

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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AFSCME COUNCIL 32, AFSCME, AFL-CIO and its Affiliated  
LOCAL 163, TIMOTHY BENIKE, and CHAD BIRKHOLZ, Complainants

vs.

WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0609  
Case Type: COMP\_PPS  
Decision No. 40699-A

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Appearances:

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

Nicole Porter, Attorney, 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 Corrections.

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

On November 27, 2023, AFSCME Council 32, AFSCME, AFL-CIO and its affiliated Local 163, filed a complaint with the Wisconsin Employment Relations Commission alleging that the State of Wisconsin Department of Corrections (DOC) had committed certain unfair labor practices within the meaning of the State Employment Labor Relations Act.

The complaint was assigned to Commission Examiner Peter G. Davis.

On December 1, 2023, DOC filed a Motion to Dismiss. In response, an amended complaint was filed on December 9, 2023, which added Timothy Benike and Chad Birkholz as named Complainants. On January 17, 2024, DOC filed another Motion to Dismiss or To Make Complaint More Definite and Certain. On January 30, 2024, Complainants filed a response in opposition to said Motions. On February 14, 2024, Examiner Davis advised the parties that he was denying the Motion to Dismiss and the Motion to Make More Definite and Certain.

On April 1, 2024, DOC filed an Answer to the amended complaint and a hearing was held on April 9, 2024, by Examiner Davis at the Kettle Moraine Correctional Institution in Plymouth, Wisconsin.

The parties thereafter filed post-hearing briefs (and supplemental briefs at the request of the Examiner) and the record was closed on September 5, 2024, when DOC confirmed that it would not be filing any additional argument.

On November 18, 2024, the Commission formally appointed Examiner Davis.

Having reviewed the record and considered the matter, the Examiner makes and issues the following:

### **FINDINGS OF FACT**

1. AFSCME Council 32, AFSCME, AFL-CIO and its affiliated Local 163, herein AFSCME, is a labor organization that has employee members who work for the State of Wisconsin Department of Corrections (DOC) at the Kettle Moraine Correctional Institution (KMCI). Timothy Benike and Chad Birkholz are members of AFSCME and officers in Local 163.

2. AFSCME purchased and distributed outer jackets to members so members could choose to wear them to work at KMCI. The jackets were the same color (black) as uniform jackets DOC purchases for employees to wear and as some personal jackets DOC allows employees to wear. The jackets had the number 163 on the front where an insignia might typically be located. DOC allows employees to wear jackets with an insignia typical of brands such as Nike.

3. DOC prohibited AFSCME members from wearing the jackets because the jackets displayed the number 163 which DOC concluded was contrary to an existing DOC uniform policy.

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

### **CONCLUSIONS OF LAW**

1. Section 111.82 of the State Employment Labor Relations Act gives employees of the State of Wisconsin the right to engage in lawful, concerted activities for the purpose of . . . mutual aid or protection.

2. Section 111.82 of the State Employment Labor Relations Act gives Timothy Benike and Chad Birkholz the right to wear the jackets described in Finding of Fact 2 unless wearing said jackets jeopardizes a compelling security interest.

3. The State of Wisconsin Department of Corrections has not established a compelling security interest that is jeopardized by employees wearing the jackets described in Finding of Fact 2.

4. By prohibiting employees at the Kettle Moraine Correctional Institution from wearing the jackets described in Finding of Fact 2, the State of Wisconsin Department of Corrections

interfered with, restrained and coerced employees in the exercise of rights guaranteed by Section 111.82 of the State Employment Labor Relations Act, and thus committed an unfair labor practice within the meaning of Section 111.84(1)(a) of the State Employment Labor Relations Act.

5. When it prohibited employees from wearing the jackets described in Finding of Fact 2, the State of Wisconsin Department of Corrections was not motivated by animus toward the exercise of the employee right to engage in lawful concerted activity and thus did not commit an unfair labor practice within the meaning of Section 111.84(1)(c) of the State Employment Labor Relations Act.

Based on the above and forgoing Findings of Fact and Conclusions of law, the Examiner makes and issues the following:

### **ORDER**

The portion of the complaint alleging a violation of Section 111.84 (1)(c) of the State Employment Labor Relations Act is dismissed.

The State of Wisconsin, its officers and agents, shall immediately cease and desist from prohibiting employees at the Kettle Moraine Correctional Institution from wearing the Local 163 jackets described in Finding of Fact 2 and take the following affirmative action:

Post and distribute the following Notice to all employees at the Kettle Moraine Correctional Institution:

### **NOTICE**

Pursuant to an Order issued by the Wisconsin Employment Relations Commission, the State of Wisconsin, Department of Corrections advises employees at the Kettle Moraine Correctional Institution that they have the right to engage in lawful, concerted activity for their mutual aid or protection-including the right to wear in the workplace the existing black jackets distributed by AFSCME with the number 163.

\_\_\_\_\_  
Warden

\_\_\_\_\_  
Date

\_\_\_\_\_  
Secretary, Department of Corrections

\_\_\_\_\_  
Date

**THIS NOTICE SHALL REMAIN POSTED IN THE WORKPLACE FOR THIRTY (30) DAYS AND SHALL NOT BE COVERED BY OTHER MATERIALS OR DEFACED IN ANY WAY.**

Issued at Madison, Wisconsin, this 21<sup>st</sup> day of November 2024.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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Peter G. Davis, Hearing Examiner

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

Section 111.82 of the State Employment Labor Relations Act provides in pertinent part that employees of the State of Wisconsin have the right to “engage in lawful, concerted activities for the purpose of . . . mutual aid or protection.”

Section 111.84(1)(a) of the State Employment Labor Relations Act provides in pertinent part that it is an unfair labor practice for the State to “interfere with, restrain or coerce employees in the exercise of their rights guaranteed in s. [111.82](#).”

Consistent with the view of the United States Supreme Court in *Republic Aviation Corp. v NLRB*, 324 U.S. 793 (1945) when interpreting similar statutory language in the National Labor Relations Act, the Wisconsin Employment Relations Commission has held that the exercise of the statutory right quoted above includes the right of State employees to wear union-related insignia in the workplace absent some “special circumstances.” *State of Wisconsin*, Dec. Nos. 29448-C, 29495-C, 29496-C, and 29497-C (WERC, 8/2000); *State of Wisconsin* Dec. No. 30166-B (WERC, 10/2002). In the context of a prison setting, the Commission has viewed the “special circumstance” analysis to focus on whether there is a “security interest” that is sufficiently compelling to warrant a restriction on the exercise of this statutory right thru the wearing of union insignia.<sup>1</sup>

Here, DOC has not proven that a compelling security interest exists. The primary security interest of distinguishing between inmates and employees is not jeopardized because the color of the jackets is the same as the color of the DOC issued jackets.<sup>2</sup> Any secondary security interest related to a speculative inmate interest in causing friction between those employees wearing the jackets and those who do not is minimal because the number 163 is relatively small and found in a seal with the KMCI initials and the words “DEPARTMENT OF CORRECTIONS”. The other interests cited by DOC in support of its uniform policy<sup>3</sup> are not primarily “security-based” and, in any event, do not warrant a restriction on the statutory right in question.

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<sup>1</sup> While the Commission was grappling with unique circumstances in Dec. No. 30166-B, Complainants correctly argue that two of the three Commissioners explicitly adopted the analysis I am utilizing, and the third Commissioner supported that analysis in an earlier related decision.

While the insignia in that matter was a union pin, given the small size of the number 163 on the jackets in question, I see no distinction between the right to wear a union pin and the AFSCME jackets in dispute here.

<sup>2</sup> While much of the hearing focused on whether the AFSCME jackets were or were not compliant with the portion of the uniform policy that allows employees to wear personal jackets, I am satisfied that is a non-issue. It is the comparison between DOC issued jackets and the AFSCME purchased jackets that is critical to the analysis. Thus, should DOC modify or end the right to wear personal jackets, it is of no consequence. However, in *State of Wisconsin*, Dec. Nos. 29448-C, 29495-C, 29496-C, and 29497-C (WERC, 8/2000), the Commission cited precedent under the National Labor Relations Act to the effect that when an employer allows the wearing of personal items in the workplace, the employer is hard pressed to justify depriving employees of the right to wear union items.

<sup>3</sup> Those other interests are “to ensure a professional work environment, instill public confidence, establish respect from inmates, offenders and juveniles under the supervision or within the custody of the Department . . . .”

Given the foregoing, I find that the prohibition against wearing the AFSCME purchased jackets interferes with KMCI employees statutory right under Section 111.82 of the State Employment Labor Relations Act and thus constitutes an unfair labor practice within the meaning of Section 111.84(1)(a) of that Act. Respondent State of Wisconsin Department of Correction is ordered to cease and desist from prohibiting employees from wearing the AFSCME jackets and to advise employees that they are allowed to wear the jackets by posting/distributing the Notice that is part of this decision.<sup>4</sup>

Issued at Madison, Wisconsin, this 21<sup>st</sup> day of November 2024.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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Peter G. Davis, Hearing Examiner

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<sup>4</sup> Complainants have also asserted that the DOC action was based at least in part on illegal animus toward the employees lawful concerted activity. I am satisfied that the rejection was based on a DOC view that the jackets did not conform to the DOC uniform policy. I further note that the Warden seemed open to allowing the jackets to be worn but his receptiveness got side-tracked by the independent uniform-based action of a supervisor who the Warden no doubt then felt obligated to support. Thus, I have dismissed the alleged Section 111.84(1)(c) unfair labor practice.