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STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH ONE

EAU CLAIRE COUNTY

WISCONSIN EMPLOYMENT  
RELATIONS COMMISSION

Eau Claire County, a quasi-  
municipal corporation,

Petitioner,

and

Thomas H. Barland, William D.  
O'Brien and Karl F. Peplau,  
Circuit Court Judges for Eau  
Claire County,

Intervening Petitioners,

vs.

Wisconsin Employment Relations  
Commission

and

Wisconsin Council of County  
and Municipal Employees, AFSCME,  
AFL-CIO,

Respondents.

MEMORANDUM OPINION

Case No. 82 CV 521

Decision No. 17488-C

The Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, filed a petition on April 11, 1980, requesting the Wisconsin Employment Relations Commission to clarify an existing courthouse bargaining unit represented by the Union consisting of clerical employees in the employ of Eau Claire county. A hearing was conducted at Eau Claire, Wisconsin, on July 8 and 9, 1980, by Examiner Stephen Pieroni, a member of the Commission staff. On March 20, 1981, the Commission issued a decision, but held in abeyance the determination as to whether the position of Register in Probate and Probate Registrar should or should not be included in the bargaining unit. The case with reference to that position was designated Case LXXXIV, No. 26325-ME-1850, Decision No. 17488-B. On May 25, 1982, the Wisconsin Employment Relations Commission by Gary L. Covelli, Morris Slavney, and Herman Torosian, Commissioners, entered their findings of fact, conclusions of law and decision that the position of Register in Probate and Probate Registrar, which is combined in Eau Claire county, should be included in the "courthouse" unit, the bargaining unit, on the basis that the position was not managerial. In its conclusion of law, the Commission held that the occupant of

Page 2 - Opinion

the position of Register in Probate/Probate Registrar in the employ of Eau Claire county possesses no significant managerial nor supervisory authority nor duties and that, therefore, said occupant is a municipal employee within the meaning of Section 111.70(1)(b) of the Municipal Employment Relations Act.

On August 5, 1982, action was commenced in this court under Sections 111.07(8) and 111.70(4)(a) and Chapter 227 Stats. to review the decision and order of the Wisconsin Employment Relations Commission.

The parties agreed to submit briefs to the Court and to have the matter scheduled for hearing and oral argument thereafter. Briefs were submitted to the Court on behalf of Eau Claire County by the corporation counsel, on behalf of Wisconsin Employment Relations Commission by Bronson C. LaFollette, Attorney General, and David C. Rice, Assistant Attorney General; and on behalf of the Wisconsin Council of County and Municipal Employees by its attorneys, Lawton and Cates. Hearing was scheduled by the Court for June 23, 1983, at Eau Claire.

On June 20, 1983, a motion and notice of motion was filed by Eau Claire County by Robert G. Evans, assistant corporation counsel, that the Honorable Thomas H. Barland, Honorable William D. O'Brien and Honorable Karl F. Peplau, Circuit Judges for Eau Claire County, be allowed to intervene pursuant to authority of circuit judges to appoint and remove the Register in Probate under Section 851.71 Wisconsin Statutes and their authority to designate the Probate Registrar under Section 865.05, Stats.

The matter came on for hearing on June 23, 1983, at the Eau Claire County Courthouse, the petitioner, Eau Claire County, appearing by Keith Zehms, corporation counsel; the three circuit judges of Eau Claire County, intervening petitioners by Robert C. Evans, assistant corporation counsel of and for Eau Claire County; and the Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, by Bruce Ehlke of the firm of Lawton and Cates; all before the undersigned, Warren Winton, judge presiding. On June 15, 1983, David C. Rice,

Assistant Attorney General, advised the Court that the Wisconsin Employment Relations Council would make no appearance on June 23, 1983, to make oral argument but would rely on its written brief and would defer to Bruce Ehlke to present oral argument.

The Court heard oral argument and now enters its memorandum opinion herein.

Mr. Ehlke objected to the intervention claiming that it should have been made before the hearing before the Wisconsin Employment Relations Commission. He stated he had no objection because the motion was not filed within five days before the hearing before the Court. Mr. Evans argued on behalf of the intervening petitioners that although the motion was untimely, there was no prejudice to any party. The Court concluded that because the original court hearing was not held, the parties having stipulated to first file briefs and then make oral argument, no prejudice would be suffered by the respondents, especially in view of Mr. Ehlke's not objecting to the statutory notice requirement and in view of the fact that the Court was not granting a continuance to allow the intervening petitioners to file a brief. Mr. Ehlke made no strenuous argument in support of his position that intervention could be granted only at a time preceding the hearing before the Commission and cited no authority. The Court granted the motion to intervene.

#### ISSUE

The issue in this case is: Is the Probate Registrar of Eau Claire County in a managerial position?

The petitioner concedes that the Register in Probate of Eau Claire County should not be excluded from the bargaining unit. The Court finds that that position is one in which the incumbent primarily keeps and files probate records for the benefit of the courts and the public. The Court finds and concludes that the position meets none of the indices requiring exclusion from the

bargaining unit. The fact that she is appointed and may be discharged by the judge is, in itself, insufficient grounds for so doing. However, because the position of Register in Probate is combined with that of Probate Registrar in Eau Claire county, the classification of Register in Probate is dependent upon the classification of the position of Probate Registrar. If the position of Probate Registrar cannot be part of a bargaining unit, then neither can the position of Register in Probate in Eau Claire county. For that reason the long list of prior decisions of the WERC holding that the position of Register in Probate is subject to being part of a bargaining unit is not applicable to this case.

The Court finds and concludes that prior decisions of the WERC and the decision in this case should not be afforded unusual weight because of the expertise of the WERC. The position is one within the special competence of this Court.

Based on the statutory duties and powers assigned the Probate Registrar, the job description, and the testimony of the present incumbent, the Court finds and concludes that although the Probate Registrar is subject to the supervision of the circuit judge, in the great majority of cases in informal probate no supervision is exercised by the circuit judge. In most cases the Probate Registrar acts as a judge of a probate court. She is in charge of the case from the filing of the petition until the case is closed. She exercises all the discretion necessary to be exercised. In that majority of cases the circuit judge has no knowledge of the individual case being commenced, its status during the proceedings and its closing. The circuit judge or circuit court may intervene if requested to do so, but the request is rarely made. For all practical purposes, the Probate Registrar acts as "the court" in informal probates. The discretion granted the Probate Registrar is very broad -- by statute. She may approve or disapprove of the designation of any individual as personal

Page 5 - Opinion

representative without citing any reason. She determines jurisdiction, whether notices were properly given, whether the decedent died testate or intestate, if testate whether the Will is properly attested, determines whether a bond should be required and sets the amount of it. She may admit a Will to probate or deny admission. She may issue letters of trust. She may determine whether the amount of an attorney's fees are just and reasonable. She determines whether or not the estate has been properly or fully administered.

The balance of the duties of the Probate Registrar are set out by statute, and it serves no useful purpose to repeat them in this decision. The majority of the duties and powers of the Probate Registrar indicate the wide discretion granted to the incumbent of the position.

In Milwaukee County vs. Labor and Industry Review Committee, 113 Wis 2d 199, the Court of Appeals stated:

"Generally the scope of review of an appellate court reviewing a circuit court's decision reversing an order of an administrative agency is the same as the circuit court's. Questions of law, including the construction, interpretation, or application of a statute, are reviewable ab initio; however, due weight is accorded to the experience, technical competence and specialized knowledge of the administrative agency, except that no special deference is required when this court is as competent as the administrative agency to decide the legal question involved." (Emphasis added.) Although the question before that court was one of law whereas the one before this court is one of mixed law and fact, the principal is the same. This court has a probate registrar whose position, duties and powers are almost identical to that in Eau Claire. This court is as competent as the administrative agency to decide the question before the court.

The position of a Family Court Commissioner is similar in many respects to that of a Probate Registrar but the Probate Registrar, under the practice and circumstances in Eau Claire county, has a discretion and power much broader in her particular field of informal probates and more akin to that of a judge. A judge's position is obviously managerial.

The court concludes that the WERC erred in finding and concluding that the position of Probate Registrar of Eau Claire county is not a managerial one. The court concludes that the position of Register in Probate-Probate Registrar in Eau Claire county is managerial.

The main thrust of the arguments of the respondents herein is that the Probate Registrar does not participate in the formulation, determination, and implementation of management policy. Secondly, they argue that she does not possess the effective authority to commit the employer's resources.

The respondents contend that the duties, powers and policies are set by statute and that the incumbent of the position is merely carrying out the policy, performing the duties and exercising the powers established by statute. This interpretation is much too broad in that all employees of the sovereign or its agencies are so circumscribed by law. The question is: Does the employee formulate policies for the carrying out of the duties and powers? She certainly "implements" them by being the person primarily responsible for exercising them. It is further argued that the testimony of the present incumbent that she does not make the policies but only carries out the matters set forth by statute is controlling. The test is not a subjective but an objective one. She may not even recognize that she is formulating policies, yet be doing so daily by the exercise of her discretion. She need not write them in stone, or write them at all, but the court finds and concludes that she is formulating policies when she decides what is important and what is not important in making an application for informal probate complete; what facts are necessary to be shown and what standards are necessary to be applied in determining what

court has jurisdiction; whether proper notice has been given and whether the necessary consents are complete, whether the decedent died testate or intestate; whether the person nominated for personal representative is suitable or not or is disqualified; whether or not a bond should be required and, if so, the amount of the bond; whether the attorney's fees are reasonable; when and whether or not the estate has been fully administered; and in the discretionary exercise of her other duties and powers. It is inconceivable that the probate registrar will determine each question in each case as if it were unique. She must, of necessity, formulate and determine policies of procedure and standards by which she will exercise her discretion in the routine case and even as to the circumstances in which she will seek intervention by the judge. Her policies may be subject to review by the court or by appellate courts and may be found to be incorrect or inappropriate. Nevertheless, they are the policies formulated, determined, and implemented by her.

The finding of the commission that the Probate Registrar does not establish an original budget but "simply communicates her opinion to the County Board who establishes the budget" is an insufficient finding to support its conclusion that she does not have the effective authority to commit the resources of Eau Claire county. Such a finding and conclusion are entirely too narrow to determine whether or not one is a managerial employee. A strict application of the rule would bar all department heads in county government and even judges, except in their infrequent exercise of the inherent powers of the court, from being managerial employees of the county. That is the way it is almost universally done. Budgets are prepared for positions or departments and incorporated in the final and formal budget of the county. Generally funds may then be expended to the extent of the budget for each department or position without further authorization but subject to the final allowance or disallowance of the expenditure by a committee of the County Board. The exact procedure in Eau Claire county was not developed by testimony. The incumbent testified that she "assisted the person preparing the budget." This is insufficient evidence for the Board

to make its finding or support its conclusion. She further testified that the information she furnished then went to the County Board. Obviously her budget was not submitted to the judge of the probate court nor submitted by him. In a full and fair sense of the meaning of the standard established by the WERC and subsequently approved by the courts she was "establishing an original budget" for her office in the same way that the heads of other departments do for incorporation in the county budget. She further testified that she could then make expenditures such as the purchase of a new desk or typewriter, that she made the decision and that it was not made by the County Board or Finance Committee or anyone else. She would secure the estimate and obtain a purchase order if there were funds in her budget to cover the expenditure. The County Board would eventually approve it.

The Court concludes that if the standard means anything in determining whether or not one is a managerial employee the practice of the Probate Registrar in Eau Claire county meets that standard. She commits the county resources insofar as any individual may do so under our system of county government. The evidence supports the conclusion. The evidence does not support the finding nor conclusion of the WERC. The position of the respondents that only the County Board establishes the budget and that the Probate Registrar cannot do so leads to the inevitable conclusion that no employee can commit the resources of the county. That position would make the standard meaningless.

Petitioner also urges that limiting "resources of the county" only to financial resources is too narrow a construction, and that by the Probate Registrar's giving advice, as directed under Sec. 865.065(2) Stats., she is committing the resources of the county. The Court agrees. The important resources of the county are not only its funds but also the expertise of its officials and employees. In advising in the preparation of the documents necessary in informal probate she is, in that sense, committing the resources of the county which are within her special competence.

In summary, the Court concludes that the findings of fact of the WERC were not supported by substantial evidence; that the



the commission could not reasonably determine that the Probate Registrar of Eau Claire county was not a managerial employee; that such employee participates in the formulation, determination, and implementation of management policy; that such employee does possess effective authority to commit the county's resources; that the commission made a material error of law in finding that such employee was not a managerial employee; that the Findings of Fact of the commission were not supported by the evidence, and that the Probate Registrar of Eau Claire county is a managerial employee and that the position is not subject to inclusion in the collective bargaining unit.

The petition is granted and the decision of the Wisconsin Employment Relations Commission that the position of the Registrar in Probate and Probate Registrar of Eau Claire county accrete to the bargaining unit is reversed.

Counsel for the petitioner may prepare a judgment pursuant to this opinion.

Dated this 10th day of October, 1983.

BY THE COURT:

A handwritten signature in cursive script, reading "Warren Winton", is written over a horizontal line.

Warren Winton, Judge