

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Case XVI  
No. 17437 ME-1007  
Decision No. 12423-A

Mr. Guy T. Ludvigson, appearing on behalf of the Municipal Employer.

Mr. Guido Cecchini, District Representative, Wisconsin Council of County and Municipal Employees, appearing on behalf of the Union.

St. Croix County, Wisconsin, having filed a petition with the Wisconsin Employment Relations Commission, wherein it requested the Commission to issue an Order clarifying an existing collective bargaining unit of employees of said Petitioner, to determine whether the Register in Probate and Deputy Register in Probate employed by said Petitioner are to be included in or excluded from said collective bargaining unit; and the Commission having ordered hearing on said petition; and a hearing having been held in the matter at Hudson, Wisconsin, on February 15, 1974, Marvin L. Schurke, Hearing Officer, being present; and the Commission, having considered the evidence and arguments and being fully advised in the premises, makes the following

IT IS ORDERED that the positions of Register in Probate and Deputy Register in Probate are, and shall continue to be, included in the collective bargaining unit consisting of all full-time regular courthouse employees of St. Croix County, excluding elected officials, District Attorney's Secretary, Sheriff's Deputy Secretary, the Secretary to the County Board, employees of the St. Croix County Department of Social Services and supervisory employees.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slawney  
Morris Slawney, Chairman

MEMORANDUM ACCOMPANYING  
ORDER CLARIFYING BARGAINING UNIT

Following an election conducted by it, this Commission issued a Certification of Representatives on April 8, 1969, wherein the Wisconsin Council of County and Municipal Employees was certified as the exclusive representative of "all courthouse employees of St. Croix County, Hudson, Wisconsin, excluding elected officials, sheriff's deputy secretary and supervisory employees."<sup>1/</sup> Through collective bargaining, as is indicated by the language of the 1974-1975 collective bargaining agreement between the parties, the unit has been limited to "full-time regular courthouse employees . . .", and the positions of District Attorney's Secretary and Secretary to the County Board have been excluded from the unit. This unit was the subject of a unit clarification proceeding before the Commission in St. Croix County Case XI, Decision No. 11930-A (6/73), whereby the position of Office Manager in the County Zoning Administrator's office was included in the bargaining unit. In St. Croix County Case XIV, Decision No. 12338 (12/73), the Commission found that the employees of the St. Croix County Department of Social Services had, in fact, been excluded from the aforesaid bargaining unit and from the collective bargaining agreement, and directed a representation election among those employees. The employees of the Social Services Department voted in favor of representation by a different labor organization, and the unit resulting from all of these changes is the unit described in the accompanying Order.

THE FACTS:

Margaret M. Schullo has occupied the position of Register in Probate for 11 years. She was eligible to vote in the election conducted by the Commission in this unit. Her subsequent employment has been covered by the collective bargaining agreements negotiated in this unit, and she is presently covered by the fair-share agreement in effect in the unit.

Diana Dabruzzi commenced employment on July 14, 1971, in a newly created position of Deputy Register in Probate. The County did not follow the posting procedures contained in the collective bargaining agreement then in effect when it appointed the Deputy Register in Probate, and a grievance was filed concerning the propriety of the County's actions in that regard. That grievance was processed to arbitration before a Board of Arbitration chaired by neutral Arbitrator Douglas V. Knudson. The majority of the Board of Arbitration ruled that the County properly interpreted and applied the terms of the collective bargaining agreement by appointing a Deputy Register in Probate without posting said position and denied the grievance. Dissatisfied with that ruling, the Union "appealed" the Arbitration Award to the County Court for St. Croix County, where the Honorable Charles D. Madsen, sitting as Acting Judge, issued an Order "affirming" the decision of the Board of Arbitration. Like the Register in Probate, the Deputy Register in Probate has been included in the bargaining unit, has been covered by the collective bargaining agreements negotiated for that unit, and is covered by the fair-share agreement presently in effect in that unit.

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<sup>1/</sup> Decision No. 8932.

In the performance of the various duties and exercise of the various powers specified in Sections 253.32 and 253.33 of the Wisconsin Statutes, the Register in Probate and Deputy are engaged primarily in clerical and related functions such as opening and recording of mail, filing, recordkeeping, typing, making of photostatic copies of records and checking papers filed with the Court for accuracy and completion. The Register in Probate testified that such clerical functions constitute the majority of the work that she and the Deputy encounter in their positions. The Register in Probate distributes and assigns the work as between herself and the Deputy. However, these employees work closely, both perform similar responsibilities and duties, and the Deputy is authorized to perform all of the functions of the Register in Probate at times when Schullo is absent or unavailable.

The present County Judge has held his office for three years. Upon assuming office the Judge generally accepted the pre-existing office procedures. The County Board created the Deputy position later at his request, and the Judge and the Register in Probate both interviewed Dabruzzi prior to her appointment to the position. The Judge has and exercises statutory authority concerning the appointment and removal of both the Register in Probate and the Deputy. The other employees working under the County Judge are a bailiff and a court reporter. The bailiff occasionally assists the Register in Probate and the Deputy with making of copies, but is not otherwise engaged in the same work and is not under their supervision. The court reporter also has completely separate functions, except that both the court reporter and the Register in Probate perform secretarial work and make appointments for the Judge from time to time. The Judge does not assign work directly to the Deputy. In discussions between the present Judge and the Register in Probate, the Judge has taken the position that the Register in Probate should be excluded from the bargaining unit as a "court-appointed officer."

#### PERTINENT STATUTES:

"111.70      Municipal employment

(1) Definitions. As used in this subchapter:

. . . .

(b) 'Municipal employee' means any individual employed by a municipal employer other than an independent contractor, supervisor, or confidential, managerial or executive employee.

. . . .

(e) 'Collective bargaining unit' means the unit determined by the commission to be appropriate for the purpose of collective bargaining.

. . . .

(o) 'Supervisor' means:

1. As to other than municipal and county firefighters, any individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

. . . .

(4) Powers of the commission. The commission shall be governed by the following provisions relating to bargaining in municipal employment in addition to other powers and duties provided in this subchapter:

. . .

(d) Selection of representatives and determination of appropriate units for collective bargaining.

. . .

2. a. The commission shall determine the appropriate bargaining unit for the purpose of collective bargaining and shall whenever possible avoid fragmentation by maintaining as few units as practicable in keeping with the size of the total municipal work force. In making such a determination, the commission may decide whether, in a particular case, the employees in the same or several departments, divisions, institutions, crafts, professions or other occupational groupings constitute a unit. Before making its determination, the commission may provide an opportunity for the employees concerned to determine, by secret ballot, whether or not they desire to be established as a separate collective bargaining unit.

. . .

"253.31 Appointment and compensation of registers in probate

(1) In each county, the county judge, or in multi-branch courts the judge of branch No. 1 shall appoint and may remove a register in probate, who, before entering upon his duties, 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 like manner.

(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 by joint action of the judges of branches Nos. 1 and 2, but such judges shall not have the power to remove said register in probate and deputy registers, except through charges for dismissal made and sustained pursuant to s. 63.10.

"253.32 Duties of registers in probate

The register in probate shall:

(1) File and keep all papers properly deposited with him unless required to transmit such papers.

(2) Keep a book called a court record and enter therein every proceeding in the court under Title XLII-B under its proper title, a brief statement of the nature of the proceeding and of all papers filed therein, with the date of filing and a reference to the volume and page of the minute book where minute records can be found or to the microfilm file where papers have been recorded so that the court record is a complete index or brief history of each proceeding from beginning to final disposition.

(3) Keep a book called a minute book and enter therein a brief statement of all proceedings of the court under Title XLII-B during its sessions, all motions made and by whom, all orders granted in open court or otherwise, and the names of all witnesses sworn or examined. If this information is all included in the court record, the judge may direct that the minute book be no longer kept.

(4) Keep a record book or books and record therein in full all wills admitted to probate with the certificate of probate, all letters and all judgments rendered. The judge may require any other documents to be recorded therein. Any documents may be recorded on microfilm instead of in a record book. These records shall be kept irrespective of s. 59.715(20) (c) unless recorded on microfilm.

(5) Keep an alphabetical index to the court record and the file containing the original documents or microfilm copies thereof.

(6) Perform any other administrative duties as the judge directs.

(7) Except in counties having a population of 500,000 or more, perform the duties of clerk of the juvenile court under ch. 48 unless these duties are performed by a person appointed under s. 48.04.

(8) When appointed deputy clerk pursuant to s. 253.344, perform such duties as the clerk of circuit court directs.

(9) In counties having a population of 500,000 or more, the register in probate shall be the department head as to all personnel, procurement, budget and related matters with reference to his office as register in probate of branches Nos. 1 and 2 of the county court. The register in probate shall appoint pursuant to ss. 63.01 to 63.16 as many deputy clerks as may be authorized by the county board for branch No. 1 and branch No. 2 of the county court, provided that such appointment shall be approved by the judge of the branch which such deputy shall serve. Such deputy clerks shall aid the register in probate and deputy registers in probate in the discharge of their duties.

#### "253.33 Powers of registers in probate

(1) The register in probate:

(a) May make orders for hearings when the judge is away from the county seat or unable to discharge his duties or when given authority in writing by the judge and an application is made to the court in a proceeding under Title XLII-B requiring notice of hearing. The order and notice when signed 'By the court, . . . , register in probate' has the same effect as if signed by the judge.

(b) Has the same powers as clerks of court to certify copies of papers, records and judicial proceedings. Copies certified by registers in probate are receivable in evidence as if certified by clerks of court.

(c) Has the power to administer any oath required by law.

(d) Has, when appointed for this purpose, the powers of deputy clerks as provided in s. 59.38.

(e) Has, when appointed for this purpose, the powers and duties of court reporters and assistant reporters specified in s. 256.55.

(2) Subsection (1) applies to duly authorized deputy registers in probate."

#### POSITION OF THE COUNTY:

The County has advanced two lines of argument favoring the exclusion of the Register in Probate and Deputy Register in Probate from the collective bargaining unit. First, the County contends that persons holding these positions hold their office at the will of the County Judge, and that this circumstance is inconsistent with their inclusion in a bargaining unit. The County asserts that the Award of the Board of Arbitration confirms its position here, and argues that the power of a court to appoint and remove assistants cannot be diminished by other branches of County government. The County also contends that the Courts can protect themselves against anything that materially affects their efficiency, and that the inclusion of these positions in the bargaining unit is such an impairment on the Court. Secondly, the County contends that both of the positions in question, and particularly that of the Register in Probate, are supervisory within the meaning of Section 111.70(1)(o)1 of the Municipal Employment Relations Act.

#### POSITION OF THE UNION:

The Union contends that the Arbitration Award excluding the Deputy Register in Probate from the posting provisions of the collective bargaining agreement is now irrelevant because of changes in the language of the collective bargaining agreement. The Union asserts that the powers of the Judge are limited by the enactment of the Municipal Employment Relations Act as a subsequent statute, and that the authority to appoint and remove is now limited by the collective bargaining agreement. The Union points out that the County retains authority to set the wages of employees and the number of employees to be assigned to the County Court. The Union offered evidence to show that other employees in the bargaining unit hold positions and perform duties involving high level functions similar to those performed by the Register in Probate and Deputy Register in Probate, and contends that the level of function does not constitute a basis for exclusion from the bargaining unit. While admitting that some of the employees in the bargaining unit act as lead workers in their respective departments, the Union denies that either of the positions in question is supervisory within the meaning of the Municipal Employment Relations Act.

#### DISCUSSION:

This is by no means a case of first impression. Issues have been raised in numerous cases concerning the inclusion of persons holding appointive positions in bargaining units with other municipal employees.

Similar arguments were advanced before this Commission in Oneida County, Decision Nos. 9134-A and 12247 (11/73), where the municipal employer sought to have the employe holding the combined position of Probate Registrar/Register in Probate excluded from a bargaining unit of courthouse clerical employes. We there re-affirmed the ruling made in Ashland County, Decision No. 7214 (7/65), where the County sought the exclusion of several appointed deputies from a collective bargaining unit of courthouse employes, and the Commission said:

"Although the elected official has power to appoint his deputy, the County Board has the power to veto such selection, if it chooses, by failing to appropriate a salary for the appointee. Moreover, the County Board is the locus of the authority to determine the deputies' conditions of employment not prescribed by statute. These conditions might be the subject of conferences and negotiations between the Union and the County, in the event the Union is selected as the bargaining representative. The fact that statutes affect the nature of a seniority provision which the County and the Union might effectively negotiate has no bearing on the question of whether the deputy may be considered an employe under the statute. Therefore, except so far as tenure is concerned, the deputy is in the same situation as any other County employe. His conditions of employment are set by the County Board.

The deputies' bonds and oath are not determinative of their status. Even the common law distinctions between municipal employes and municipal officials acknowledge that a person merely by being bonded does not thereby attain the status of an official. Similarly, oath-taking does not necessarily have any significance regarding a determination as to whether the Legislature intended such person be granted the right to collective bargaining, if he so chose."

None of the arguments advanced here constitute a basis for a contrary result in this case.

The Board of Arbitration appointed to determine the dispute concerning the appointment of the Deputy Register in Probate concluded that the posting provisions of the collective bargaining agreement could not be applied as a limitation on the authority of the County Judge to appoint a Deputy Register in Probate, but that panel did not imply that the position of Deputy Register in Probate should be excluded from the bargaining unit or from the coverage of the remaining portions of the collective bargaining agreement. Since that proceeding was conducted pursuant to binding arbitration provisions of the collective bargaining agreement, there may be some question concerning the propriety of the entire "appeal" and affirmation procedure which followed therefrom. The comments made by Judge Madsen concerning the exclusion of the Register in Probate from the unit are not regarded as binding on this Commission.

The cases cited by the County do indicate that the County Court would be in a better position to defend itself against the type of County Board "veto" suggested in the first sentence of the foregoing quotation from the Ashland case than would be a County Clerk or a County Treasurer with respect to their deputies. The Union contends that the County has modified the Court's appointive authority through collective bargaining, while the County contends that other branches of government have no authority to interfere in such matters. These

arguments frame an issue which may some day have to be resolved, but it is neither the function nor the intention of the Commission to make such an interpretation in this representation case.

The primary considerations relied upon by the Commission in the Ashland case, and those found to be controlling here, concern the authority vested in the County Board over the wages and hours of the employees in question and over their conditions of employment other than tenure. Chapter 253 of the Statutes does not purport to give the County Judge authority with respect to all aspects of the employment relationship, and Section 253.31(3) specifically vests control over salaries in the County Board. Tenure of employment is only one of the items within the broad scope of subjects of collective bargaining in municipal employment. The removal of one subject from the scope of bargaining does not foreclose bargaining on the remaining subjects, and the possibility of a limited scope for bargaining has been encountered in other situations in municipal employment, such as in Milwaukee County, Decision No. 9904-B (12/70), where the Commission concluded that there was some room for bargaining within the framework of maximums and minimums established by State regulations concerning the operation of County public welfare agencies.

The definition of "Municipal Employee" set forth in the Municipal Employment Relations Act makes no provision for the exclusion of employees holding appointive positions from the rights secured to municipal employees in Section 111.70(2), Wisconsin Statutes. Nothing contained in the Municipal Employment Relations Act prohibits the inclusion of appointed employees in bargaining units with employees holding non-appointive positions. Section 111.70(4)(d)2.a. mandates the avoidance of fragmentation of bargaining units, and in conformity with that mandate we have found multi-department units of clerical employees to be appropriate. See Dane County, Decision No. 10492-A (3/72). A unit of employees assigned to the County Court would constitute an undue fragmentation, and we, therefore, conclude that the positions in question should remain in the courthouse unit unless they are excludable for reasons of supervisory authority.

The only evidence of the exercise of supervisory authority by the Deputy Register in Probate relates to occasions when the bailiff assigned to the County Court is called in to provide some assistance to the office personnel with copying work. This would appear to be de minimus, and is insufficient to warrant a finding that the Deputy Register in Probate is a supervisor within the meaning of Section 111.70(1)(o)1 of the Municipal Employment Relations Act.

The Register in Probate was consulted by the County Judge concerning the selection of a Deputy, but any implication that the Register in Probate exercised independent judgment in the hiring of that Deputy would run directly contrary to the County's own arguments concerning the statutory authority of the Judge to act on matters of tenure. The Register in Probate testified that she assigns work to the Deputy, but her testimony also indicates that she performs work of the same nature as is performed by the Deputy and that they work very closely. Both perform a clerical function similar to the clerical functions performed by other employees in the bargaining unit, and the Register in Probate is performing lead worker functions similar to those performed by other employees in the bargaining unit classified as "first Deputy." We find that the true locus of supervisory authority is with the County Judge, and that the Register in Probate is not a supervisor within the meaning of the Municipal Employment Relations Act. Accordingly, we have ordered that both of the positions in question remain in the bargaining unit.



The Union adduced testimony concerning discussions between the County Judge and the Register in Probate which might be interpreted as supervisory interference with the free exercise of the rights secured by Section 111.70(2) of the Municipal Employment Relations Act. Such allegations are properly before the Commission for a decision thereon only in a prohibited practice proceeding under Section 111.70(3)(a) of the Municipal Employment Relations Act, and no determination is made herein on the propriety of those discussions.

Dated at Madison, Wisconsin, this 25<sup>th</sup> day of April, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney -  
Morris Slavney, Chairman

Zel S. Rice II  
Zel S. Rice II, Commissioner

Howard S. Bellman  
Howard S. Bellman, Commissioner