

COUNTY OF MILWAUKEE,

Petitioner,

Case No. 143-238

vs.

JUDGMENT

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Respondent.

Decision No. 12571-B

BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

The above entitled review proceeding having been heard by the Court on the 24th day of May, 1976, at the City-County Building in the City of Madison; and the petitioner County having appeared by Attorney Patrick J. Foster, Assistant Corporation Counsel; and the respondent Commission having appeared by Assistant Attorney General Charles D. Hoornstra; and the Court having had the benefit of the argument and briefs of counsel, and having filed its Memorandum Decision wherein Judgment is directed to be entered as herein provided;

It is Ordered and Adjudged that the Certification of Representatives by respondent Wisconsin Public Relations Commission dated June 27, 1974, entered In the Matter of the Petition of Association of Assistant District Attorneys Involving Certain Employees of Milwaukee County, Case LIV, No. 16456, ME-875, Decision No. 12571-B, be, and the same hereby is, affirmed.

Dated this 1st day of June, 1976.

By the Court:

George R. Currie /s/
Reserve Circuit Judge

COUNTY OF MILWAUKEE,

Petitioner,

Case No. 143-238

vs.

MEMORANDUM DECISIONWISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Decision No. 12571-B

Respondent.

BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

This is a proceeding under ch. 227, Stats., to review the certification of representatives issued by the respondent Commission (hereafter WERC) dated June 27, 1974. The County in this proceeding is not challenging the results of the election held June 21, 1974, certified to by this certification, but rather the composition of the collective bargaining unit as set forth in WERC's direction of election dated March 22, 1974. Such direction of election is in the nature of an interlocutory order which is not directly reviewable under ch. 227, Stats., but is reviewable in a review proceeding instituted to review the certification of election.

STATEMENT OF FACTS

On January 23, 1973, the Association of Assistant District Attorneys (hereafter the association) filed with WERC a petition for an election. The purpose of the election petitioned for was to determine whether the attorneys in an appropriate unit wanted the association to be its collective bargaining representative. The petition described the bargaining unit as including all Milwaukee County Assistant District Attorneys and excluding only the District Attorney and his two Deputy District Attorneys.

Hearing was noticed, and prior thereto the association and the County stated their respective positions in writing by letter to WERC. An investigative type of hearing was held on July 25, 1973, at which only the association and the County were represented, and consisted in no sworn testimony but rather merely an agreement as to various facts involving attorneys employed by the County. WERC found, and no party takes issue with, that in addition to the assistant district attorneys, the County at the material times employed the following attorneys in 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

Both the association and the County asserted that the appropriate unit would consist only of assistant district attorneys and would not consist of other attorneys employed by the County.

WERC by its direction of election ordered that an election be held. It defined the bargaining unit, however, as consisting of "all regular full-time Attorneys employed by Milwaukee County, but excluding supervisory, managerial and confidential personnel . . ." Attached to the direction of election was a memorandum decision explaining WERC's rationale.

In WERC's subsequent certification of representatives the outcome of the election was stated to be:

1. Total number eligible to vote 62
2. Total ballots cast 50
3. Total Ballots challenged 11
4. Total valid ballots counted 39
5. Ballots cast for the above named Union 39
6. Ballots cast against the above named Union . . 0

WERC's certification is that the association was selected by a majority of the eligible employees of the County to be their collective bargaining representative, and defined the collective bargaining unit as "consisting of all regular full-time attorneys employed by Milwaukee County, excluding supervisory, managerial and confidential personnel"

The County filed the instant petition for Review on July 15, 1974. Because the County also argued that attorneys were not employees within the meaning of the Municipal Employment Relations Act, secs. 111.70 et seq., this case was held in abeyance until the Supreme Court decided the question in *City of Milwaukee v. Wisconsin Employment Relations Commission* (1976), Wis. 2d , 239 N.W. 2d 63 (holding that Milwaukee assistant city attorneys are employees).

RELEVANT STATUTES

Section 111.70 (4) (d) 2., Stats., 1973, provides:

"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. The commission shall not decide, however, that any unit is appropriate if the unit includes both professional employees and non-professional employees, unless a majority of the professional employees vote for inclusion in the unit. The commission shall not decide that any unit is appropriate if the unit includes both craft and noncraft employees unless a majority of the craft employees vote for inclusion in the unit. Any vote taken under this subsection shall be by secret ballot.

"b. Any election held under subd. 2.a. shall be conducted by secret ballot taken in such a manner as to show separately the wishes of the employees voting as to the unit they prefer.

"* * *." (Emphasis supplied.)

THE ISSUES

The County's brief advances these contentions:

(1) WERC in establishing the composition of the collective bargaining unit should have taken into consideration the wishes of the employees by conducting an election to determine whether certain groups of attorneys wished to be included in the unit.

(2) WERC ignored a prior finding made by it that assistant corporation counsels were confidential employees.

(3) There is no community of interest between the assistant district attorneys and the other attorneys included in the unit in these four respects:

- (a) Physical location
- (b) Work assignment
- (c) Employment status
- (d) Conflict of interest

THE COURT'S DECISION

A. Holding an Election to Ascertain Wishes of Employees With Respect to Composition of Bargaining Unit

While the third sentence of sec. 111.70 (4) (d) 2a, Stats., authorizes WERC before making its decision with respect to the composition of the bargaining unit to provide an opportunity for the employees concerned to determine by secret ballot whether or not they desire to be established as a separate bargaining unit, this is entirely discretionary with WERC whether to do so. The overriding determinative factor specified in sec. 111.70 (4) (d) 2a is to "whenever possible avoid fragmentation". It is exclusively a policy function of WERC to have balanced this factor against the wishes of certain attorney employees who desired not to be included in the same unit with other attorney employees and to have concluded not to hold such an election. The courts should refrain from interfering with such an administrative policy determination.

B. The Prior Finding Made by WERC

The County places great reliance upon this finding made in 1965 by WERC in Case I, No. 8600, ME 10, Decision No. 7135, Memo, page 14:

"We are satisfied that the employes in the . . . Corporation Counsel perform such duties which are confidential to the employer-employee relationship and therefore all employes in that department will be excluded from the eligibles in the county wide unit."

WERC in its memorandum attached to its direction of election dated March 22, 1974, made this comment with respect to the above quoted finding:

"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."

Furthermore, it is basic administrative law that stare decisis does not obtain. See Nick v. State Highway Comm. (1963), 21 Wis. 2d 489, 495, ("an administrative agency is not bound by its prior determinations."). See also Robertson Transport Co. v. Public Service Comm., (1963), 39 Wis. 2d 653, 661.

WERC's instant direction of election expressly excludes "supervisory, managerial and confidential personnel" from the bargaining unit. Thus the County is free to raise on a case by case basis the issue of whether any particular attorney employee, or employees, are confidential employees.

C. The Community of Interest Issue

The Court is satisfied that the fact that the district attorney's office is located in the Milwaukee Safety Building while the other attorneys in the bargaining unit are housed elsewhere is not pertinent to the community of interest issue. In establishing a statewide unit of attorneys in state service, the legislature included people in different cities as well as in different buildings.

The County's brief points out the wide divergence in work assignments of the various groups of attorneys included in the bargaining unit. This, however, is common to most bargaining units.

The Court has been most impressed by the County's argument that assistant district attorneys are not included in the classified civil service while employees in the corporation counsel's office and all other attorney employees in the bargaining unit are. Some illustrations of the benefits afforded to employees in the classified civil service and not in the unclassified service are hearings on discharge, layoff, recall, vacations, personal days, and sick leave. Undoubtedly in negotiating collective bargaining contracts the assistant district attorneys will seek to obtain some or all of the benefits now enjoyed by attorneys in the classified civil service, and any granting of such demands by the County will not benefit other attorneys in the bargaining unit and might lead to dissatisfaction on the part of the latter.

The Court is satisfied that including classified and unclassified employees in the same bargaining unit makes it more difficult for the County in conducting collective bargaining negotiations than would be the case if each group were placed in a separate bargaining unit. On the other hand, it is not uncommon in collective bargaining negotiations for special demands to be made upon the employer in behalf of some particular group in the bargaining unit. The County has cited no legal authority holding that it is illegal or improper to place in the same bargaining unit employees in classified civil service with employees not having such status. The Court is satisfied that this is a discretionary policy decision which should be made by WERC and should not be reversed by a reviewing court.

The final argument advanced by the County is that situations arise where a conflict of interest occurs between attorneys in the bargaining unit as now constituted. One example cited is the duty of assistant district attorneys to investigate county officials for misconduct in office which might lead to the instituting of criminal charges against them which it is the duty of attorneys in the corporation counsel's office to counsel such public officials. Another example cited is when an attorney on the corporation counsel's staff in a nonsupport case prosecutes the matter before an assistant family court commissioner who is also in the bargaining unit.

The legislature by enacting sec. 111.81 (3) (a) 6c, Stats., has provided that all attorneys in state service subject to being placed in a collective bargaining unit shall be placed in one state-wide unit. The conflict of interest which may arise in a county bargaining unit of attorneys is no greater than that in the required state-wide unit of attorneys. For example, counsel for the Public Service Commission have to try contested matters before a hearing examiner of that agency with both being members of the same bargaining unit.

Conflicts of interest are matters of legal ethics rather than labor law. Merely because two attorneys having opposing interests belong to the same collective bargaining unit without more would not in the opinion of this Court present any conflict of interest from the standpoint of legal ethics. However, if both had acted closely together as officers or committee members of the association that was the collective bargaining agent, this might present an ethical problem which would require one or the other to withdraw from the matter.

It is the Court's conclusion that there is sufficient community of interest to permit WERC to have constituted the instant collective bargaining unit so as to include all regular full-time attorneys employed by the County excluding supervisory, managerial and confidential personnel.

Let judgment be entered affirming WERC's certification of representatives here under review.

Dated this 1st day of June, 1976.

By the Court:

George R. Currie /s/
Reserve Circuit Judge