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STATE OF WISCONSIN

CIRCUIT COURT

WAUPACA COUNTY

BRANCH I WISCONSIN EMPLOYMENT

RELATIONS COMMISSION

COUNTY OF WAUPACA,

Petitioner,

Case NO. 85-CV-698

vs.

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

DECISION

Respondent.

Decision No. 20854-C

In the current posture of this case, this Court has as responsibility to review that which the Wisconsin Employment Relations Commission determined relative to the Register in Probate, Probate Commissioner and Victim/Witness Coordinator positions in Waupaca County. That is all this Court can do. It cannot, as suggested by Waupaca County, determine those issues de novo. Whichever standard of review applies, whether "any rational basis" or "due weight", nonetheless, this Court must give deference to the Commission's decision in the first instance so long as the Commission applied the correct law. This Court is satisfied that the correct law was indeed applied by the Commission.

We must then turn our attention to whether or not the Commission's ultimate decision is sustained in the record. In doing so, I believe it is appropriate to apply the "any rational basis" standard rather than "due weight" inasmuch as the positions addressed by the Commission and the analysis undertaken by it are not of such unique or first impression character so as to warrant the more stringent standard of review.

The Commission's determination with regard to either of the disputed positions concerning the issue of "participation in the formulation, determination and implementation of management policy" appears to be sustained in the record. Given a review of the transcript and the characterization of the respective positions, there is more than ample and rational basis in the record to sustain the Commission's findings that neither the Register in Probate/Probate Commissioner nor the Victim/Witness Coordinator is of such a character as to place them within that definition. Insofar as their daily and customary activities are concerned, the record is replete with instances of their respective ministerial nondiscretionary employment requirements. Very little exercise of discretion or formulation of policy appears to be placed within their sphere of responsibility. Certainly, not enough to warrant a classification as a managerial employee as opposed to a municipal employee.

Even if I were in disagreement with the Commission's interpretation, however, there is a rational basis in the record to sustain its determination and I am not permitted under law to substitute my opinion unless the decision is contrary to law. As to that issue, I do not find its decision to be inappropriate. The suggestion that these positions are rendered discretionary so as to fit within the definition of managerial employee because they encompass giving directions, both procedurally and logistically, to citizens, as well as otherwise assisting them, would compel this Court to rule that a traffic officer directing the flow of traffic at a busy intersection is as well a

managerial employee. Clearly, such an officer is at times called upon to assist the general public. Clearly, such an officer is directing individuals where to go, when to stop. All those activities engaged in by the officer while on the location of a busy intersection are done within his sole discretion. No supervisor is standing next to him suggesting how long he should keep the blue Ford waiting, which direction he should suggest the two-tone Chevrolet should turn or whether or not he should give some other assistance to the attractive driver of the Fiero T-top. Those activities clearly do not cause such a traffic officer to be elevated to a position of managerial employee. If the opposite were true, then every police department this Court can visualize would be heavily laden with chiefs and very few indians.

In addressing the issue of whether or not the respective positions in question meet the other definition of managerial employee, to-wit: has the power to commit employer resources because of their involvement in the budget process, it would appear on the face that there is a sufficient rational basis in the record for the determinations of the Commission. It is necessary, however, to reconcile if at all possible, the Commission's decision with the results found in Eau Claire County v. WERC, 122 Wis. 2d 363 (1984). On what appears at least superficially to be similar facts, the Appellate Court found as a matter of law, contrary to an earlier Commission determination, that a Register in Probate/Probate Registrar was a managerial employee. The sole basis for the Appellate Court's decision was

that the incumbent of that position established an original budget as that term was defined by the Appellate Court within that case.

The particular mechanisms by which the incumbent arrives at the budget do not appear to have influenced the Appellate Court in the Eau Claire decision, nor is this Court of the opinion that they should. The simplistic method of budget preparation as cited by the Commission in this case may fall far short of concepts of sophisticated accounting and budgetary practices which we as taxpayers expect from our public servants. I suspect, however, that a great deal of budget preparation is done in the very same manner as testified to by the incumbents of these disputed positions. The Eau Claire decision seems to stand for the proposition that the responsibility for budget preparation is more important than the formality of final approval. Therefore, if substance is to take precedence over form, the manner of budget preparation in terms of how the numbers are added up is of less significance than the responsibility for doing those procedures. Does that mean that any individual who provides any input into the budget process is, therefore, a managerial employee? The answer must obviously be no. Clearly, MERA was not intended to have a subemployee within a particular department who merely gathers information together and submits it to another individual for ultimate compilation and inclusion in a budget be construed as a managerial employee. Clearly, MERA intended that the person who has the actual legal

responsibility or authority for budget submission would be regarded as a managerial employee.

The positions which are at issue in this case lie somewhere between the two extremes. However, it would appear the position of the Register in Probate/Probate Registrar as set forth in the Eau Claire case did also. The principal distinguishing factor between the different positions, however, seems to be that in the instant positions both incumbents, while they collected data and compiled the budget, nonetheless did not report their results or communicate their recommendation directly to the County Board as in Eau Claire. In each instance in this case, the incumbents reported their budget and made their recommendations to their immediate supervisor; the Circuit Court Judge and the District Attorney. A reasonable reading in the Eau Claire case causes me to believe that the Register in Probate/Probate Registrar in that instance reported directly to the County Board.

Does the existence of an intermediate step distinguish this case from that set forth in the Eau Claire decision? I think not. As I have already noted, the form or manner of budget preparation is not the basis upon which the managerial/municipal employee distinction is derived. Rather, "establishing an original budget" means not just the independent budgetary authority or power to force the County Board to accept a proposed budget, but as well, in this Court's interpretation, includes the responsibility for preparation of the departmental budget to ultimately be included within the final and formal county budget.

To rely upon the mere fact that the Circuit Court Judge or District Attorney is the one who ultimately transmits the proposed budget to the County Board as the reason for denying managerial status to the positions is to give substance to mere form. The mere right to transmit the concluded budgetary document from the Register in Probate or Victim/Witness Coordinator departments without regard to the fact that the incumbent's recommendations are generally accepted without modification or changes, may recognize the statutory, custom or local authority in the budget process and yet ignore the reality of the responsibility thrust upon and enjoyed by the incumbents of the disputed positions.

I am further mindful that the statutory responsibilities as to the operation of the Register in Probate/Probate Registrar positions in Eau Claire County are exactly the same as those existing in Waupaca County insofar as the circuit court exercises ultimate authority. Along that continuum, between the mere gatherer of budgetary data and the position of ultimate responsibility for budgetary submission, this Court is convinced that the disputed positions in this case fall more within that spectrum of the continuum defined as managerial employee than in the opposite, especially as that term is defined in the Eau Claire decision. Given that the Eau Claire decision revolves around budgetary responsibility, that analysis is applicable to both the Register in Probate/Probate Court Commissioner and Victim/Witness Coordinator positions. Nothing within the transcript causes the Court to believe otherwise.

Although this Court may not personally agree with the Eau Claire decision, principally because it provides little, if any, guidance as to the criteria to be utilized in discerning where within the employment continuum a position should be placed, nonetheless, I believe the Eau Claire decision controls in this instance. Such criteria should be developed by the court of appeals in order that the Commission and lower review courts can exercise better reasoned judgment in making these decisions. Absent such specific criteria, I must be guided by the general sense of that which the Appellate Court did in the Eau Claire case. Given the Appellate Court's intention of broadening the definition of actions which constitute "establishing an original budget", I believe that which the incumbents in these positions do falls within the spirit of that decision. The remaining issues need not be addressed by the Court in view of the above.

IT IS HEREBY ORDERED in accordance with the above findings and conclusions that the factual findings of the Commission in the above-entitled matter are not supported by substantial evidence and further than the Commission has made a material error of law in finding that the Register in Probate/Probate Court Commissioner and Victim/Witness Coordinator positions are municipal employees.

Counsel for the County is directed to draft an order in conformity with this decision.

Dated at Appleton, Wisconsin this 30th day of April,
1986.

BY THE COURT:

A handwritten signature in black ink, appearing to read 'Dennis C. Luebke', is written over a horizontal line.

DENNIS C. LUEBKE
Circuit Court Judge
Outagamie County, Br. II