IN RE ARBITRATION BETWEEN

STATE OF MINNESOTA, MMB

And

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFSCME COUNCIL 5,

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DECISION AND AWARD

BMS 25-PA-0029

JEFFREY W. JACOBS

ARBITRATOR
1041 LOON Dr.
LAKE SHORE, MN 56468

February 3, 2025

State of Minnesota, MMB
Employer,

And

AFSCME, Council 5
Union

DECISION AND AWARD
BMS 25-PA-0029
Class action grievance

APPEARANCES:

FOR THE STATE:

Ryan Borgan Labor Relations Consultant
Matthew Begansky, MMB
Teri Hable, DHS Dir. of Employee and Labor Relations
Cindy Jungers, Dir. for Direct Care and Treatment
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FOR THE UNION:

Eric Jacobson, Union Representative
Tanya Hollen, Union Representative
Melinda Pearson, Chief Negotiator, Council 5
Alethea Modlin, LPN, AFSCME member
Jessica Langhorst, V.P. Local AFSCME #1092
Debbie Knutsen, LPN, Local #735
Rebecca DeGroot, President AFSCME # 607
Art Miller, Counselor, Moose Lake Facility
Cathy Malvin, AFSCME member

PRELIMINARY STATEMENT

The hearing was held on November 8, 2024 at the BMS offices in St. Paul The parties presented testimony and documentary and video evidence at that time at which point the record was closed. There were no procedural arbitrability issues raised and the parties agreed that the matter was properly before the arbitrator. The parties submitted post-hearing briefs on January 17, 2025.

ISSUE PRESENTED

Did the Department of Human Services, DHS, violate the collective bargaining agreement, CBA, when it changed the practice of communicating with the Union representatives via personal email? If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 1 - PREAMBLE

This Agreement is made and entered into the 16th day of August, 2023, by and between the State of Minnesota, hereinafter referred to as the "EMPLOYER", and the Minnesota AFSCME Council 5, AFL-CIO, and its affiliated Local Unions, and unless otherwise noted in this Agreement, "UNION" hereinafter refers to the Minnesota AFSCME Council 5, AFL-CIO. This Agreement has as its purpose the promotion of harmonious relations between the parties; the establishment of an equitable and peaceful procedure for the resolution of differences; and the establishment of rates of pay, hours of work, and other conditions of employment; and to express the full and complete understanding of the parties pertaining to all terms and conditions of employment.

ARTICLE 17 – GRIEVANCE PROCEDURE

Section 2. Processing Grievances

C. See Appendix J entitled "Appointing Authority/Designee's Duty to Furnish Information to Exclusive Representatives Regarding Contract Grievances."

D. Steps

Step 4: ... Except as provided in the procedures for Section 4, expenses for the arbitrator's services and the proceedings shall be borne by the losing party, however, each party shall be responsible for compensating its own representatives and witnesses. ...

Section 5. Arbitrator's Authority.

The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this Agreement. They shall consider and decide only the specific issue or issues submitted to them in writing by the parties of this Agreement, and shall have no authority to make a decision on any other matter not so submitted to them. The arbitrator shall be without power to make decisions contrary to, inconsistent with, or modifying or varying in any way the application of laws, rules, or regulations having the force and effect of law. The decision shall be based solely upon the arbitrator's interpretation and application of the expressed terms of this Agreement and to the facts of the grievance presented.

Section. 2. Processing Grievances. C. See Appendix J entitled "Appointing Authority/Designee's Duty to Furnish Information to Exclusive Representatives Regarding Contract Grievances."

ARTICLE 24 – MANAGEMENT RIGHTS

It is recognized that, except as expressly modified by this Agreement, the Employer retains all inherent managerial rights necessary to operate and direct the affairs of the Employer and its agencies in all its various aspects.

These rights include, but are not limited to the right to determine policy, functions, and programs; determine and establish budgets; utilize technology; relieve employees due to lack of work or other legitimate reasons; determine the methods, means, organization and number of personnel by which such operations and services are to be conducted; and select, and direct personnel.

Any terms of employment not specifically established or modified by this Agreement shall remain exclusively within the discretion of the Employer to modify, establish, or eliminate.

Appendix J – Appoint Authority/Designee's Duty to Furnish Information to Exclusive Representatives Regarding Contract Grievances

I Purpose

To provide guidelines for State agencies regarding release of information requested by exclusive representatives as part of the grievance process so that Appointing Authorities/designees can determine what information to release and when to release it.

III. What Information Should Be Disclosed To The Exclusive Representatives

C. Information must be released to the exclusive representative in a useful and timely fashion. This does not mean that the Appointing Authority/designee must necessarily provide the information in the form requested by the exclusive representative. However, under the Data Practices Act, the Appointing Authority/designee is required, upon request, to explain the meaning of the data that is being provided.

VI. When The Requested Information Should Be Released To The Exclusive Representative

Generally, an exclusive representative should not be given data or information prior to a formal grievance being filed. However, if the Appointing Authority/designee believes that disclosing certain information to the exclusive representative could resolve a dispute thereby preventing the filing of an official grievance, the Appointing Authority/designee may decide to disclose such information. Thus, "pre-grievance" disclosure is optional with the Appointing Authority/designee, consistent with all of the above guidelines.

The Labor Relations Bureau encourages Appointing Authorities to cooperate in the release of information at an early stage in the grievance process. Often grievances can be resolved at these earlier steps if the exclusive representative has access to information upon which to base a decision as to whether or not to proceed with the grievance. Accordingly, if an exclusive representative requests relevant information at the first or second step of the grievance procedure, generally the information should be released unless the issue has not yet crystallized to the point where the Appointing Authority can determine whether or not the requested information, if non-public, is relevant. However, before disclosing such information, line supervisors and managers should be aware of the implication such information will have on the impact the final outcome of the grievance.

If the information has not been released at an earlier stage and an exclusive representative requests information at the third step of the grievance procedure, the Appointing Authority/designee must release the information, under the standards discussed in this policy, to the exclusive representative. The Appointing Authority/designee should consider meeting with the exclusive representative prior to the actual third step meeting to disclose as well as explain the information in a single setting. A third step meeting would then be held at a later time. Another option is to begin the third step meeting by providing the information to the exclusive representative, explaining it as necessary, and then proceeding with the meeting.

RELEVANT PORTIONS OF THE MINNESOTA GOVERNMENT DATA PRACTICES ACT

Minn. Stat. §13.05 Duties of Responsible Authority

Subd. 4. Limitations on collection and use of data.

Private or confidential data on an individual shall not be collected, stored, used, or disseminated by government entities for any purposes other than those stated to the individual at the time of collection in accordance with section 13.04, except as provided in this subdivision. (b) Private or confidential data may be used and disseminated to individuals or entities specifically authorized access to that data by state, local, or federal law enacted or promulgated after the collection of the data. (d) Private data may be used by and disseminated to any person or entity if the individual subject or subjects of the data have given their informed consent. Whether a data subject has given informed consent shall be determined by rules of the commissioner.

Subd. 5. Data protection.

(a) The responsible authority shall: establish appropriate security safeguards for all records containing data on individuals, including procedures for ensuring that data that are not public are only accessible to persons whose work assignment reasonably requires access to the data, and is only being accessed by those persons for purposes described in the procedure; and

Minn. Stat. § 13.08 Civil Remedies

Subd. 1. Action for damages.

Notwithstanding section 466.03, a responsible authority or government entity which violates any provision of this chapter is liable to a person or representative of a decedent who suffers any damage as a result of the violation, and the person damaged or a representative in the case of private data on decedents or confidential data on decedents may bring an action against the responsible authority or government entity to cover any damages sustained, plus costs and reasonable attorney fees. In the case of a willful violation, the government entity shall, in addition, be liable to exemplary damages of not less than $1,000, nor more than $15,000 for each violation. The state is deemed to have waived any immunity to a cause of action brought under this chapter.

Subd. 2. Injunction.

A responsible authority or government entity which violates or proposes to violate this chapter may be enjoined by the district court. The court may make any order or judgment as may be necessary to prevent the use or employment by any person of any practices which violate this chapter.

Minn. Stat. § 13.43 Personnel Data

Subd. 2. Public Data.

(a) Except for employees described in subdivision 5 and subject to the limitations described in subdivision 5a, the following personnel data on current and former employees, volunteers, and independent contractors of a government entity is public: (1) name; employee identification number, which must not be the employee's Social Security number; actual gross salary; salary range; terms and conditions of employment relationship; contract fees; actual gross pension; the value and nature of employer paid fringe benefits; and the basis for and the amount of any added remuneration, including expense reimbursement, in addition to salary;

(2) job title and bargaining unit; job description; education and training background; and previous work experience;

(3) date of first and last employment;

(4) the existence and status of any complaints or charges against the employee, regardless of whether the complaint or charge resulted in a disciplinary action;

5) the final disposition of any disciplinary action together with the specific reasons for the action and data documenting the basis of the action, excluding data that would identify confidential sources who are employees of the public body;

(6) the complete terms of any agreement settling any dispute arising out of an employment relationship, including a buyout agreement as defined in section 123B.143, subdivision 2, paragraph (a); except that the agreement must include specific reasons for the agreement if it involves the payment of more than $10,000 of public money;

(7) work location; a work telephone number; badge number; work-related continuing education; and honors and awards received; and

(8) payroll time sheets or other comparable data that are only used to account for employee's work time for payroll purposes, except to the extent that release of time sheet data would reveal the employee's reasons for the use of sick or other medical leave or other not public data.

(b) For purposes of this subdivision, a final disposition occurs when the government entity makes its final decision about the disciplinary action, regardless of the possibility of any later proceedings or court proceedings.

Final disposition includes a resignation by an individual when the resignation occurs after the final decision of the government entity, or arbitrator. In the case of arbitration proceedings arising under collective bargaining agreements, a final disposition occurs at the conclusion of the arbitration proceedings, or upon the failure of the employee to elect arbitration within the time provided by the collective bargaining agreement. A disciplinary action does not become public data if an arbitrator sustains a grievance and reverses all aspects of any disciplinary action.

(c) The government entity may display a photograph of a current or former employee to a prospective witness as part of the government entity's investigation of any complaint or charge against the employee. (d) A complainant has access to a statement provided by the complainant to a government entity in connection with a complaint or charge against an employee.

(e) Notwithstanding paragraph (a), clause (5), and subject to paragraph (f), upon completion of an investigation of a complaint or charge against a public official, or if a public official resigns or is terminated from employment while the complaint or charge is pending, all data relating to the complaint or charge are public, unless access to the data would jeopardize an active investigation or reveal confidential sources. For purposes of this paragraph, "public official" means:

(1) the head of a state agency and deputy and assistant state agency heads;

(2) members of boards or commissions required by law to be appointed by the governor or other elective officers;

(3) executive or administrative heads of departments, bureaus, divisions, or institutions within state government; and

(4) the following employees: (i) the chief administrative officer, or the individual acting in an equivalent position, in all political subdivisions; (ii) individuals required to be identified by a political subdivision pursuant to section 471.701; (iii) in a city with a population of more than 7,500 or a county with a population of more than 5,000: managers; chiefs; heads or directors of departments, divisions, bureaus, or boards; and any equivalent position; and (iv) in a school district: business managers; human resource directors; athletic directors whose duties include at least 50 percent of their time spent in administration, personnel, supervision, and evaluation; chief financial officers; directors; individuals defined as superintendents and principals under Minnesota Rules, part 3512.0100; and in a charter school, individuals employed in comparable positions.

(f) Data relating to a complaint or charge against an employee identified under paragraph (e), clause (4), are public only if:

(1) the complaint or charge results in disciplinary action or the employee resigns or is terminated from employment while the complaint or charge is pending; or

(2) potential legal claims arising out of the conduct that is the subject of the complaint or charge are released as part of a settlement agreement. This paragraph and paragraph (e) do not authorize the release of data that are made not public under other law.

Subd. 4. Other data. All other personnel data is private data on individuals, but may be released pursuant to a court order. Data pertaining to an employee's dependents are private data on individuals.

RELEVANT PORTIONS OF PELRA

179A.07 EMPLOYER RIGHTS AND OBLIGATIONS.

Subd. 4. **Other communication.** If an exclusive representative has been certified for an appropriate unit, the employer shall not meet and negotiate or meet and confer with any employee or group of employees who are in that unit except through the exclusive representative. This subdivision does not prevent communication to the employer, other than through the exclusive representative, of advice or recommendations by professional employees, if this communication is a part of the employee's work assignment. This subdivision does not prevent communication between public postsecondary employers and postsecondary professional employees, other than through the exclusive representative, regarding policies and matters that are not terms and conditions of employment.

Subd. 9. Access. (a) A public employer must allow an exclusive representative or the representative's agent to meet in person with a newly hired employee within 30 calendar days from the date of hire during new employee orientations or, if the employer does not conduct new employee orientations, at individual or group meetings arranged by the employer in coordination with the exclusive representative or the representative's agent during the newly hired employees' regular working hours. For an orientation or meeting under this paragraph, an employer must allow the employee and exclusive representative up to 30 minutes to meet and must not charge the employee's pay or leave time during the orientation or meeting, or the pay or leave time of an employee of the public employer acting as an agent of the exclusive representative using time off under subdivision 6. An orientation or meeting may be held virtually or for longer than 30 minutes only by mutual agreement of the employer and exclusive representative.

PARTIES' POSITIONS

UNION'S POSITION

The Union's position is that the State violated the CBA when it restricted the e-mail the Union can use to send and receive information regarding Union business. In support of this position the Union made the following contentions:

1. The Union asserted in the strongest terms that the attempt by the State to restrict the place and manner in which the Union chooses to have information sent to it is nothing more than an anti-labor ploy to control the information and the Union's ability to represent its members.

2. The Union asserted that the State's concern about security of information was "imaginary" and that in reality it is an attempt to limit the Union's ability to get the information necessary to adequately represent its members and discharge its duty to process grievances.

3. The Union pointed to the provisions of Appendix J and asserted that the State must provide information to the Union representative for the purposes of enforcement and investigation of potential grievances and that it is up to the Union only to determine who the representative is and how that representative is to receive information to do that.

4. The Union also asserted that the State has in fact provided information to the Union represented in physical or electronic form for decades without conflict around the process. The Union further asserted that it was repeatedly described through testimony that prior to the change in administration within the Department of Human Services that information was routinely sent to a Union official's personal e-mail account.

5. Union witnesses also described the difficulty it would cause if they were only allowed to use their State issued e-mail as that might restrict the time they could even get such information. The Union also noted that not every Union steward or official has a Union issued e-mail account, such as an AFSCME.org account and that the State should not be allowed to dictate to the Union that they create one. That is for the Union to decide. The State does not have the right or the authority to dictate to the Union who or how it receives information necessary to process a grievance.

6. The Union also asserted that to allow the State to limit the individuals to whom such information could be sent would create grave difficulties in how the Union handles grievances. It would also require the narrowing of information being passed to hundreds of stewards and chief stewards to less than a handful of Union staff people and would disrupt a network created over decades and virtually ensure that some contract violations would "fall through the cracks."

7. The Union noted that it represents thousands of workers throughout Minnesota and that the policy would create an insurmountable barrier to being able to enforce contractual rights.

8. The Union also noted that it is routine to redact sensitive information and that this could easily be done, and has been, to protect the individuals involved. There could also be a protective order issued by a court or arbitrator to both ensure privacy and to allow the Union access to relevant information necessary to process grievances.

9. Further, the State's proposed system will not ensure any more security than exists now and is nothing more than an attempt to govern how Union's do business. Information received through a State issued e-mail could theoretically still be disseminated inappropriately, but there was no evidence whatsoever of that happening on this record.

10. The Union officials involved testified that they take their responsibility to safeguard private information very seriously as well and since many are employees of the State as well, they are subject to the rule pursuant to the MGDPA and know that privacy of confidential information is crucial. The State's position is nothing more than a solution in search of an imaginary problem.

The Union seeks an award sustaining the grievance and restoring the right of the Union to receive information as chosen by the Union.

STATE'S POSITION

The State took the position that there was no contract violation on these facts and that the MN Government Data Practices Act, MGDPA, mandated the change made to the e-mails the Union is allowed to use. In support of this position, the State made the following contentions:

1. The State noted that it collects a large amount of private and confidential data on individuals and must take extraordinary steps to protect that data. The State further noted that Direct Care and Treatment, DCT, is a division of the Department of Human Services, DHS and that DCT has data on as many as 12,000 patients housed in DHS facilities, including programs such as adult mental health services, child and adolescent services, chemical dependency treatment, community, residential and vocational services for individuals with developmental disabilities and/or mental illness.

2. As part of its responsibility to safeguard that sensitive information, DHS advised its Union representatives as follows: "[the] employer cannot email grievance related information to a personal email with a Yahoo, Gmail, Hotmail or similar address under advisement by Human Resources." See, Joint Exhibit 2.

3. The State further clarified that message and told Union officials "In order to keep private data private, we have to use State email addresses when corresponding with information or documents within emails." DHS met with Union officials and agreed that private data would be transmitted via State issued or Union provided E-mail addresses, but that it would not provide private data via a personal e-mail address with the addresses listed above. It was explained that this was to protect any private personal data on the residents and patients treated by DHS. The State noted that it was "sympathetic" to the Union's concerns, but could not provide private data to a personal e-mail.

4. The State asserted that the Union was unable to cite any specific article or language in the CBA that was violated through this policy. Further, the State asserted that there was insufficient proof of a binding past practice of providing such data and that as such, the grievance must be denied.

5. Moreover, the provisions of sending private data through State issued e-mail addresses is actually consistent with the CBA. That policy is within Management's discretion to provide such information in a reasonable manner and is consistent with requirements that grievance data sent to Union representatives consistent with the requirements of the MGDPA. DCT cannot reasonably ensure that private personnel data intended for Union representatives will only be accessed by authorized parties when it is sent to personal email accounts in order to safeguard private data.

6. The State asserted that neither Article 17 nor Appendix J or the CBA requires DHS to send grievance related information through personal e-mails. There is thus no contract violation that can be shown here.

7. While Article 17 C provides for "*guidelines* for State agencies regarding release of information requested by exclusive representatives as part of the grievance process so that Appointing Authorities/designees can determine what information to release and when to release it." That however reserves to MMB the right to set such guidelines for the purpose of protecting the information. Guidelines do not create binding obligations.

8. Further, Appendix J III C provides that "information must be released to the exclusive representative in a useful and timely fashion." However, the sentence immediately following makes clear that "a useful and timely fashion" does not mean that information has to be provided "in the form requested by the exclusive representative." The State asserted that this sentence must mean that the Appointing Authority can determine what method to use to disseminate the information

9. The State pointed to the MGDPA and asserted that it prohibits public employers from disseminating private or confidential personnel data unless the data subject consents, or they are specifically authorized to do so and provides for penalties for violating any section of the law.

10. There is an exception in the MGDPA allowing the dissemination of personnel data and PELRA further allows "labor organizations and exclusive representatives to communicate about Union business, including grievances, on State electronic devices and servers, so long as they comply with applicable technology use policies." See Minn. Stat. 179A.07, Subd. 9. The State asserted that compliance with tech policies encompasses the DCT rule here. See also Minn. Stat. 179A.07 Subd 4 which prohibits a public employer from bypassing the Union to communicate with any individuals about processing and resolving grievances.

11. The State asserted that the law goes even further and requires safeguards to ensure that only appropriate individuals have access to protected data. See Minn. Stat. 13.056 *and Smallwood v. Dep't of Human Servs.*, 966 N.W.2d 257, 261 (Minn. App. 2021).

12. To comply with that requirement the State adopted an enterprise-wide policy to ensure that private data would only be accessed by those authorized by law, their job duties or consent to view it. See DHS brief at page 15 for a list of those requirements.

13. Neither PELRA at 179A.07 nor the MGDPA permit or require public employers to send private personnel data to private individuals on their private email accounts.

14. The State asserted that sending private data to a personal e-mail account poses an unnecessary risk of inappropriate dissemination. Even though other methods are not "foolproof," as the State acknowledged as well, the State must take every reasonable approach to ensure the security of such data.

15. The State also countered the claim that there is a binding past practice of providing personal data to private e-mail accounts. The State noted that a past practice must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both Parties." Citing Elkouri and Elkouri, *How Arbitration Works*, Section 12-4 (8th Ed. 2016).

16. The State asserted that DHS leadership was unaware of any such practice and that the required mutuality and acceptance elements are missing. See also, *MAPE & State of Minnesota Department of Natural Resources, and Department of Labor and Industry,* (Gallagher 1991) attached as Exhibit A to the State's brief. Further, MMB was unaware of this alleged practice as well and cannot be bound by a practice it had no knowledge of. See also, Exhibit B, which is a publication by the arbitrator regarding past practice also requiring actual knowledge to establish mutuality and acceptance.

17. The Union failed to establish any contractual provision that was violated nor any past practice between the parties and thus failed to meet its burden of proof.

The State seeks an award denying the grievance in its entirety.

DISCUSSION AND MEMORANDUM

The facts were straightforward. The record was clear that for years, in fact as far back as many witnesses could remember, in fact, as long as e-mails have been used to disseminate information, the parties have been using Union officials' personal e-mail accounts for the exchange of information regarding the processing of grievances. This included sometimes data that was personnel related and needed to be redacted or protected in some fashion to prevent inappropriate dissemination to unauthorized individuals. This included Yahoo, Gmail and Hotmail accounts.

There was no evidence on the record that Union officials have ever knowingly violated any provisions of the MGDPA or that information was disseminated in an irresponsible manner. The testimony of Ms. Modlin was that she has been using her personal e-mail accounts to send and receive information in her role as a Union official since 2011. Ms. Langhorst testified that she has been using her personal e-mail accounts for this purpose since 2013. Ms. Knutson testified that she has been using her personal e-mail accounts and that she has received training on the need to secure the information as well as HIPAA issues.

Ms. DeGroot, current president of Local 607, testified similarly that she uses her personal e-mail and that she generally is laid off in the summer and might not have easy access to a State issued e-mail if she were to be limited to using that in her role as a Union official. She also testified credibly as to the problems that she has encountered when required to use only a State issued e-mail. Some of her members are hearing or visually impaired and e-mail is the best and sometimes the only way to reach them. Mr. Miller testified that he has routinely used personal e-mail in his role as a Union official.

All of these witnesses testified persuasively and credibly that they have used their personal e-mails for years in their official capacity with the full knowledge of management and that there have been no issues until the new policy went into effect with anyone telling them that they were not to use that e-mail account. Neither was there evidence of any problems with the security or protection of privacy of information when this method of sending and receiving information was utilized.

The State's witnesses raised what were seen as hypothetical concerns regarding the possible appropriate dissemination of information through a personal e-mail. These concerns though have not materialized in any empirical way. Certainly, security of private information is a real concern, but the evidence on the record showed that even using a State issued e-mail account or one provided through the Union would not adequately address those concerns. The State acknowledged that information could well be used inappropriately through the use of a State issued e-mail account – although as noted, no such case was identified on this record.

It was also clear that the Union officials who testified were well aware of their responsibility both as Union officials and as employees of DHS, as many of them are, to maintain the privacy of the individuals who may be mentioned in such a release of data. Thus, while the State's concerns about protection of privacy were understandable, the rights of Unions to gather information pursuant to their duty under PELRA outweigh those concerns on this unique issue. As noted here, there are certainly effective ways to protect private information without also impinging on the rights of the Union to gather information in the best way the Union deems appropriate.

As discussed below, the State reserves the right to redact certain information or to require a protective order as necessary when disseminating information. The language of Appendix J clearly allows for this, but does not allow the State to dictate to the Union to whom the information is to go or to whom that information is to be sent. See, Appendix J III C. Such a rule would be tantamount to allowing a public employer to dictate to the Union what its internal procedures are.

Finally, the most effective way to protect that is to redact certain information as necessary both to accomplish the purpose of providing sufficient information to the Union to allow it to properly assess and process grievances as well as to protect the privacy of individuals. That can certainly be done in such a way to both meet the requirements of Appendix J and Article 17 and protect the information as required by the MGDPA.

As in any contract interpretation dispute, the starting point is the applicable language of the contract. Here Article 17 C provides for guidelines as to what information is released and when it is to be released. It is further clear that the Union has a right to information necessary to properly assess and process grievances under PELRA. See Minn. Stat 179A.07 set forth above.

Article 17 appears to flow from that clear statutory language and is consistent with the general rule that Unions have a right to the information they feel is necessary to process the grievance. The language of Appendix III J C requires the information to be released in a "useful and timely fashion," but contains the admonition that the information may not be in the form the Union requests. That will be discussed more below.

That said, it was clear that Article 17 says nothing about *how* information is to be released. The clear past practice of the parties is to allow the information to be released to a Union official in their capacity as an acting Union official, for the purpose of processing and assessing a grievance. Further, those guidelines say nothing about the manner in which the information is to be released and do not therefore restrict the Union's right to seek information in whatever way the Union deems appropriate.

On this record, while the State's desire to ensure the privacy of information may well be well intentioned, the policy of disallowing private data to be sent to Union officials personal e-mail as part of a formal grievance process thwarts the underlying purpose of both Article 17 and Appendix J.

More to the point, while there is legitimate concern for the protection of private data, simply sending that information through a State or Union issued e-mail will not accomplish that purpose alone.

Information could easily be transmitted to unauthorized persons irrespective of what e-mail address is used. As noted, the most effective way to protect that is to redact certain information as necessary both to accomplish the purpose of providing sufficient information to the Union to allow it to properly assess and process grievances as well as to protect the privacy of individuals.

The wording Appendix J at Section III C was a significant piece of the puzzle here and was reviewed in some detail. At first blush the wording appears somewhat inconsistent, but upon careful review, is consistent with the Union's position. The language reads as follows:;

> Information must be released to the exclusive representative in a useful and timely fashion. This does not mean that the Appointing Authority/designee must necessarily provide the information in the form requested by the exclusive representative. However, under the Data Practices Act, the Appointing Authority/designee is required, upon request, to explain the meaning of the data that is being provided.

The language when read as a whole shows a somewhat different meaning than the State asserted. The first sentence requires that information must be provided in a useful and timely fashion. That is modified by the second sentence that cautions that the information may not be in the "form" requested by the Union. That sentence however is in turn modified by the last sentence which requires that the Appointing Authority is required to explain the meaning of the data provided.

The apparent meaning of the language in total is that the "form" of the data may be different from what the Union requested and that the data may need to be explained. That scenario contemplates that the data may be in a different format, but says nothing about the manner of transmission – that's the "how" issue noted herein. There is nothing in that language limiting the Union from requesting data through the personal e-mail of a Union official who is acting in their official Union capacity. That latter limitation is significant here since the evidence showed that such information is requested by Union officials acting as Union officials; and not simply private citizens seeking to snoop into private data. Neither is there any limitation on where such information can go after it is released – whether that be to a personal or State issued e-mail.

Further, there was some evidence that issuing data only to a State issued e-mail may prove problematic in getting it. Several Union witnesses testified credibly that they regularly and frequently use their personal e-mail to correspond with their counterparts at the State and that no one has ever indicated prior to this grievance being raised that it was inappropriate to do so or disallowed.

Further, there are times when Union officials do not have access to their State issued e-mail and must use their personal e-mail. See testimony of Ms. Langhorst, as well as other Union witnesses, who testified credibly that she uses her personal e-mail when away from work or is on vacation, but still receives Union related e-mails. There was thus evidence to show that the use of a State e-mail only might well result in a grievance being late or untimely filed or that relevant information not be released in a timely fashion. That could adversely impact the Union's ability to process or assess the merits of a grievance.

Further, the MGDPA at Minn. Stat. 13.43, subd. 6(a) allows the dissemination of information to Unions as follows:

> Personnel data must be disseminated to labor organizations and the Public Employment Relations Board to the extent necessary to conduct elections, investigate and process grievances, and implement the provisions of chapters 179 and 179A.")

PELRA requires public employers to permit labor organizations and exclusive representatives to communicate about Union business, including grievances, on State electronic devices and servers, so long as they comply with applicable technology use policies. Here, that language does not grant *carte blanche* to a public employer to dictate to a Union who is entitled to the information nor the manner in which that information is sent to them. It requires that the Union comply with the technological use policy and not disseminate information to unauthorized individuals.

Moreover the management rights clause, Article 24 does not alter that result. First, the clause the State relied on deals with the operations of the employer, not the Union. Second, the clear requirements of the specific language of Article 17 and Appendix J override the more general language of Article 24. As such, the facts and evidence fully supported the Union's contentions here that the State is not authorized to tell it who or how to get information.

As noted, it was clear that the information at issue here was sent to Union officials acting in their official capacity and in the process of handling, processing or assessing grievances. There was thus adequate protection of information without the need to have the State dictate the Union's internal affairs and processes. Accordingly, the evidence and the relevant contractual language supported the Union's grievance here.

PAST PRACTICE

On this record, the language of the contract at Article 17 and Appendix J III C effectively govern this case and requires that the State give the Union the information the Union needs to represent their members properly and effectively. However, since the parties addressed the notion of a binding past practice some discussion of that, albeit an abbreviated version of it, is appropriate.

The seminal case in Minnesota in affirming an arbitration where a past practice was used to interpret contract language is *Ramsey County v AFSCME*, 309 N.W.2d 785 (Minn. 1981). There the arbitrator found that the parties' practice with respect to vacation accrual rates differed from the clear language of the contract. Despite that, the arbitrator ruled in favor of the employees because the practice, even though different from that required by the labor agreement, met the tests for a binding past practice.

In affirming the arbitrator's award, the Supreme Court held as follows:

> "past practice has been defined as a 'prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances.' Certain qualities distinguish a binding past practice from a course of conduct that has no particular evidentiary significance: (1) clarity and consistency; (2) longevity and repetition; (3) acceptability; (4) a consideration of the underlying circumstances; (5) mutuality. 709 N.W.2d at 788, n. 3 (Citing from Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in Arbitration and Public Policy 30 (S. Pollard Ed. 1961). The essential feature of any award however, whether derived from reliance on past practice or not, is whether it 'draws its essence from the labor agreement.'" See, 709 N.W.2d at 790-91.

As noted, there was clear evidence that the practice of sending requested information to the Union officials through their personal e-mail met all of these criteria.

The testimony of the Union witnesses was both clear and persuasive that the practice has been going on for years, even decades, it was frequent and clear and, more importantly, that DHS management was well aware of it yet accepted it as both normal and appropriate.

Certainly, steps may well have been taken to ensure the security of information and some information may have been redacted and protective orders issued – a practice which is routine by court and arbitrators alike – however the evidence was clear that the parties accepted and understood this to be a required response to a recurring set of circumstances, or as Arbitrator Mittenthal observed, " 'prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances.' See Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in *Arbitration and Public Policy* 30 (S. Pollard ed. 1961). See also Elkouri and Elkouri, *How Arbitration Works,* 5th Ed. p. 630.

Thus, while this case was governed largely by the clear language of the CBA and the underlying obligations in PELRA to provide information without undue interference by the employer as to the manner in which that information is provided, there was clear evidence too of a binding past practice that also supported the Union's claim.

Accordingly, the grievance is granted and the State is order to cease and desist from requiring that Union officials use only the e-mail address the State requires to send and receive pertinent information regarding grievances and other Union business.

One final matter needs to be addressed. It was clear that the Union is not seeking to allow anyone other than a Union official acting in their capacity as a Union official involved in handling and/or processing grievances or collective bargaining to access data through their private e-mails. To that extent, the award herein must be construed as consistent with the provisions of the language of MGDPA, section 13.05. Awards should be consistent with applicable law.

This award should not be construed as requiring the State to violate the law, but is to be construed as allowing the Union to select the e-mail accounts to receive information from the State by a Union official acting in that capacity while they are carrying out their duties as Union officials. To that extent, which was consistent the Union's position in this matter, the grievance is sustained as set forth herein.

Finally, as noted above, the parties contract provides that the losing party to the arbitration is to be assessed the full amount of the arbitration fees.

AWARD

The grievance is SUSTAINED. The State is ordered to cease and desist from requiring that Union officials use only the e-mail address the State requires to send and receive pertinent information regarding grievances and other Union business as set forth above

Dated: February 3, 2025

Jeffrey W. Jacobs, Arbitrator

State of Minnesota AFSCME CLASS AWARD BMS 24-PA 0029 2025.doc

State of Minnesota, MMB
Employer,

And

AFSCME, Council 5
Union

Ruling on Motion for clarification and to delete certain portions of the Award
BMS 25-PA-0029
Class action grievance

APPEARANCES:

FOR THE STATE:
Ryan Borgan Labor Relations Consultant

FOR THE UNION:
Eric Jacobson, Union Representative

PRELIMINARY STATEMENT

The initial hearing was held on November 8, 2024 at the BMS offices in St. Paul The award was served on the parties on February 3, 2025. On February 21, 2025 the State submitted a motion to clarify and seeking to have certain findings regarding past practice deleted from the award. The Union filed a response on February 27, 2025. This ruling incorporates by reference all of the findings and conclusions reached in the original decision and may be added to the original decision in this matter.

PARTIES' POSITIONS

STATE'S POSITION

The State took the position that there was insufficient evidence to support a finding of a past practice and seeks to have the entire section of that original ruling deleted from the award. In support of this position, the State made the following contentions:

1. The State asserted that the parties' Agreement prescribes the arbitrator's powers and requires that "The arbitrator shall be without power to make decisions contrary to, inconsistent with, or modifying or varying in any way the application of laws, rules, or regulations having the force and effect of law."

2. Further, under state law the "employer" for purposes of collective bargaining is MMB and only MMB has legal authority to bind the State of Minnesota to a contractual term or practice. See Minn. Stat. § 179A.22, subd. 2.; Minn. Stat. § 43A.06, subds. 1, 3, and 5.

3. Here, the Decision and Award finds that there was a binding past practice without a finding that MMB was aware of, a party to, or assented to the practice. There was no such record evidence. Therefore, the portion of the Decision and Award that discusses and finds a binding past practice is contrary to law and beyond the Arbitrator's authority.

4. The State acknowledged that there was a violation of "the clear requirements of the specific language of Article 17 and Appendix J," and that accordingly, there was an independent basis for the decision. However the decision regarding past practice should be regarded only as dicta and should be deleted from the award as unnecessary and contrary to law as set forth above.

The State seeks a ruling as follows: That the arbitrator reconsider and correct the Decision and Award by omitting the seven paragraphs of superfluous discussion immediately following the heading, "PAST PRACTICE" (Decision and Award at 18-19).

UNION'S POSITION

The Union's position is that there are no grounds to alter the original decision and award in this matter. In support of this position the Union made the following contentions:

1. The evidence provided to the past practice tracks back into history as far as any memories reach. The new human resources officials who attempted to change this practice were likely ignorant of the practice, but the evidence was clear and supported the award issued on February 3, 2025.

2. Furthermore the award was accurate and based on substantial evidence that there was a binding past practice in this matter that Union officials and representatives have been using their personal e-mails for many years and that the appointing authority within the CBA knew and accepted this practice.

3. The officials at MMB either knew or should have known that this practice was in place as MMB is responsible for adjusting/resolving grievances and for preparing any grievance for hearing. Accordingly, it is reasonable that MMB is charged with constructive knowledge of the practice of sending information and getting formation from Union officials on their personal e-mails.

4. The fact that new HR officials at MMB were not aware of this practice does not alter the fact that the practice has been in place for many years and that no one has sought to change it.

The Union seeks a ruling denying the State's motion in its entirety.

RULING ON THE MOTION TO RECONSIDER/CLARIFY THE AWARD DATED FEBRUARY 3, 2025

The motion to delete portions of the original award is DENIED for the reasons stated in the following memorandum. The original decision may be supplemented with this ruling and memorandum.

Dated: March 3, 2025

Jeffrey W. Jacobs, Arbitrator

DISCUSSION AND MEMORANDUM

On a factual basis, it was abundantly clear that the practice of sending and receiving information regarding grievances and other Union related business between AFSCME and its stewards and representatives and management at DHS has been on going consistently for many years.

Ms. Modlin testified credibly and persuasively that she has been using her personal e-mail for at least 11 years and that she sometimes uses her personal phone and texts as well. See Tr. at page 16:8-23 and 17:12-23. She acknowledged that she does not deal directly with Minnesota Management and Budget, MMB, Tr at 17:10-11, however as discussed below, that fact does not control where a past practice exists. As discussed below, it was absolutely clear that management at DHS knew she used her personal e-mail to request and receive information on her personal e-mails. Tr. at 22: 1-15 and 23:18-24.

These references were part of her overall testimony that showed that Ms. Modlin has been using her personal e-mail and cell phone for years to conduct Union business with the full knowledge and apparent consent of the management at DHS,

Ms. Langhorst also testified credibly and persuasively that she has also regularly used her personal e-mail for Union business since 2013. See Tr. at page 31:2-12. She also credibly described a situation where she received a phone call on her personal cell phone from a supervisor regarding a Union related matter. Tr at page 31: 13-25 to page 32: 1-8. Overall her testimony was credible and persuasive that management knew of her use of personal e-mail and phone to send and receive information about Union related business and that management had full knowledge of this practice.

Ms. Knutson also tested credibly and persuasively that she has also regularly used her personal e-mail for Union business. See Tr. at page 37:1-25 and 38 at 1-6. It was very clear from her testimony that management at DHS knew of this practice, and actively participated in it. There was never any indication that the practice of sending and receiving information to and from Union officials using their personal methods of communication was resisted in any way by management at DHS nor regarded as abnormal. In fact, the record was clear that this practice was clear, consistent, well understood and mutually accepted by both parties.

Mr. Miller also testified credibly and persuasively that he has also regularly used his personal e-mail for Union business. See, Tr. at page 56: 3-25 and 57:1-5.

Ms. Malvin also testified credibly and persuasively that she has also regularly used her personal e-mail for Union business. See, Tr. at 60:1-25 and 61:1-15. She has been doing so since 1991.

Ms. Pearson testified credibly and persuasively that she has also regularly used her personal e-mail for Union business and that she regularly acts as a liaison between the Union and MMB directly. See, TR at pages 63:21-25 and 64:1-7. It was clear from the record too that management at DHS knew of this practice of Union officials using their personal e-mails to send and receive information and that this was an accepted practice for years.

There was no evidence that until the present issue arose, there was ever any indication that this practice was contrary to any State law or regulation nor was there evidence that the State communicated to the Union that the practice was incorrect or needed to be changed in any way.

Ms. Hable testified on behalf of DHS in her capacity as the Director of Labor Relations at DHS, and indicated that pursuant to a delegation agreement, Exhibit 1 at Tab 6, between MMB and various State agencies, including DHS, MMB "holds the delegation for all areas noted within this agreement. And the delegation is MMB granting that authority to DHS to provide the direction in each one of these areas that are outlined within the delegation here." See, Tr. at page 75:14-18. It was also clear from the record that the Union is not a party to that delegation agreement and that the agreement is an internal document between MMB and the State agencies.

Her testimony also showed that the delegation agreement provides for certain things that are not delegated to the agencies. Her testimony was a follows:

> Generally it says these are some of the areas of the authority that are not subject to delegation, which one of them is handle or settle grievances that have been appealed to arbitration, enter any -- Let's see. It goes on, so I don't know if you want me to read each one of these individually. ... Enter into MOU or MOA, we can't do that. See, Tr. at page 76: 3-10.

She also described what areas of responsibility MMB retained and the delegation agreement itself showed that overall MMB retains the right to adjust grievances, and prepare cases for hearing as necessary. One inescapable conclusion from that testimony and document is that MMB must therefore be privy to the information about a grievance in order to do its due diligence and discharge its duty to review a grievance when it gets to that level to determine if it is to be resolved and if so how, or whether the case is to be taken to arbitration. MMB would therefore have to have all of the information necessary to do either one of those tasks.

For example, MMB would need to know what the grievance was about and what the basis for it was. MMB would need to know what information was requested by the Union and what information was sent to the Union by an Agency and its managers. MMB would need to know if there was a timeliness/arbitrability issue and whether that defense was preserved.

There would certainly be other matters that may well be part of the file sent to MMB in order that MMB could do its job. On this record, but one thing was clear; the file must have contained the e-mail threads between management at DHS and the Union that showed that the Union was using personal e-mail addresses for the purpose of processing these grievances and other matters.

The basis of the State's motion is essentially that there was no clear record that MMB was aware of the practice outlined above by multiple Union witnesses. The State argued that only MMB has the authority to bind the State and further asserted that without evidence that MMB was directly involved in the practice of sending and receiving information through personal e-mails there can be no past practice.

That argument is misplaced for at least two reasons. First, that argument is not how past practice works. It is not necessary that the highest levels of management be aware of the practice. It is only necessary to demonstrate that local management was aware of it and accepted it in order to satisfy the mutuality and acceptability requirements of the past practice doctrine. To carry the State's logic to its ultimate conclusion, the Governor would have to know about a practice before it could be enforced through the past practice doctrine. Likewise, the international board of a Union would also have to be aware of it before such a practice could be enforced contrary to a Union's desires. Neither of those scenarios are consistent with the past practice doctrine.

As an example, in the *Ramsey County v AFSCME* case cited in the original award and which serves as the seminal case in Minnesota for purposes of determining what a binding past practice exists, the facts showed that the payroll department was paying a higher rate of pay to the affected employees. There was no direct evidence that the County Board had any knowledge of that, yet the arbitrator determined that there was a past practice and the Supreme Court affirmed that ruling.

Likewise, here, it was clear from the overall record that DHS management knew of this practice and accepted it as the appropriate response for years. The overall record further showed that all of the elements outlined in *Ramsey County* were met – the practice was clear, consistent longstanding and mutually accepted. It was, as the Court in *Ramsey County* described it, the required response to a recurring set of circumstances. (Citing Richard Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements, in Arbitration and Public Policy* 30 (S. Pollard ed. 1961). Thus, on this record even if there was no evidence at all that MMB was aware of this practice, the past practice doctrine would still apply.

Further, a review of the statutes relied upon by the State for its argument were reviewed and did not alter the conclusion reached here. Minn. Stat. 179A.22 and 43A.06 say nothing about past practice. Neither of those statutes alter the effect of an Agency to create a past practice that may well be binding on that Agency. While MMB has the ultimate authority to adjust grievances, the appointing authority, as that term is used in the CBA, can and, in this case, did, create a past practice through a longstanding and consistent practice.

However, as referenced above there was one other factor that weighed in here. The record showed that MMB *did* know of this practice – it had to have. As discussed above and without undue repetition, the delegation agreement certainly allowed MMB to retain certain powers with respect to adjustment and processing of grievances.

The parties CBA contains a grievance procedure at Article 17. Throughout that language there are repeated references to the "Appointing Authority," which is a reference to DHS. Throughout the various steps of the grievance procedure, the "Appointing Authority" is referenced. Specifically Step 4 contains language that provides for the Union to "submit a letter to the State Negotiator and the 'Appointing Authority' that it desires to proceed with the arbitration ..." After that the contract references the "Employer" in discussing the procedure for arbitration. That language makes it clear that MMB essentially take the case over after Step 4.

As noted, that also makes it clear that MMB is to get the entire file so it can proceed to arbitration or to resolve the grievance. It is thus clear too that MMB would have the knowledge of the e-mail addresses to whom and from whom information was sent regarding any particular grievance – including the personal e-mails of the Union officials involved.

However, MMB must have had at least constructive knowledge of the practice because it is axiomatic that MMB gets the files to review in order to do its job effectively – a matter that the arbitrator knows well from years of experience dealing with the MMB department. MMB does do an effective and very thorough job of investigating and processing grievances with all of its departments and he Unions that represent those employees.

There was thus a reasonable conclusion drawn from the record as a whole, that MMB had actual knowledge of the practice because MMB got the files which clearly would have shown the e-mail trails, which of course showed that the Union officials were using their personal e-mails to send and receive information.

Lastly, it was abundantly clear too that at no point until the present matter arose that MMB ever raised any issue with this practice either even though it would unreasonably strain credibility to conclude that MMB did not know of the practice.

Accordingly the past practice discussion was not dicta and was related to the very argument the Union raised, which was both a matter of contract language as well as one related to past practice, see testimony of the Union witnesses described above, which was in effect directly related to a claim of past practice.

One final matter should be discussed to clarify the net effect of this award. The record here related to DHS and should not be construed as going beyond that Agency. The award was intended to be limited to DHS and should not be construed as applying to any other State Agency or Union.

As noted above the award should include this discussion as part of the award itself.