STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

vs.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS and JON LITSCHER, Respondents.

Case 518
No. 59960
PP(S)-321

Decision No. 30166-A

Appearances:

Mr. P. Scott Hassett, Lawton & Cates, S.C., Attorneys at Law, Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53701-2965, for the labor organization.

Mr. David J. Vergeront, Chief Legal Counsel, Department of Employment Relations, 345 West Washington Avenue, P.O. Box 7855, Madison, Wisconsin 53707-7855, for the employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On May 17, 2001, the Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO, filed a complaint with the Wisconsin Employment Relations Commission alleging that the State of Wisconsin, Department of Corrections and Jon Litscher had violated Secs. 111.84 (1)(a)(d) and (e), Wis. Stats., by adopting a dress and grooming code which rescinded prior authorization for employees to wear WSEU insignia. Hearing in the matter was held on August 28, 2001, before Hearing Examiner Stuart D. Levitan of the commission's staff. A transcript was available to the parties by September 6, 2001. The

parties filed written arguments with the examiner, the last of which was received on January 23, 2002. The examiner, being fully advised in the premises, hereby makes and issues the following

FINDINGS OF FACT

1. The Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO ("WSEU," or "the union") is a labor organization with offices at 8033 Excelsior Drive, Madison, Wisconsin. At all times material hereto, the union was and continues to be the exclusive bargaining agent for state employees whose positions are in certain statutory bargaining units.

2. The State of Wisconsin Department of Corrections ("DOC") is the state employer, with offices at 149 East Wilson Street, Madison, Wisconsin. The Department and its Secretary, Jon Litscher, are charged with responsibilities that include the operation of prisons and correctional centers throughout the state. In fulfilling its duties, the DOC employs members of various local unions affiliated with Council 24, including uniformed and non-uniformed correctional officers.

3. During the course of negotiating their 1993-95 collective bargaining agreement, representatives of the union and DOC agreed to a dress and grooming code for all uniformed and non-uniformed correctional officers at the DOC. That code allowed for the wearing of tie tacks or pins reflecting association with the union, and was memorialized in the subsequent 2000-2001 collective bargaining agreement at Negotiating Note 31, as follows:

> During the course of negotiating the 1993-95 Agreement, representatives from the Department of Corrections and the Union agreed to a dress and grooming code for all uniformed and non-uniformed officers of the Department of Corrections, including the Wisconsin Resource Center.

4. On January 16, 1998, DOC Administrator of Adult Institution Dick Verhagen issued an administrative directive regarding the professional appearance of uniformed correctional officers. That directive listed under paragraph III H, "other authorized items for wear with the uniform," the following:

- Tie tacks or pins that reflect association with the union can be worn on the uniform as long as they are worn in a professional manner.

The directive also defined a tie tack as an "accessory item to be provided by the employee," under the following terms of paragraph III L:

- Tie tacks or tie bars will be gold or silver in color. Inscription on tie tacks may reflect association with the State of Wisconsin, DOC, WCA, ACA, the institution, or union.

- All other tie tacks or tie bars will be plain in nature. Those reflecting association with any fraternal, religious or similar organizations are prohibited.

5. In late 1997 or early 1998, Verhagen became aware of an organizing drive by a rival union to the WSEU, the Wisconsin Association of Professional Correctional Officers ("WAPCO.") On March 3, 1998, Verhagen sent the following e-mail to various DOC supervisory and administrative staff:

> It has come to my attention that some officers are wearing a WAPCO pin as part of their uniform. This is not an allowable item per Administrative Directive 14.3 (Professional Appearance of Uniformed Correctional Officers). Please see section III-H which states "Tie tacks or pins that reflect association with the union can be worn on the uniform without ties as long as they are worn in a professional manner" and Section III-L which states "Tie tacks or tie bars will be gold or silver in color. Inscription on tie tacks may reflect association with the State of Wisconsin, DOC, WCA, ACA, the institution, or the union. All other tie tacks or tie bars will be plain in nature. Those reflecting association with any fraternal, religious or similar organization are prohibited". The only exception to this is a pin portraying the U.S. flag. WAPCO is not recognized as a union and therefore, the pin is not recognized as a union pin and is not an allowable item to be worn on the uniform. (emphasis in original)
>
> If you have any questions on the above, please contact me.

6. On April 6, 1998, DOC Secretary Michael J. Sullivan, Litscher's immediate predecessor as the chief executive officer of the DOC, issued a memorandum regarding communications regarding labor relations activities, which read in part as follows:

> The recent Labor Relations activities of some DOC correctional officers have raised questions for management as to which activities are permissible and which activities should be prohibited. This memo provides guidelines for handing (sic) communications should be followed consistently throughout the Department.

> DOC recognizes AFSCME Council 24, WSEU as the sole labor organization representing our correctional officers and we are committed to the implementation of the Master and all our Local agreements. We will, however ensure, as required by law, that DOC remains otherwise neutral in dealing with the involved groups and that management and supervisory staff shall not support or encourage employees to take sides in this issue.
>
> . . .
>
> *Wearing pins*
>
> The uniform policy indicates that pins that reflect association with the union may be worn as well as tie tacks or bars which reflect association with the State of Wisconsin, DOC, WCA, ACA, the institution, or the union. Any other symbol, insignia, jewelry, etc. not specifically authorized by the policy can not (sic) be worn. Therefore, uniformed staff may not wear other pins or any items not specifically authorized in the uniform policy.

7. Starting on August 5, 1998, WAPCO and its adherents and the WSEU filed with the Wisconsin Employment Relations Commission a series of four complaints against each other and the DOC, alleging a variety of prohibited practices concerning interference with various protected activities. On September 18, 1998, the Commission appointed Coleen Burns, a member of the Commission's staff, to serve as Examiner. On December 3, 1998, the Commission consolidated four complaints – three by WAPCO and/or its adherents against WSEU and DOC, one by WSEU against WAPCO -- into one proceeding. Examiner Burns conducted hearings in the matter on October 16, December 2 and December 8, 1998; January 12, February 23, February 25, March 18, April 8 and April 19, 1999. Briefing was completed on September 15, 1999. On March 24, 2000, Burns issued Findings of Fact, Conclusions of Law and Order in the consolidated proceeding. She found, as a Conclusion of Law, as follows:

> By interpreting the uniform policy to prohibit the display of Wisconsin Association of Professional Correctional Officers pin and enforcing this prohibition, the Department of Corrections has interfered with, restrained, or coerced employees in the exercise of their rights guaranteed by Sec. 111.82, Stats., and, thus, has violated Sec. 111.84(1)(a), Stats.

In her accompanying memorandum, Examiner Burns explained her decision as follows:

The uniform policy referenced in DOC Administrator Verhagen's Administrative Directive of January 16, 1998, permits uniformed SPS employes to wear "Tie tacks or pins that reflect association with the union." This policy also permits uniformed SPS employes to wear a tie tack or tie bar that reflects association with the State of Wisconsin, DOC, WCA, ACA, or the institution.

The uniform policy does not define "union" as the WSEU. Thus, the policy, on its face, is neutral with respect to the rights of the competing WSEU and WAPCO labor organizations.

On March 3, 1998, DOC Administrator Verhagen advised DOC management that the uniform policy did not permit uniformed SPS employes to wear a WAPCO pin because "WAPCO is not recognized as a union and, therefore, the pin is not recognized as a union pin and is not an allowable item to be worn on the uniform." Subsequently, DOC management enforced the uniform policy, as interpreted by Administrator Verhagen, and prohibited SPS employes from displaying a WAPCO pin on their uniform. DOC's uniform policy, as interpreted and enforced, permits, but does not require employes to wear pins and/or tie tacks that reflect association with WSEU.

By March 3, 1998, WAPCO had established itself as an organization with an expressed purpose and objective to "promote the organization of workers, to bring together and unite all employees for the purpose of advancing their interests, promote their welfare, improve their wages and other terms and conditions of employment." On that date, WAPCO was a union with members who were also members of the SPS bargaining unit.

Neither the fact that WSEU is the exclusive collective bargaining representative of members of the SPS bargaining unit, nor the fact that WSEU may have a contractual right to display insignia on DOC uniforms, provides DOC with the right to implement a uniform policy that prohibits the display of WAPCO pins. As WAPCO argues, the Wisconsin Supreme Court has found that rights or benefits that are granted exclusively to the majority representative, and thus denied to minority organizations, must in some rational manner be related to the functions of the majority organization in its representative capacity, and must not be granted to entrench such organization as the bargaining representative. BOARD OF SCHOOL DIRECTORS OF MILWAUKEE V. WERC, 42 WIS.2D 637, 649 (1969).

DOC argues that WSEU is an entity that has a present, direct and official responsibility concerning correctional administration and that authorization of WSEU affiliated pins and tie tacks is no more than an acknowledgment of these facts. Such "acknowledgment," however, is not rationally related to the performance of the functions of WSEU in its representative capacity and serves to entrench WSEU as the bargaining representative. In interpreting the uniform policy to prohibit the display of a WAPCO pin and by enforcing this prohibition, DOC has interfered with State employes in the exercise of their rights guaranteed in Sec. 111.82, Stats.

As DOC argues, the Commission has recognized that employer conduct which may well have a reasonable tendency to interfere with an employe's exercise of protected rights will not be found to be unlawful if the employer has a valid business reason for such conduct. DOC asserts that it has valid business reasons to limit the display of "union" insignia to that associated with WSEU.

DOC argues that the safety and security of the correctional institutions could be compromised if DOC allowed the competition between the unions to become an issue in the workplace. According to DOC, the display of competing union insignia provides inmates with information concerning staff differences that may be used by inmates to divide and manipulate staff and may cause dissension in the workplace between employes that do not support the same union.

Under the existing DOC uniform policy, employes have a choice to display, or to not display, WSEU affiliated insignia. By this choice, employes present differences that are fodder for the cannons of inmates who wish to manipulate or divide staff, as well as to staff who wish to take exception to another employe's exercise of rights protected under Sec. 111.82, Stats. Thus, the existing uniform policy does not protect against the disruptive behaviors that the State seeks to avoid with its prohibition against the display of WAPCO pins.

More importantly, however, it is not the person who displays a WAPCO pin that engages in disruptive behavior that threatens the safety and security of DOC institutions. Rather, it is the inmate who seeks to divide or manipulate staff; the employe that permits an inmate to divide or manipulate staff; and the employe that harasses, threatens, or assaults another employe for engaging in rights protected under Sec. 111.82, Stats., that engage in disruptive behaviors.

DOC has a valid business interest in ensuring the security and safety of its institutions. However, this valid business interest is not served by prohibiting uniformed employes from displaying a WAPCO logo or insignia. Rather, this valid business interest is served by prohibiting inmates and employes from responding to this display in a manner that threatens the safety and security of its institutions and by imposing sanctions upon inmates and employes that engage in such responses.

The DOC uniform policy permits State employes to wear pins that reflect association with WSEU, but does not permit State employes to wear pins that reflect association with WAPCO. This uniform policy has a disparate impact upon employes' right to join and assist WAPCO. DOC has not established that it has a valid business reason for such conduct.

By implementing this disparate uniform policy, DOC has interfered with, restrained, or coerced employes in the exercise of rights protected by Sec. 111.82, Stats. Accordingly, the Examiner has found this uniform policy, as interpreted and enforced by DOC, to be in violation of Sec. 111.84(1)(a), Stats.

As remedy, Examiner Burns directed the State respondent to:

> (e) Permit uniformed employees to display a Wisconsin Association of Professional Correctional Officers pin in the same manner as it permits uniformed employees to display an AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO, pin.

8. On August 31, 2000, the Wisconsin Employment Relations Commission issued an Order affirming in part and reversing in part Examiner Burns' Findings of Fact, Conclusions of Law and Order. The commission affirmed in all particulars Examiner Burns' findings, conclusion and order relating to the wearing of pins or tie tacks. The commission included this explanation:

> 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.

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9. On September 29, 2000, the DOC petitioned Dane County Circuit Court Judge David T. Flanagan for review of the WERC order. The WERC cross-petitioned seeking enforcement of its order. Both WAPCO and WSEU were permitted to intervene in the proceeding.

10. On November 7, 2000, DOC legal counsel David Whitcomb submitted to the commission a statement of DOC's response to the WERC order of August 31. At paragraph 1(a), Whitcomb represented that DOC would comply with the commission order that it cease and desist from violating employees' rights guaranteed under sec. 111.82 by interpreting and enforcing the uniform policy in such a manner as to unlawfully discriminate against WAPCO as follows:

> DOC will be in compliance with this provision. The uniform policy is to be amended to prohibit the wearing of any pins or buttons.

11. On November 10, 2000, WSEU legal counsel P. Scott Hassett wrote commission general counsel Peter G. Davis as follows:

. . .

> The Union takes issue with proposal 1(a), relating to the uniform policy. The WSEU bargained for the right to wear union-related pins or buttons. If the DOC prohibits the wearing of pins or buttons, the WSEU expects to file a prohibited practice complaint/
>
> The WSEU either takes no position or has no dispute with the remaining proposals, 1(b) and (c) and 2 (a) through (g).

12. The WERC was represented in the proceeding before Judge Flanagan by assistant attorney general David C. Rice. On December 1, 2000, Davis wrote Rice, with copies to the parties' attorneys, as follows:

> As you know, the Wisconsin Employment Relations Commission's August 31, 2000 Order in the above matters required the State of Wisconsin to advise the Commission as to the action it has taken to comply with the Order.
>
> By letter dated November 3, 2000, the State advised the Commission of the action it had taken or would be taking to comply with the Commission's Order. By letters dated November 9 and 10, 2000, WSEU and WAPCO respectively advised the Commission as to their views on the State's compliance.
>
> Having considered the terms of the Order and the parties' positions regarding compliance, the Commission asks that you pursue enforcement of its Order in a manner consistent with this memo.

. . .

> **Wearing of Pins/Buttons**
>
> Paragraphs 1(a) and 2(3) of our Order require the State to:
>
> 1(a) Cease and desist from interfering with, restraining and coercing employes in the exercise of their rights guaranteed in Sec. 111.82, Stats., by interpreting and enforcing the uniform policy in such a manner as to unlawfully discriminate against the Wisconsin Association of Professional Correctional Officers.
>
> and to :

> 2(e) Permit uniformed employees to display a Wisconsin Association of Professional Correctional Officers pin in the same manner as it permits uniformed employes to display an AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO pin.

The State proposes to comply with these Paragraphs of the Order by ending employees' right to wear Council 24 pins/buttons and thereby denying employees the right to wear Council 24 or WAPCO bins/buttons. As was the case with the use of mailboxes, the State's proposed compliance rescinds rights previously enjoyed pursuant to a collective bargaining agreement.

A Commission majority (Chair Meier and Commissioner Hempe) concludes that the State can either "level up" or "level down" to comply with the above quoted Paragraphs of the Commission's Order, and thus that the State's decision to "level down" the right to wear pins/buttons constitutes compliance. Commissioner Hahn concludes that the State must "level up" to comply with the Commission's Order because employees have the statutory right to wear union pins/buttons absent "special circumstances" which the Commission found in its August 31, 2000 decision that the State had not established.

As was true for the use of mail boxes/bulletin boards, at any point in the future, pursuant to the order of an appropriate forum or otherwise, should the State again allow employees to wear Council 24 pins/buttons, the State must extend that same right to the wearing of WAPCO pins/buttons.

13. On January 25, 2001, Rice wrote to Judge Flanagan, in part, as follows:

I write to advise you about the status of the above-referenced case. The petitioner, the Wisconsin Department of Corrections (DOC), and the respondent, the Wisconsin Employment Relations Commission (WERC), have resolved their differences and are prepared to dismiss the case. As will be explained more fully in this letter, because DOC has satisfied WERC that DOC has complied with WERC's order, as interpreted by WERC, DOC is willing to dismiss its petition for judicial review and WERC is willing to dismiss its counter-petition for enforcement of its order. One of the intervenors, the Wisconsin State Employees Union (WSEU), agrees with DOC and WERC that the case may be dismissed, but, in expressing its agreement, WSEU wishes to make clear that it is not thereby waiving any contractual or statutory rights that it may be entitled to assert on behalf of the employees it represents. The other intervenor, the Wisconsin Association of Professional Correctional Officers

(WAPCO), opposes dismissal of the case on the grounds that WERC's order, as now interpreted by WERC, does not adequately remedy the unfair labor practices found by WERC.

. . .

Second, the majority of WERC concluded that DOC would be in compliance with its order regarding the wearing of pins by uniformed employees if, as DOC proposed, DOC prohibited the wearing of any pins by uniformed employees. *See* Attachment 4, pp. 2-3. Third, WERC concluded that DOC would **not** be in compliance with its order regarding the wearing of tee shirts or pins if, as DOC proposed, DOC only prohibited the wearing of tee shirts or pins displaying WAPCO or WSEU insignia or logos. *See* Attachment 4, p. 4. WERC explained that this was because the violation of the law in question was not premised upon the disparate treatment of WAPCO and WSEU, but, rather, the disparate treatment of WAPCO and WSEU as labor organizations on the one hand and of other organizations and corporations on the other hand. *See id*. The majority of WERC suggested that DOC would be in compliance if DOC required all employees to wear a uniform tee shirt and banned all pens. *See id*. Fourth, WERC concluded that DOC would be in compliance with its order regarding solicitation if, as DOC proposed, employees would be permitted to solicit on behalf both WAPCO and WSEU during paid break times except when inmates are present or within hearing. *See* id. Fifth, and finally, WERC noted that DOC was **not** in compliance with that part of its order that required DOC to post a notice.

. . .

On January 12, 2001, counsel for DOC assured counsel for WERC that DOC would post WERC's notice. Based upon this assurance, WERC is satisfied that DOC has fully complied with WERC's order. Consequently, both DOC and WERC are prepared to dismiss this case at this time. As noted earlier in this letter, WSEU likewise is willing to have the case dismissed. WAPCO, however, opposes dismissal.

14. On March 19, 2001, Judge Flanagan issued a Memorandum Decision and Order by which he dismissed the matter. Judge Flanagan wrote, in part, as follows:

> On January 25, 2000 (sic), the court was advised that the petition DOC and the respondent WERC had resolved their differences and wished to dismiss the case. The court was also advised that the intervenor WSEU agrees that the case may be dismissed but further maintains that in so doing it does not thereby waive any contractual or statutory rights it may be entitled to assert on behalf of the employees it represents.

15. On April 25, 2001, the DOC Administrator of Adult Institutions, Dick Verhagen, issued a memorandum to all wardens, whereby he issued an amended Administrative Directive 14.4, effective on April 30. By that Directive, DOC eliminated "tie tacks or pins that reflect association with the union" from the list of "Other authorized items for wear with the uniform," DOC eliminated these bullets under paragraph III/L:

> III/L **Tie**
>
> - Tie tacks or tie bars will be gold or silver in color. Inscription on tie tacks may reflect association with the State of Wisconsin, DOC, WCA, ACA, the institution, or union.
>
> - All other tie tacks or tie bars will be plain in nature. Those reflecting association with any fraternal, religious or similar organization are prohibited.

By that Directive, DOC added a new provision, as follows:

> III/I **Unauthorized items, not to be work on or with the uniform**
>
> . . .
>
> - Any other emblem, insignia, jewelry, etc., including any items reflecting association with the union that has not been specifically authorized by this Directive.

16. By promulgating the amended Administrative Directive 14.4, effective April 30, 2001, the DOC interfered with, restrained and/or coerced employees in the exercise of their right to engage in lawful, concerted activity for the purpose of mutual aid or protection.

17. By promulgating the amended Administrative Directive 14.4, the DOC did not refuse to bargain collectively with the WSEU on a mandatory subject of bargaining.

18. By promulgating the amended Administrative Directive 14.4, the DOC did not violate any collective bargaining agreement previously agreed upon by the DOC and WSEU.

CONCLUSIONS OF LAW

1. By interfering with, restraining and/or coercing employees in the exercise of their rights guaranteed by Sec. 111.82, Stats., by its adoption and enforcement of an administrative directive that prohibits the wearing of a tie tack or pin reflecting association with the WSEU, the DOC has violated Sec. 111.84(1)(a), Stats.

2. By its adoption of an administrative directive that prohibits the wearing of a tie tack or pin reflecting association with the WSEU, the DOC has not violated Sec. 111.84(1)(d), Stats., and, derivatively, Sec. 111.84(1)(a), Stats.

3. By repealing those provisions of the former Administrative Directive that had authorized only pins reflecting association with WSEU, the DOC did not violate Sec. 111.84(1)(e), Stats.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

1. The State of Wisconsin, its officers and agents, shall immediately:

   (a) Cease and desist from interfering with, restraining or coercing employees in the exercise of their rights guaranteed by Sec. 111.82, Stats, by suspending application and enforcement of a uniform policy (Administrative Directive 14.4) which unlawfully prevents the wearing of a union pin or tie tack.

   (b) Notify all employes in the SPS bargaining unit employed by the Department of Corrections by posting in conspicuous places within the correctional institutions and correctional centers, where such employes are employed, copies of the Notice attached hereto and marked "Appendix 'A.'" The Notice shall be signed by the Secretary of the Department of Corrections and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the State of Wisconsin to ensure that said Notice is not altered, defaced or covered by other material.

2. The complaint as to a violation of Sec. 111.84(1)(d), Stats., is hereby dismissed in its entirety.

3. The complaint as to a violation of Sec. 111.84(1)(e), Stats., is hereby dismissed in its entirety.

Dated at Madison, Wisconsin, this 25th day of March, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart Levitan /s/
Stuart Levitan, Examiner

APPENDIX A

NOTICE TO EMPLOYES OF

STATE OF WISCONSIN CORRECTIONAL INSTITUTIONS AND CENTERS

As ordered by the Wisconsin Employment Relations Commission, and in order to remedy a violation of the State Employment Labor Relations Act, the State of Wisconsin and the Department of Corrections notifies you of the following:

1. WE WILL NOT prohibit uniformed employees from displaying a pin or tie tack reflecting association with a labor organization.

By ---_____

Secretary of the Department of Corrections

STATE OF WISCONSIN (DEPARTMENT OF CORRECTIONS)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

Union Position

There is no question that the respondents breached the collective bargaining agreement by unilaterally modifying the dress code to prohibit union insignia. The union disputes the respondent's contention that the WERC and court invalidated the contract provision. The union also disputes the respondent's attempt to resurrect the 'special circumstances' argument that failed in the earlier proceeding.

The issue of the WSEU's contractual right to wear union insignia was never addressed in the earlier proceeding, which only dealt with WAPCO's rights in relation to those of the WSEU. The decision in that case did not invalidate or even address the WSEU's contractual rights, but simply said that the WSEU and WAPCO must be treated "in the same manner" on the issue of union insignia.

The WERC and circuit court found DOC to be in compliance with the commission's order as it related to WAPCO. WSEU had no standing to assert its contractual rights until DOC agent Verhagen issued the memo of April 25, 2001.

The DOC also again attempts to justify its actions based on the 'special circumstances' involving security issues. This is simply warmed over gruel that failed to convince either the Examiner or Commission in the initial proceeding. Respondents have presented nothing new to disturb the earlier decision that the valid business interest of security is properly served by prohibiting inmates and employees from improper activity than by restricting the display of union insignia.

There is no dispute that the original dress code policy was unilaterally revoked, as it relates to union insignia, and that neither the circuit court nor commission invalidated the provision. Respondent's 'security' arguments also fail. Respondents have thus breached the collective bargaining agreement and committed prohibited practices, and the complainants respectfully request relief.

Employer Position

The dress code in question was incorporated into the collective bargaining agreement by Negotiating Note No. 31, and as such is subject to being invalidated as allowed for by the agreement's Article 15/2/1. By providing that the invalidation of any part or provision of the agreement by a tribunal of competent jurisdiction shall not invalidate the remaining portions of the agreement, the parties clearly anticipated that a provision might be invalidated. That is what has happened, and that is why the DOC has not violated the terms of the agreement.

The old uniform dress code, as it relates to pins, was invalidated by the WERC. That code made several references to "the union," and it is abundantly clear that all such references were to the WSEU and no other union. The dress code was negotiated by WSEU for WSEU members, and was not intended to apply to any other union. Indeed, the basis for the examiner's decision that the old dress code violated the statutory rights of WAPCO members was precisely because the code did not allow for the wearing of any union pins other than those of the WSEU.

The only way to read the language of negotiating note 31 is that WSEU pins and only WSEU pins are allowed. There is no other way to read that language. For a remedy, the commission ordered DOC to cease and desist from enforcing the dress code policy in such a manner as to unlawfully discriminate against WAPCO. Based on the clear language of the uniform policy, the only way to comply with this order was to not comply with a contractual provision that was unlawful. If the relevant language of the uniform policy cannot be enforced as written, it certainly is invalidated as written.

The commission directed the DOC to either allow both unions to wear pins, or neither. By allowing these options, the commission has acknowledged that the status quo (the negotiated language) was not an option because the language as written was unlawful and therefore unenforceable. The commission made it absolutely cleat that the negotiated language was not an option because it was unlawful.

By not allowing the DOC to use the negotiated language, the WERC has clearly rendered that language invalid; the language was invalidated by the WERC.

The WERC is a tribunal of competent jurisdiction, both as defined by statute and practice. Clearly, there is no doubt that the commission is a "tribunal of competent jurisdiction" as referenced in 15/2/1 of the collective bargaining agreement, and that it has invalidated the provisions of negotiating note number 31.

The old uniform dress code was invalidated by operation of law, in that the commission determined it was in violation of the SELRA because of the disparate treatment caused by the negotiated language which allows WSEU pins but not pins of any other union. As such, the old uniform dress code policy regarding pins was invalidated by operation of law.

Even if the policy were not invalidated by the commission or operation of law, the uniform dress code was rendered unenforceable, resulting in a code that does not allow for pins. The WSEU negotiated the pin part of the dress code for its pins and its pins only; there can be no doubt that the phrase "the union" referred exclusively to the WSEU. It is ludicrous to think for even one moment that WSEU would negotiate a provision to allow a competing union to wear its pins.

By holding that the language of the dress code policy as it relates to pins was discriminatory and order DOC to cease enforcing the language as written, the net effect of the commission's decision was that the uniform dress code no longer could make any reference to "the union's" or "union" pins. That in turn means that the uniform dress code would have no provision for the wearing of any pins, including WSEU pins.

If the language in question was rendered null and void, that language cannot be enforced; if not enforced, no one can wear pins. How can the DOC be found to be in violation of the law when it issues a memorandum that does exactly what the WERC directs be done – not enforce language which promotes disparate treatment? The answer most certainly is that there can be no violation.

Further, the DOC had good faith and justifiable business reasons for implementing the new policy, namely security of the prison environment and safety of all of the correctional officers.

Further, since the commission and the circuit court approved the new policy, there can be no violation. How can it be said that DOC has violated SELRA when all it was doing was complying with the commission's order? Implicit in the commission's allowing the options of leveling up or leveling down is that these options were lawful. One can only conclude that the commission was fully cognizant of what it was doing when it allowed DOC to adopt one of two options and then approved the option DOC chose; one must therefore conclude that leveling down was not a violation of SELRA. DOC reasonably relied on that and chose the option which was consistent with the position it took at the prior hearing in justification of its contention that pins of more than one union cause security problems.

Under the circumstances – commission and court approval of the compliance – WSEU had no further rights to reserve. The matter was resolved with finality. Therefore, WSEU cannot raise a challenge via this proceeding.

Neither the commission nor the court would accept compliance that violated the law. Therefore, there is no violation.

Further, the WSEU is estopped from claiming a violation. It is totally inequitable – it is unfair – when a party, like the complainant, can remain silent in a prior proceeding involving the same parties and same issue, only to later challenge a result of the prior proceeding. The WSEU is estopped, either by record estoppel or equitable estoppel or both from entering the fray at this late date. The DOC was entitled to rely on the commission's permission and approval that it could level down, entitled to rely on the court's approval, and entitled to rely on the WSEU's inaction.

Further, the complainant has failed to meet the required burden of proof. As to the (1)(a) complaint, there is absolutely no proof that the adoption of the new policy contained or involved a threat of reprisal or a promise of a benefit that would reasonable tend to interfere with protected rights.

As to the (1)(d) complaint, there is absolutely no proof of a refusal on the part of the DOC to bargain in good faith. There is no even any proof that the WSEU requested to bargain with DOC over language to replace that which had been rendered invalid and unenforceable. In the absence of a request to bargain, there can be no refusal.

As to the (1)(e) complaint, there must be a contractual provision previously agreed upon and proof of a breach of that provision. However, the contractual provision previously agreed upon was invalidated and found unenforceable. The provision thus became null and void. In the absence of such a provision, there can be no breach and no violation of SELRA.

Further, the DOC cannot be directed to adopt language which it did not arrive at through negotiations. What was negotiated was that the only union pins which could be worn were WSEU pins. However, the WERC has ruled that what was negotiated regarding pins is unenforceable. The DOC went to the mat to back what it negotiated only to be told by the WERC that the negotiated language was unenforceable. In the absence of that language, the union's pins cannot be worn. The WERC has rendered the negotiated language unenforceable and thus, there is no negotiated language. No one can wear pins.

The WERC must leave the parties alone. It must not impose on DOC that for which it did not bargain. The WERC should allow the DOC and WSEU to resolve this through negotiations.

The only fair and equitable way to resolve this is that the parties be required to bargain over the wearing of pins. Until an agreement is reached, the status quo would be that no pins can be worn by anyone since that is the net effect of the WERC's order. The complaint should be dismissed in its entirety. In the event a violation is found, the only appropriate remedy is that the parties bargain over the wearing of pins.

Union Reply

The respondent errs is asserting that the original policy was invalidated. The commission order allowed DOC to level up or down, but was silent on the negotiated rights of the WSEU as to uniforms. The WSEU specifically reserved its rights on this and related issues.

Instead of dealing with the union, the DOC unilaterally revised the dress code to prohibit all union-related insignia.

The DOC errs in asserting that it could not have leveled up without modifying or violating the dress code. In fact, the DOC would have the authority to allow other parties to wear pins without disturbing the existing dress code by infringing on the rights of the WSEU. The DOC could simply have allowed

other pins to be displayed, in accordance with the terms of the commission's order. This would not interfere with the pre-existing rights of the WSEU to wear pins.

The DOC further errs in relying on estoppel, an affirmative defense which was simply not raised in the body of the general pleadings or among the three specific affirmative defenses previously set forth. In the event this defense is not disregarded, the WSEU should be allowed to present further evidence on this issue. The WSEU made it very clear that leveling down would result in a complaint before the WERC, but that it would not hold up what appeared to be a significant resolution of larger issues between the parties.

Accordingly, the complaint should be found valid and the requested relief provided.

DISCUSSION

It's the second anniversary of this tie tack tussle, and I've little doubt we'll reach the third.

It was precisely two years ago that Examiner Burns found that the DOC had violated SELRA by enforcing the pins policy under Administrative Directive 14.4 to allow tie tacks to WESU and not WAPCO. Since then, this matter has been to and through the full Commission and the Dane County Circuit Court.

Now it is back, with a WSEU challenge to DOC's manner of compliance, a precise directive that the commission negotiated and the court endorsed.

The WSEU alleges the state has violated sections 111.84(1)(a), (d) and (e), Wis. Stats. The state has raised no jurisdictional issues or sought deferral to arbitration or any other forum.

Sec. 111.84(1)(a) complaint

Sec. 111.84(1) Stats., provides that it is a prohibited practice for the state employer individually or in concert with others:

> (a) To interfere with, restrain or coerce employees in the exercise of their rights guaranteed in s. 111.82.

Section 111.82, Stats, states:

> Employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing under this subchapter, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. Employees shall also have the right to refrain from any or all of such activities.

As the Wisconsin Supreme Court has noted,

> It is helpful to compare the wording of MERA and SELRA, whereupon we find that the rights guaranteed to employees under these acts are identical . . . It would be illogical to apply a different test to MERA than SELRA merely because a different group of protected persons are involved (municipal employees versus state employees). STATE OF WISCONSIN, DEPARTMENT OF EEMPLOYMENT RELATIONS V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, 122 Wis.2D 132, 143 (1985).

The municipal employment equivalent to 111.84(1)(a) is sec. 111.70(3)(a)1, Stats.

In order to establish a violation of Secs. 111.84(1)(a) or 111.70(3)(a)1, a complainant must establish by a clear and satisfactory preponderance of the evidence that the respondent's conduct contained either some threat of reprisal or promise of benefit which would tend to interfere with, restrain or coerce employees in the exercise of their Section (2) rights. STATE OF WISCONSIN, DEPARTMENT OF ADMINISTRATION, DEC. NO. 15945-A (Michelstetter, 7/79), aff'd by operation of law, DEC. NO. 15945-B (WERC, 8/79); STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DEC. NO. 17218-A (Pieroni, 3/81), aff'd by operation of law, DEC. NO. 17218-B (WERC, 4/81); STATE OF WISCONSIN, DEC. NO. 19630-A (McLaughlin, 1/84), aff'd by operation of law, DEC. NO. 19630-B (WERC, 2/84); STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND SOCIAL SERVICES (DHSS), DIVISION OF CORRECTIONS (DOC), DODGE CORRECTIONAL INSTITUTION (DCI), DEC. NO. 25605-A (Engmann, 5/89), aff'd by operation of law, DEC. NO. 25605-B (WERC, 6/89). BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84). It is not necessary to demonstrate that the employer intended its conduct to have such effect, or even that there was actual interference; instead, interference may be proven by showing that the conduct has a reasonable tendency to interfere with the exercise of protected rights. THE STATE OF WISCONSIN, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, DEC. NO. 11979-B (WERC, 11/75); STATE OF WISCONSIN, DEC. NO. 25987-A (McLaughlin, 10/89), aff'd by operation of law, Dec. No. 25987-B (WERC, 12/89). WERC V. EVANSVILLE, 69 Wis. 2D 140

(1975); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84). However, employer conduct which may well have a reasonable tendency to interfere with an employee's exercise of Sec. 111.70(2) rights will generally not be found to violate Sec. 111.70(3)(a)1, Stats., if the employer had valid business reasons for its actions. CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT, DEC. NO. 25849-B (WERC, 5/91). OSHKOSH PROFESSIONAL POLICE OFFICERS' ASSOCIATION, No. 57964, DEC. NO. 29791-A (Shaw. 11/00)

While, as noted above, intent is not an issue in this complaint, I must stress at the outset that the record is absolutely void of any evidence that the state employer intended to interfere with the exercise of protected rights in any regard. While the state clearly believed as a matter of public policy that "leveling down" rather than "leveling up" was the preferred option, I find that the state adopted this position solely out of legitimate concerns over safety and security within the correctional system, and not out of any anti-union animus. The fact that the "business necessity/security concern" defense may have ultimately proved invalid does not mean that the state presented that position in bad faith.

The state's conduct in issuing Administrative Director 14.4 in April, 2001 contained a significant threat of reprisal for specific conduct. Prior to that directive, WSEU members were authorized to wear their union tie tack as part of their uniform; following its issuance, such conduct would leave them subject to discipline. The threat of discipline constitutes a threat of reprisal so as to satisfy the first prong of the BEAVER DAM SCHOOL test.

For the union to prevail, it still must establish that wearing such a pin is a right protected under s. 111.82.

As the commission correctly noted in its review of the Burns decision, applicable federal law brings a "useful and persuasive analytical approach" to the issue. STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Decs. No. 29448-C, 29495-C, 29496-C, 29497-C (WERC, 8/00). Indeed, the NLRB and federal courts have vastly more experience on this precise question than does the WERC, with a substantial caseload in all circuits.

The federal equivalent to sections 111.82 and 111.70(1)(a)2 is Sec. 157 of the National Labor Relations Act, as amended, also known as "section 7," which provides that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protections ....

With the exception of a stray modifier or two, this language is identical to that of the Wisconsin statutes. Given the extensive consideration the NLRB and federal judiciary have given this precise issue – the seminal Supreme Court case predates the adoption of SELRA by over 25 years – it is useful to consider their case law.

As the commission correctly noted, the United States Supreme Court spoke dispositively on this matter almost sixty years ago. In REPUBLIC AVIATION CORP., 12 LRRM 320, the NLRB had stated that "the right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity, and the respondent's curtailment of that right is clearly violative of the Act." 12 LRRM at 321 (1943). The U.S. Supreme Court endorsed this understanding and affirmed the board's decision in REPUBLIC AVIATION CORP. V. NLRB, 324 US 793 (1945).

As the Seventh Circuit Court of Appeals stated in NLRB V. MAYRATH COMPANY, 319 F. 2d 424 (7th Cir. 1963):

> Under the rights guaranteed by Section 7 of the Act, employees were entitled to wear union buttons as part of a concerted activity to assist the union. REPUBLIC AVIATION CORP. V. NATIONAL LABOR RELATIONS BOARD, 324 US 793; NLRB V. ESSEX WIRE, 245 F. 2D 589 (9TH CIR.)
>
> There is, of course, some limitation on this right. This Court, in CATERPILLAR TRACTOR CO. V. NLRB, 230 F. 2D 357 (7TH CIR.), said that an employer's right to prohibit such organizational activity "is limited to the restriction of activities which disrupt, or tend to disrupt, production and to break down employee discipline, and *does not include restriction* of passive inoffensive advertisement of organizational aims and interests, i.e. *the wearing of advertising insignia and buttons* which in no way interferes with discipline or efficient production." (emphasis added)
>
> (The Company) attempts to justify its May 30th prohibition of wearing union buttons on the ground production was interfered with, but we do not think the record supports this contention.

In NLRB V. SHELBY MEMORIAL HOSP. ASS'N, 1 F 3d 550, 565 (7th Cir. 1993), the court cited and reaffirmed MAYRATH, again holding that "under the rights guaranteed by (Section 7), employees are entitled to wear union buttons or insignia as part of a concerted activity to assist the union," subject to a business necessity defense. *See also,* QUALITY ALUMINUM PRODUCTS, INC., 121 LRRM 1187 (1986); HOSPITAL DEL MAESTRO INC., 125 LRRM 1095 (1987); KEYSTONE LAMP MANUFACTURING CORP., 125 LRRM 1296 (1987);

CHRISTIE ELECTRIC CORP., 127 LRRM 1292 (1987); M.A. INDUSTRIES, 128 LRRM 1144 (1987); CONTROL SERVICES, 137 LRRM 1292 (1991); SUNLAND CONSTRUCTION CO., 141 LRRM 1312 (1992); MEIJER INC., 150 LRRM 1216 (1995).

By plain understanding and well-developed federal case law, then, the act of wearing a union tie tack is "lawful concerted activity … for mutual aid or protection," and as such is protected under language that is the functional equivalent to sections 111.70(2) and 111.82, Stats. I now turn to consider whether the state has established a business necessity defense that would outweigh the employees' statutory right to wear union insignia.

Throughout these proceedings, the state made a concerted effort to establish such a business necessity defense arising from its security concerns. Those concerns are indeed legitimate, and there is no evidence that the state raised them in anything other than good faith.

However, the examiner and commission gave extensive consideration to the state's security argument, and they both explicitly rejected it. See, 29448-B, et seq., at 89-92; 29448-C, et seq., at 21. The state's brief presentation before me did nothing to substantially supplement the record such that I would reopen this question of fact already found.

Under the facts of this case – the state's failure to establish a valid business/security defense -- wearing a union pin was a right guaranteed under sec. 111.82, Stats. Eliminating the union tie tack from the list of authorized accessories and placing it on the list of unauthorized items contained a threat of reprisal, for violations of the dress code can legitimately lead to discipline. Accordingly, the state's action in this regard constituted a violation of Sec. 111.84(1)(a), Stats.

The DOC may rightfully feel that it has been wronged by its reliance on the result in the prior proceeding. Indeed, DOC must feel it has somehow fallen prey to a bizarro-world form of jurisprudence where an examiner sees fit to overturn as unlawful an explicit action of the commission and circuit court.

The problem for the state is the lesson from the age-old adage that two wrongs don't make a right.

The examiner and commission correctly found that the state violated sec. 111.84(1)(a) by interfering with WAPCO's 111.82 rights by denying its adherents the right to wear a union pin. Somehow, during the subsequent compliance proceeding, the commission negotiated a remedy that caused another violation of those same rights, this time as guaranteed to WSEU. To remedy this second violation, I have ordered the State to allow employees to wear a pin or tie tack reflecting association with a labor organization.

Finally, while I am also sympathetic to the state's arguments as to the union being estopped from pursuing this proceeding, I am ultimately not persuaded thereby. The union explicitly stated on the record that it disagreed with the proposed revisions to the uniform policy and reserved its contractual and statutory rights to challenge "leveling down." This served to put the state on sufficient notice such that its equitable estoppel argument is unavailing. Further, given the significant statutory rights herein at issue, I do not believe the principles of equity and justice are as unambiguously on the state's side as the state seems to feel.

Sec. 111.84(1)(d)

Section 111.84(1)(d), Stats., states, in relevant part, that it is a prohibited practice for the state employer:

> To refuse to bargain collectively on matters set forth in s. 111.91(1) with a representative of a majority of its employees in an appropriate collective bargaining unit.

Section 111.91(1), Stats., provides that, with certain exceptions not herein applicable, "matters subject to collective bargaining to the point of impasse are wage rates … fringe benefits … hours and conditions of employment."

A violation of Sec. 111.84(1)(d), Stats., also constitutes a derivative violation of Sec. 111.84(1)(a), Stats., discussed above.

Again, it is instructive to review cases involving the parallel statute for municipal employers, Sec. 111.70(3)(a)4, Stats. Generally speaking, a municipal employer has a Sec. 111.70(3)(a)4 duty to bargain with the bargaining representative of its employees with respect to mandatory subjects of bargaining.

Mandatory subjects of bargaining are those which "primarily relate" to wages, hours and conditions of employment, as opposed to those subjects of bargaining which "primarily relate" to the formulation and choice of public policy. CITY OF BROOKFIELD V. WERC, 87 WIS.2D 819 (1979); UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WERC, 81 WIS.2D 89 (1977); and BELOIT EDUCATION ASSOCIATION V. WERC, 73 WIS.2D 43 (1976).

A municipal employer's statutory duty to bargain with a union during the term of a collective bargaining agreement extends to all mandatory subjects of bargaining except those which are covered by the agreement, or to those which the union has clearly and unmistakably waived its right to bargain. SCHOOL DISTRICT OF CADOTT, DEC. NO. 27775-C (WERC, 6/94);

CITY OF RICHLAND CENTER, DEC. NO. 22912-B (WERC, 8/86); BROWN COUNTY, DEC. NO. 20623 (WERC, 5/83); and RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 18848-A (WERC, 6/82).

An employer may not normally make a unilateral change during the term of a contract to a mandatory subject of bargaining without first bargaining on the proposed change with the collective bargaining representative. CITY OF MADISON, DEC. NO. 15095 (WERC, 12/76) at 18 citing MADISON JT. SCHOOL DIST. NO. 8, DEC. NO. 12610 (WERC, 4/74); CITY OF OAK CREEK, DEC. NO. 12105-A, B (WERC, 7/74); and CITY OF MENOMONIE, DEC. NO. 12564-A, B (WERC, 10/74). Unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining because each of those actions undercuts the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84) at 12 and GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/94) at 18-19. Absent a valid defense, a unilateral change to a mandatory subject of bargaining is a *per se* violation of the MERA duty to bargain. SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85).

Given the statutory right of employees to wear union insignia, matters relating to the wearing of union pins are a mandatory subject of bargaining. The state must now provide a valid defense for unilaterally abrogating the old policy, or be found to have violated Sec. 111.84(1)(d), Stats.

The state suggests that the union sat on its rights and effectively waived them. Indeed, the duty to bargain is not self-actuating, but rather rises upon a demand for such. CITY OF GREEN BAY, DEC. NO. 29469-A (Neilsen, 7/99). Accordingly, waiver by inaction has been recognized as a valid defense to alleged refusals to bargain, including alleged unilateral changes in mandatory subjects of bargaining, except where the unilateral change amounts to a fait accompli or the circumstances otherwise indicate that the request to bargain would have been a futile gesture. CITY OF GREEN BAY, SUPRA; ST. CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-B (Burns, 1/93); WALWORTH COUNTY, DEC. NOS. 15429-A, 15430-A (Gratz, 12/78). RANDOM LAKE SCHOOL DISTRICT, Case 30, No. 58011, DEC. NO. 29998-B (Burns, 9/01)

Clearly, there was a unilateral change to a mandatory subject of bargaining during the term of the collective bargaining agreement, and the union made no request to bargain either the change or its impact. Can it avoid the sanction of waiver-by-inaction by claiming that it was merely deferring to a *fait accompli* that would have been futile to oppose?

The union was aware on or about November 3, 2000 that DOC was proposing to "level down." It filed a written objection to that proposal on November 10, by which it raised the specter of a prohibited practice complaint "if the DOC prohibits the wearing of pins or buttons." However, it did not request that the DOC bargain on this point. The WSEU was also aware on or about December 1, 2000 that the WERC was accepting that level of compliance, but the union filed no further comment.

Granted status as intervenor in the underlying litigation, WSEU was given full opportunity to participate in the discussions and proceedings over compliance. At no time did the WSEU make a request or demand of DOC that it bargain over the issue of union pins or buttons, or the impact of reversing the prior uniform policy. The WSEU placed its disagreement with the revised policy of "leveling down" on the record, but took no further steps as the litigation moved towards dismissal.

In so doing, the union was not merely deferring to a fait accompli that would have been futile to oppose, but in fact was an active participant in the resolution. Given the range of issues and remedies at stake, the union understandably made a considered decision when it signed off on dismissing the litigation the following month. But such a decision was not without legal consequences.

While the union did continue to assert that it did not waive any contractual or statutory rights, a reiteration of reserved rights is not the same as a demand to bargain. Because the WSEU made no demand to bargain it effectively waived its rights to proceed under sec. 111.84(1)(d), Stats. Accordingly, I have dismissed that portion of the complaint alleging a violation thereof.

Sec.111.84(1)(e)

Sec. 111.84(1)(e), Stats., makes it an unfair labor practice for an employer:

> To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting employes, including an agreement to arbitrate or to accept the terms of an arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.

A labor organization having exclusive bargaining status can file a complaint with the commission under this section alleging (1) a breach of contract, specifically that the employer has violated the parties' collective bargaining agreement; (2) a refusal to arbitrate, or (3) a refusal to accept the terms of an arbitration award. STATE OF WISCONSIN, Dec. No. 28189-A (Jones, 8/95). The parallel statute for municipal employers is Sec. 111.70(3)(a)5, Stats.

The state challenges this aspect of the union's complaint, contending that for there to be a violation of Sec. 111.84(1)(e), Stats., there must first be a contractual provision previously agreed upon and proof of a breach of that provision; as the state reviews the prior proceeding, it considers that the contractual provision previously agreed upon had been invalidated and found unenforceable. There being no valid contractual provision, the state concludes, there can be no violation of Sec. 111.84(1)(e).

The state does not, however, challenge the basic jurisdictional question of whether these are indeed provisions of the collective bargaining agreement at play. As the state acknowledged, "there can be no doubt that the dress code, via Negotiating Note No. 31, is a provision of the collective bargaining agreement."

Nor does the state challenge my jurisdiction as the commission's agent to hear this case as a complaint, rather than have it deferred to arbitration. Generally speaking, where the parties have bargained a procedure for final and binding impartial resolution of disputes over contractual compliance, the Commission will not assert its statutory jurisdiction under Sec. 111.84(e), Stats., to resolve breach of contract claims because of the presumed exclusivity of the contractual procedure and a desire to honor the parties' agreement. STATE OF WISCONSIN, DEC. NO.27510-A (Schiavoni, 11/93). In an analogous proceeding brought under sec. 111.70(3)(a)5, the Commission will defer where (1) the Respondent is willing to arbitrate and renounce technical objections which would prevent a decision on the merits by the arbitrator; (2) the collective bargaining agreement clearly addresses itself to the dispute; and (3) there is no important issue of law or policy involved. SCHOOL DISTRICT OF WESTFIELD, DEC. NO. 27742-A (Schiavoni, 12/93), citing RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 20941-B (WERC, 1/85).

Because the respondent herein has neither objected to Commission jurisdiction nor given an unambiguous affirmation of its willingness to arbitrate this dispute, I conclude this matter is properly before me as examiner.

The critical question, then, is whether or not the proceeding before Examiner Burns resulted in the invalidation of the provisions in the dress code allowing pins and tie tacks. If the result of that proceeding was to invalidate those provisions, there is nothing for the state to violate; if those provisions remain in force, the complainant's case will stand.

The state makes a strong argument that the earlier proceedings have served to invalidate the contract clause in question. Certainly, by including Article 15/2/1 in their collective bargaining agreement, the parties anticipated that a contract clause might be invalidated, as follows:

> Should any part of this Agreement or any provisions contained herein be declared invalid by operation of law or by any tribunal of competent jurisdiction, such invalidation of such part shall not invalidate the remaining portions hereof and they shall remain in full force and effect.

Also, there can be no question but that the commission proceeding as ratified by the court system constitutes a "tribunal of competent jurisdiction."

But was the old uniform dress code really invalidated by the commission – as the state claims – or not? It depends on who you ask, and when.

As reflected in Verhagen's e-mail of March 1998 and Sullivan's memorandum of April 1998, the state has consistently treated the provision as applying exclusively to WSEU. Indeed, it was this very exclusivity that Examiner Burns and the commission found constituted the violation of WAPCO's 111.82 rights.

As the exclusive bargaining representative, WSEU was indeed bargaining exclusively – for its members and *only* for its members. The notion that the WSEU would be bargaining to preserve the advocacy rights of a rival union is, as the state suggests, ludicrous.

The testimony of the union's own witness, the veteran assistant WSEU director Karl Hacker, was essentially in agreement with the state's analysis. Hacker testified that the idea of wearing pins was "an issue that came up at a bargaining table" several years ago, and that wearing pins was "a right that we bargained at the bargaining table" with Litscher's predecessor, Sullivan. The pin itself, Hacker said, was something "that we developed for the members within the Security and Public Safety Bargaining Unit."

Given Hacker's testimony, it is hard to see how the WSEU could maintain that the right to wear pins was not exclusive to the WSEU. Yet that is the position it now takes in the matter before me, asserting that the DOC "would have the authority to allow other parties to wear pins without disturbing the existing dress code." The DOC, the WSEU now declares, "could simply allow other pins to be displayed," which it states would be in accordance with the earlier Commission order and "would not interfere with the pre-existing rights of the WSEU to wear union pins."

Indeed, allowing other union pins to be displayed would be consistent with case law, even obligatory. However, it is not consistent with the terms of the old uniform policy, as enforced, which explicitly authorized wearing tie tacks or pins "that reflect association with *the* union," and explicitly barred those pins "reflecting association with any fraternal, religious or similar organization…." (emphasis added) In the collective bargaining agreement between the

WSEU and the State of Wisconsin, references to "the union" are explicitly references to the WSEU. Again, as noted above, it was that exclusivity to WSEU that lead Examiner Burns to find the policy, as enforced, to be unlawful.

The provisions of the 1998 administrative directive, incorporated by reference into the collective bargaining agreement, authorized pins reflecting association only with the WSEU and no other labor organization. These provisions, as applied, were invalidated by a tribunal of competent jurisdiction. Accordingly, I have dismissed the union's complaint that the state employer's promulgation of the revised administrative directive 14.4 constituted a violation of 111.84(1)(e), Stats.

Dated at Madison, Wisconsin, this 25th day of March, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart Levitan /s/
Stuart Levitan, Examiner

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