

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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AFSCME COUNCIL 32, and its AFFILIATED LOCAL 1215,  
BENJAMIN GRUBER, LOCAL 1215 PRESIDENT, PAUL SICKMAN, LOCAL 1215  
STEWARD, and PATRICK M. NEAL, LOCAL 1215 STEWARD, Complainants,

vs.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES, Respondent.

Case ID: 306.0015  
Case Type: COMP\_PPS

DECISION NO. 40370-A

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Appearances:

Robert Lindsay and Mark Sweet, Attorneys, Sweet and Associates LLC, 2510 E. Capitol Drive, Milwaukee, Wisconsin, appearing on behalf of the Complainants.

David Makovec, Assistant Legal Counsel, Department of Administration, 101 E. Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Natural Resources.

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

On December 11, 2023, AFSCME Council 32, its affiliated Local 1215, and Benjamin Gruber filed a complaint with the Wisconsin Employment Relations Commission asserting that the State of Wisconsin Department of Natural Resources had committed certain unfair labor practices within the meaning of the State Employment Labor Relations Act. The complaint was subsequently amended to add Paul Sickman and Patrick M. Neal as Complainants.

On October 22, 2024, Respondent State filed an Answer denying that it had committed any unfair labor practices.

On October 30, 2024, the first day of hearing was held in Madison, Wisconsin before Commission Examiner Peter G. Davis who had been appointed to serve in that capacity on May 13, 2024. A second day of hearing was held November 22, 2024, in Madison, Wisconsin before Examiner Davis.

The parties filed written argument on January 31, 2025, and the State filed a reply brief on February 21, 2025.

On July 21, 2025, Examiner Davis invited the parties to file supplemental argument. The State advised that it would not be doing so. Complainants filed supplemental argument on July 31, 2025.

Effective September 11, 2025, Davis became the Chairman of the Wisconsin Employment Relations Commission.

The Commission hereby apologizes to the parties for the delay they have experienced as to the issuance of this decision.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following:

### **FINDINGS OF FACT**

1. At all times material herein, Benjamin Gruber, Paul Sickman and Patrick M. Neal were employed by the State of Wisconsin Department of Natural Resources (DNR).
2. Gruber, Sickman and Neal engaged in activity to further the work place interests of certain DNR employees.
3. The State of Wisconsin Department of Natural Resources was aware of the activity of Gruber, Sickman and Neal on behalf of certain DNR employees.
4. The State of Wisconsin Department of Natural Resources was hostile to the activity of Gruber, Sickman and Neal on behalf of certain DNR employees.
5. The State of Wisconsin Department of Natural Resources took adverse action against Gruber, Sickman and Neal at least in part out of hostility to their activity on behalf of certain DNR employees.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

### **CONCLUSIONS OF LAW**

1. AFSCME Council 32 and its affiliated Local 1215 is a “labor organization” within the meaning of Section 111.81(12) of the State Employment Labor Relations Act.
2. Within the meaning of Section 111.82 of the State Employment Labor Relations Act, Benjamin Gruber, Paul Sickman and Patrick M. Neal engaged in lawful concerted activity for the purpose of mutual aid or protection of certain employees of the State of Wisconsin Department of Natural Resources.
3. The State of Wisconsin Department of Natural Resources’ adverse actions against Benjamin Gruber, Paul Sickman and Patrick M. Neal had a reasonable tendency to interfere with,

restrain or coerce Gruber, Sickman and Neal in the exercise of their rights under Section 111.82 of the State Employment Labor Relations Act. Thus, the State of Wisconsin Department of Natural Resources thereby committed unfair labor practices within the meaning of Section 111.84(1)(a) of the State Employment Labor Relations Act.

4. The State of Wisconsin Department of Natural Resources committed unfair labor practices within the meaning of Section 111.84(1)(c) of the State Employment Labor Relations Act by taking adverse action against Benjamin Gruber, Paul Sickman and Patrick M. Neal at least in part out of hostility toward their lawful concerted activity.

5. Complainants are a “prevailing party” within the meaning of Wis. Stat. § 227.485(3).

6. The position of the State of Wisconsin Department of Natural Resources in this matter was “substantially justified” within the meaning of Wis. Stat. § 227.485(2)(f).

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following:

### **ORDER**

1. The State of Wisconsin Department of Natural Resources, its officers and agents, shall cease and desist from retaliating against Benjamin Gruber, Paul Sickman, Patrick M. Neal and any other employee of the Department of Natural Resources based on hostility toward the exercise of said employee’s statutory right to engage in lawful concerted activity and shall take the following affirmative action which the Commission concludes will effectuate the purposes of the State Employment Labor Relations Act:

- (a) Place a copy of this Decision in the personnel files of Benjamin Gruber, Paul Sickman and Patrick M. Neal.
- (b) Rescind and expunge the Letters of Expectation received by Benjamin Gruber and Paul Sickman from their personnel files.
- (c) Email the following Notice on pg. 4 of this Decision to all Wardens employed by the State of Wisconsin Department of Natural Resources.

2. The motion for attorney fees is denied.

Issued at Madison, Wisconsin, this 16<sup>th</sup> day of March 2026

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

*Electronically signed by: Peter G. Davis*

Peter G. Davis, Chairman

**NOTICE**

Pursuant to a March 16, 2026, Order from the Wisconsin Employment Relations Commission, the State of Wisconsin Department of Natural Resources hereby notifies its employees that they have the statutory right to engage in lawful, concerted activity to address workplace issues and that the State cannot and will not retaliate against any employee who exercises that statutory right.

Dated:

Signed by Karen Hyun, Secretary  
Wisconsin Department of Natural Resources

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER**

Complainants assert that the State of Wisconsin Department of Natural Resources (DNR) has retaliated against Gruber, Sickman and Neal out of hostility toward their lawful concerted activity and thereby committed unfair labor practices within the meaning of Sections 111.84(1)(a) and (c) of the State Employment Labor Relations Act.

Respondent State denies that it committed any unfair labor practices.

**Relevant Statutes**

Section 111.82 of the State Employment Labor Relations Act (SELRA) provides in pertinent part:

Employees have the right . . . to engage in lawful, concerted activities for the purpose of . . . mutual aid or protection.

Sections 111.84 (1)(a) and (c) provide in pertinent part:

(1) It is an unfair labor practice for an 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 . . .

(c) To encourage or discourage membership in any labor organization by discrimination in hiring, tenure or other terms or conditions of employment.

**Applicable Legal Standards and General Framework for Analysis**

A successful claim of discrimination in violation of Sec. 111.84 (1)(c), Stats., requires proof of the following four elements: (1) that the employees were engaged in lawful concerted activities; (2) that the employer was aware of those activities; (3) that the employer bore animus towards those activities; and (4) that the employer took adverse action against the employees at least in part out of animus towards those activities. *Employment Relations Department v. WERC*, 122 Wis.2d 132 (1985)

A successful claim of interference in violation of Sec. 111.84(1)(a), Stats. can be made by establishing the same four elements. *State of Wisconsin, Dec. No. 31207-C (WERC, 3/06)*.

The statutory phrase “lawful concerted activity” encompasses more than being a union member, steward or officer. Such activity is a right individual employees have whether or not they are affiliated in some manner with a labor organization such a Local 1215. Thus, to the extent the State defends against the complaint allegations by asserting that specific DNR supervisors were unaware of the formal roles of Gruber, Sickman or Neal within Local 1215, that defense is not persuasive if the supervisors were nonetheless aware of the lawful concerted advocacy by employees Gruber, Sickman or Neal on behalf of other employees as to workplace issues.

It is also important to acknowledge that “lawful concerted activity “ can create unpleasant circumstances. As the Commission noted in *Clark County, Dec. No. 30361-B (WERC, 11/03)*, lawful concerted activity is “often exercised in tense, chilly or hostile atmospheres, because by its very nature such activity involves challenging the employer’s authority.” Thus, the Commission noted that vocal, condescending and/or disrespectful conduct addressing workplace issues is generally “concerted” activity protected by law. The Commission does acknowledge that in the quasi-law enforcement context inhabited by DNR wardens, some speech and conduct that has legal protection in a non-quasi-law enforcement setting may lose that protection in the DNR warden context due to the legitimate need for a modicum of respect for the chain of command. In the Commission’s judgment, none of the language or conduct at issue in this matter lost statutory protection. It is also noted that supervisors on the receiving end of belligerent expressions of lawful concerted activity are lawfully entitled to be offended as long as no retaliation occurs.

Lastly, the Commission acknowledges the reality that union leaders such as Gruber, Sickman and Neal tend to perceive any negative interaction with management as inevitably based on some animus toward their exercise of statutory rights. As will be discussed more fully below, that is not always the case. Furthermore, conflict with management over individual matters is not protected activity because such matters are not raising issues that significantly impact others – they are not “concerted”. Thus, to the extent some of the criticisms in the disputed evaluations reflect individual performance issues as to Gruber and Sickman, those criticisms are not prohibited by SELRA.

In this matter, as will be discussed more fully below, it is the DNR’s negative reaction to the exercise of lawful concerted activity that establishes the animus Complainants persuasively allege is present. Criticism of the tone of Gruber and Sickman’s interactions with management in their evaluations clearly demonstrates the animus DNR supervisors held toward their lawful concerted advocacy on behalf of DNR employees.

Proof of animus toward Neal is not as evident. It rests on his assertions that after participating in a meeting with DNR management as a Local 1215 representative, his work performance came under greater scrutiny, DNR sought his retirement, and he was subjected to a potential disciplinary investigation. As will be discussed more fully, close scrutiny of his retirement and investigatory allegations leads the Commission to conclude that DNR’s conduct was not based on animus toward his lawful concerted activity. Further, it is apparent that, as was true for Gruber and Sickman, DNR had some legitimate concerns about aspects of his work performance. Nonetheless, the record as a whole persuades the Commission that animus did exist toward Neal’s lawful concerted activity. His advocacy on behalf of other employees as a Local 1215 steward led DNR to nit-pick at minor matters that had previously not been issues.

The fourth element of a successful retaliation claim is proof of adverse action against employees. The State asserts that negative evaluations and Letters of Expectation are not adverse action as they lack the formality and impact of a suspension or discharge. The Commission acknowledges the disparity of impact between suspension and discharge and receipt of a Letter of Expectation or a less favorable evaluation or nit picking on minor issues. Nonetheless, it is clear that even these relatively minor retaliatory actions have a negative and potentially chilling impact on the employees who receive them. Thus, the Commission rejects this State contention.

## **Gruber**

The evidence as to Gruber's interactions with DNR management establishes instances in which Gruber's behavior and communication were focused more on individual performance concerns rather than his advocacy on behalf of fellow DNR employees. Thus, his 2023 performance evaluation reflect both DNR's legitimate interest in having constructive dialogue about individual workplace issues as well as criticism as to how Gruber raised workplace issues impacting other employees. To the extent that some of the language in portions of the evaluation (as confirmed by the hearing testimony of DNR supervisors) reflects criticism of the tone used by Gruber when advancing workplace concerns, animus and retaliation are established and violations of both Secs. 111.84 (1)(a) and (c), Stats. are proven.

As to the Letter of Expectation (LOE) Gruber received for making an inappropriate joke about supervisors during a training session, it is apparent that DNR choose to issue an LOE (as opposed to conducting a coaching session) because of a linkage to its already expressed performance evaluation concerns about Gruber's advocacy tone. Because the escalation in the level of the DNR response was linked to what has been found to be its prior illegal conduct, the issuance of the LOE is also found to be violative of Secs. 111.84 (1)(a) and (c), Stats.

## **Sickman**

As was true for Gruber, management's evaluative criticisms reflect a mix of negative commentary as to individual performance issues and to his lawful concerted activity on behalf of his fellow employees. It is the latter that violates Secs. 111.84(1)(a) and (c), Stats.

Complainants also specifically focus on the Letter of Expectation Sickman received as a consequence of his interaction with management when he objected to how a fellow employee was being treated as to a potential workplace transfer. As noted in the earlier reference to the *Clark County* decision, the exercise of lawful concerted activity can be confrontational and generally does not thereby lose its statutory protection. Sickman's conduct in the heated interaction with management did not exceed the bounds of statutorily protected activity. Issuance of a Letter of Expectation as a direct consequence of Sickman's exercise of his statutory rights is an adverse action reflecting DNR management hostility to said exercise and violates Secs. 111.84(1)(a) and (c), Stats.

Complainants also contend that SELRA was violated when Sickman was not allowed to address fellow wardens about Local 1215 matters at the end of a DNR training session. Complainants assert that other non-DNR organizations have been allowed to make presentations at DNR training session and thus that denying Sickman that same opportunity was a discriminatory violation of SELRA rights. Unlike the evidence as to how other organizations have successfully sought to speak by asking to be formally placed on a meeting agenda, the record establishes that Sickman did not seek to be placed on the meeting agenda and simply spontaneously rose as the meeting was breaking up to try to answer any questions wardens might have about Local 1215. Thus, Complainants have failed to establish any discriminatory conduct as to this denial.

**Neal**

At hearing, Neal testified that he attended the May 2023 meeting with DNR management, and that, as a Local 1215 steward, he provides employees with assistance as to workplace issues. He further testified that ever since the May 2023 meeting, his work has been subjected to greater scrutiny. Complainants contend that this greater scrutiny is an illegal attempt by the State DNR to chill his lawful concerted activity as a steward. As discussed earlier herein, the Commission has found that contention to be persuasive.

Complainants more pointedly assert that discussion of Neal's retiring and the DNR investigation related to his personal use of technology were also based on hostility to his lawful concerted activity.

As to the discussion of Neal's potential retirement, Complainants presented text messages from a participant in a March 2024 late-night casual conversation among several DNR employees-including Neal's supervisor. The text messages asserted that Neal's supervisor had said he really wanted Neal to retire. Complainants argue that the supervisor wanted Neal to retire so Neal could no longer advocate on behalf of employees.

The sender of the late-night texts did not testify, and aside from Neal's supervisor, nor did anyone else who might have been a participant. Neal's supervisor did testify and described the conversation as generally addressing long-standing concerns about succession planning whenever Neal retires and DNR loses his extensive training expertise. More specifically he described concerns he had as to Neal's ability to successfully retire given his devotion to work and thus he sought advice from a friend of Neal's on what he could do to help facilitate a healthy separation from DNR. He indicated the friend advised that Neal was not going to have any problem successfully retiring when the time came. It seems apparent that it is the "how can I help" portion of the conversation that was interpreted by the text sender as an interest in having Neal retire. Further, it is undisputed that Neal and his supervisor had several conversations about succession planning prior to March 2024. Ultimately, the Commission is satisfied that Complainants have not met their burden of proof as to any alleged State DNR interest in having Neal retire sooner rather than later because of his lawful concerted activity.

Turning to the DNR investigation of Neal's use of certain technology for DNR work, the record reflects DNR efforts to allow some use of technology on employee's personal devices while it was attempting to gain IT approval. Thus, it is clear that Neal had been allowed to use certain technology on his personal devices for work purposes. It is also clear that DNR had been concerned about the risks of such use. The technology that was the focus of the DNR investigation of Neal was new. The record establishes that Neal's supervisor was not previously aware of its use and had not given Neal permission to use it. DNR initiation of a formal investigation into Neal's use of this technology does seem to be an unnecessarily aggressive response to the matter and raises an inference that the action was motivated in some part by DNR knowledge of Neal's lawful concerted activity. No action was taken against Neal following the investigation. On balance, the Commission is again satisfied that Complainants have not met their burden of proof as to any alleged State DNR motivation to investigate Neal's technology use because of his lawful concerted activity.

### **Attorney Fees**

The Commission concludes that although Complainants are a “prevailing party” within the meaning of Wis. Stat. § 227.485 (3), the State was “substantially justified” within the meaning Wis. Stat. § 227.485 (2)(f) regarding the position it took before the Commission. Therefore, the request for costs and fees is denied.

The State has the burden to establish that its position was “substantially justified,” and to meet this burden the State must show (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced. *Board of Regents v. Personnel Commission*, 254 Wis.2d 148, 175 (2002). Losing a case does not raise the presumption that the agency was not substantially justified nor does advancing a novel but credible extension or interpretation of the law. *Sheely v. DHSS*, 150 Wis.2d 320, 338 (1989).

In *Behnke v. DHSS*, 146 Wis.2d 178 (1988), the Court of Appeals adopted an “arguable merit” test for determining whether a governmental action had a reasonable basis in law and fact. It defined a position which has “arguable merit” as “one which lends itself to legitimate legal debate and difference of opinion viewed from the standpoint of reasonable advocacy.” In *Sheely*, the Supreme Court commented on the “arguable merit” test as follows:

Although we disagree with the court of appeals’ assessment of a reasonable basis in law and fact as being equivalent to “arguable merit,” we do note that its definition of “arguable merit” is substantially similar to our comment here that a “novel but credible extension or interpretation of the law” is not grounds for finding a position lacks substantial justification. *Id.* at 340.

In this matter, particularly in the context of the rejection of some of Complainants’ contentions as to specific violations, the Commission is satisfied that the State had a reasonable basis in truth for the facts alleged, a reasonable basis in law for the theory propounded, and a reasonable connection between the facts alleged and the legal theory advanced. Therefore, the request for fees and cost is denied.

Issued at Madison, Wisconsin, this 16<sup>th</sup> day of March 2026

### **WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

*Electronically signed by: Peter G. Davis*

Peter G. Davis, Chairman