

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MANITOWOC COUNTY

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: Case VI
: No. 11622 ME-324
: Decision No. 8152-E
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Mr. Michael J. Wilson, District Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 370, Manitowoc, Wisconsin 54220, and Lawton and Cates, Attorneys at Law, by Mr. Bruce F. Ehlke, Tenney Building, 110 East Main Street, Madison, Wisconsin 53703, on behalf of the Union.

Manitowoc County having filed a petition requesting the Wisconsin Employment Relations Commission to clarify an existing collective bargaining unit of courthouse employees, by determining whether the Register in Probate should be excluded from said unit which is currently represented by Manitowoc County Courthouse Employees, Local 986A, AFSCME, AFL-CIO; and hearing in the matter having been held in Manitowoc, Wisconsin, on August 11, 1980, before Examiner Amedeo Greco; 1/ and briefs having been received from the parties by November 10, 1980; and the Commission, by letter dated January 9, 1981, having invited the parties to file additional arguments based on a circuit court decision 2/ involving the status of Registers in Probate which decision was rendered subsequent to the filing of briefs herein; and the parties having filed such additional arguments; and the Commission having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order Clarifying Bargaining Unit.

2. That Manitowoc County, hereinafter referred to as the County, is a municipal employer which operates and maintains a courthouse in Manitowoc, Wisconsin.

- 1/ Said hearing was a consolidated hearing which also involved the unit placement of Lieutenants in Petitioner's Sheriff Department. The Commission, by separate decision on January 12, 1981, ruled that the Lieutenants should be excluded from the collective bargaining unit in the Sheriff's Department. Manitowoc County, Decision No. 18351 (1/81).
- 2/ William E. McEwen, Circuit Judge, et al. v. Pierce County and Pierce County Courthouse Employees Local 556A, AFSCME, AFL-CIO, Case No. 77-CI-D116, November 25, 1980.

3. That the County and Union are parties to a collective bargaining agreement which recognizes the Union as the exclusive collective bargaining representative of certain courthouse employees in the employ of the County; that for a number of years the Register in Probate/ Probate Registrar 3/ has been included in said unit; that the Register in Probate keeps office hours as required by the County Board under Section 59.14, performs the appropriate range of duties which are applicable in the County and spelled out in Section 851.72 and 865.07-865.21 and has the powers enumerated in Sections 851.73 and 865.065 of the Wisconsin Statutes; that in particular the incumbent, Dorothy Brandt, assists in the administration of estates by performing various administrative duties such as processing petitions, publishing notices for hearing, processing claims against the estate, keeping inventory, maintaining final accounts, and publishing final judgements; and that Brandt also handles summary assignments, termination of joint tenancies, summary settlements, guardianships, and serves as a hearing officer in certain probate matters.

4. That on January 4, 1980 the three Circuit judges for the Circuit Court of the County, who appointed her pursuant to Sections 851.71 and 865.065, jointly signed an order formally delegating certain powers to Brandt, which reads in relevant part as follows:

IT IS ORDERED that in addition to her other powers and duties, Dorothy Brandt, as Register in Probate, is assigned the powers and duties of a probate court commissioner. The Register in Probate shall have the authority to:

(A) Administer oaths, take depositions and testimony, and certify and report the depositions and testimony, take and certify acknowledgements, allow accounts and fix the amount and approve the sufficiency of bonds; and,

(B) Determine any probate matter over which the Circuit Judges of Manitowoc County have jurisdiction, and sign any order or certificate required in such determinations; except the following matters which the Circuit Judges hereby retain jurisdiction of:

- (A) Will contests;
- (B) Claims in dispute;
- (C) Other disputed matters requiring an evidentiary hearing.

5. That in April 1980 the County prepared a job description for the position held by Brandt, which contains the following illustrative examples of work performed by her:

1. Checks all probate papers filed with the court to be sure they are properly executed; presents them to the court for signature and files them.
2. Supervises all files so that attorneys comply with statutory filing requirements and closing of estates.
3. Collects all fees in probate matters; keeps a receipt book and turns in money to County Treasurer at end of each month.
4. Takes over duties performed by a judge in informal court proceedings.
5. Keeps all court records regarding guardianships, protective placements; sets up court hearing dates.

3/ The Register in Probate also serves as Probate Registrar and a Probate Court Commissioner. For purposes of this proceeding, the Commission shall refer to the incumbent as the Register in Probate, but shall consider all of the duties performed by her under these three titles.

6. Drafts and types all paperwork with regard to mental commitments, alcoholic and drug commitments; follows the case to either commitment or dismissal.
7. Keeps all adoption records; sets up court hearing dates; gets reports from investigative agencies; collects all fees; sends reports of the adoption to the State, and gets new birth certificate issued.
8. Orders all office supplies.
9. Makes out annual budget and annual reports.
10. Makes certified copies of all documents; replies to mail, answers telephone, and assists with microfilming of all court files.
11. Keeps daily statistical reports of Court administrative activities and reports same each week to State Court Administrator.
12. Administers oaths.
13. Takes depositions and testimony, and certifies and reports the depositions and testimony.
14. Takes and certifies acknowledgements.
15. Allows accounts and fixes the amount and approves the sufficiency of bonds.
16. Determines any probate matter over which the Circuit Judges of Manitowoc County have jurisdiction, and signs any order or certificate required in such determinations; except the following matters which the Circuit Judges hereby retain jurisdiction of: Will contests; Claims in dispute; other disputed matters requiring an evidentiary hearing.
17. Performs other duties as assigned.

6. That Brandt does not participate in the formulation or implementation of management policy on behalf of the County and does not have the power to commit its resources; and that she does prepare the proposed budget figures for her office based on anticipated purchases of office supplies and equipment (in an amount less than \$5,000 per year) and submits them to the Clerk of Court for possible inclusion as part of the overall court budget and approval by the County Board and she also makes ministerial decisions with regard to the expenditure of sums from the budget previously established by requisitioning the purchase of necessary supplies.

7. That Brandt's salary is paid by the County and that her rate of pay at the time of the hearing herein, which was established by the collective bargaining agreement between the Union and the County, was \$6.82 per hour; that Brandt's hours and other working conditions have likewise been determined by the County and the Union under the terms of said agreement; and that Circuit Judge Leon H. Jones, who was formerly a County Judge with jurisdiction over matters handled by the Register in Probate and appointed her under Section 851.71 and is now the Circuit Judge, who exercises de facto supervision over her work on behalf of all three Circuit Judges, approves her vacations and other leave requests, and supervises her in the performance of her duties.

8. That in performing her duties, Brandt is assisted by Jo Ann Manka, the Deputy Register in Probate who earns \$5.54 per hour; that Brandt occasionally makes routine work assignments to Manka, but Manka primarily performs her duties, which consist of microfilming and clerical tasks, on her own; that Brandt recommended that Manka be hired after she was first interviewed by the then sitting judge, however, there is no indication that Brandt then exercised any independent judgement in Manka's hire, as Brandt interviewed her primarily

because the judge at that time merely wanted Brandt's opinion on whether she could work with her as a prospective fellow employee; that Brandt lacks the authority to discipline Manka and Brandt does not evaluate Manka's work; that Brandt is not authorized to resolve any grievances which may be filed by Manka and that Judge Jones, not Brandt, approves Manka's vacation and other leave requests, and retains de facto authority to supervise her work performance on behalf of all three circuit judges.

9. That the Register in Probate is employed by the County and does not perform any substantial supervisory or managerial duties.

Based upon the foregoing Findings of Fact, the Commission makes the following

CONCLUSIONS OF LAW

1. That any potential conflict between the provisions of Chapters 851 and 865 of the Wisconsin Statutes relating to the appointment, duties and powers of Registers in Probate and Probate Registrars and the application of provisions of the Municipal Employment Relations Act to their employment can be reconciled without offending the constitutional doctrine of the separation of powers.

2. That the Register in Probate is employed by Manitowoc County and is a municipal employee within the meaning of Section 111.70(1)(b) of the Municipal Employment Relations Act and not a supervisory, managerial or executive employee, and is therefore properly included in the existing courthouse collective bargaining unit represented by Manitowoc County Courthouse Employees Local 968A, AFSCME, AFL-CIO.

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

ORDER CLARIFYING BARGAINING UNIT

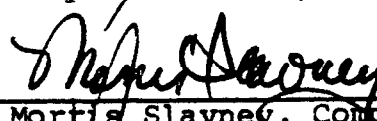
That the classification of Register in Probate employed in the courthouse shall continue to be included in the established courthouse collective bargaining unit.

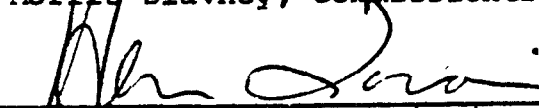
Given under our hands and seal at the City of Madison, Wisconsin, this 29th day of July, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Gary L. Covelli, Chairman


Morris Slavney, Commissioner


Herman Torosian, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER CLARIFYING BARGAINING UNIT

The County argues that the Register in Probate performs supervisory and managerial duties and that therefore she should be excluded from the courthouse unit. In addition, the County asserts that the Register in Probate should also be excluded pursuant to the rationale of the Mc Ewen case 4/, wherein the Circuit Court excluded the Register in Probate on the grounds, *inter alia*, that she was not a "municipal employe" under the Municipal Employment Relations Act, herein MERA.

The Union, on the other hand, contends that the Register in Probate is neither a supervisory nor managerial employe. Furthermore, the Union maintains that Mc Ewen, *supra*, was wrongly decided and that a Register in Probate in fact is a "municipal employe" under Section 111.70(1)(b) of MERA.

Discussion

Alleged Supervisory Managerial or Executive Status

In agreement with the Union, the Commission finds that the Register in Probate lacks sufficient *indicia* of either supervisory or managerial status so as to warrant her exclusion from the existing courthouse collective bargaining unit. Instead, and as noted in Finding No. 9 above, it is clear that any such duties performed by the Register in Probate are *de minimus* at best and, as a result, are insufficient to warrant her exclusion from the unit. 5/ We have also found that she is not an "executive" employe since she possesses no significant managerial responsibilities. As the Union correctly points out we have previously held in City of Oak Creek (17633 3/80) that an executive employe is

"... an individual possessing managerial authority who has the overall responsibility for the management of an agency or major department of the employer. Thus an executive employe also has managerial and/or supervisory responsibilities, but is distinguishable by reason of his or her possession of the overall responsibility and authority for an agency or major department."

The Mc Ewen Case

The County contends that the Register in Probate should be excluded from the unit under the rationale of Mc Ewen, *supra*. In that case Judge William Mc Ewen appointed a non-bargaining unit employe to serve as Register in Probate without following the contractual posting procedure which the union had negotiated with Pierce County. The union thereafter filed a grievance which claimed that said appointment was violative of the contractual job posting procedure. Judge Mc Ewen responded by filing a court action which requested that the court find that the Register in Probate was not a municipal employe under MERA, but rather an officer of the court who was not covered under the applicable collective bargaining agreement, including the job posting procedure.

The Circuit Court in Mc Ewen, *supra*, agreed with that contention. In doing so, the Court noted that Section 851.71 Stats. gives judges the right to hire and remove Registers in Probate by providing:

4/ Supra, note 2. The Commission was not a party to said proceeding.

5/ Oneida County, Decision No. 19134-A and 12247 (11/73); Ashland County, Decision No. 7214 (7/65); St. Croix County, Decision No. 12433-A. (4/74); and Kewaunee County, Decision No. 13185 (11/74).

851.71 Appointment and compensation of registers in probate. (1) In each county, the judges of the County shall appoint and may remove a register in probate. Appointments and removals may be made only with the approval of the chief judge. Before entering upon duties, the register in probate shall take and subscribe the constitutional oath of office and file it, together with the order of appointment, in the office of the clerk of circuit court.

(2) One or more deputies may be appointed in the manner specified in sub. (1).

(3) The salary of the register in probate and of any deputies shall be fixed by the county board and paid by the county.

(4) In counties having a population of 500,000 or more, the appointment under subs. (1) and (2) shall be made as provided in those subsections but the judges shall not remove the register in probate and deputy registers, except through charges for dismissal made and sustained under s. 63.10.

The court held that "there is an irreconcilable conflict between this Statute, Section 851.71, and the present bargaining agreement. . . and that, as a result, the Register in Probate could be hired without going through the contractual job posting procedure. The Court added that: (1) the Supreme Court's decision in Glendale 6/ was inapposite because that case centered on the relationship of MERA to a pre-existing statute, whereas here Section 851.71 was amended after MERA was enacted in 1971; (2) the legislature intended for Registers in Probate to be excluded from MERA's coverage; (3) numerous provisions of the applicable collective bargaining contract interfere with the proper administration of the duties performed by the Register in Probate; (4) a Register in Probate is an officer of the court and/or executive employee who is not covered under MERA; (5) MERA does not apply to courts by virtue of the separation of powers doctrine; and (6) the courts, and not counties, are the employers of Registers in Probate.

The Glendale Case and Legislative Intent

We agree with the Court's ruling in Mc Ewen, supra, that the contractual language in issue could not be lawfully applied to the selection of Registers in Probate. That language, which was contained in Article 5, Section 3, of the contract stated:

All new or vacated positions shall be posted in the Courthouse for ten (10) working days on a sheet of paper stating the job to be filled, on what date it is to be filled, the rate of pay, and this notice shall be posted immediately upon a vacancy. Seniority and qualifications shall be considered in the selection of the applicant for the new or vacated position. Within five (5) days of filling the position, the respective supervisors and Union Representatives shall meet jointly and attempt to mutually agree on the nominee for the position, and if a mutual agreement is not reached at this point, a grievance may be filed by the Union. The successful applicant shall be allowed sixty (60) days to qualify for the position. Interim appointments may be made by the supervisor until such time as a mutual agreement is reached by both parties. No one shall sign more than one job posting within a twelve month period, once it

6/ Glendale Professional Policeman's Association vs. Glendale,
83 Wis. 2d. 90 (1978).

is placed in a position through the job posting procedure, unless mutually agreed by both parties of this Agreement.

This language if interpreted to apply to registers in probate would not permit the circuit judges to appoint a Register in Probate. As a result, we agree that to the extent that said provision is in conflict with Section 851.71, which expressly gives judges the right to appoint and remove Registers in Probate, it was unlawful. For, as noted by the Supreme Court in Glendale, supra:

"When an irreconcilable conflict exists, we have held that the collective bargaining agreement should not be interpreted to authorize a violation of the law WERC v. Teamsters Local No. 563, supra (footnote citation omitted)."

We disagree, however, with the Court's contention in Mc Ewen, supra, that Glendale, supra, is inapposite to the instant controversy merely because Section 851.71 was amended in 1978, after the enactment of MERA in 1971. In this connection, it is true that Glendale, supra, centered on the applicability of MERA to a pre-existing statute. However, the Court in Glendale, supra, did not rule that MERA could not be harmonized with statutes which are enacted after MERA's passage. To the contrary, the Court in Glendale, supra, held that harmonization should be attempted "whenever possible", thereby indicating that such harmonization should not be limited to situations involving only pre-existing statutes.

It may be assumed that when it enacted Chapter 449 of the Laws of 1977 the legislature was aware of prior decisions which broadly construed Section 111.70(1)(b) of MERA which defined a "municipal employee" as follows:

"Municipal Employee" means any individual employed by a municipal employer other than any independent contractor, supervisor, or confidential, managerial or executive employee.

In construing the phrase "municipal employee" in the predecessor statute to MERA, the Supreme Court in Milwaukee vs. Wisconsin Employment Relations Commission, 43 Wis. 2d 596, 601 (1969) held:

"The broad definition of "municipal employee" found in Section 111.70 Stats., certainly indicates a legislative desire to make collective bargaining units available for as many municipal employees as is consistent with sound municipal government."

Following the Court's holding in Milwaukee, supra, the Commission for a number of years has consistently ruled that Registers in Probate are municipal employees who are to be included in collective bargaining units. 7/

The legislature, then, was presumably aware of this interpretation when it amended Section 851.71 in 1977. At that time, the only change made by the legislature was to provide that henceforth the appointment and removal of Registers in Probate were to be made by the County judge. The legislature, however, gave absolutely no indication when it amended Section 851.71 that Registers in Probate should no longer be considered municipal employees under MERA. Absent any such limiting language, it must be concluded that the legislature intended that Registers in Probate should continue to be municipal

7/ See, for example, St. Croix County; Kewaunee County; and Oneida County, supra, note 4.

employees and that they continue to be covered under MERA, just as in the past. In this regard we note the requirement that their salaries continue to be fixed by the County Board and paid by the County.

As a result, we do not find controlling the fact that MERA, does not contain a provision similar to that found in Section 111.93(3) of SELRA. Rather, the absence of such a provision merely means that an attempt must be made to harmonize Section 851.71 Stats. with MERA "whenever possible", pursuant to the Court's ruling in Glendale, supra.

Applying that principle here, the Commission concludes that the broad definition of "municipal employee" set forth in Section 111.70(1)(b) of MERA, which reads the same as the Commission's interpretation of old Section 111.70(1)(b) which was affirmed by the Court in Milwaukee, supra, encompasses Registers in Probate and that it is possible to harmonize Section 851.71 Stats. with this interpretation of Section 111.70 of MERA. For, as noted above, Section 851.71 Stats. is limited only to the question of who can hire and remove Registers in Probate. That provision, however, does not contemplate that judges shall set the wages for the Registers in Probate. To the contrary, Section 851.71(3) provides that it is the county which shall fix the salary of the Register in Probate. By the same token, Section 59.15(2) also provides that the county board shall establish the compensation of all county employees, excluding only certain elective officers, supervisors, and circuit judges. It is entirely possible, therefore, for judges to hire and terminate Registers in Probate and to supervise their work, while at the same time a union bargains with the county over wages, hours, and other conditions of employment for said employees consistent with the limitations in Chapter 59 of the Statutes. Indeed, the Supreme Court in Glendale, supra, was confronted with this very same issue when it ruled that a police chief's appointive powers under Section 62.13(4)(a) Stats. could be reconciled with MERA.

Alleged Conflict with Duties of Register in Probate

It is the County, and not the circuit judges, which decides such matters as how much to pay Registers in Probate, whether overtime will be paid, what holidays are to be granted, how much vacation time is to be offered, how much retirement will be paid for by the County, the level and cost of health insurance benefits, the amount of sick leave, whether personal leave will be available, the manner and timing of any pay received, leave policy, etc. And, it is the County which sets the hours of operation of the office of the Register in Probate and has the general authority to establish the operating budget for the courts. 8/ In such circumstances, we conclude that Registers in Probate are employed by the county and, as such, are covered under the definition of "municipal employee" spelled out in Section 111.70(1)(b) of MERA. 9/ The fact that the Register in

8/ We recognize that the inherent powers of the courts are such that if the county or legislature fails to provide the courts with necessary funds or personnel to operate it may take appropriate action to secure same. In Re Janitor of the Supreme Court 35 Wis. 410 (1874).

9/ In this connection, the Attorney General noted in 67 Op. Att'y Gen. 169:

That is, the register in probate is not only an employe of the county but the person appointed register in probate also is a county official.

Going on, the Attorney General also stated that:

Status as an officer, therefore does not necessarily disqualify an employe as that word is used or defined in any particular statute.

In that opinion, the Attorney General stated that Registers in Probate are entitled to the protection of the Fair Employment Act (Section 111.31-37 Stats.).

Probate is subject to the supervision of the judge or judges while performing her duties is not controlling since the judge or judges are not the employer(s), the county is.

In this connection, we cannot agree with the Court's comments in Mc Ewen, supra, that various provisions of a collective bargaining agreement - such as hours, break time, holidays, etc. would necessarily interfere with the proper functioning of the judiciary or with the statutory duties performed by Registers in Probate. Thus, the instant record is totally barren of any evidence to suggest, for example, that the Register in Probate has ever advised a judge that she was leaving promptly at 4:30 p.m., even though she may have been in the midst of performing her duties. Furthermore, we also note that no such evidence was introduced in the Mc Ewen case, supra, with regard to the prior Register in Probate who had served in that position for approximately seven (7) years, during which time she was covered under collective bargaining agreements. The absence of any such evidence, of course, is not surprising as it can be expected that employees who are involved in such activities as those herein will conduct themselves in a responsible fashion in order to ensure the effective administration of justice. Moreover, if a particular provision of a collective bargaining agreement unduly interferes with the manner in which a Register in Probate performs his or her duties, such provision can be invalidated by the Courts as being in conflict with their inherent powers. ^{10/} Further, any alleged conflict between the hours required to be kept by the Register in Probate under Section 59.14 and the terms of the agreement would have to be reconciled in favor of said statutory provision or the agreement would be held invalid to that extent.

Separation of Powers

In so finding, we reject the court's assertion in Mc Ewen, supra, that such a holding interferes with the separation of powers doctrine. For, as noted above, collective bargaining will seldom, if ever, interfere with the statutory duties performed by a Register in Probate, or with the proper functioning of the judiciary, and if it does the Courts can take the necessary corrective measures.

For these purposes we see no meaningful distinction between a legislative act which delegates to a county, or a civil service system within a county, the authority to establish wages, hours and working conditions for court employees and one which requires the county to bargain with a representative of court employees concerning those same matters. Several opinions of the Attorney General support this interpretation. ^{11/}

In addition, the Wisconsin Supreme Court has held that even the appointment and removal of court employees do not necessarily involve the exercise of inherent powers of a court or the principle of separation of power. ^{12/} Thus, since the legislature created the position of Register in Probate, the legislature similarly can impose

^{10/} Supra, Note 7.

^{11/} See 67 Op. Att'y Gen. 169 (1978) and the opinions cited therein at pp. 172-173.

^{12/} In re Appointment of Revisor 141 Wis. 592, 124 NW 670 (1910) the Court quoted with approval Ross v Essex Co. 69 N.J. Law, 55 Atl. 310, for the proposition:

"An examination of our constitutional and legislative history will dissipate the idea that the power of appointing to office is the peculiar property of any one of the three departments of our government."

reasonable regulations surrounding the manner in which Registers in Probate shall perform their duties so long as such regulations do not unduly interfere with the judicial branch. The legislature, by according collective bargaining to all municipal employees, may insist that a judge's control over Registers in Probate be generally limited to the right to hire and fire at will, and that the county negotiating with the Union under MERA, should cover all remaining aspects of the employment relationship enjoyed by Registers in Probate. Applying this principle to the instant controversy, the Commission concludes that the legislature's extension of collective bargaining to Registers in Probate neither impairs nor abridges the ability of the courts to properly perform their judicial functions.

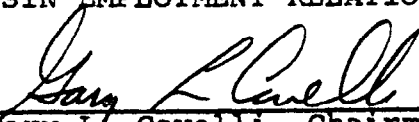
Lastly, we reject the County's claim that Registers in Probate should be excluded from MERA because they are "officers of the court." For, as noted above, the Supreme Court in Milwaukee, supra, has countenanced a broad definition of the term "municipal employee". Since the legislature has failed to exclude Registers in Probate from under its coverage, there simply is no basis for excluding Registers in Probate from under MERA's coverage on the grounds that they are "officers of the court" when performing quasi-judicial and judicial tasks. The mere fact that someone is an "officer of the court", does not automatically mean that they are to be excluded from under MERA. To the contrary, the Supreme Court has ruled that attorneys, who are also "officers of the court", are covered under MERA. 13/

In light of the above noted considerations, which establish that Registers in Probate are "municipal employees" who are covered under MERA, and that the Register in Probate herein is neither a supervisory or managerial employee, we conclude that the Registers in Probate should be included in the established courthouse unit.

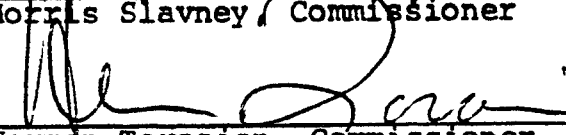
Dated at Madison, Wisconsin this 29th day of July, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Gary L. Covelli, Chairman


Morris Slavney, Commissioner


Herman Torosian, Commissioner

13/ Milwaukee v. WERC 71 Wis 2d 709 (1976).