

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE COUNTY

Case LIV  
No. 16456 ME-875  
Decision No. 12571

Aul & Tesch, Attorneys at Law, by Mr. Joseph E. Tesch and Mr. Joel Rosenthal, Chairman of the Executive Committee of the Association of Assistant District Attorneys, appearing on behalf of the Petitioner.

Mr. Robert G. Polasek and Mr. Patrick J. Foster, Assistant Corporation Counsel, Milwaukee County, appearing on behalf of the Employer.

Association of Assistant District Attorneys having petitioned the Wisconsin Employment Relations Commission, pursuant to Section 111.70 of the Wisconsin Statutes, to conduct an election among certain employees of the County of Milwaukee; and hearing on such petition having been conducted on July 25, 1973 at Milwaukee, Wisconsin, Zel S. Rice II, Commissioner, being present; and the Commission having considered the evidence and arguments of the parties, and being satisfied that a question has arisen concerning representation for certain employees of the County of Milwaukee;

NOW, THEREFORE, it is

That an election by secret ballot be conducted under the direction of the Wisconsin Employment Relations Commission within sixty (60) days from the date of this Direction in the collective bargaining unit consisting of all regular full-time Attorneys employed by Milwaukee County, but excluding supervisory, managerial and confidential personnel, who were employed on March 22, 1974, except such employees as may prior to the election quit their employment or be discharged for cause, to determine whether a majority of such employees desire to be represented by the Association of Assistant District Attorneys for purposes of collective bargaining.

Given under our hands and seal at the  
City of Madison, Wisconsin this 22nd  
day of March, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Morris Skavney, Chairman

Zel S. Rice II, Commissioner

Howard S. Bellman, Commissioner

NO. 12571

MEMORANDUM ACCOMPANYING DIRECTION OF ELECTION

Petitioner, the Association of Assistant District Attorneys, requests the Commission to conduct an election in a unit described as "All Milwaukee County Assistant District Attorneys and excludes only the District Attorney and the two Deputy District Attorneys." The unit, as described, would not only exclude those specifically named in the Association's description of the unit, but it would also exclude all other attorneys employed by Milwaukee County, occupying the following classifications:

<u>Classification</u>	<u>Number of Positions</u>
Assistant Corporation Counsel I	4
Assistant Corporation Counsel II	2
Assistant Corporation Counsel III	2
Assistant Corporation Counsel IV	1
Deputy Corporation Counsel	3
Corporation Counsel	1
Deputy Register in Probate	2
Probate Commissioner	2
Register in Probate	1
Assistant Family Court Commissioner	4
Deputy Family Court Commissioner	1
Family Court Commissioner	1
Legal Counsel (Public Welfare)	3
Court Intake Commissioner	2

Milwaukee County, in a letter dated June 5, 1973 and the Association, in a letter dated April 24, 1973, received by the Commission prior to the hearing, presented their positions on matters of "law and fact" on the issues in this case. At the hearing on July 25, these letters of position were made part of the record.

POSITION OF THE EMPLOYER:

The County argues that none of the attorneys in the employ of the County are "municipal employees" as defined in the Municipal Employment Relations Act and, in the alternative, that if the Commission finds that attorneys are covered by the Act, the unit appropriate is the one described by the Association in its petition for an election respecting the alternative positions. The County would exclude all attorneys other than the Assistant District Attorneys from the unit on primarily two grounds, first, that these attorneys function in quasi-judicial capacities, and, therefore, like judges, it would be inappropriate to include them in a collective bargaining unit; and secondly, that a number of the positions listed above are supervisory in nature and, therefore, excluded under the Municipal Employment Relations Act. 1/

The Corporation Counsel's office has 13 attorneys. The County claims that the Corporation Counsel and his three deputies are supervisors and, therefore, should be excluded from the unit; that one Assistant Corporation Counsel IV and one Assistant Corporation Counsel II are engaged in labor relations matters and should, therefore, be excluded from the unit.

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1/ Although the parties denoted a number of positions as supervisory and confidential in nature, no evidence was presented at the hearing concerning said status. The Commission does not consider itself bound to said stipulations and if a question concerning supervisory personnel should arise, the Commission will decide that question on the basis of challenged ballots.

The County notes that in Decision No. 7135 (5/65) the Commission excluded the non-professional employees employed in the Corporation Counsel's office from an overall unit of County employees on the basis of their confidential status. An anomalous situation would be created according to the County, if the Assistant Corporation Counsel were included with the Assistant District Attorneys and afforded rights under the Act where the non-professional employees in the office of Corporation Counsel historically have been denied those rights. 2/

The County would have the Register in Probate, his deputy, the Family Court Commissioner, his deputy, all excluded due to their supervisory status. 3/

The County contends that the Probate Court Commissioner, the Assistant Family Court Commissioner, Legal Counsel (Public Welfare) and the Court Intake Commissioner are all quasi-judicial officers. The attorneys in these positions act either as hearing officers or make legal determinations and rulings within very severe limits with the same authority as the judge. An example of an attorney with such authority is the Probate Court Commissioner. At times, the Assistant District Attorney and the Assistant Corporation Counsel must appear before one or more of the above Commissioners, and the Employer argues that the objectivity or the appearance of objectivity which an Assistant Commissioner must possess could be seriously impaired by the fact that the "judge" and an attorney appearing before him both belong to the same labor organization.

#### POSITION OF THE ASSISTANT DISTRICT ATTORNEY'S ASSOCIATION:

The Association maintains that attorneys are "municipal employees" within the meaning of the Municipal Employment Relations Act.

The Association supports its position that the 29 attorneys employed by the County outside of the Office of the District Attorney should be excluded from the unit on the following grounds. First, the District Attorney's offices are in a separate building. Secondly, the duties of the Assistant District Attorneys are primarily focused in the area of criminal law and they are mainly engaged in trial work. The Corporation Counsel and his assistants, on the other hand, function in all other areas of the law to the exclusion of the area of the criminal law. Very little of the Corporation Counsel's time is spent in trial work. There is no interchange between the attorneys in the District Attorney's office and those attorneys employed by the other offices of the County.

The Association places great stress on the ethical considerations which militate against inclusion of attorneys employed in other offices of the County with the Assistant District Attorneys. The Association argues that the District Attorney has the same broad discretionary powers and independence possessed by a judge. In fact, the Office of the District Attorney, by case law, has been treated as a quasi-judicial office in which the District Attorney possesses independent authority to prosecute or not to prosecute. In order to maintain its independence and impartiality, the Association contends it is imperative that the Assistant District Attorneys be isolated in their own unit. The Association cites Standard 1.2(a) of the American Bar Association on

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2/ It is noted, however, that the cited determination was upon uncontested contentions. The Commission would review that determination upon appropriate petition being filed, and is not compelled to reconcile its instant findings therewith.

3/ See Footnote number 1.

Standards for Criminal Justice which reads: "A prosecutor should avoid the appearance or reality of a conflict of interest with respect to his official duties." The appearance of this conflict of interest, its scope and its depth, is sought to be demonstrated by the examples of such conflict contained in the Association's prehearing brief dated April 24, 1973. One example cited provides as follows: The Corporation Counsel may have provided public officials with advice in a situation where the District Attorney would then be in a position to investigate those officers who may or may have not acted upon the advice of the Corporation Counsel in areas such as bribery, special privileges for public utilities (946.11 Wis. Stats.) misconduct in public office, (946.11) private interest in public contact, (946.13), prohibited violations of the corrupt practices act (Chapter 12 of the Wisconsin Statutes) etc.

PERA, at Section 111.70(4)(d)2a, mandates that the Commission in determining the appropriate bargaining unit shall avoid fragmentation but in making such determination, the Commission may, if it wishes, provide the employees employed in a separate department or division the opportunity to determine whether they desire to be established as a separate collective bargaining unit. It is the Association's position that its argument concerning physical location, the duties of the Assistant District Attorney, the ethical consideration and the potential conflict of interest inherent in an inclusive unit of all the attorneys employed by the County, and the fact that the Assistant District Attorneys are not classified in the County Civil Service System, whereas, the other attorneys employed by the County are a part of a statutory County Civil Service System <sup>4/</sup> point to the impracticality of including the Assistant District Attorneys with other attorneys employed by the County.

Finally, the Association maintains that it is the desire of the Assistant District Attorneys to be in a unit by themselves, and this desire should be given great weight in applying Section 111.70(4)(d)2a of the Wisconsin Statutes.

#### ANALYSIS:

The County's assertion that no attorneys employed by it are employees within the meaning of the Municipal Employment Relations Act is not supported by any argument submitted to the Commission. The Commission has determined that attorneys are "municipal employees" within the meaning of the Municipal Employment Relations Act. City of Milwaukee Decision No. 12035-A (2/74).

#### APPROPRIATE UNIT:

The Commission has determined that a county-wide unit of attorneys is an appropriate collective bargaining unit, Dane County Decision No. 11482 (12/72).

The Commission is of the opinion that any unit which attempts to divide the unit of all attorneys employed by the Municipal Employer would cause unnecessary fragmentation. In the Dane County case, supra, the Assistant District Attorneys and the Assistant Family Court Commissioners are included in the same unit. In fact, in the State Employment Labor Relations Act at Section 111.81(3), the Legislature established appropriate collective bargaining units and included in that list of employees of the State engaged in the legal profession. The Commission noted in its City of Milwaukee decision, Decision No. 12035-A, that the

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<sup>4/</sup> 63.03 Wis. Stats.

attorneys employed by the State in diverse offices and positions such as the Assistant Attorney General in the Office of the Attorney General, the hearing officers of the Unemployment and Workmen's Compensation Divisions of the Department of Industry, Labor and Human Relations, the attorneys employed by the Department of Revenue and the Department of Natural Resources are all included in one unit under the State Act. The independence and the quasi-judicial nature of the duties performed by these State employees did not prevent the State Legislature from specifically listing and including in one unit all persons engaged in a profession whose professional function, skill and talent manifests itself in such a diverse manner in state employment. The attorneys employed by Milwaukee County in the positions listed above are no more independent nor subject to the ethical strictures of the Bar than the attorneys employed by the State of Wisconsin.

One argument of the Association of Assistant District Attorneys is most compelling. Under 63.03 of the Wisconsin Statutes, the Assistant District Attorneys of Milwaukee County are not included nor are they protected by the Milwaukee County Civil Service System, whereas, the other attorneys employed by Milwaukee County are classified and protected by Milwaukee County Civil Service System. <sup>5/</sup> Although the Commission recognizes that coverage by the Civil Service System may seriously affect job security and tenure of an employee, there is no evidence in the record which would substantiate a finding that inclusion in or exclusion from the Civil Service System has significantly affected wages, or fringe benefits of the attorneys in such a way as to justify severance of the attorneys into two units.

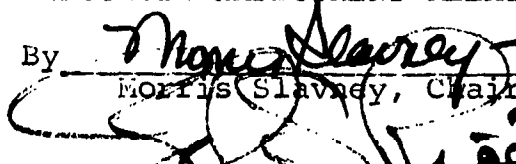
There is a community of interest among all attorneys employed by the County, therefore, the Commission has determined that the appropriate unit is an inclusive county-wide unit as described in the Direction.

The Commission has directed that an election be conducted within sixty (60) days from the date of the Direction, unless the Association notifies the Commission by April 5, 1974 that it does not wish to appear on the ballot in an election, in which case, the Commission will dismiss the petition.

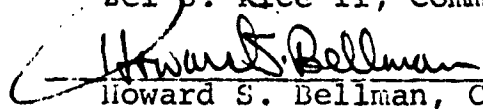
Dated at Madison, Wisconsin this 22nd day of March, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Morris Slavney, Chairman

  
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Howard S. Bellman, Commissioner

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<sup>5/</sup> Deputy District Attorneys serve at the pleasure of the District Attorney pursuant to Section 59.46 of the Statute. The Corporation Counsel and Assistant Corporation Counsel of Milwaukee County are part of the classified service under Section 59.455 of the Wisconsin Statutes. The Family Court Commissioner and the Assistant Family Court Commissioner are part of a classified service of the County under 247.13 of the Statutes. The Register and Deputy Register in Probate are also a part of the Civil Service System under Section 253.31 of the Statutes.