therefore, the General Counsel dismissed the charge and Mr. Moberg appealed.

On appeal, Mr. Moberg identified several errors in the dismissal of his unfair practice charge. PERB reviewed whether Mr. Moberg engaged in protected activity by submitting a grievance and sending e-mails to co-worker's regarding adjunct faculty pay. First, PERB found that Mr. Moberg engaged in protected activity when he filed and processed his grievance. Although the e-mail Mr. Moberg sent to various individuals including the District's Board of Trustees following the District's refusal to respond to his grievance, did not specifically assert a violation of the CBA, did not include the grievance, and did not allege

that the CBA provided for a grievance process, PERB still found that because the charge alleged that the grievance asserted violations of various provisions of the CBA, it was protected. PERB explained that whether the CBA contained a grievance process was not relevant. PERB noted that an employee engages in protected activity by asserting a violation of a labor agreement even if the employee does so outside of the contractual grievance process.

Second, PERB found that Mr. Moberg's e-mails in September 2015 responding to his co-worker's messages about adjunct faculty pay also constituted protected activity. PERB reasoned that "the relationship between federal government spending on defense and education and the employment and/or wages of Moberg and other District faculty is not so attenuated that the e-mails lost their protection." PERB also focused on the fact that Mr. Moberg was responding to the association president's and co-worker's e-mails directly involving adjunct faculty pay.

Finally, PERB considered whether Mr. Moberg had the right to disseminate these statements via the District's e-mail system – a question that had not been previously considered by the Office of the General Counsel. In 2008, PERB held in *Los Angeles County Superior Court,*[3] that an employee's use of his or her employer's e-mail system is only protected if it qualifies as "permissible non-business use" under the employer's e-mail policy.[4] In coming to this conclusion, PERB relied on a National Labor Relations Board ("NLRB") decision, *The Register-Guard*[5] However, seven years later, *The Register Guard* decision was overruled and the NLRB announced a new rule in *Purple Communications, Inc.*[6] Because the NLRB is the agency that administers federal labor laws covering private sector employers, this is only persuasive and not controlling authority for PERB. In this case, PERB was presented with the first opportunity to determine whether to continue to rely on the analysis in *The Register Guard,* or to instead follow the new rule announced in *Purple Communications.*

In *The Register Guard*, the NLRB found that an employer's ban on employee use of its e-mail system for all "nonjob-related solicitation" did not interfere with employee rights under the National Labor Relations Act ("NLRA"). In 2014, the NLRB in *Purple Communications* overruled *The Register Guard* finding that it did not place enough importance on e-mail as a means of workplace communication. *Purple Communications* held that presumably when employees have rightful access to their employer's e-mail system, they have the right to engage in protected communications during nonworking time. An employer may rebut this presumption by demonstrating that special circumstances necessary to maintain production or discipline justify restricting employee rights. The NLRB noted however, that it would be a "rare case" where special circumstances could justify a total ban

on non-work e-mail use.

PERB agreed with *Purple Communication* and also disapproved of its decision in *Los Angeles County Superior Court.* PERB reasoned that e-mail has become a fundamental forum for employee communication in the present day which now serves the same function as faculty lunch rooms and employee lounges once did. Therefore, PERB concluded that a "rule which reflects this change in the contemporary workplace, presumes that employees who have rightful access to their employer's e-mail system in the course of their work have a right to use the e-mail system to engage in . . . protected communications on nonworking time." PERB also stated that "an employer may rebut the presumption by demonstrating that special circumstances necessary to maintain production or discipline justify restricting its employees' rights." The rule announced by PERB is based on the right of employees to "form, join, and participate in the activities of employee organizations" under EERA, which PERB noted includes the right to communicate with each other in the workplace.

Ultimately, PERB agreed with the Office of the General Counsel in finding that Mr. Moberg did not sufficiently allege that the District had knowledge of his prior PERB charges against SMCOE. PERB also considered whether there was any unlawful motive between Mr. Moberg's protected activity and the adverse employment action. PERB agreed that Mr. Moberg was subjected to an adverse employment action, however, there was no evidence, direct or circumstantial, to establish that there was an unlawful motive behind that action.

Significance to Public Employers and Recommended Next Steps:

While PERB decided this case under EERA which provides employees the general right to form, "join, and participate in the activities of employee organizations," these rights are also protected under the MMBA and therefore applicable to cities, counties, and special district employers. Under PERB's new rule, an employee's use of employer e-mail during non-work hours is protected if it relates to subjects such as wages, hours of work, and other terms and conditions of employment. However, this new rule does not give employees the broad right to use employer e-mail for *all* non-work related items.

Public agencies should carefully review their e-mail use policies and ensure compliance with this new decision. Employers are encouraged to seek the advice of their City Attorney or legal counsel when addressing circumstances that implicate this new PERB rule.

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[1] *Moberg v. Napa Valley Community College District* (2018) PERB Decision No. 2563.
[2] *Id.* at p. 19.
[3]*Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C.
[4] *Id*. at p. 15.
[5] *The Register Guard* (2007) 351 NLRB 1110.
[6]*Purple Communications, Inc.,* (2004) 361 NLRB No. 126.