STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

vs.

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

Case 518
No. 59960
PP(S)-321

Decision No. 30166-B

Appearances:

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 the Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO.

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 Corrections and Jon Litscher.

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

On March 25, 2002, Examiner Stuart D. Levitan issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that Respondent State of Wisconsin (herein State) committed an unfair labor practice within the meaning of Sec. 111.84(1)(a), Stats., by prohibiting employees from wearing a tie tack or pin reflecting association with Complainant Wisconsin State Employees Union (herein WSEU). He ordered the State to cease and desist from prohibiting the wearing of tie tacks or pins reflecting association with a labor organization and to post a notice advising employees of their right to wear such tie tacks or pins.

The Examiner further concluded that the State had not committed unfair labor practices within the meaning of Sec. 111.84(1)(d) or (e), Stats., and dismissed those complaint allegations.

On April 8, 2002, the State filed a petition with the Wisconsin Employment Relations Commission pursuant to Secs. 111.07(5) and 111.84(4), Stats., seeking review of those portions of the Examiner's decision that concluded the State had committed an unfair labor practice. The parties thereafter filed written argument in support of and in opposition to the petition -- the last of which was received June 7, 2002.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

A. The Examiner's Findings of Fact 1-15 are affirmed.

B. The Examiner's Findings of Fact 16-18 are set aside.

C. The Examiner's Conclusion of Law 1 is reversed and the following Conclusion of Law is made:

1. By prohibiting the wearing of any union insignia, the State of Wisconsin did not interfere with, restrain or coerce employees in the exercise of rights guaranteed by Sec. 111.82, Stats., and thus did not commit an unfair labor practice within the meaning of Sec. 111.84(1)(a), Stats.

D. The Examiner's Conclusions of Law 2-3 are affirmed.

E. The Examiner's Order is affirmed in part and reversed in part and modified to read:

The complaint is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 22nd day of October, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steven R. Sorenson /s/
Steven R. Sorenson, Chairperson

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

I dissent.

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

The Pleadings

WSEU's complaint alleged that the State committed unfair labor practices within the meaning of Secs. 111.84(1)(a)(d) and (e), Stats., by modifying the uniform policy for correctional officers to rescind authorization to wear WSEU insignia/prohibit the wearing of WSEU insignia.

The State filed an answer that denied having committed any unfair labor practices and affirmatively asserted that the State's action: (1) is necessary to maintain and regulate security for employees and inmates in a correctional environment; (2) was found by the Commission and the Dane County Circuit Court to be consistent with the Commission's remedial Order in STATE OF WISCONSIN, DEC. NOS. 29448-C and 29495-C (WERC, 8/00) AFF'D CASE NO. 00-CV-2667 (CIRCT DANE 3/01) wherein the Commission found to be illegal the then-existing uniform policy that allowed the wearing of WSEU insignia.

The Examiner's Decision

As to the allegation that prohibiting the wearing of WSEU insignia interfered with employee rights under Sec. 111.82, Stats., the Examiner concluded that employees have a statutory right to wear union insignia and that the State had not established a business necessity/security defense sufficient to outweigh this employee right. He noted that in STATE OF WISCONSIN, the Commission had rejected the same business necessity/security defense and concluded that the record before him was not sufficient to warrant revisiting the sufficiency of said defense. Therefore, the Examiner found that the State had interfered with employee rights and thereby violated Sec. 111.84(1)(a), Stats.

In response to the State argument that in STATE OF WISCONSIN**,** the Commission had approved the prohibition against wearing union insignia, the Examiner concluded that the Commission had erred when coming to that conclusion. Finding that WSEU had reserved its rights to challenge the manner in which the State complied with the Commission's Order in STATE OF WISCONSIN, he also rejected the State argument that WSEU should be estopped from contesting the legitimacy of the State's action.

As to the contention that the State's action had violated its duty to bargain with WSEU, the Examiner found no violation of Sec. 111.84(1)(d), Stats., because he concluded WSEU had failed to demand to bargain.

Regarding the alleged violation of contract, the Examiner concluded that the contractually related provision in question had been declared invalid in STATE OF WISCONSIN and thus that the State's failure to follow that provision did not violate Sec. 111.84(1)(e), Stats.

POSITIONS OF THE PARTIES ON REVIEW

The State

The State contends that the Examiner's decision must be reversed because it is contrary to the Commission's recent approval of the ban on all union insignia as part of compliance proceedings in STATE OF WISCONSIN.

The State argues that fundamental laws of jurisprudence dictate that Commission examiners are obligated to follow the law created by the Commission and approved by the Circuit Court. The State asserts that this is particularly true where, as here, the Commission and Court explicitly approved the very conduct in question -- conduct taken to comply with the Commission's Order. Thus, the State contends the Examiner should not be allowed to overrule the Commission and the court.

The State contends that if the Commission affirms the Examiner, it will be reversing itself and undermining its credibility with parties and practitioners. The State asserts such action would also be "totally absurd, unfair and unjust" because the State acted in reliance on the Commission's approval of its actions.

The State also argues that it has established that there are legitimate security concerns which warrant prohibition of union insignia. The State contends that the existing record warrants the conclusion that the wearing of competing union insignia creates divisiveness between employees that compromises prison security.

WSEU

WSEU urges affirmance of the Examiner's conclusions that the State violated Sec. 111.84(1)(a), Stats., by prohibiting the wearing of union insignia.

WSEU contends that the Examiner's decision is properly based on the statutory right of employees to wear union insignia and on the Commission's consistent rejection of the State's security argument as a basis for overriding that right. WSEU asserts that the employees it represents are in a far better position than prison management to assess the risks of wearing union insignia and that it would not be pursuing this litigation if the employees believed there was any significant risk.

As to the State's contention that the Examiner is improperly overruling the Commission's action in STATE OF WISCONSIN, WSEU argues that the issue resolved in STATE OF WISCONSIN was that it was illegal for the State to allow the wearing of one union's insignia but to prohibit the wearing of the insignia of another competing labor organization. WSEU acknowledges that the issue of whether the State could ban all union insignia did emerge during compliance proceedings. However, WSEU asserts that because the Commission majority position allowing such a ban was only stated informally as part of compliance proceedings, the Examiner's decision does not conflict with or overrule any published agency decision.

DISCUSSION

The antecedents of this case lie in a provision that has had a continued presence in the biennially negotiated labor agreements between the State of Wisconsin and the Wisconsin State Employees Union since the provision's original insertion in the 1993-95 labor contract. Under that provision, corrections officers employed by the Department of Corrections (DOC) were permitted to wear small insignia bearing the Wisconsin State Employees Union (WSEU) logo or initials. The clause does not require the officers to wear the insignia but leaves wearing it or not up to the individual officers.

In 1999 a rival labor organization launched a campaign to raid the DOC security personnel then represented by WSEU. Adherents of the challenging organization attempted to emulate their WSEU cohorts by wearing the insignia of the challenger on their uniforms during their duty hours.

But DOC did not permit the supporters of the challenging labor organization to wear its insignia. The Department prohibited the wearing of any labor union insignia by its prison guards except for the WSEU pins on the grounds that 1) the latter were expressly authorized by the parties' labor contract, but the former were not, and 2) business necessity (i.e., institution security) justified the disparate treatment.

The rival labor organization protested to this agency and the issue was joined by the three parties involved. Our response considered the employee rights of self-organization set forth in Sec. 111.82, Stats., and led to our conclusion that Department of Corrections could

not allow employees to wear the insignia of one labor organization, but ban them from wearing the insignia of a rival organization. STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, DEC. NOS. 29448-C, 29496-C, 29497-C (WERC, 8/00).

In the course of our decision, we rejected DOC's business necessity/security arguments in support of its policy of allowing advocates of WSEU to wear its insignia while denying the same privilege to the advocates of the rival organization seeking to supplant WSEU as the exclusive bargaining representative for the corrections officers. We acknowledged that the State had made a "strong and credible argument" in support of its disparate treatment of the competing labor organizations. (SUPRA, 20). We further expressed our view that there was "no basis for doubting the good faith judgment of the State" in attempting to reduce the potential for conflict between supporters of each. (SUPRA, 21). Nonetheless, when we balanced these factors against the statutory self-organization rights of employees we concluded that the business necessity/security factors cited by the State did not justify the disparate, discriminatory treatment accorded to the supporters of the competing labor organizations.

In a separate, subsequent proceeding for enforcement of this order (as well as others included within the purview of the case) filed with a branch of the Dane County Circuit Court, the Attorney General of Wisconsin, acting on our behalf, advised the Court that a majority of the Commission (Chairperson Meier and Commissioner Hempe), believed DOC compliance with the WERC order could be achieved by either "leveling up" or "leveling down," i.e., either 1) allowing supporters of each competing labor organization to wear the insignia of the union they favored or 2) prohibiting the supporters of both competing labor organizations to wear the insignia of either union. 1/ The Circuit Court approved the compliance options crafted by the majority.

1/ Commissioner Hahn dissented on the grounds that the supporters of each of the two competing labor organizations should be permitted to wear the insignia of whichever union they supported.

In this case the Examiner now seeks to vitiate the majority's conclusion by eliminating the option it had granted DOC to "level down." The Examiner wrote:

> However, the examiner and commission gave extensive consideration to the state's security argument and they both explicitly rejected it. 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.

But the Examiner misinterprets our opinion and expands it to cover a factual construct not present in the case we decided. For contrary to the Examiner's perception, we neither explicitly nor by inference rejected the State's security argument with respect to allowing the supporters of *each* competing labor organization to wear union insignia. What we rejected was DOC's argument that business necessity, i.e., security concerns, justified its *discrimination against the challenging labor organization by allowing the supporters of the incumbent union to wear its insignia while denying that right to the supporters of the challenger.*

Thus we evened the playing field for the two competitors. We made no pronouncement that the statutory rights of on-duty prison correctional officers that were involved in a heated representational campaign included a right for the respective supporters of each of the competing unions to wear pins or buttons proclaiming their respective allegiances in a prison setting. Neither did we make any declaration that DOC's attempts to avoid open conflicts between its correction officer/employee supporters of competing unions by banning all extraneous insignia not a part of the official uniform lacked a sufficient legal basis.

Certainly, we recognize, in general, the right of workers to wear union pins as a part of their right to self-organize, subject, of course, to the defense of "business necessity." N.L.R.B v. SHELBY MEMORIAL HOSPITAL ASS'N, 1 F 3RD 550, 565 (CA 7, 1993). We are aware that the National Labor Relations Board has found that "the right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity . . ." REPUBLIC AVIATION CORP., 51 NLRB 1186, 1187, 12 LRRM 320, 321 (NLRB, 1943). But we are also cognizant that the United States Supreme Court has found that the "opportunity to organize and proper discipline are both essential elements in a balanced society." Neither, says the Court, are unlimited, ". . . in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee." REPUBLIC AVIATION CORP. V. N.L.R.B., 324 U.S. 793, 797-8 (1945). More specifically, as we found in the precursor of this matter, an employer may prohibit the wearing of items where the employer can demonstrate special circumstances warrant such a prohibition. STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, SUPRA.

In STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, SUPRA, although the Commission found that the leadership of each competing organization appeared to conduct itself responsibly (SUPRA, 23), the record contained examples of heated, intense confrontations between individual corrections officers – confrontations that at times seemed to endanger the safety of some of the individual adversaries. 2/ Under these circumstances, it is difficult to

ignore the fact that the tensions and passions that were produced by campaign confrontations between individual officers actually did disrupt or tended ". . . to disrupt production and to break down employee discipline." See CATERPILLAR TRACTOR CO. v. NLRB, 230 F. 2D 357 (CA 7, 1956).

2/ In one instance, a newsletter containing the logo of one of the competing labor organizations at the state prison at Racine generated an impromptu, heated wrangle between two correctional officers in the presence of approximately 40 prisoners. Another involved a loud and intense confrontation between two other correctional officers at the same institution that was apparently triggered by one officer observing a pen bearing the logo of one of the competing unions being worn by the other. In still another instance at the Fox Lake prison, on two occasions a correctional officer known to favor one of the labor organizations found the lug nuts for his automobile had been loosened, which in one case was not discovered until the wheel came off while the vehicle was being driven. In two other separate instances, one involving an off-prison premises, physical confrontation between Fox Lake correctional officers that very nearly came to blows, the other, Green Bay Reformatory correctional officers, a supporter of each labor union was found to have engaged in conduct towards a fellow officer that was harassing and intimidating. The first four of these incidents were described by DOC (former) Administrator of the Division of Adult Institutions Dick Verhagen, (now) Deputy Superintendent of the Milwaukee Security Facility. Joint Exhibit 3 at Tr. p. 1234-1236. The fourth and fifth incidents were also found by a unanimous Commission to constitute unfair labor practices by the guilty corrections officers involved. Dec. Nos. 29448-C, 29495-C, 29496-C & 29497-C.

For unfettered debate on union organizational issues within a factory shop or an office is one thing. It may be vociferous, temporarily unsettling, and even informative and desirable. But debate in those more cloistered environs lacks the potentially disruptive factor of being presented within a large population of prison inmates – in a population that is quick to recognize and attempt to exploit divisions among their guards – a factor that the State amply demonstrated through the testimony and evidence it presented.

As the record in STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, SUPRA, makes clear, the representational campaigns of each organization did, indeed, engage the passions and emotions of corrections officers (both on and off prison premises) to a degree somewhat reminiscent of the representational labor strife of earlier eras. To contend that the wearing of union insignia directly triggered none of these incidents is not only myopic, but also unrealistic, for it ignores the volatile effects on human emotions that even mere "insignia" have produced throughout history. 3/ In the full context of the representational competition, it

is equally clear that the competing insignias, by themselves, appeared to have an inflammatory effect on some of the correctional officers, even in the presence of imprisoned convicted felons.

3/ Insignia are symbols. Some symbols, of course, can be unifying, e.g., the reactions of most Americans to the American flag raised by New York firefighters at Ground Zero or that of combat U.S. Marines to the American colors when raised by fellow - Marines at Mt. Suribachi. Others may be divisive and predictably violent, e.g., reactions to Nazi insignia and logos paraded through Skokie, Illinois. The point is that symbols of heated or contested issues that are perceived through lens of self-interest, self-respect or organizational loyalties and expressed by even objects as small as pins, pens and buttons can generate reactions that are divisive, disruptive, and even violent.

The testimony of former DOC Administrator of Adult Institutions Dick Verhagen (now Deputy Superintendent of the Milwaukee Security Facility) is instructive on this point. In direct response to the question of "(w)hat underlying rationale is there for going with the no union insignia pins given the choice of leveling up or down," Verhagen gave the following answer:

> The department and particularly the institution are very concerned in the security and operation of the institution based on what could be perceived by inmates as competitiveness between employees in terms of a rival union affiliation. Inmates are very sophisticated and manipulative in terms of perceiving or inviting fighting between staff among each other. . . . But the issues of idleness, crowding, heat we've had, gang affiliation, out-of-state placement, et cetera, there's so much tension going on in an institution on a day-to-day basis anyway. We had obvious concerns about how further tensions that inmates would manipulate among staff and take away from the responsibilities of an officer to supervise and manage that population. *It was detrimental to the security of our operations*. Tr. at 27-8. (Emphasis supplied).

Certainly, discipline can be imposed for abusive, coercive, insulting actions of misguided adherents of either organization. But that seems rather analogous to the proverbial locking of the stable door after the horse in missing. As the State suggests, it should not be necessary that further abusive and disruptive conduct be suffered – attended, perhaps, with the further possibility of prisoner misbehavior – before DOC is permitted to take reasonable steps to reduce or eliminate actions, displays – or symbols – that can trigger these kinds of encounters.

The record in this case offers sufficient legal support to justify DOC in its selection of the option a Commission majority earlier extended of "leveling down." Very clearly, although the leaders of both labor organizations involved in this matter appear to have conducted themselves responsibly, the same cannot be said for some of their respective supporters. The organizing campaign of the "raiding" organization and counter-measures of the incumbent generated unusual heat, all in the environs of Wisconsin prisons. Under these special circumstances, DOC determined that "leveling down" offered a more prudent course of action.

Whether DOC's choice is the choice that we might initially favor is immaterial. There can be no question that DOC is better qualified to manage a prison and a prison system than are we. The discretion a Commission majority granted the Department to "level up" or "level down" was advisedly made with the hope and expectation that DOC would exercise its discretion wisely in conjunction with its experienced perception of reasonable security needs in operating a prison system. Based on the entirety of the record we view, we cannot say that DOC has failed to do so.

Finally, as the State argues, for us now to find the Department guilty of an unfair labor practice for following in good faith one of the options we expressly approved in the not very distant past would not only represent unjustifiable micromanagement of a prison system that we cannot be expected to understand fully, but an irresponsible public policy as well. This Commission can hardly maintain credibility if it condemns today as illegal what two years ago it approved as lawful compliance – an approval that was subsequently echoed by the Circuit Court of Dane County. Litigants appearing before us should be able to rely on our word.

Dated at Madison, Wisconsin, this 22nd day of October, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Department of Employment Relations

CONCURRING OPINION OF CHAIRPERSON STEVEN R. SORENSON

As reflected in the Examiner's Findings of Fact, in STATE OF WISCONSIN, a Commission majority (Chair Meier and Commissioner Hempe) concluded that the State would be complying with the Commission's remedial Order if it prohibited the wearing of all union insignia. The State thereafter amended its uniform policy to prohibit the wearing of all union insignia. The instant complaint was then filed by WSEU.

Where, as here, the Commission has advised a party that it will be complying with a Commission Order if it engages in certain conduct, I believe the Commission is thereafter foreclosed (absent a change in relevant circumstances not present here) from determining that the party engaging in that conduct has violated the laws the Commission administers.

On that basis, I reverse the Examiner as to his conclusion that the State committed an unfair labor practice within the meaning of Sec. 111.84(1)(a), Stats.1/

1/ My conclusion is consistent with the provisions of Sec. 227.57(8), Stats., that provide for reversal of agency action that is ". . . inconsistent with an agency rule, an officially stated agency policy or prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency."

My reversal of the Examiner should not be understood as a concurrence with the merits of the Commission's decision regarding compliance in STATE OF WISCONSIN. As a general matter, I find myself in agreement with Commissioner Hahn's view that there is a statutory right to wear union insignia which can only be diminished by a compelling security interest not sufficiently demonstrated here. Thus, in all future cases, I will evaluate the facts and law presented and cast my vote without regard to my reversal of the Examiner here.

Dated at Madison, Wisconsin, this 22nd day of October, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steven R. Sorenson /s/
Steven R. Sorenson, Chairperson

Department of Employment Relations

DISSENTING OPINION OF COMMISSIONER PAUL A. HAHN

I would affirm the Examiner.

As I indicated during compliance proceedings in STATE OF WISCONSIN, the security concerns advanced by the State were not then sufficient to override the right of employees to engage in concerted activity in support of a labor organization through the wearing of union pins. The record before the Examiner does not contain any significant additional evidence as to security concerns than was earlier presented by the State in STATE OF WISCONSIN. Therefore, it continues to be my view that there is a right to wear union pins. Therefore, I dissent.

Dated at Madison, Wisconsin, this 22nd day of October, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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