

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

DEC 30 1987

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NOTICE

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**WISCONSIN EMPLOYMENT
RELATIONS COMMISSION**

No. 86-1271

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

COUNTY OF WAUPACA,

Petitioner-Respondent,

v.

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION,
AFSCME, Local 2771,

FILED
DEC 30 1987
CLERK OF COURT OF APPEALS
OF WISCONSIN

Decision No. 20854-C

Respondents-Co-Appellants.

APPEAL from a judgment of the circuit court for Waupaca county: DENNIS C. LUEBKE, Judge. Reversed.

Before Dykman, J., Eich, J., and Sundby, J.

DYKMAN, J. The Wisconsin Employment Relations Commission (WERC) and the Waupaca County Courthouse Employees, AFSCME Local 2771 (Union) appeal from a judgment reversing a WERC order holding that Waupaca County's positions of Register in Probate/Probate Commissioner (Register) and Victim/Witness Coordinator (Coordinator) are not within the "managerial" exception to the Municipal Employment Relations Act (MERA), sec. 111.70(1)(i), Stats.¹ Waupaca County (County) attacks that part of the judgment affirming WERC's finding that the Coordinator did not

participate in the formulation of policy, but has not appealed or cross-appealed.

The first issue is whether WERC's interpretation of sec. 111.70(1)(i), Stats., is reasonable and consistent with the statute's purposes. The second issue is whether there is substantial evidence in the record to support WERC's findings that the Register and the Coordinator are not "managerial employees." The third issue is whether including the Register within the coverage of MERA violates the doctrine of separation of powers. We do not address the County's assertions of error because it filed no appeal or cross-appeal, and because it requests that we affirm the trial court's judgment. We conclude that WERC's interpretation and application of the statute is reasonable and that there is substantial evidence to support WERC's findings. We also conclude there is no violation of the separation of powers doctrine. We therefore reverse.

FACTS

WERC held a hearing to determine whether employees in the County's Coordinator and Register positions were "managerial employees" and thus were included in the county's bargaining unit. The Coordinator testified that she submitted a budget to her supervisor, the district attorney, who then submitted it to the county board. WERC found that most of this budget was the Coordinator's salary, set by the county board. The Coordinator arrived at most of the other figures in the 1985

budget by doubling the previous six-month budget from 1984. Only a small portion of the 1985 budget was not in the 1984 budget. With regard to the Register, WERC found that the great majority of the items in the budget were items over which the Register had no control. The increases in the remaining items in the budget were estimated based on the past year's experience. The Register had no control over whether services would be increased. The budget is subject to the county judge's approval, who then presents it to the county board. The Register did not establish budget priorities nor how money was spent.

WERC issued its "Findings of Fact, Conclusions of Law and Order Clarifying Bargaining Unit," making the following findings:

15. That the Victim/Witness Coordinator does not significantly participate in the formulation, determination and implementation of managerial policy with respect to the Victim/Witness program; and that she does not have effective authority to commit the employer's resources.

....

17. That the Register in Probate/Probate Commissioner does not participate in the formulation, determination and implementation of management policy to any significant degree or possess significant authority to commit the employer's resources; and that any authority possessed by her to make expenditures is essentially ministerial.

WERC concluded from these findings that the persons in these positions were "municipal employees" within the meaning of sec. 111.70(1)(i),

Stats., and therefore were included in the bargaining unit represented by the Union.

The circuit court concluded that WERC's findings did not have a reasonable basis in the evidence and that WERC had made a material error of law by finding that the persons in the contested positions were municipal employees.

STANDARD OF REVIEW

Our standard of review under ch. 227 is the same as the circuit court's. Boynton Cab Co. v. ILHR Department, 96 Wis.2d 396, 405, 291 N.W.2d 850, 855 (1980). Section 227.57(5), Stats., describes the extent of our review of an administrative agency decision: "[t]he court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law..." However, "due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved" Sec. 227.57(10). Because WERC is charged with applying MERA, its interpretation of this statute is entitled to great weight, and we defer to it unless it has no rational basis. Drivers, etc., Local No. 695 v. WERC, 121 Wis.2d 291, 294, 359 N.W.2d 174, 176 (Ct. App. 1984). WERC has well-established expertise in distinguishing between municipal and managerial employees. Milwaukee v. WERC, 71 Wis.2d 709, 714-15, 239 N.W.2d 63, 66 (1976). Where an agency's expertise is significant to a value judgment, we give the agency's

judgment great weight. Nottelson v. ILHR Department, 94 Wis.2d 106, 117, 287 N.W.2d 763, 768 (1980). We sustain WERC's reasonable interpretation of MERA even if an alternative interpretation is equally reasonable. Milwaukee v. Wis. Employment Relations Comm., 43 Wis.2d 596, 602, 168 N.W.2d 809, 812 (1969).

Section 227.57(6), Stats., provides that this court shall reverse an agency action if it "finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record." However, an agency's findings of fact are conclusive if supported by substantial evidence in the record. Gilbert v. Medical Examining Board, 119 Wis.2d 168, 195, 349 N.W.2d 68, 80 (1984). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. (Citations omitted.) Questions regarding the weight and credibility of the evidence are solely for the agency. Bucyrus-Erie Co. v. ILHR Department, 90 Wis.2d 408, 418, 280 N.W.2d 142, 147 (1979); sec. 227.57(6).

The County contends that WERC's "Findings of Fact" 15 and 17 are legal conclusions because they involve the application of WERC's interpretation of a statute to a particular set of facts. The County concludes that our standard of review is therefore less deferential. However, the Wisconsin Supreme Court has addressed this issue.³ Regardless of whether this question is labeled one of law or fact, because

the agency's expertise is involved in the application of a law to a set of facts, we defer to any reasonable conclusion of the agency. Nigbor v. DILHR, 120 Wis.2d 375, 383-84, 355 N.W.2d 532, 537 (1984). Therefore, although we agree that WERC's "Findings of Fact" 15 and 17 are legal conclusions, we must defer to WERC's conclusions if they are reasonable.

The County also points out that because the Coordinator is a new position, WERC has not had prior experience with this position. Therefore, on a case of first impression, we need not accord the agency's determination "great weight" but only due weight. Berns v. Wis. Employment Relations Comm., 99 Wis.2d 252, 261, 299 N.W.2d 248, 253 (1980). Further, the County asserts that because WERC's determinations on both positions are contrary to our holding in Eau Claire County v. WERC, 122 Wis.2d 363, 362 N.W.2d 429 (Ct. App. 1984),³ we need not afford them great weight. See Milwaukee v. Wis. Employment Relations Comm., 43 Wis.2d at 600, 168 N.W.2d at 811 (we affirm agency's expert application of a statute unless it conflicts with prior appellate decisions).

WERC has developed an expertise in differentiating between municipal and managerial employees. Milwaukee v. WERC, 71 Wis.2d at 716-17, 239 N.W.2d at 67 (1976). Therefore, in any case where WERC is required to distinguish between municipal and managerial employees, we will defer to its application of MERA if there is any rational basis to support it.

The Supreme Court has accepted WERC's definition of "managerial" employees as those whose "relationship to management imbues them with interests significantly at variance with those of other employees." Milwaukee v. WERC, 71 Wis.2d at 716, 239 N.W.2d at 67. There is a two-fold analysis to determine if an employee's position is "managerial" within the meaning of sec. 111.70(1)(i), Stats. The first test is whether an employee participates in formulating, determining and implementing management policy. Eau Claire, 122 Wis.2d at 366, 362 N.W.2d at 431. The second test is whether the employee has effective authority to commit the employer's resources, or "the authority to establish an original budget or to allocate funds for differing program purposes from such an original budget." Id. However, the power to make ministerial expenditures is not a factor. Id. WERC's interpretation of sec. 111.70(1)(i) is reasonable and consistent with the purposes of MERA.

In Eau Claire, WERC concluded that the position in question possessed "no significant managerial or supervisory authority or duties." Eau Claire, 122 Wis.2d at 365, 362 N.W.2d at 430. The test was not whether the position had any managerial authority, but whether the position had significant managerial authority. Determining whether an employee's interests are "significantly at variance with other employees," Milwaukee, 71 Wis.2d at 716, 239 N.W.2d at 67, requires a value judgment.

The County claims the circuit court erred in affirming WERC's finding that the Coordinator did not formulate policy. Because the County filed no cross-appeal as required by sec. 809.10(2)(b), Stats., we lack jurisdiction to address this issue.⁴ State v. Huff, 123 Wis.2d 397, 408, 367 N.W.2d 226, 231 (Ct. App. 1985).

The second test to determine if an employee is "managerial" is whether the employee possesses effective authority to commit the employer's resources, or, in other words, the power to establish an original budget or to allocate funds under such a budget. Eau Claire, 122 Wis.2d at 366, 362 N.W.2d at 431. As "significantly" implies a value judgment, so does "effective."

The Coordinator testified that most of the budget figures were arrived at by doubling the amount stated in the initial program plan. Many items were provided by the county clerk's office. The Coordinator presented the budget to the district attorney, who presented it to the county board. The Register's supervisor is the county judge, who testified that he gives the ultimate approval of the budget before it is submitted to the county board. The Register's compilation of the budget entailed adding figures not set by her, such as witness fees, Judge's dues and court commissioner fees; increasing previously budgeted amounts from year to year, such as a maintenance contract for the typewriter, postage, and telephone; and providing money for office equipment, in this case a

chair for an employee. WERC evaluated these positions on their actual input into the budget process and concluded that neither position had effective authority to commit the County's resources.

The circuit court held that WERC's determination of the second test conflicted with our holding in Eau Claire. However, the circuit court misconstrued the "mandate" of Eau Claire as broadening the definition of actions which constitute "establishing a budget." There is no definitive test for determining whether a position is managerial, and each position must be individually evaluated in terms of its duties, powers and responsibilities. See Eau Claire, 122 Wis.2d at 367-68, 362 N.W.2d at 431 (determination must be rationally based on the facts and findings). As the circuit court noted, there is a continuum between the two extremes of a "mere gatherer of budgetary data" and "the person who has the actual legal responsibility or authority for budget submission." However, because of WERC's expertise in distinguishing between municipal and managerial employees, we defer to its reasonable determination of whether an employee's budgetary duties imbues that employee with managerial interests sufficient to distinguish them from municipal employees. Nigbor, 120 Wis.2d at 384, 355 N.W.2d at 537.

The County points out excerpts from the evidence which it says demonstrate that these positions are managerial. However, because we conclude that substantial evidence⁵ supports WERC's findings, those

findings are conclusive. WERC's conclusions that neither position has effective or significant authority to commit the County's resources and that the Register's authority to spend is essentially ministerial require value judgments, to which we defer, and therefore affirm.

The County also claims that the application of MERA to the Register's position would violate the doctrine of the separation of powers because the employees' collective bargaining rights under MERA would conflict with a judge's statutory powers under sec. 851.71, Stats.⁶ The question is whether the collective bargaining rights guaranteed under MERA conflict with the court's statutory power to appoint or discharge Registers in Probate/Probate Court Commissioners. However, any part of a labor contract that violates a statute is void as a matter of law. WERC v. Teamsters Local No. 563, 75 Wis.2d 602, 612, 250 N.W.2d 696, 701 (1977). Therefore, the Registers in Probate/Probate Court Commissioners are protected under MERA on labor matters to the extent that those matters are not entrusted to the courts.

By the Court.--Judgment reversed.

Inclusion in the official reports is not recommended.

APPENDIX

¹ Section 111.70(1)(i), Stats., provides:

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

² Nottelson v. ILHR Department, 94 Wis. 2d at 115-117, 287 N.W.2d at 768, provides in part.

One of the most troublesome issues in administrative law is determining whether the third question, namely, the application of a statutory concept to a concrete fact situation, should be treated as a question of fact or of law for purposes of judicial review. In many cases we have said that the determination of whether the facts fulfill a particular legal standard is a question of law. The conclusions that there is a "voluntary termination" or that "good cause attributable to the employing unit" exists are drawn from the underlying findings of fact, and we label them legal conclusions.

Nevertheless, merely labeling the question as a question of law and labeling the commission's determination as a conclusion of law does not mean that the court should disregard the commission's determination. Determination of voluntary termination or good cause attributable to the employing unit calls for a value judgment, and judicial review of such a value judgment, though a question of law, requires the court to decide in each type of case the extent to which it should substitute its evaluation for that of the administrative agency. We have recognized that when the expertise of the administrative agency is significant to the value judgment (to the determination of a legal question), the agency's decision, although not controlling, should be given weight. (Footnotes omitted.)

³ We recently re-examined Eau Claire in Kewaunee County v. WERC, No. 86-1800, slip op. (Aug. 11, 1987) (Ordered published Nov. 5, 1987). Nothing in this opinion is meant to conflict with our holding in Kewaunee County.

⁴ The County alleges that WERC and the circuit court erred in finding the Victim/Witness Coordinator did not formulate policy, but requests that we affirm the circuit court's judgment. We therefore do not address this issue.

⁵ WERC found:

Victim/Witness Coordinator

....

With respect to the second indicia of managerial status, the effective authority to commit the employer's resources, the evidence again falls short. Although [Victim/Witness Coordinator] Leischow prepared the 1985 budget for the Victim/Witness Program, once prepared, the budget is submitted to District Attorney Maroney for his approval and signature prior to submission to the County Board for its approval. We note that the biggest portion of the budget is attributable to Leischow's salary which is set by the County Board. Other figures in the 1985 budget represent the simple doubling of the corresponding amount in the previous six-month budget for 1984. Only a small portion of the budget represents items not in the previous year's budget. In the absence of a greater showing of input or control over the budget, Leischow's involvement with the budget is routine and ministerial and therefore, insufficient to confer managerial status.

....

Register in Probate/Probate Commissioner

....

However, with respect to the second indicia of managerial status, the effective authority to commit the employer's resources, [Register in Probate/Probate

Commissioner] Virnig's involvement with the court budgets requires closer examination. The Commission has stated that such authority includes the authority to establish an original budget. Analysis of the record reveals that the majority of the items in the two budgets that Virnig prepares are items over which she has no control or input such as salaries, which are set by the County Board, fees for legal or medical services, witnesses, conventions and seminars, and publications. Of the \$72,829 proposed for the 1985 circuit court budget, nearly \$64,000 of it was for items in these categories. The remaining items were for office supplies and equipment. Virnig testified that she based increases in budget items on the past year's experience and anticipated increases in the level of services. However, Virnig has no control or input into whether such services are in fact increased in the first instance. Once the budget is prepared, Virnig must then submit it to the Judge for his approval and he then presents it to the County Board. Virnig does not appear before the Finance Committee when the budget is presented. Once the budget is approved, Virnig's tasks are essentially ministerial in that payments are only made after the voucher has been approved by the Judge. While we agree that a certain amount of managerial discretion is exercised when a budget is drafted, particularly when the employee is an experienced one with a firm knowledge of the costs of operating the department, that factor standing alone, is not sufficient to confer managerial status when much of the preparation appears to be routine and the preparer does not make final decisions as to budgetary needs and allocations. Virnig does not determine either what kinds of items or services money is spent on or budget priorities. Rather she estimates what such services would cost if provided. Under these circumstances, we conclude that Virnig does not possess the effective authority to commit the Employer's resources and, therefore, we do not exclude the Register in Probate on managerial grounds. [Footnotes omitted.]

⁶ Section 851.71(1), Stats., provides in part:

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.

No. 86-1271

SUNDBY, J. (dissenting). Our decision in Eau Claire County v. WERC, 122 Wis.2d 363, 362 N.W.2d 429 (Ct. App. 1984), has, unfortunately, focused the attention of the WERC and the courts on the least important facet of the two-part test currently employed by the WERC in determining who is a municipal employee within the meaning of sec. 111.70(1)(i), Stats. If the trend of the WERC determinations continues, soon the only municipal officers or employees who will be on management's side of the table will be the chief executive and the governing body. That certainly was never the intent of the legislature in guaranteeing to municipal employees the right of collective bargaining.

This case is classical. Two positions are involved: the victim/witness assistance coordinator and the register in probate/probate court commissioner. The victim/witness coordinator is created by the county pursuant to sec. 950.05, Stats., which encourages counties to provide a broad range of services to victims and witnesses. The register in probate is a statutory officer, sec. 851.71, Stats., who, before entering upon his or her duties, must take and subscribe the constitutional oath of office. The duties of registers in probate are enumerated in secs. 851.72 and 851.73. The office of the probate court commissioner may be created by the county board pursuant to sec. 757.72, Stats. The commissioner's

duties are prescribed by that statute. The commissioner is also required to take and file an official oath of office. Sec. 757.72(6).

In each case the officer exercises independent discretion and authority. The job description of the Waupaca County victim/witness coordinator includes among the coordinator's duties: to act as witness advocate and liaison with various court and police agencies; maintain communication with prosecutors regarding case status; advocate with employers to pay witnesses their regular wages for time spent in testifying in court; and to fully implement ch. 950, Stats., which includes committing the county's family support services, including child and other dependent care services. The Waupaca County victim/witness coordinator testified that she performed her duties without supervision.

The powers of the register in probate include: making orders for hearings when the judge is away or unable to discharge duties or when given authority in writing by the judge; and the powers of deputy clerks as provided in sec. 59.38, Stats. Sec. 851.73(1), Stats.

The probate court commissioner has the powers of a general court commissioner. Sec. 757.72(7), Stats. The judge may assign to the commissioner any matters over which the judge has jurisdiction and the commissioner may determine such matters and sign any order or certificate required in such determination. Sec. 757.72(2). It is apparent that the

register in probate/probate court commissioner is the right hand of the judge. In fact, the judge testified: "She can do anything that I am authorized to do except in contested probate cases."

Irrespective of whether they have the power to commit the county's financial resources, the victim/witness coordinator and the register in probate/probate court commissioner exercise substantial, independent discretion. They not only affect county policy, but they make and implement it.

The WERC findings of fact that the victim/witness coordinator and the register in probate/probate court commissioner do not participate in the formulation, determination and implementation of management policy to any significant degree are contrary to the great weight and clear preponderance of the evidence upon the record as a whole.

The majority refuses to review this determination of the WERC because the county did not file a cross-appeal. The majority states we lack jurisdiction to address this issue. The case cited by the majority, State v. Huff, 123 Wis.2d 397, 367 N.W.2d 226 (Ct. App. 1985), does not support its holding. In that case we said:

A respondent may raise an issue in his brief without filing a cross-appeal "when all that is sought is the raising of an error which, if corrected, would sustain the judgment" If the respondent seeks

modification of an order entered in a proceeding from which the appellant appealed, the respondent must file a notice of cross-appeal.

Id. at 407-08, 367 N.W.2d at 231 (citation omitted).

Here, the county does not seek a modification of the trial court's order. The order reversed the WERC. There was no ruling adverse to the county which the county could appeal. The county simply advances another reason to sustain the trial court's order. We therefore have jurisdiction to consider the issue and we should do so since it was briefed by all the parties.

While I agree with the trial court's determination of the budget issue, I will not write extensively on that issue because it pales in significance when compared to the issue of whether these employees are managerial or executive employees because of the discretionary, policy-making duties which they routinely perform.