STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PAUL WRIGHT, Complainant,

vs.

AFSCME COUNCIL 24 and THE STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondents.

Case 464
No. 56753
PP(S)-294

Decision No. 29448-C

THE WISCONSIN STATE EMPLOYEES UNION (WSEU), AFSCME, COUNCIL 24, AFL-CIO, Complainant,

vs.

WISCONSIN ASSOCIATION OF PROFESSIONAL CORRECTIONAL OFFICERS (WAPCO), Respondent.

Case 468
No. 56891
PP(S)-298

Decision No. 29495-C

Dec. No. 29448-C
Dec. No. 29495-C
Dec. No. 29496-C
Dec. No. 29497-C

WISCONSIN ASSOCIATION OF PROFESSIONAL CORRECTIONAL OFFICERS, Complainant,

vs.

AFSCME COUNCIL 24 and THE STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondents.

Case 470
No. 56952
PP(S)-299

Decision No. 29496-C

WISCONSIN ASSOCIATION OF PROFESSIONAL CORRECTIONAL OFFICERS and DAVID FREDERICK, Complainants,

vs.

AFSCME COUNCIL 24 and THE STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondents.

Case 471
No. 56991
PP(S)-300

Decision No. 29497-C

Appearances:

Ms. Sally A. Stix, Attorney at Law, 7609 Elmwood Avenue, Suite 202, Middleton, Wisconsin 53562-3134, appearing on behalf of Wisconsin Association of Professional Correctional Officers (WAPCO), Paul Wright and David Frederick.

Lawton & Cates, S.C., by **Attorney P. Scott Hassett,** Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO.

Attorney David C. Whitcomb, Chief Legal Counsel, State of Wisconsin, Department of Corrections, 149 East Wilson Street, P.O. Box 7925, Madison, Wisconsin 53707-7925, appearing on behalf of the State of Wisconsin, Department of Corrections.

Attorney David J. Vergeront, Chief Legal Counsel, Department of Employment Relations, 345 West Washington Avenue, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the State of Wisconsin, Department of Employment Relations.

ORDER AFFIRMING IN PART AND REVERSING IN PART EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On March 24, 2000, Examiner Coleen A. Burns issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matters wherein she concluded that State of Wisconsin and WSEU had committed certain of the alleged unfair labor practices within the meaning of Secs. 111.84(1)(a) and (2)(a), Stats. To remedy the violations found against the State, she granted WAPCO an additional three months to gather the requisite showing of interest in support of an election petition and ordered the State to cease and desist and take certain affirmative action including the posting of a notice. To remedy the violations found against WSEU, she ordered WSEU to cease and desist from such violations.

The Examiner dismissed those portions of complaints against the State that alleged violations of Sec. 111.84(1)(c), Stats., and also dismissed those alleged violations of Sec. 111.84(1)(a), Stats., that she concluded the State did not commit.

As to the alleged violations of Sec. 111.84(2)(a), Stats., that she did not find WSEU to have committed, the Examiner dismissed those portions of the complaints.

The Examiner dismissed all of the complaint allegations filed by WSEU against WAPCO.

The State and WSEU each timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.84(4) and 111.07(5), Stats. The parties thereafter filed written argument in support of and in opposition to the petitions, the last of which was received June 12, 2000.

Having reviewed the record and being fully advised in the premises, we make and issue the following

ORDER

A. Examiner Findings of Fact 1-30 are affirmed.

B. Examiner Finding of Fact 31 is reversed and the following Finding is made:

> 31. An agent of DOC removed a WAPCO meeting notice from a General Interest bulletin board at the Green Bay Correctional Institution on June 26, 1998 but subsequently returned the notice to the bulletin board after discussing the matter with other DOC representatives. This conduct does not have a reasonable tendency to interfere with, restrain, or coerce employes in the exercise of their rights guaranteed by Sec. 111.82, Stats.

C. Examiner Finding of Fact 32 is affirmed.

D. The Commission makes and issues the following Finding of Fact;

> 33. The totality of the conduct of employe Lori Cygan set forth in Finding of Fact 8 has a reasonable tendency to interfere with, restrain or coerce employe Camp in the exercise of rights guaranteed by Sec. 111.82, Stats.

E. Examiner Conclusions of Law 1-9 are affirmed.

F. Examiner Conclusion of Law 10 is reversed and the following Conclusion of Law is made:

> 10. By removing and then replacing a WAPCO meeting notice at the Green Bay Correctional Institution on June 26, 1998, the State of Wisconsin did not violate Sec. 111.84(1)(a), Stats.

G. Examiner Conclusions of Law 11-12 are affirmed.

H. Examiner Conclusion of Law 13 is reversed and the following Conclusion of Law is made:

> 13. Through the conduct of Lori Cygan, the Wisconsin Association of Professional Correctional Officers has violated Sec. 111.84(2)(a), Stats.

I. The Commission makes and issues the following Conclusion of Law:

> 15. The State of Wisconsin did not commit any unfair labor practices within the meaning of Sec. 111.84(1)(c), Stats.

J. Paragraphs 1-5 of the Examiner's Order are affirmed.

K. Paragraph 6 of the Examiner's Order is set aside as to the violation of Sec. 111.84(2)(a), Stats., found in Conclusion of Law 13 and the following Order is made:

> 6. Wisconsin Association of Professional Correctional Officers, its officers and agents, shall immediately:

a. Cease and desist from interfering with, restraining or coercing employes in the exercise of rights guaranteed by Sec. 111.82, Stats.

L. Paragraph 7 of the Examiner's Order is set aside.

Given under our hands and seal at the City of Madison, Wisconsin this 31st day of August, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

Department of Employment Relations

MEMORANDUM ACCOMPANYING ORDER AFFIRMING IN PART AND REVERSING IN PART EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

Early in 1998, WAPCO began its effort to replace WSEU as the collective bargaining representative of those State employes in the Security and Public Safety bargaining unit. The WAPCO effort required that the State determine how it would regulate the organizational activities of WAPCO and WSEU at the work place. The WAPCO effort also produced some conflict between WAPCO and WSEU supporters.

The four complaints before the Examiner and now before us on review involve disputes between WAPCO, the State and WSEU over the legality of the State's regulation of WAPCO's organizational activity and over the legality of conduct by WAPCO and WSEU supporters.

THE EXAMINER'S DECISION

WAPCO V. STATE OF WISCONSIN

Clothing Policies – Uniformed Employes

Pins

The Examiner concluded that the State prohibited the wearing of WAPCO pins and tie tacks but allowed WSEU pins and tie tacks to be worn. Applying BOARD OF SCHOOL DIRECTORS OF MILWAUKEE V. WERC, 42 WIS.2D 637 (1969), she determined that this State policy interfered with the statutory right of State employes to support a union of their own choosing (in this case WAPCO) because the policy was not rationally related to WSEU's performance of its functions as the exclusive collective bargaining representative. Therefore, she found that this State conduct was an unfair labor practice within the meaning of Sec. 111.84(1)(a), Stats.

When making this determination, the Examiner rejected the State's argument that no violation of law should be found because the pin/tie tack policy serves the valid business purpose of avoiding dissension in the work place which could compromise safety and security. She noted that the existing policy (i.e. some employes wear WSEU pins and some do not) does not protect against the disruption the State seeks to avoid. She further asserted that the State's security interest was served not by regulating pins/tie tacks but by regulating employe and inmate behavior that responded to any pins/tie tacks which employes chose to wear.

Hats

The Examiner concluded that the State prohibited the wearing of both WSEU and WAPCO hats and that the prohibition was consistent with the State's legitimate business interests. Therefore, she concluded that WAPCO supporters did not have a statutorily protected right to wear WAPCO hats and thus that the State did not violate Sec. 111.84(1)(a), Stats., by disciplining a WAPCO supporter for wearing a hat. She further concluded that the State's discipline of the WAPCO supporter was not motivated in whole or in part by hostility toward the employe's support of WAPCO and thus that the State did not thereby violate Sec. 111.84(1)(c), Stats.

Pens

The Examiner concluded that the State prohibited the wearing of pens with the WAPCO insignia printed on the clip. Because the policy only applied to WAPCO pens and other pen insignia (Green Bay Packers, corporate logos, etc.) were allowed, the Examiner concluded that the policy violated Sec. 111.84(1)(a), Stats.

Tee Shirts

The Examiner determined that the State prohibited the wearing of tee shirts with any insignia. Thus, she concluded that by denying WAPCO supporters the ability to wear WAPCO tee shirts, the State did not violate Sec. 111.84(1)(a), Stats., because the State did not provide the majority union (WSEU) with a right denied to WAPCO.

Consistent with the foregoing, the Examiner further concluded that the State did not violate Secs. 111.84(1)(a), Stats., by directing a WAPCO supporter to remove a modified WAPCO tee shirt.

Clothing Policies – Non-Uniformed Employes

The Examiner concluded that the State prohibited the wearing of WAPCO tee shirts by non-uniformed employes while allowing the wearing of clothing with other insignias (Green Bay Packers, UAW, etc.)

Consistent with her determination as to the prohibition against WAPCO pen insignias for uniformed employes, the Examiner concluded that the State thereby violated Sec. 111.84(1)(a), Stats.

Verbal Solicitation and Distribution of Written Material

Verbal Solicitation

The Examiner concluded that while employes are on duty, the State allowed WSEU supporters to solicit other employes to join WSEU but prohibited such conduct by WAPCO supporters. She determined that by applying the solicitation policy in a manner that has a disparate impact on minority union supporters, the State thereby violated Sec. 111.84(1)(a), Stats.

The Examiner determined that the State prohibited WAPCO supporters from soliciting other employes while on paid break but allowed employes to take care of personal matters, smoke cigarettes etc. She concluded that this State conduct had a disparate impact on WAPCO and thus violated Sec. 111.84(1)(a), Stats.

Use of Bulletin Boards

Applying MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 9258, (WERC, 8/69) and MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 9258-A (WERC, 11/74), the Examiner concluded that the State could give WSEU greater bulletin board access than that granted to WAPCO or the general public so long as said access was restricted to material necessary to the WSEU's status as the exclusive collective bargaining representative. Because the State granted WSEU the right to post material which was not necessary to WSEU's status as the exclusive collective bargaining representative, the Examiner determined that the State was therefore obligated to give WAPCO bulletin board access. She then concluded that as a general matter, the State had given WAPCO sufficient access to bulletin boards to avoid a

violation of Sec. 111.84(1)(a), Stats. However, in a specific instance where a supervisor mistakenly removed WAPCO material from a bulletin board, she concluded that the State thereby violated Sec. 111.84(1)(a), Stats.

Use of Mailboxes

Consistent with her analysis of use of bulletin boards, the Examiner concluded that when the State allowed WSEU to use employe mailboxes to distribute material that is not essential to WSEU's function as the exclusive collective bargaining representative (union recreational and social affairs, etc.) but in some instances denied WAPCO access to the mail boxes, the State thereby violated Sec. 111.84(1)(a), Stats.

Distribution of Material in Work Areas on Work Time

The Examiner found that the State prohibited the distribution of written material during work time in work areas-except for material necessary for WSEU to perform its function as the exclusive collective bargaining representative. Applying KENOSHA SCHOOL DISTRICT, DEC. NO. 6986-C (WERB, 2/66) and ACME DIE CASTING CORP., DEC. NO. 8704-B (WERC, 5/69), the Examiner concluded that a general prohibition against the distribution of written material during work time in work areas was presumptively valid. Given the State's interest in controlling inmate access to written material, she determined that the State's general prohibition against distribution of written material did not violate Sec. 111.84(1)(a), Stats.

Distribution of Material in Non-Work Areas on Non-Work Time

Applying KENOSHA and ACME, she determined that it was presumptively appropriate for WAPCO and WSEU to distribute written material on non-work time in non-work areas. She concluded that the record did not contain any instances in which the State had denied WAPCO the opportunity to distribute written material in non-work areas on non-work time.

Solicitation and Distribution On Work Premises by Non-Employes or Employes Not in Work Status

The Examiner concluded that the State prohibited non-employes or employes not on work status from soliciting or distributing material unless such solicitation or distribution is

scheduled with the State or is rationally related to WSEU's status as the exclusive collective bargaining representative. She determined that this prohibition was based on the State's legitimate business interest in controlling access to correctional facility property and thus that when it acted in a manner consist with this prohibition, the State did not violate Sec. 111.84, Stats.

Allegations of State Hostility Toward WAPCO

Although inferences could be drawn that the State acted out of hostility toward WAPCO when taking certain actions against certain employes, the Examiner ultimately concluded that no violations of Sec. 111.84(1)(c), Stats., occurred.

Remedy

To remedy the violations found against the State, the Examiner granted WAPCO an additional three months to obtain the statutorily established showing of interest; ordered the State to cease and desist and post a notice; and rescinded disciplinary actions taken against WAPCO supporters based on State conduct she found to be illegal.

WAPCO V. WSEU

Physical and Verbal Threats

As to the allegation that WSEU steward Asporte indicated he would be "breaking people's kneecaps" if WAPCO became the bargaining representative and "we lose even one benefit", the Examiner concluded that such a remark would violate Sec. 111.84(2)(a), Stats. However, she dismissed the allegation for insufficient proof.

As to allegations that WSEU Local President Bath violated Sec. 111.84(2)(a), Stats., by threatening employe Callahan with loss of WSEU representation based on Callahan's WAPCO support, the Examiner concluded that Bath was acting an agent of WSEU and that Callahan would have just cause to believe that Bath was so acting. Therefore, she determined that WSEU thereby violated Sec. 111.84(2)(a), Stats.

As to allegations that WSEU Local Secretary-Treasurer Stevens or other WSEU supporters physically threatened WAPCO supporter Cygan or other WAPCO supporters at a WSEU social function, the Examiner dismissed the allegation for lack of proof. As to the allegation that WSEU supporters harassed WAPCO supporters Jim and Lori Cygan at a WSEU social function, the Examiner concluded that WSEU supporters had no legal obligation to be congenial to WAPCO supporters who chose to attend a WSEU social function and thus that the harassment did not violate Sec. 111.84(2)(a), Stats. As to the allegation that WSEU violated WAPCO supporter Cygan's statutory rights by expelling her from AFSME membership, the Examiner concluded that Cygan did not have an unfettered right to AFSCME membership and that the expulsion did not violate Sec. 111.84(2)(a), Stats.

As to the allegation that WSEU Local President Bath threatened to do "everything in his power" to stop distribution of WAPCO literature by another employe, the Examiner concluded that WSEU thereby violated Sec. 111.84(2)(a), Stats. However, as to Bath's subsequent suggestion to the same WAPCO supporter that he "take those papers (WAPCO literature) and shove them up your ass.", the Examiner found no violation because she found the remark to be a permissible statement in opposition to WAPCO's organizing effort as opposed to the threat implicit in Bath's earlier "everything in his power" comment.

As to an allegation that WSEU breached its duty of fair representation regarding potential grievances of WAPCO supporter Frederick, the Examiner determined that no violation occurred.

The Examiner dismissed an allegation that WSEU violated SELRA when a law firm ceased to represent WAPCO following a conversation between a member of the law firm Local President Bath. She concluded that Bath did not threaten the law firm or promise benefits and that the law firm ended its representation voluntarily.

To remedy the violations found against WSEU, the Examiner ordered WSEU to cease and desist therefrom.

WSEU V. WAPCO

The Examiner concluded that the harassment of employe Camp by WAPCO supporters did not rise to the level of coercion or intimidation prohibited by Sec. 111.84(2)(a), Stats., and thus she dismissed these allegations.

POSITIONS OF THE PARTIES ON REVIEW

The State

The State asks that the Examiner's determinations that it violated Sec. 111.84(1)(a), Stats., be reversed. The State argues that it did not engage in any conduct that had a reasonable tendency to interfere with employes' exercise of rights under Sec. 111.82, Stats., and that even if it did, no violations should be found because it had a valid business reason for its conduct-maintenance of safety and security in the State's correctional facilities.

The State asserts that its business reason has three components: (1) an overcrowded dangerous prison environment; (2) an antagonistic election campaign between WSEU and WAPCO; and (3) concerns about inmate manipulation of the strife between WSEU and WAPCO supporters. The State argues that the Examiner failed to appropriately defer to its judgments as to how best to balance the overriding concern for safety and security with employe rights under Sec. 111.82, Stats. The State asks the Commission to extend the same deference to its prison administrators that prison officials typically receive from courts when conflicts arise between security and safety and other rights.

The State argues that the Examiner's rationale for rejecting the State's business reason defense is unpersuasive. The State asserts that there are no facts in the record against which to test the Examiner's view that the allowed scenario of WSEU pins vs. no pins could produce the same tension as the prohibited scenario of WAPCO pins vs. WSEU pins. Although it concedes the Examiner correctly held that security interests can be addressed by disciplining prisoners and employes that attempt to exploit WAPCO/WSEU conflict, the State contends that it should not be prohibited from taking preventive steps to minimize divisiveness before it creates a problem. It asserts that it should be able to take any reasonable measures to reduce the likelihood of conflict in a correctional facility.

The State alleges that the Examiner's decision as to the wearing of pins presents the State with the Hobson's choice of allowing the wearing of both WAPCO and WSEU pins (with a resultant increase in friction) or banning the wearing of WSEU pins (with a resultant increase in friction due the resentment which would be produced). The State argues that either choice produces negative consequences for security and safety.

As to the prohibition against wearing of WAPCO tee shirts, the State notes that WSEU tee shirts are also prohibited and thus that the Examiner's finding of a violation is based the allowable wearing of tee shirts with sports team logos etc. The State contends this rationale is

unpersuasive and that the "in your face" impact of union tee shirts is at odds with the State's interest in security and safety.

Regarding the prohibition against WAPCO solicitation on the premises, the State asserts that the harassment suffered by employe Camp at the hands of WAPCO supporters demonstrates the dangers of allowing solicitation. But for the State's prohibition, it is conceivable that isolated problems such as Camp's would have become widespread-a risk that is not tolerable in a correctional setting. Further, the State contends that if it were to respond to the Examiner's decision by ending the existing right of WSEU to solicit or granting WAPCO the right to solicit along with WSEU, it would be confronted with the same unacceptable dilemma discussed above as to the wearing of pins.

Turning to the issue of mailboxes, the State argues that allowing WAPCO access would inevitably produce significant employe conflict with an unacceptable increase in security risk. Thus, the State asks that the Examiner's decision be reversed as to mailbox access.

As to the Examiner finding a violation based on the mistaken temporary removal of WAPCO literature from a single bulletin board, the State argues that this single, isolated incident should not be found to be violative of Sec. 111.84(1)(a), Stats.

Regarding the remedy ordered by the Examiner regarding the time for filing the 30 percent showing of interest, the State asserts such a remedy exceeds the Commission's jurisdiction and is contrary to Sec. 111.83(6), Stats., and STATE OF WISCONSIN, DEC. NO. 29754 (WERC, 10/99).

The State contends that even under the limitations it imposed on WAPCO activity in the interests of security and safety, WAPCO's access to employes was substantially equal to WSEU's. Contrary to the argument of WAPCO, the absence of numerous employe conflicts supports the wisdom and effectiveness of the State's policies-not the proposition that the State has exaggerated the potential for conflict.

Given all of the foregoing, the State asks that the Examiner be reversed as to the violations found and the remedy ordered.

WSEU

WSEU filed a petition for review that seeks reversal of the portion of the Examiner's Order that extends the period of time for gathering the statutory showing of interest. WSEU takes no position as the petition for review filed by the State.

WSEU argues that the relief ordered by the Examiner is beyond the Commission's jurisdiction because it is contrary to the provisions of Sec. 111.83(6), Stats. WSEU assets that the Commission has already correctly held that it lacks authority to waive the 30% showing of interest requirement contained in Sec. 111.83(6), Stats. WSEU contends that it follows that the "October" only filing requirement found in the same statute also cannot be waived. WSEU also asserts that the remedy ordered has an impact on WSEU which is disproportionate to the misconduct WSEU was found to have committed.

WSEU further alleges that the remedy ordered does not address the "decidedly stale" status of the WAPCO showing of interest signatures. WSEU argues that as a general labor law matter, a showing of interest must be current and that the problem of staleness is particularly significant given the substantial changes in employe wages, hours and conditions of employment which have occurred since the WAPCO petition was filed in October 1998.

Lastly, WSEU argues that the remedy is flawed because the WAPCO petition no longer exists-having been dismissed by the Commission without appeal in October, 1999.

Given all of the foregoing, WSEU asks that this portion of the Examiner's remedy be reversed.

WAPCO

WAPCO asks that the Examiner's decision be affirmed in its entirety.

As to the State's contention that it has a valid business reason for policies that deny WAPCO the same rights enjoyed by WSEU and other entities, WAPCO argues that the State has failed to provide a persuasive legal or factual basis for this contention. WAPCO contends that the cases cited by the State regarding the balance between inmate rights and security do not support the proposition that great deference should be given the State's security judgments in the context of an election campaign. WAPCO asserts that the State has been unable to present any instance in which an inmate took advantage of the competition between WSEU and WAPCO to cause a security problem.

As to WSEU's assertion that a portion of the Examiner's remedial order should be overturned, WAPCO contends that the Examiner's order simply and appropriately leveled the playing field between WAPCO and WSEU. Far from punishing WSEU, WAPCO asserts that the Examiner's order only gives WSEU the opportunity to re-establish its worth to employes in a fair election. WAPCO alleges that the Examiner's order is a fair and reasonable remedy for the wrong doing that occurred and that the remedy is within the jurisdiction of the Commission.

DISCUSSION

State Regulation of WAPCO Organizing

Existing Law

In CITY OF KENOSHA BOARD OF EDUCATION, DEC. NOS. 6986-C, 6986-D (WERB, 2/66), following a closely contested election, the then Board/now Commission was confronted with the question of whether employer adopted rules regarding employe campaigning during work time and regarding use of mail boxes, bulletin boards and other work place facilities interfered with the employes' exercise of their statutory right to support either of two competing unions. The rules in question generally prohibited:

> The use of any school facilities or equipment (mail boxes, telephones, duplicating equipment, etc.)and/or teacher time during the school day for the purpose of promotional activities (solicitation of teachers, distribution of materials, etc.) on the part of any teacher organization, . . .

but did allow: (1) employes to discuss the election when students were not present; (2) each union to use the school mail boxes for distribution of up to three distributions of materials; and (3) building principals to approve posting of announcements of meetings scheduled by either union.

The Board generally concluded that the above-summarized rules did not interfere with employes' exercise of their statutory rights and made the following holdings:

> Rules established by a municipal employer, in effectuation of its public function, which regulate, on a non-discriminatory basis, the activities of its employes and their representatives on the employer's time and premises, and which may arguably limit the rights and protected activities of employes, as established in Section 111.70, Wisconsin Statutes, shall be presumed valid.
>
> Rules in this regard, if any, must be applied on a non-discriminatory basis to all employe organizations involved.

> Permitting the use of the employer's premises on a reasonable basis . . . ordinarily affords a greater opportunity for the employes to be adequately informed about matters affecting their free choice.

Shortly after KENOSHA, the then Board/now Commission issued BOARD OF SCHOOL DIRECTORS OF THE CITY OF MILWAUKEE, DEC. NO. 6995-A (WERB, 3/66) and MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 6833-A (WERB, 3/66) AFF'D IN PERTINENT PART CIRCT DANE, CASE NO. 120-017, 11/67, and therein held that: (1) the Municipal Employment Relations Act allowed the employer to grant exclusive use of its facilities (including mail boxes and bulletin boards) to the union representing the majority of employes for purposes limited to that union's representative function; but (2) if the employer allows the majority union to use its facilities (including mail boxes and bulletin boards) for "organizational or internal purposes" (i.e. purposes beyond the representative function), the Municipal Employment Relations Act requires that such use be granted to minority unions as well.

In May, 1969, the Commission issued ACME DIE CASTING CORP. DEC. NO. 8704-B wherein it held the following as to employer limitations on the distribution of union materials on the employer's premises:

> . . . we have, in CITY OF KENOSHA, BOARD OF EDUCATION, stated that rules established by a municipal employer to regulate, on a non-discriminatory basis, the distribution of materials and other employe activities "on employer's time and premises" shall be presumed valid.
>
> Similarly, we now believe it appropriate to adopt a policy whereby no distribution rules which prohibit the distribution of materials during non-working time in non-working areas shall be presumed invalid. The adoption of such a rule, we believe, fairly accommodates the interests of the employes in their right to engage in concerted activities and the right of the employer to maintain production and discipline in its establishment. . . .
>
> To overcome the presumption of invalidity, the employer must prove that restriction on distribution in non-working areas during non-working time is actually necessary in order to maintain production or discipline. . . .

In October, 1969, in MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 9258, the Commission found that where the municipal employer allowed the following materials to be distributed by the majority representative by mail box or bulletin board, it was obligated to

extend that same opportunity to a minority union because the materials in question "did not pertain to" the majority union's "function as the exclusive bargaining representative . . ."

> _An application for membership in the Wisconsin Education Association.
> _A flier promoting support of and membership in the majority union.
> _A flier promoting participation in the majority union's income protection plan.

In November, 1974, in MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 9258-A, the Commission reiterated that all unions must have the same opportunity (or lack thereof) to use mail boxes and bulletin boards to distribute materials "relating to internal union activity and organizing campaigns." because such materials are "not necessary" for the exclusive collective bargaining representative to "perform its function." The Commission further indicated materials/information such as "the status of negotiations, including positions of the parties as relating to wages, hours and working conditions and the status of grievances being processed through the negotiated grievance procedure" did "pertain only to the function of the exclusive bargaining representative . . ."

Most importantly, in BOARD OF SCHOOL DIRECTORS OF MILWAUKEE V. WERC, 42 WIS.2D 637, 649 (1969) and MILW. FED. OF TEACHERS, LOCAL NO. 252 V. WERC, 83 WIS.2D 588, 596 (1978) our Supreme Court made clear that it took a very narrow view of the distinctions which can permissibly be made (i.e without violating employes' statutory rights) between the minority and majority unions under collective bargaining agreements. The Court therein held that even collectively bargained dues check off provisions cannot be limited in their application to the majority union because

> . . . there was no reasonable relationship between the granting of an exclusive checkoff and the functioning of the majority representative in its representative capacity; that 'the sole and complete purpose of exclusive checkoff is the self-perpetuation and entrenchment.'

Given the Court's holding in the two MILWAUKEE cases, it is clear that if the rights given exclusively to the majority union are not narrowly limited to those necessary to meet that union's obligations as the exclusive collective bargaining representative, the fact that those rights are a creature of the collective bargaining process is no defense to an interference allegation.

Although most of the foregoing law involves interpretation of the Municipal Employment Relations Act, the Wisconsin Supreme Court has noted that where the language used in Municipal Employment Relations Act and State Employment Relations Labor Act is the identical, it would be "illogical" to apply different interpretations of the two statutes. STATE V. WERC, 122 WIS.2D 132, 143 (1985). Because the language of the pertinent portions of the applicable statutes (Secs. 111.70(2) and (3)(a) 1, Stats., and Secs. 111.82 and 111.84(1)(a), Stats.) is identical, we, like the Examiner, conclude it is appropriate to apply the foregoing precedent to the facts of these cases.

As the foregoing summary of existing precedent reflects, the Examiner correctly concluded that the statutory rights of employes ". . . of self-organization and the right to form, join and assist labor organizations . . . and to engage in lawful concerted activities . . . for the purposes of mutual aid or protection" generally require that competing unions be treated the same in the work place in terms of their ability to communicate with employes through use the employer's facilities (mailboxes, bulletin boards etc.), through the spoken word, and through the wearing of pins, pens, tee shirts etc. As she further correctly noted, the existing precedent holds that distinctions between rights of majority and minority unions can only be made where the majority union's communication rights are restricted to matters necessary to the performance of the majority union's function as the exclusive collective bargaining representative.

Here, it is undisputed that through both unilaterally adopted policy and the terms of the existing WSEU/State contract, distinctions were made between by the State between the communication rights of employes supporting WAPCO and employes supporting WSEU. It is also undisputed that under existing precedent, those distinctions went beyond matters necessary to the performance of WSEU's function as the exclusive collective bargaining representative (i.e included matters related to internal union business/organizing/social matters). Thus, it is clear that under existing precedent, the distinctions made by the State between the communications rights of WAPCO and WSEU supporters had a reasonable tendency to interfere with the rights of State employes.

However, the State correctly notes that under existing Commission precedent, conduct that tends to interfere with employe rights may not be found to violate the statute if the employer has valid business reasons for its actions. CEDAR GROVE-BELGIUM SCHOOL DISTRICT, DEC. NO. 25849-B (WERC, 5/91). The State argues that its interest in the security and safety of inmates and employes in the correctional facilities is a sufficiently strong business reason to justify the distinctions made between the rights of WAPCO and WSEU supporters. The State further asserts that given the extraordinary importance of its interest, all doubts as to whether it has struck an appropriate balance between security and safety and employes' statutory rights should be resolved in the State's favor.

The State makes a strong and credible argument. Although the cases cited by the State (which involve the balancing of inmates rights with the interest of safety and security) do not mandate that the security judgments of the employer outweigh the statutory rights of employes, we certainly have no basis for doubting the good faith judgment of the State that security and safety are enhanced if the potential for conflict between WAPCO and WSEU supporters is reduced. However, even for the State, the desire to eliminate any potential basis for conflict clearly does not override all employe rights under State Employment Labor Relations Act. Thus, for instance, the State properly allowed the posting of WAPCO notices on "General Interest" bulletin boards.

Further, we doubt the State would seriously argue that the interest in conflict avoidance would warrant a conclusion that correctional employes could not organize for the purposes of collective bargaining because of the conflict which could arise between employes who support a union and those employes who wish to be unrepresented. Therefore, we think it clear that the identification of the legitimate business interest in conflict reduction needs to be balanced against the intrusion into statutory rights when we determine whether a statutory violation has occurred.

When we strike that balance, we are persuaded that the State's interest in conflict reduction is not sufficient to justify the State's intrusion into WAPCO employe supporters Sec. 111.82 statutory rights ". . . of self-organization and the right to form, join or assist labor organizations . . . and to engage in lawful, concerted activities for the purpose of . . . mutual aid or protection." Thus, we have affirmed the Examiner's rejection of the State's business reason for its disparate treatment of WSEU and WAPCO regarding communications/solicitations that go beyond those necessary for WSEU to meet its responsibility as the exclusive collective bargaining representative.

Even where disparate treatment between WAPCO and WSEU was not present, the Examiner concluded that where the State allowed employes to (1) wear pens with logos of companies or sports teams (uniformed employes), (2) wear tee-shirts bearing the logos of companies or sports teams (non-uniformed employes), and (3)take care of personal business during break time, the State violated Sec. 111.84(1)(a), Stats., by failing to allow WAPCO employe supporters the right to wear WAPCO clothing etc. or to solicit other off duty employes to support WAPCO.

Under the National Labor Relations Act, the wearing of pens, pins, hats and tee-shirts is viewed as protected employe activity. REPUBLIC AVIATION CORP. V. NLRB, 324 US 793 (1945). However, it is permissible for the employer to prohibit the wearing of items where

the employer can demonstrate that special circumstances (i.e. maintenance of production and discipline or public image, safety, etc.) warrant such a prohibition. BURGER KING CORP. V. NLRB 725 F.2D 1953 (CA 6, 1984). Where the employer allows employes to wear non-union related buttons, pins, etc., it is difficult for the employer to establish that there is a "special circumstance" which warrants the prohibition against the wearing of union buttons, pins, etc. OHIO MASONIC HOME, 295 NLRB 357 (1973) AFF'D OHIO MASONIC HOME V. NLRB, 511 F.2D 527 (CA 6, 1975).

While we are not bound to follow precedent developed under the National Labor Relations Act, we find the balancing of interests referenced above to be a useful and persuasive analytical approach to considering the employe and employer interests presented here. In the context of: our prior rejection of the State's "safety and security" interest; the State's allowing the wearing miscellaneous non-union pens, pins etc; and the State's allowing the wearing WSEU insignia of various kinds, we conclude that the State has not established the existence of any "special circumstance" which warrants the prohibition against the wearing of WAPCO items. Thus, we affirm the Examiner's conclusion that these prohibitions violate Sec. 111.84(1)(a), Stats.

As to the right of WAPCO supporters to orally solicit other employes while on break time, the Examiner applied KENOSHA SCHOOLS, SUPRA., and concluded that it was permissible to limit such solicitation to "non-work" time. However, to the extent the State's interpretation of "non-work" time prohibited oral solicitation during paid breaks when employes were free to engage in personal business (i.e smoke cigarettes etc.), the Examiner concluded that the State was regulating "non-work" time in a manner which interfered with the exercise of Sec. 111.82 rights. We agree. As reflected in the State's own policy, the security and safety of employes and inmates is not significantly implicated by "non-work" time solicitation and thus we conclude that the Sec. 111.82 rights of employes allow solicitation in these circumstances. Thus, we affirm the Examiner in this regard as well.

Included in the violations found by the Examiner regarding State restrictions on WAPCO employe activity was the temporary removal of a WAPCO meeting notice from a bulletin board (Finding 31 and Conclusion of Law 10). Given the temporary duration of the removal, we conclude that this State conduct did not have a reasonable tendency to interfere with the exercise of employe rights and thus we have reversed the Examiner as to this allegation.

Remedy

To remedy the violations of Sec. 111.84(1)(a), Stats., the Examiner concluded that it was appropriate, among other matters, to order that WAPCO receive an additional 3 months of time within which to solicit and submit the 30% showing of interest which is a statutorily prerequisite to Commission conduct of the WAPCO-sought election. Both WSEU and the State question whether we have the statutory remedial authority to grant such an extension and whether, in any event, such an extension is warranted.

We need not resolve the parties' dispute over the extent of our remedial authority because we are satisfied that the extension granted by the Examiner is not an appropriate remedy under the facts of this case. Particularly in light of the upcoming October 2000 opportunity for WAPCO to file an election petition with a fresh showing of interest, we conclude that the 3 month extension simply is not warranted. Thus, we find that the notice posting and cease and desist order made herein is both a sufficient and appropriate remedy for the Sec. 111.84(1)(a) violations found.

Unfair Labor Practices Committed by WSEU

In her Conclusion of Law 14, the Examiner determined that WSEU committed unfair labor practices within the meaning of Sec. 111.84(2)(a), Stats., through the actions of its agent, Fox Lake Local Union President Andy Bath. We find the Examiner's determination to be supported by the applicable facts and law.

To remedy these unfair labor practices, the Examiner ordered WSEU, its officers and agents, to cease and desist from such conduct but did not order that WSEU post a notice. The Examiner's decision reflects her view that the posting of a notice was not needed because the unfair labor practices were the "actions of one hothead." We concur with the Examiner's view that WSEU did not approve of or condone Bath's conduct and find her remedy to be appropriate.

Unfair Labor Practices Allegedly Committed by WAPCO

The Examiner dismissed all of the complaint allegations made by WSEU against WAPCO. We affirm the Examiner in all respects except as to the actions of WAPCO supporter Lori Cygan toward employe Camp. When the record is viewed in its totality, we are satisfied that Cygan was acting as an agent of WAPCO and that her actions did have a reasonable tendency to interfere with, restrain or coerce Camp in the exercise of her Sec. 111.82, Stats., right to support the labor organization of her choice. Therefore, to that

extent, we reverse the Examiner and find that WAPCO thereby committed an unfair labor practice within the meaning of Sec. 111.84(2)(a), Stats.

As was true for the conduct of WSEU Local President Bath, we view Cygan's conduct as that of a "hothead" who was acting without WAPCO's approval. Thus, as was true for the remedy as to Bath's conduct, a cease and desist remedy is appropriate.

Conclusion

Based on this record, we believe both competing organizations, as organizational entities, have generally acted in a responsible manner throughout the election campaign. It is largely for this reason that we require no posting as to the conduct of the individual members of each that we have found objectionable, even though we have found the individuals who committed the actions to have acted in an agency capacity.

This is not to say that our views of each of these sponsoring organizations would remain as benign should members of either engage in similar future conduct. We expect each organization to educate and control its representatives as to appropriate, lawful conduct during election campaigns and to administer appropriate internal sanctions for unlawful conduct of its officers or representatives when necessary.

Dated at Madison, Wisconsin this 31st day of August, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

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