

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

ONEIDA COUNTY

Involving Certain Employees of

ONEIDA COUNTY

Case 52
No. 54830
ME-870

Decision No. 24844-F

Appearances:

Cullen, Weston, Pines & Bach, by **Attorney Gordon E. McQuillen**, 122 West Washington Avenue, Suite 900, Madison, Wisconsin 53703, appearing on behalf of Oneida County Courthouse, Local 158, Wisconsin Professional Police Association.

Ruder, Ware & Michler, S.C., by **Attorney Dean R. Dietrich**, 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appearing on behalf of Oneida County.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
ORDER CLARIFYING BARGAINING UNIT

Oneida County initiated this matter on August 14, 1996 by filing a complaint for declaratory relief in Oneida County Circuit Court asking that the Deputy Register of Deeds II, the Deputy County Treasurer, the Deputy Clerk of Courts, and the Deputy County Clerk be excluded from the collective bargaining unit represented by Oneida County Courthouse, Local 158, Wisconsin Professional Police Association because these employees are Chief Deputies who should be "exempt" from the bargaining unit and because these employees are supervisors and managerial employees. On December 16, 1996, the Circuit Court ordered the matter transferred to the Wisconsin Employment Relations Commission.

No. 24844-F

A mediation session was held by Commission Examiner Karen J. Mawhinney in Rhinelander, Wisconsin on June 11, 1997 and the Examiner held a hearing on July 8, 1997. The parties submitted briefs by December 22, 1997.

During the pendency of the matter before the Commission, the statute regarding the County Treasurer's power to appoint deputies (Sec. 59.25, Stats.) was amended. The Commission sought and the parties filed supplemental argument regarding the impact of the statutory change on this proceeding, the last of which was received July 2, 1998. Having given prior notice to the parties, the Commission hereby takes official notice of the legislative Drafting File relative to amended Sec. 59.25, Stats.

The Commission, having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. Oneida County, herein the County, is a municipal employer having its offices at the Oneida County Courthouse, P.O. Box 400, Rhinelander, Wisconsin, 54501-0400.

2. The Oneida County Courthouse, Local 158, Wisconsin Professional Police Association, herein the Union, is a labor organization with its offices at 340 Coyier Lane, Madison, Wisconsin 53713. The Union represents a bargaining unit of certain Oneida County employees. The Union and the County are parties to a 1995-1997 collective bargaining agreement which contains the following recognition clause:

The County hereby recognizes the Association as the exclusive bargaining agent for all regular full-time and regular part-time employees of the Oneida County Courthouse covered by this Agreement, but excluding all elected personnel, supervisory personnel, confidential personnel and managerial personnel, as defined by the Act.

3. Deputy Clerk of Courts: The incumbent Deputy Clerk of Courts (also called Chief Deputy Clerk of Courts) for the last three years is Marilyn Tucker. The elected Clerk of Courts, Kenneth Gardner, is her supervisor. There are six other employees in the office – an Account Technician, a Criminal Court Clerk, a Typist II, an Account Clerk II, a Small Claims Court Clerk, and a Traffic Clerk.

Tucker's duties include processing family, civil and paternity cases, including entering them on the docket, collecting fees and preparing them for court activity. She sees that judgments are filed, that wage assignments are completed, and that documents are in order. In the absence of the Clerk of Courts, she has his statutory powers. She works thirty-seven and one-half hours per week, spending anywhere from four to thirty hours a week in the courtrooms, swearing in witnesses, marking exhibits, and providing clerking services to the court. She also helps out taking telephone calls or giving people service at the office counter.

Tucker and Gardner compose an interview panel for hiring new employees and they reach a consensus on who to hire. Tucker has hired a limited term employee on her own, with Gardner's ultimate approval. Tucker has given one employee an oral reprimand but has not taken higher levels of disciplinary action on her own authority. She has not recommended any other disciplinary action to Gardner.

Tucker started giving annual performance evaluations to employees in the office with Gardner's input in the last year. Gardner has changed one of her recommendations on an evaluation, giving that employee a higher category in performance than Tucker recommended. Tucker has supported reclassifications in the office for certain employees and recommended those reclassifications to Gardner. Tucker served as Union President and requested a reclassification of an employee as part of her duties as Union President.

Tucker assigns work to employees but typically does not change their assignments.

The Union contract sets the employees' hours of work. In Gardner's absence, Tucker has authority to modify employees' work schedules. The County decides which hours the Courthouse will be open, and the Clerk of Courts' office is open during those hours. Tucker does not have the authority to close the office in case of inclement weather nor keep it open with extended hours. She authorizes overtime on her own discretion, based on workload and ongoing court proceedings, although Gardner signs the time cards approving that overtime. Tucker grants time off for vacations and sick leave and compensatory time. She signs time cards in Gardner's absence. Either Tucker or Gardner try to be in the office at all times and they schedule their own vacations and time off around each other's schedule. Tucker meets with Gardner to discuss office matters.

Tucker does not develop programs or policies for the County, nor does she determine the level of services or what activities will occur in the Clerk of Courts' office. She has no involvement in creating a budget and does not take bids or enter into any contracts on behalf of the County. She sometimes appears at County Board meetings on behalf of the Clerk of Courts' office, including meetings where she is requesting money for programs such as the KIDS program. She has presented bills to a committee for approval.

Tucker is paid according to the wage schedule of the collective bargaining agreement. Of the six employees she oversees in the office, three are paid more and three are paid less than Tucker. The Account Technician has always been paid more than the Chief Deputy in the office.

Gardner has deputized all the employees in his office, but Tucker is the only deputy Gardner has authorized to exercise his authority in his absence. The other employees are deputized so that they can perform duties such as swearing in witnesses or assisting people seeking passports.

The Deputy Clerk of Courts has supervisory duties and responsibilities in sufficient combination and degree to be a supervisor.

4. Deputy County Clerk: The incumbent Deputy County Clerk for the last four years is Sandra Gardner. The elected County Clerk is Robert Bruso. When the County Clerk is absent, Gardner has the authority to exercise the Clerk's statutory powers.

Gardner takes care of County Board agendas and minutes, works on elections and legal notices for elections, and performs various other duties. Aside from Bruso and Gardner, there is a part-time Secretary working 70 percent of the time. While the organizational chart also shows a limited term employee, there have been none since Gardner has been the Deputy Clerk.

The part-time Secretary, LuAnn Brunette, distributes mail and handles the minutes for three different committees. Gardner may occasionally assign her different duties. Bruso authorizes overtime or grants requests for time off for vacations, sick leave or compensatory time off. Gardner can act in Bruso's absence to have Brunette work additional hours.

Gardner has no involvement in the budget. She does not establish policy or procedures, although she makes changes in procedures such as distributing election supplies to town clerks and she has changed forms used for licenses. She does not determine the level of services or activities that occur in the office. Gardner can sign contracts in Bruso's absence but has not done so.

The Deputy County Clerk does not have supervisory duties and responsibilities in sufficient combination and degree to be a supervisor, and she does not have sufficient authority to commit the County's resources or have sufficient participation in the formulation, determination and implementation of management policy to be a managerial employee.

5. Deputy County Treasurer: The incumbent Deputy County Treasurer for the last seven years is Kristina Ostermann. She reports to elected County Treasurer, Jennie Huber. Aside from Huber and Ostermann, the Treasurer's office consists of a part-time Account Clerk I, Pat Harvey, who works 75 percent of the time, and two limited term employees (LTE's) who work mainly in the summer. The two LTE's are budgeted for a total of 1,300 hours a year. One of the LTE's, Mary Gregory, works the majority of those hours. LTE's are used to help with mail and receptionist duties.

Ostermann collects taxes, handles foreclosures on properties, hands out payroll checks, and performs various other duties associated with the Treasurer's office. She exercises Huber's authority as Treasurer when Huber is absent. Both the part-time Secretary, Harvey, and the LTE, Gregory, were in the office before Ostermann became Deputy. One LTE has been hired during Ostermann's tenure. Ostermann and Huber both knew the applicant personally and agreed she should be hired.

Ostermann has never disciplined nor recommended discipline for an employee. She has authority to discipline in the absence of Huber.

Ostermann discusses performance evaluations with Huber but does not sign them. She sits with Huber in discussions when employees are given their evaluations.

No grievances have been filed in the Treasurer's office but Ostermann would take a grievance to the Personnel office in Huber's absence.

Ostermann assigns work to Harvey and the LTE's on a daily basis and changes their work assignments. She and Huber discuss what work needs to be done each week, and Ostermann tells Harvey what hours she needs to work. Huber determines whether employees can work overtime and grants requests for vacation and compensatory time. Huber and Ostermann coordinate their vacations so that they are not both gone at the same time. When both of them are gone, Harvey takes over in the office. Harvey is deputized so she can sign certain documents.

Ostermann does not establish any policies but she has changed office procedures and Huber did not have to approve these changes. Ostermann has changed fees for some office services without Huber's approval, based on the amount of work involved in providing the service. Most of the fees charged are for copying, tax searches, or bad checks. She and Huber usually discuss how much should be charged, and if the Finance Committee needs to approve of a fee change, Huber would go before the Committee. Ostermann discusses the budget with Huber. Ostermann has the discretion when collecting taxes to waive penalties and interest. Harvey has the same discretion. Occasionally, in Huber's absence, Ostermann has had to decide how to invest the County's money and look at interest rates and whether money can be put in certain banks, within established policies and guidelines. The Finance Committee and Huber set policies for investments. Ostermann's appearances before the Finance Committee are usually to give them tax information on a certain parcel or bring in vouchers to be signed or provide information about investments.

Two years ago, Huber was absent for a significant amount of time – two or three months – due to some family and personal illnesses. She was absent about five weeks during the year prior to hearing, because of some surgery and rehabilitation. Huber expects Ostermann to handle her job in her absence and considers her to be her liaison to other staff in the office.

The Deputy County Treasurer does not have supervisory duties and responsibilities in sufficient combination and degree to be a supervisor, and she does not have sufficient authority to commit the County's resources, or have sufficient participation in the formulation, determination and implementation of management policy to be a managerial employee.

6. Deputy Register of Deeds II The incumbent Deputy Register of Deeds II for the last four years is Ann Marie Zuiker (formerly Huber). She reports to the elected Register of Deeds, Thomas Leighton. Aside from Leighton and Zuiker, the office consists of two full-time Deputy Register of Deeds I – Leah White and Jill Stevens – and a limited term employee, Sue Ross, who works up to 600 hours a year. The office receives and records documents, such as deeds to property, and receives birth, death and marriage records.

No employees have been hired during Zuiker's tenure as Deputy.

Zuiker assisted Leighton when White transferred into the Register's office. She helped create the test taken by employees who bid for the position, sat in on interviews with Leighton, asked questions, and recommended that White be the employee transferred into the job. Deputy I Stevens also sat in on the interviews when White was transferred. Zuiker sat in on the transfer interview when Stevens transferred into the Register's office but took no active role in the interview.

Zuiker has never disciplined anyone. She has corrected the work of others or given them directions. She has the authority to issue reprimands or suspensions in Leighton's absence.

Leighton evaluates the employees although Zuiker gave Stevens one performance evaluation when Leighton was on vacation and the evaluation needed to be processed before he returned.

Zuiker does not have the authority to adjust grievances or lay off employees.

Zuiker gives assignments to employees and changes those assignments. The hours of work are established by the Union contract. Zuiker authorizes overtime or compensatory time off. Leighton grants requests for vacations. Zuiker signs time cards in Leighton's absence. Zuiker and Leighton coordinate their vacation schedules to have one of them cover the office at all times.

Zuiker is paid \$10.76 per hour which is more than one of the Deputy I's and less than the other.

Zuiker does not establish policy for the County. She may change procedures for handling records, such as running print outs of certain records every three months instead of every month. Since computers are now available to members of the public in their office, she asked Leighton to run a grantor-grantee index once a year. She discussed the grantor-grantee index with other employees in the office also before making changes. She does not determine fees. She monitors expenditures from the Register's budget and seeks Finance Committee approval to move money from one account to another when necessary. She cannot spend amounts over one hundred dollars without approval. Leighton and Zuiker prepare a proposed budget for the office each year and recommend it to a County Board Committee. Sometimes Zuiker presents the proposed budget and other times Leighton presents the budget to the committee. One year they both went to the committee together. She has also presented bills for payment authorization to the appropriate committees.

The Deputy Register of Deeds II does not have supervisory duties and responsibilities in sufficient combination and degree to be a supervisor, and she does not have sufficient authority to commit the County's resources or have sufficient participation responsibility in the formulation, determination and implementation of management policy to be a managerial employee.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. The Deputy Clerk of Courts (Incumbent Tucker) is a supervisor within the meaning of Sec. 111.70(1)(o)1, Stats., and therefore is not a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

2. The Deputy County Clerk (Incumbent Gardner) is not a managerial employee within the meaning of Sec. 111.70(1)(i), Stats., and is not a supervisor within the meaning of Sec. 111.70(1)(o)1, Stats., and therefore is a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

3. The Deputy County Treasurer (Incumbent Ostermann) is not a managerial employee within the meaning of Sec. 111.70(1)(i), Stats., and is not a supervisor within the meaning of Sec. 111.70(1)(o)1, Stats., and therefore is a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

4. The Deputy Register of Deeds II (Incumbent Zuiker) is not a managerial employee within the meaning of Sec. 111.70(1)(i), Stats., and is not a supervisor within the meaning of Sec. 111.70(1)(o)1, Stats., and therefore is a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

5. The Deputy Clerk of Courts, Deputy County Clerk, Deputy County Treasurer and Deputy Register of Deeds are not excluded as a matter of law from municipal employee status by virtue of their being Chief Deputies.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER CLARIFYING BARGAINING UNIT

The Deputy Clerk of Courts shall be excluded from the bargaining unit represented by the Union, and the remainder of the positions at issue in this proceeding shall continue to be included in the bargaining unit.

Given under our hands and seal at the City of Madison, Wisconsin this 12th day of January, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

I concur.

James R. Meier /s/

James R. Meier, Chairperson

Oneida County

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER CLARIFYING BARGAINING UNIT**

POSITIONS OF THE PARTIES

Initial Briefs

The County

The County submits that all four positions at issue should be excluded from the bargaining unit as a matter of law in light of the nature of the positions and the requirement that a deputy serve as the elected official in the elected official's absence. Additionally, the County believes that the positions are supervisory and managerial within the meaning of MERA.

The County asserts that in *COUNTY OF EAU CLAIRE V. AFSCME LOCAL 2223*, 190 WIS.2D 299 (CT. APP. 1994) the Court of Appeals was asked to determine whether a circuit court had properly ruled that deputized employees in the offices of the Eau Claire County Clerk of Courts and Register of Deeds were exempt from a collective bargaining agreement. The Court of Appeals indicated that one chief deputy in each office may properly be excluded from a bargaining unit, after examining *CRAWFORD COUNTY V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION*, 177 WIS.2D 66 (1993). In *CRAWFORD*, the Court of Appeals was asked to determine whether the Wisconsin Employment Relations Commission had correctly ruled whether a union proposal to include Deputy Register of Deeds, Deputy Clerk of Court, and Administrative Law Clerk positions in a bargaining unit represented a mandatory subject of bargaining. The Court held that the union's proposal was a non-mandatory subject of bargaining, since the inclusion of the deputies in the unit would have transferred the statutory authority of the Register of Deeds and Clerk of Courts to appoint and remove individuals from the deputy positions. In this case, the deputies were appointed by their respective elected officials pursuant to statute. Since there is only one deputy in each department, the deputies are "chief deputies" within the meaning of the law and should be excluded from the bargaining unit in accord with the ruling in *COUNTY OF EAU CLAIRE*.

The County asserts that the deputies should also be removed in light of the nature of their statutory positions and duties. They perform the statutory duties, and with regard to the offices of the Register of Deeds and the Clerk of Court the constitutional duties, of their respective elected officials during a vacancy in the elective office, during an absence of the elected official, or during a period of time in which the elected official is unable to perform his or her duties. The deputies' terms of employment are co-extensive with the elected official who appointed them. They are required to take and file an oath and post a bond. Their duties and conditions of employment are those of the elected officials, rather than mere employees. They can be removed at the pleasure of their elected officials, and the terms of the bargaining agreement – such as discharge, posting a vacant deputy position, and accrual and termination of seniority – cannot be applied to the deputies.

The County also argues that the deputies are supervisory employees. The County points to prior Commission decisions such as CALUMET COUNTY, DEC. NO. 11158-A (WERC, 9/88) and CITY OF MAUSTON, DEC. NO. 21424-E (WERC, 1993). In MAUSTON, the Commission excluded from the unit a deputy city treasurer as a supervisor even though only two other employees were employed in the treasurer's office.

The Deputy Clerk of Courts, Tucker, supervises six employees, the County states. She assigns them duties, directs them when to work overtime and does so without consulting with the Clerk of Courts. She coordinates the employees' work, grants or denies their vacation and compensatory time off requests, and grants requests to leave early or go home sick. Tucker may also discipline employees and has issued an oral reprimand to an employee. She is involved in the hiring process and has the authority to hire individuals to fill limited term employee positions without consulting with the Clerk of Courts. She evaluates employees on an annual basis, approves time cards in the Clerk's absence, and has the authority to lay off employees in the Clerk's absence. She would be the first step of the grievance procedure. Tucker also coordinates her vacation schedule with the Clerk of Courts' schedule to ensure that one of them is available to supervise the office.

The Deputy County Clerk, Gardner, is also a supervisor and is responsible for supervising a part-time, 70 percent Secretary and any limited term employees the County hires to work in the Department. Gardner assigns work to the part-time Secretary and can change her tasks. If the County Clerk is absent, Gardner may grant the part-time Secretary time off from work or direct her to work additional hours. Gardner would advise the Clerk if the Secretary had job performance problems. In the Clerk's absence, she may discipline the part-time Secretary and grant a request for sick leave or vacation. If there were a vacancy in that part-time position, Gardner would assist the Clerk in filling the vacancy. Her interests conflict with those of the part-time secretary and other collective bargaining unit employees.

The County states that the Deputy Treasurer, Ostermann, is clearly a supervisor. She supervises a 75 percent Account Clerk I employee and two limited term employees during the summer. She assigns them work on a daily basis, changes their work assignments and determines their work schedules. She receives complaints from employees in the office and may discuss their job performance or deficiencies with them. She reports employee performance problems to the Treasurer. Ostermann discusses employees' job performance with the Treasurer and is present at all meetings where the Treasurer reviews an evaluation with an employee. She has signed time cards and authorized LTE's to work overtime. The Treasurer has been absent from work for two to five weeks at a time and was absent for two to three months in 1996. During those absences, Ostermann has the authority to hire and fire employees, discipline them, lay off employees, adjust their grievances, approve vacation and sick leave requests and sign their time cards. She recommends what action should be taken in regard to those matters even when the Treasurer is present. Ostermann recommended the hiring of an LTE who was hired. She coordinates her vacation schedule with the Treasurer to ensure that both are not gone at the same time. She receives a higher rate of pay than other employees in the Department.

The County believes that the Deputy Register of Deeds II, Zuiker, is a supervisor as she is responsible for supervising two employees and one LTE. Zuiker assigns them work on a daily basis, changes their assignments, authorizes them to work overtime, and grants them compensatory time off. She consults with the Register of Deeds about employees' job performances. She has the authority to issue reprimands and suspensions. She signs time cards in the absence of the Register of Deeds. She participates in the employee evaluation process and has completed an evaluation on one employee without consulting with the Register of Deeds. Zuiker is also involved in hiring. She reviews job applications and participates in the interviews. She has made effective recommendations regarding hiring. Zuiker coordinates her schedule with the Register of Deeds so that both of them will not be gone at the same time.

The County submits that the deputies should also be excluded from the bargaining unit as managerial employees. The Deputy Clerk of Courts, Tucker, serves in the Clerk's absence and performs all of the Clerk's statutory duties. The Clerk consults with Tucker on a daily basis about the Department's operations. Tucker has recommended to the Clerk and to the County's Personnel Committee that certain positions in the office be reclassified to a higher level, and she was successful in obtaining a reclassification for the Account Clerk I position. Tucker meets with County officials about changing procedures in the office. She attended a meeting on behalf of the Clerk of Courts' office about changing procedures, along with the Oneida County Sheriff and District Attorney, court reporters and representatives of the Minocqua Police Department, the State Patrol and the Oneida County Circuit Court.

The County believes that the Deputy County Clerk, Gardner, is also a managerial employee. Gardner recommended that the part-time Secretary in the Department be reclassified to a higher position and the Secretary was in fact reclassified. Like any manager, she can unilaterally implement changes in the office procedures. During an election involving the County Clerk position, she is solely in charge of conducting a canvas of the election results. Gardner prepares the finance report that the county clerk provides to the Finance Committee. In the Clerk's absence, she attends County Board and County Committee closed sessions where confidential matters are discussed.

The Deputy Treasurer, Ostermann, is also a managerial employee, the County asserts. Ostermann has the authority to establish and implement policies addressing procedures employees must follow in the office. She assumes the duties of the Treasurer in her absence. The evidence shows that the Treasurer has been consistently absent in the past for extended periods of time. In 1997, the Treasurer was absent for a period of five weeks. In 1996 the Treasurer was absent for two to three months. During those times, Ostermann assumed all the functions of the office. She may increase or decrease fees charged for Department services. She has the authority to waive interest and penalties on late tax payments. Most importantly, the County notes that Ostermann has authority in regard to the County's finances and its investments. She recommends to the Treasurer how the County should invest its funds and the Treasurer has adopted those recommendations. She twice changed the County's investments without consulting with the Treasurer. In the Treasurer's absence, she appears before the County Board and committees to provide information regarding the County's finances. The Treasurer reviews the Department's budget with Ostermann, who determines the amount to be budgeted for purchasing all items in the office.

The County further submits that the Deputy Register of Deeds II, Zuiker, is a managerial employee who performs the duties of the Register of Deeds in his absence. Zuiker prepares the budget over the course of the year and has the authority to transfer money from one account to another account without consulting with anyone. She presents the budget to the County's Finance Committee for approval and recommends its adoption. She has the authority to spend money in a manner different from that originally allocated, within limits. Zuiker has appeared before the Board and County Committees on behalf of the Register of Deeds' office on numerous occasions.

The Union

The Union views the law of the status of these deputies as being well settled. It first states that in *KEWAUNEE COUNTY V. WERC*, 141 Wis.2d 347 (CT. APP. 1987), the Court of Appeals found that an employee who was Register in Probate, Probate Registrar and Probate Court Commissioner was not a managerial employee because she lacked the authority to commit the employer's resources without further authority being granted by the county. In reviewing whether the lower court had properly harmonized the powers of the appointing judge and the rights of employees under the Municipal Employment Relations Act (MERA), the Court of Appeals said that a judge appointing an individual to such a position would not be bound by the provisions of a collective bargaining contract which restricted the court's discharge of its duties. In 1992, the Supreme Court held in *IOWA COUNTY V. IOWA COUNTY COURTHOUSE/SOCIAL SERVICE EMPLOYEES, LOCAL 413, AFSCME, AFL-CIO*, 166 Wis.2d 614 (1992), that any provision of a collective bargaining agreement that attempted to regulate the power of a circuit court judge to appoint or remove a register in probate was void and unenforceable and not subject to the arbitration provisions of the bargaining agreement.

Then, in *CRAWFORD COUNTY V. WERC*, 177 Wis.2d 66 (1994), the Court of Appeals found that the county could not be compelled to bargain over the appointment and discharge of a deputy register of deeds and deputy clerk of the circuit court, but that the union could bargain over wages, hours and other conditions of employment so long as those negotiated provisions did not intrude on the powers of the elected officials. Again in 1994, the Court of Appeals in *COUNTY OF EAU CLAIRE V. AFSCME LOCAL 2223*, 190 Wis.2d 298 (CT. APP. 1994) considered whether multiple deputies in the register of deeds and clerk of courts' offices were excluded from a bargaining unit because of their deputy status. The Court held that *CRAWFORD* must be read narrowly to avoid the evisceration of the legislative intent underlying MERA and the relevant sections of Chapter 59. Deputies with managerial duties would be excluded from a collective bargaining unit based on their status as managerial employees not because they were appointed deputies.

The Union asserts that none of the incumbents in this case can be considered to be managerial or supervisory. The Chief Deputy Clerk of Courts, Tucker, did not know whether the County had accepted her recommendations for hiring employees. While she thought she had the authority to discipline others, she had only done so once, and she stated that she would confer with the Clerk of Courts before imposing any discipline. She testified that she

administered performance evaluations on others in her department, but she had not done so before September of 1996, and the County's initial action in this case was filed in August of 1996. While Tucker said she had the authority to promote employees, the example she gave was of a reclassification rather than a promotion. She cannot reward employees and does not adjust grievances. In fact, she filed a grievance herself on behalf of the Union. Tucker has limited authority to change hours of work and does not set the work schedule. She does not assign work that is outside of the normal workload of employees. She may authorize overtime but that authorization is based upon factors outside her control. She does not have any authority to prevent overtime – if the work is there to be done, then someone must work overtime. Her authorization of overtime consists of approving the employees' calculations of their time spent, not of the overtime itself. Additionally, overtime must be approved ultimately by the department head. Tucker is also paid less than three others in her department.

The job description for her position was signed by the Clerk of Courts just a few weeks before the County filed its action for unit clarification. The Clerk of Court admitted that job description is not accurate in the percent of time spent on duties. The job description indicates that Tucker spends 10 percent of her time managing and supervising employees, and yet the Clerk of Courts agreed that she spends nowhere near the 195 hours or five full weeks annually performing supervisory and managerial duties. Nor does she spend two percent of her time processing grievances. The percentages assigned to the performance of managerial and supervisory duties were inflated by the County in anticipation of this unit clarification action, the Association submits. Tucker has no managerial duties. She does not establish programs for the County and has no independent authority to establish the level of services. She does not participate in any financial dealings on behalf of the County. All she does for budget preparation is to apply previously approved percentages to the prior year's budget.

The Association states that the Deputy County Clerk, Gardner, is not a supervisory or managerial employee. She has but a single employee whom she might supervise. She had no role in hiring the Secretary who predated her own appointment as deputy. She has had no occasion to discipline anyone and does not know if she has the authority to do so. She has not done a performance evaluation on the lone employee below her in the office. She processes no grievances, has a limited ability to change work assignments and does not schedule hours of work. Gardner does not grant overtime or approve of time off. She was certain that she was not paid for supervising the Secretary.

Similarly, the Association asserts that the Deputy Treasurer, Ostermann, has virtually no one in her office to supervise. She assists only in hiring LTE's for summer work. the incumbent Account Clerk was already in the office when she was appointed as deputy. She does not interview the LTE's but merely checks elsewhere in the County to see if candidates are available. She has never disciplined anyone. Although she testified that she participates in employee evaluations, it is unclear what her role is other than to sit in on the discussion with the Treasurer about the employees' performance. Ostermann does not have any meaningful input into the budget making process. She cannot enter into contracts and cannot modify the budget for additional expenditures. She may handle some investments for the County, but she has

guidelines set by the Board and the County's insurers that dictate how she will make those investments. Ostermann's appearances before the Finance Committee are ministerial, most of her appearances consist of providing otherwise public information to the Committee.

Finally, the Association argues that the Deputy Register of Deeds II, Zuiker, is neither a supervisor nor a managerial employee. Although Zuiker appears to have certain supervisory duties, they are of recent vintage and intended, like the recently constructed job descriptions, to bolster the County's argument that these employees should not be in the bargaining unit. Zuiker's duties as to two other employees appear to be nothing more than lead worker duties. She did one performance evaluation on one employee when the Register of Deeds was absent, but did not evaluate the other employee since the Register of Deeds was available. Thus, her supervisory duties are very sporadic. Zuiker has never disciplined an employee and has not participated in promoting or rewarding employees. She has filed grievances, but lacks the authority to adjust them for others. She cannot alter hours of work or approve vacations or time off. She is not paid for supervising others. Further, Zuiker has little discretion in the budget process. She takes no bids, makes no contracts, and can spend money only within the budget.

Reply Briefs

The County

The County asserts that the Union has misstated the relevant case law. Also, in *Winnebago County v. Winnebago County Courthouse Employees Association*, 196 Wis.2d 733 (Ct. App. 1995), the Court of Appeals noted that one chief deputy in each office may properly be excluded from a collective bargaining unit. Thus, the case law in this area is clear, and chief deputies are to be excluded from MERA coverage as a matter of law due to the nature of their duties.

The County further argues that the Union has mischaracterized the evidence in this dispute. The Union states that it is not clear whether the hiring recommendations of Tucker were followed, but she testified that her recommendations were followed, that she conferred with the Clerk of Courts on the matter. Contrary to the Union's statement, Tucker also testified that she was involved in disciplining an employee and gave an oral reprimand. Also, she has evaluated other employees. While the Union states that Tucker filed a grievance, she filed it as the president of the bargaining unit, not for her personal benefit. She also directs employees to work overtime without consulting with the Clerk of Courts and has substantial control over work hours.

The Union has stated that the reason the deputies want to be removed from the bargaining unit is to permit the County to grant them higher wage increases than those granted to bargaining unit employees. The County asserts that the reason is not relevant. If an employee is in fact a supervisor or managerial employee, that employee must be removed from the bargaining unit.

The County objects to the Union's statement that the Deputy County Clerk, Gardner, does not know if she has the authority to discipline any employee. The County Clerk testified that he would expect her to discipline someone in his absence. Gardner also testified that she assigned duties to the Secretary and could change them. The Union has also ignored the fact that in the Treasurer's office, Ostermann is responsible for supervising two LTE's during the summer as well as the Account Clerk. Ostermann effectively recommended that one LTE be hired. She further testified that she has the authority to discipline employees in the Treasurer's absence, and the Treasurer has been absent from work for periods from two to four weeks at a time. In 1997, the Treasurer was absent for a five-week period, and she was absent in 1996 for two to three months. Ostermann's role in performance evaluations was established by her testimony, as well as the Treasurer's.

Contrary to the Union's statement that the Deputy Register of Deeds II, Zuiker, is a lead worker over two regular employees, the County points out that there are three regular full-time employees and one LTE in the office. Zuiker gives her input on performance evaluations. The Union fails to note that at the time that Zuiker filed a grievance, she was the Deputy Register of Deeds I and thus was not in her current Chief Deputy position of Deputy Register of Deeds II.

The Union

The Union disputes the County's interpretation of case law cited in its initial brief, arguing the cases relate to the power of certain elected officials to appoint and remove deputies of those elected officials. The fact that a deputy can be removed from the position as deputy is irrelevant to the larger question as to whether a deputy must be removed from a collective bargaining unit for all purposes, and the cases cited by the County do not address that question. The Union agrees with the County that the terms that the deputies serve are co-extensive with the terms of those who appoint them. However, none of the cases cited by the County discusses what is to happen to the deputies whose positions are lost because their appointing official leaves office or removes them as deputies. The Union asserts that a collective bargaining agreement can address those issues to that extent and is consistent with the deputies remaining in the unit for certain purposes.

The Union states that the power of elected officials in this case do not include setting wages, hours and conditions of employment of the appointed deputies. Those powers are left to the larger political body – the County. What the County is really asserting here is that certain provisions of the bargaining agreement ought not to apply to the deputies (a question for a declaratory ruling with the Commissions expertise as arbiters of mandatory permissive or illegal subjects), which is not a relevant question in a unit clarification.

The Union finds no valid argument in the County's brief as to why the facts asserted, when viewed in light of the statutory criteria, generate the conclusion that the employees in question are supervisory or managerial employees.

DISCUSSION

Exclusion of Chief Deputies As a Matter of Law

When responding to the County's argument that under EAU CLAIRE and WINNEBAGO, one deputy for each elected official is to be automatically excluded from the bargaining unit, it is useful to review the evolution of the relevant judicial precedent.

In KEWAUNEE COUNTY, 142 WIS.2D 347 (CT. APP. 1987), the Court was confronted with the argument that it was inappropriate to allow registers in probate, probate registrars and probate court commissioners to exercise rights under collective bargaining agreements as municipal employees because the exercise of such rights would violate the separation of powers doctrine, interfere with a judge's statutory authority to appoint and discharge, and disrupt working conditions. The Court held at pages 358-359 that:

Here, MERA can be harmonized with the separation of powers doctrine and a court's statutory authority to appoint persons to and discharge them from the offices of register in probate, probate registrar, and probate court commissioner. Provisions in a labor contract that are contrary to law are unenforceable, WERC v. TEAMSTERS LOCAL NO. 563, 75 WIS.2D 602, 612, 250 N.W.2D 696, 701 (1977). Thus, any provision in a collective labor agreement between the union and the county that hampers a court in its operation or interferes with its constitutional functions would be void. Furthermore, any contractual provision that conflicts with the authority vested in a judge to appoint or remove someone from such a position would also be void. Reimer may invoke her rights under MERA and negotiate with the county on those labor matters not entrusted to the courts.

As evidenced by the above-quoted portion of the Court's decision, harmonization of MERA with other doctrines and statutory provisions produced a conclusion that the employees in question could continue to be included in a bargaining unit but that provisions of a collective bargaining agreement which conflicted with the constitutional functions or statutory appointment or removal powers were void.

In IOWA COUNTY v. IOWA COUNTY COURTHOUSE, 166 WIS.2D 614 (1992) the Wisconsin Supreme Court also addressed the question of whether contractual provisions could override the authority of a circuit court judge to appoint and remove a register in probate who was included in the bargaining unit. The Court concluded the circuit court judge's appointment and removal power could not be overridden by contractual provisions. The Court held at page 620 that:

. . . In entering into a collective bargaining agreement, the county as a municipal employer may limit its own power with respect to registers in probate, but it could not put restrictions on the hiring of a register in probate because it was not within its power to begin with. If the provisions of the

collective bargaining agreement were found to be binding, these provisions would effectively transfer the circuit court judge's statutory power to the county.

. . .

In CRAWFORD COUNTY, 177 WIS.2D 66 (CT.APP. 1993), the Court followed the reasoning of IOWA COUNTY and concluded as to deputy clerks of court and deputy registers of deeds that the statutory power of the clerk of court and register of deeds to appoint and discharge deputies could not be bargained away by the municipal employer. However, the Court noted that bargaining over the pay and other conditions of employment of deputies was appropriate. The Court stated at pages 78-79 that:

We conclude, therefore, that while the county has the authority to establish the pay and regulate other conditions of employment of its employees, and thus the authority to bargain collectively with the union on those subjects, that authority does not extend to bargaining away the statutory power of the clerk of court and register of deeds to appoint and discharge deputies. (footnote omitted)

. . .

As in IOWA COUNTY, the express powers of the register of deeds and the clerk of courts to appoint and discharge deputies are separate from those of the county.

No authority is granted to the county to influence the appointment decision [in these instances]. In entering into a collective bargaining agreement, the county as a municipal employer may limit its own power with respect to [these deputy positions], but it could not put restrictions on the[ir] hiring . . . because it was not within its power to begin with. . . . If [the union] were to prevail here, the [clerk of court's and register of deeds'] power to appoint [deputies] would be transferred to the county, a result totally in conflict with the statute[s], IOWA COUNTY, 166 WIS.2D AT 620-21, 480 N.W.2D AT 502.

Thus, following the issuance of CRAWFORD, the law continued to be the same as established by the Court in KEWAUNEE and IOWA COUNTY. The appointive and removal power of elected officials governed over conflicting provisions of collective bargaining agreements but the appointed employees continued to be municipal employees under MERA who could be included in a collective bargaining unit and whose pay and conditions of employment could be the subject of collective bargaining.

In COUNTY OF EAU CLAIRE V. AFSCME LOCAL 2223, 190 WIS.2D 298 (CT.APP. 1994) the Court was confronted with a factual scenario in which virtually all employees in the Clerk of Court and Register of Deeds offices were "deputies."

The Clerk of Court office consisted of the elected Clerk of Court, a “chief deputy” who was not included in the bargaining unit, and 16 deputies who were included in the bargaining unit. The County discharged one of the deputies in the Clerk of Court’s office and took the position that under CRAWFORD, the just cause disciplinary provisions of the existing bargaining agreement were inapplicable to the discharge.

The Register of Deeds’ office consisted of the elected Register of Deeds, a “chief deputy” who was not included in the bargaining unit and four employees (three of whom were deputies) who were included in the bargaining unit. The Register filled a vacancy in a bargaining unit deputy position without regard to otherwise applicable provisions of the existing agreement and argued that under CRAWFORD, there was no obligation to follow the contract.

The issue before the Court in EAU CLAIRE was whether the holding of CRAWFORD COUNTY (i.e., that the statutory authority of the clerk of court and register of deeds to appoint and remove a deputy exempted the employer from compliance with provisions of a contract regarding employee rights to fill or retain a deputy position) extended to any and all deputies. As we have previously noted in SHAWANO COUNTY, DEC. NO. 28250-B (WERC, 1/97), the EAU CLAIRE Court concluded that the statutory authority to appoint and remove a deputy is automatically superior to a collective bargaining agreement only as to one deputy for each elected official (i.e., the chief deputy) and that additional exemptions from compliance with applicable contract provisions were dependent on whether the additional deputies were managerial employees under MILWAUKEE V. WERC, 71 WIS.2D 709 (1976). The Court was not being asked to exclude any deputies from a bargaining unit, and did not conclude that the statutory appointment and removal powers formed an independent basis for excluding any deputies from a bargaining unit.

The Court’s opinion states at pages 304-307:

The circuit court applied the holding in CRAWFORD to resolve the dispute here in favor of the County. We have examined the appellate briefs and appendices in CRAWFORD, now located in the archives of the state law library. We observe that the respective appointments by the clerk and the register in CRAWFORD were limited to a single chief deputy in each office.

CRAWFORD acknowledged that GLENDALE PROFESSIONAL POLICEMEN’S ASS’N V. GLENDALE, 83 WIS.2D 90, 264 N.W.2D 594 (1978), pronounced the general rule: A collective bargaining agreement under Sec. 111.70, Stats., must, where possible, be harmonized with other statutory provisions. Thus, as Crawford noted:

In GLENDALE, the issue was whether a provision in a collective bargaining agreement between the city and its police officers which tied promotions to seniority was illegal in light of the provisions of the general city charter law giving the police chief

the power to promote subordinates. . . . The supreme court was able to harmonize the contract provision and the chief’s statutory

powers by concluding that because the seniority provision applied only to situations where there was more than one qualified candidate for promotion, it did not require the chief to select an unqualified person who would be entitled to the position not by his or her qualifications, but only by seniority. According to the court, “[a] requirement that the chief promote the most senior qualified applicant merely restricts the discretion that would otherwise exist.”

Id. at 72-73, 501 N.W.2d at 839 (quoting GLENDALE, 83 WIS.2D AT 102-03, 264 N.W.2D AT 601 (citation omitted)).

CRAWFORD distinguished GLENDALE, holding that application of the union contract to influence the decision of the clerk and the register in his or her appointment decision would produce “a result totally in conflict with the statutes,” CRAWFORD, 177 WIS.2D AT 79, 501 N.W.2D AT 842, granting that appointment power. We limit that holding to its facts to avoid the evisceration of the legislative intent underlying MERA and Secs. 59.38 and 59.50, Stats.

Read apart from MERA, the deputy appointment power of the clerk and the register is unfettered. As GLENDALE suggests, however, the union contract and related statutes should be harmonized wherever possible. MERA and the appointment statutes certainly relate to the same subject, the hiring and firing of County employees. While CRAWFORD could not reconcile the appointment of a deputy clerk and deputy register at the pleasure of their superior, it does not follow that the number of appointments pursuant to this statutory power is unlimited. The size and function of the particular office will ultimately determine the scope of the power.

We remand to the circuit court to determine which, if any, of the deputies in this case fall within the definition approved by our supreme court in MILWAUKEE V. WERC, 71 WIS.2D 709, 715-16, 239 N.W.2D 63, 67 (1976):

Managerial employees, as well as supervisors, have been excluded from MERA coverage on the basis that their relationship to management imbues them with interests significantly at variance with those of other employees. In that managerial employees participate in the formulation, determination and implementation of management policy, they are unique from their co-workers. . . . In addition, managerial status may be related to a position’s effective authority to commit the Employer’s resources. Managerial employees do not necessarily possess confidential information relating to labor relations or supervisory authority over subordinate employees.

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We think MERA and the appointment authority can be harmonized so that the clerk and the register retain the power to hire and fire deputies at will,

but only to the extent that the persons so appointed fall within the classification of “managerial employees” as that term has been defined by case law. Where the facts demonstrate that the appointment is not merely a subterfuge to avoid the union contract, and the employee’s functions actually coincide with the well-established definition of a managerial employee, the appointment of more than one exempt deputy is in harmony with MERA and the discretion granted an elected official to manage his or her office.

We decline to hold as a matter of law that none of the deputies meets this definition of a managerial employee.

While the job descriptions for the clerk’s employees do not suggest that any of them have authority to “commit the County’s resources,” or that they participate in the formulation, determination and implementation of management policy, the recitation of “typical duties” is “illustrative only.” Further, the job descriptions for employees in the register’s office are not included.

We therefore remand to the trial court to determine which if any of the employees are properly exempt from the union contract as deputies based upon the preceding definition. The court may exercise its discretion to determine whether and to what extent further evidence is necessary upon which to resolve any dispute. With the court’s approval, the parties may stipulate to submit the dispute to WERC arbitration.

In WINNEBAGO COUNTY V. COURTHOUSE EMPLOYEES ASSOCIATION, 196 Wis.2D 733 (CT. APP. 1995), the Court was confronted with the question of whether the clerk of circuit court has the statutory power to terminate a judicial assistant’s employment without regard to the just cause provisions of a contract. The Court concluded the clerk did not have said statutory power. In its opinion, the Court also stated:

In COUNTY OF EAU CLAIRE, 190 WIS.2D AT 302, 526 N.W.2D AT 803, the court concluded that deputized employees, apart from the chief deputy, are exempt from Municipal Employment Relations Act (MERA) coverage only to the extent that they in fact function as managerial or supervisory employees, as that term is defined by case law. The court in COUNTY OF EAU CLAIRE went on to harmonize MERA and the appointment authority so that the clerk retained the power to hire and fire deputies at will, but only to the extent that the persons appointed fell within the classification of managerial employees. (footnote omitted)

In the present case, whether Felker functioned as a managerial employee in her capacity as a deputy clerk was not an issue before the trial court; hence, no findings were made. We need not, however, decide this question today. It is undisputed that Felker also had the employment status of a judicial assistant.

The County negotiated a collective bargaining agreement with the union which

included the position of judicial assistant under “office positions.” Because the position of judicial assistant is covered under the labor agreement and is not a position which the clerk of circuit court is empowered by statute to appoint or remove, Felker must be allowed the due process afforded under the contract’s grievance procedure.

Lastly, Felker and WCCEA argue that the trial court should have stayed the proceedings and ordered arbitration. Instead, the court held that because Articles VI and VII of the agreement as applied to deputies of constitutionally elected officials of Winnebago County was null and void, the labor grievance was not substantively arbitrable under Sec. 111.70, Stats. We conclude that because the labor agreement and the statutory powers of the clerk of courts can be harmonized, the just cause and grievance procedure provisions of the agreement are not null and void, and thus, arbitration should have been ordered.

We concede that the Court’s paraphrase of EAU CLAIRE can be read as excluding the “chief deputy” from the bargaining unit, as opposed to excluding the “chief deputy” from coverage under the relevant provisions of a contract. However, given the actual holding of the EAU CLAIRE Court, we do not find this interpretation to be persuasive.

Following the filing of initial briefs by the parties in this case, 1997 Wisconsin Act 211 (which took effect May 12, 1998) amended Sec. 59.25, Stats., as to the appointive and removal power of the County Treasurer vis-à-vis Deputy Treasurers. Section 59.25, Stats., had previously provided that the Treasurer “may” appoint “one or more deputies.” As amended, Sec. 59.25, Stats., provides that the Treasurer “shall” appoint “one deputy,” who “may be removed only for just cause.”

We have reviewed the new statute, the drafting file, and the parties’ supplemental argument. We conclude that the statutory changes do not address the question of whether the deputy treasurer is or is not excluded from the bargaining unit. Thus, the statutory change does not alter our analysis of the law as to this question. Therefore, in our view, a deputy treasurer continues to be a “municipal employee” eligible for inclusion in a bargaining unit unless he or she is a supervisor or a confidential or managerial employee.

In reaching this conclusion, we acknowledge the content of the January 27, 1997 memo authored by Marc Shovers, Senior State Counsel, Legislative Reference Bureau. Shovers’ memo states:

You have asked that 1995 AB-995 be redrafted for this session. In drafting the bill for this session, I reviewed the file from last session and discovered that the instructions for last session’s bill were to include in s. 59.25(2) the language from the case note that follows s.59.43. The case note is an annotation from a court of appeals decision that, in part, addresses the question of whether a register of deeds and a clerk of court have the authority to

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appoint and discharge deputies, or whether such deputies may be covered by a

collective bargaining agreement that would limit the authority of a register of deeds and clerk of court to hire or discharge an appointed deputy. A question arose with regard to last session's bill as to whether a similar issue would arise if a county treasurer appointed one or more deputies under s. 59.25(2)(a) as it is amended in this bill.

In the cited case, *CRAWFORD COUNTY V. WERC*, 177 Wis.2d 66, 78 (CT.APP. 1993), the court held that "while the county has the authority to establish the pay and regulate other conditions of employment of its employees, and thus the authority to bargain collectively with the union on those subjects, that authority does not extend to bargaining away the statutory power of the clerk of court and register of deeds to appoint and discharge deputies." *Id.* In effect, the court held that because the statutes gave a register of deeds and a clerk of court the authority to appoint and discharge deputies, such authority could not be overridden by a collective bargaining agreement and such appointees would be excluded from the union to which they would otherwise be eligible to join.

Based on a later decision of the same court of appeals, however, *CRAWFORD* is limited to its facts and only applies to the union exclusion of a single chief deputy. See *COUNTY OF EAU CLAIRE V. AFSCME LOCAL 2223*, 190 Wis.2d 298, 301 (CT.APP. 1994). The court further concluded that "deputized employees, apart from the chief deputy, are exempt from MERA [the Municipal Employment Relations Act in s. 111.70 of the statutes] coverage only to the extent that they in fact function as managerial or supervisory employees, as that term has been defined by case law." *Id.*

Consequently, it seems that if this bill becomes law only the chief deputy treasurer and any other deputy treasurer whose "functions actually coincide with the well-established definition of a managerial employee" could be excluded from the union to which he or she would otherwise be eligible to join. *Id.* at 306.

As evidenced by our earlier discussion of *CRAWFORD COUNTY*, we do not share Shovers' understanding of the Court's holding in *CRAWFORD*. The Court did not hold that deputies "would be excluded from the union to which they would otherwise be eligible to join." Instead, as Shovers' memo notes, the Court held that a county has the authority to bargain with the union over deputy wages and conditions of employment. Such bargaining could not occur unless the deputies are in the bargaining unit.

In conclusion, as discussed above, the evolution of judicial precedent does not yield a conclusion that a "chief deputy" for each elected official is automatically exempted from the bargaining unit. While a "chief deputy" is not entitled to enforce certain provisions of a contract (i.e., those which cannot be harmonized with the appointment and removal power of

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the elected official), their inclusion or exclusion from a bargaining unit still turns on the question of whether they are supervisors within the meaning of Sec. 111.70(1)(o)1, Stats., or managerial employees within the meaning of Sec. 111.70(1)(i), Stats.

We turn to a consideration of those questions.

Supervisory or Managerial Status

At the outset of our consideration, we acknowledge that the four deputies in question assume the statutory power and authority of the elected official when that official is absent or the elected position becomes vacant. When the four deputies assume that power and authority, we acknowledge that they assume the supervisory and managerial authority of the elected official.

However, this assumption of authority is not sufficient to warrant a conclusion that the deputies are supervisors or managerial employees. First, we have historically held that the occasional assumption of supervisory or managerial authority is not sufficient to establish supervisory or managerial status. CITY OF RACINE, DEC. NO. 24840-A (WERC, 9/97); MENOMINEE COUNTY, DEC. NO. 26983-B (WERC, 4/94); MARINETTE COUNTY, DEC. NO. 26154-B (WERC, 3/92); CITY OF NEW BERLIN, DEC. NO. 13173-B (WERC, 8/83); CITY OF LACROSSE, DEC. NO. 14019 (WERC, 10/75); CITY OF FRANKLIN, DEC. NO. 6147 (WERC, 10/62). Second, the record establishes that the elected officials in question function as full-time employees in their respective offices. Their absences are limited to vacation, sick leave, attendance at conferences, etc. Absences for these purposes are not of sufficient duration to warrant supervisory or managerial status for the deputies who fill in during these periods. Third, particularly given the small number of employees in each office, we are persuaded that deputies would rarely have the opportunity to exercise any significant supervisory (hire, discipline) or managerial authority (prepare a budget, make an important policy change) and would, in any event, consult with the absent elected official before taking any significant action.

Given the foregoing, we reject the County's contention that the statutory authority to assume the role of the elected official provides a sufficient basis to exclude the deputies from the unit as supervisors or managerial employees.

Before discussing the specific duties and responsibilities of each deputy, it is helpful to set forth the supervisory and managerial standards against which those duties and responsibilities will be measured.

Supervisor

The statutory definition of a supervisor in Sec. 111.70(1)(o)1, Stats., is the following:

. . . any individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or

discipline other employees, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The factors that we focus on in evaluating claims of supervisory status under Sec. 111.70(1)(o)1, Stats., are the following:

1. The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees;
2. The authority to direct and assign the work force;
3. The number of employees supervised and the number of persons exercising greater, similar or lesser authority over the same employees;
4. The level of pay, including an evaluation of whether the supervisor is paid for his/her skill or his/her supervision of employees;
5. Whether the supervisor is supervising an activity or is primarily supervising employees;
6. Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employees; and
7. The amount of independent judgment exercised in the supervision of employees. CHIPPEWA COUNTY, DEC. NO. 10497-A (WERC, 8/97).

Not all of the above factors need to reflect supervisory status for us to find an employee to be a supervisor. For instance, an employee who spends a majority of his/her time doing non-supervisory duties may be determined to be a supervisor where sufficient supervisory authority is present. CITY OF MADISON, DEC. NO. 19906 (WERC, 9/82). Our task is to determine whether the factors are present in sufficient combination and degree to warrant finding an employee to be a supervisor. WALWORTH COUNTY, DEC. NO. 29378 (WERC, 5/98).

Managerial Employees

While the Legislature has excluded “managerial employees” from the definition of “municipal employees,” it did not provide a statutory definition of managerial employees and thus left it to the Commission to develop the precise definition. There are two analytical paths to assess claimed managerial status. One considers the degree to which individuals participate in the formulation, determination and implementation of management policy; the other considers the degree to which individuals possess the authority to commit the employer’s resources. MILWAUKEE V. WERC, 71 WIS.2D 709 (1976); EAU CLAIRE COUNTY V. WERC, 122 WIS.2D 263 (CT.APP. 1984).

For an individual to assume managerial status based on participation in program and policy, such involvement must be at a relatively high level of responsibility. VILLAGE OF JACKSON, DEC. NO. 25098 (WERC, 1/88) Managerial status based on allocation of the employer’s resources necessarily entails significantly affecting the nature and direction of an

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employer’s operations, such as the kind and level of services to be provided, or the kind and number of employees to be used in providing services. VILLAGE OF JACKSON, SUPRA.

Deputy Clerk of Courts (Tucker)

Tucker's role in the hiring of employees is critical to our conclusion she is a supervisor. She hired an LTE without any significant involvement from the Clerk of Court. She plays a central role in the hiring of regular employees by interviewing applicants with the Clerk and then reaching a consensus on who should be hired.

Tucker's disciplinary authority is more limited. She has independently given an employee a verbal reprimand but her independent authority to impose higher levels of discipline is unclear. It is also unclear whether she can effectively recommend to the Clerk that higher levels of discipline be imposed.

Tucker has some authority to direct and assign the other six unit employees in the Clerk's office. She approves leave requests and she evaluates the employees' performances.

Tucker supervises six employees with the Clerk of Court having ultimate supervisory authority over the employees. Grievances are filed with the Clerk.

Tucker's pay is determined by the collective bargaining agreement and at present three of the employees she supervises are paid more than Tucker. Clearly, she is not presently being paid for her supervision of employees. However, because her pay is determined by the collective bargaining process, it is not a significant factor in our analysis.

Tucker spends the majority of her time performing the same type of work as the six employees she supervises.

Tucker's hiring involvement, her evaluation of employees, and the number of employees whose work she directs are of sufficient strength to overcome her limited disciplinary authority and the limited amount of time she spends supervising employees. We find her to be a supervisor.

Given our conclusion, we need not determine whether she is a managerial employee.

Deputy County Clerk (Gardner)

Gardner is not a supervisor.

Her authority to effectively recommend hiring has yet to be tested. Although her supervisor, the County Clerk, testified that she would be involved in the hiring process, we conclude that in the context of a three person office (the Clerk, Gardner and a part-time Secretary) the Clerk's role and authority would dominate Gardner's.

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Her disciplinary authority is limited to the ability to impose a verbal reprimand. In the context of such a small office, we conclude the Clerk would independently make any significant disciplinary decisions.

Gardner has very limited authority to direct the work of the part-time Secretary. She

does not approve the leave requests or evaluate the employee.

Because Gardner's pay level is determined by the bargaining agreement, the fact that it does not reflect supervisory status is not particularly significant.

Gardner spends very little time directing the work of the part-time Secretary.

In summary, there is very little evidentiary support for finding Gardner to be a supervisor and conclude she is not a supervisor.

Gardner has no significant role in the formulation, determination and implementation of management policy or in committing the employer's resources. She is not a managerial employee.

Deputy County Treasurer (Ostermann)

Ostermann has been given authority to hire or to discipline employees in the Treasurer's absence. The Treasurer has been absent from five weeks to several months per year. During those absences, Ostermann did not have occasion to hire or discipline anyone.

Ostermann's ability to effectively recommend hiring or discipline is unclear. We credit the Treasurer's testimony that she "would never hire anyone" without consulting Ostermann, but do not believe this testimony establishes that Ostermann can effectively recommend that someone be hired. The only hiring which has occurred during Ostermann's tenure as Deputy was of an LTE that both she and the Treasurer knew. They jointly agreed to hire this individual as an LTE. Given the informal joint nature of this hire, we do not find it particularly indicative one way or the other of Ostermann's hiring authority.

Ostermann has limited authority to direct and assign the work of the one regular employee in the office (a $\frac{3}{4}$ time Secretary) and the two part-time LTE's. She can direct their work and change their assignments but does not approve leave requests except in the Treasurer's absence. She does not independently evaluate their work but does participate with the Treasurer in the evaluation process.

Ostermann is paid more than the Secretary in the office but because the pay rates are established by the collective bargaining process, this factor is not particularly significant in our analysis.

Ostermann spends a substantial majority of her time performing duties unrelated to directing the work of the Secretary or the LTE's.

On balance, we find Ostermann is not a supervisor. While she possesses significant

authority in the Treasurer's absence, these absences are not of a sufficient duration to warrant supervisory status. When the Treasurer is present, particularly given the small number of employees involved, we are satisfied that the Treasurer would exercise any significant supervisory authority which was needed.

While Ostermann has some involvement in determining and implementing policy, her involvement is not of a sufficiently high level to qualify her a managerial employee. Similarly, her role investing the County's funds is generally restricted to periods of the Treasurer's absence and by County investment policy. Thus, her role in committing the County's resources is also insufficient to establish managerial status.

Deputy Register of Deeds II (Zuiker)

We conclude Zuiker is not a supervisor.

As no one has been hired since she became Deputy Register of Deeds II, her involvement in the hiring process is unknown. She did play a significant role in the transfer/posting process which brought Deputy I White to the Register's office but a much lesser role in the same process which brought about the transfer of Stevens. Presuming her role in hiring will parallel her experience in the transfer/posting process, the inconsistency between the White and Stevens scenarios precludes a conclusion that she will have effective authority to recommend hiring.

When Leighton is present in the office, she has no significant disciplinary authority.

Zuiker does direct and assign the work of the three employees in the office. Her pay rate does not reflect supervisory status but because her pay rate is established by the collective bargaining process, this factor is not significant.

Zuiker spends the substantial majority of her time performing the same type of work as the other employees in the office and is primarily directing office activity rather than supervising employees.

As evidenced by the fact that Leighton approves leave requests, normally evaluates employees, and adjusts any grievances, Zuiker does not exercise a significant amount of independent judgment when directing the employees in the office.

Given all of the foregoing, we are persuaded that Leighton is the supervisor of the employees with Zuiker functioning as a lead worker.

Examining Zuiker's role in committing the County's resources or as to matters of policy, we conclude she is not a managerial employee. Her budgetary role is not sufficiently independent of Leighton's to warrant managerial status and she plays no significant policy role.

Zuiker is a municipal employe who shall continue to be included in the unit.

Dated at Madison, Wisconsin this 12th day of January, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

ONEIDA COUNTY

CONCURRING OPINION OF CHAIRPERSON JAMES R. MEIER

I write separately on the question of the MERA status of the chief deputies of elected constitutional offices appointed under the specific sections of Chapter 59. I note initially that this Commission has no special expertise on the subject of harmonizing a statute which it administers with those that it does not administer.

I concur with the result reached by my colleagues but write separately because I do not believe my colleagues' analysis sufficiently confronts what I understand to be the central issues before us: what is the meaning of the language in *COUNTY OF EAU CLAIRE V. AFSCME LOCAL 2223*, 190 Wis.2d. 298 (CT.APP. 1994) relative to chief deputy clerks and is that language dicta?

In *EAU CLAIRE*, the Court stated:

We distinguish *CRAWFORD* on its facts because it apparently involved a union exclusion of only a single chief deputy in each office. We conclude that deputized employees, apart from the chief deputy, are exempt from MERA coverage, only to the extent that they in fact function as managerial or supervisory employees, as that term has been defined by case law. (emphasis added)

and

Where the facts demonstrated that the appointment is not merely a subterfuge to avoid the union contract, and the employee's functions actually coincide with the well-established definition of a managerial employee, the appointment of more than one exempt deputy is in harmony with MERA and the discretion granted an elected official to manage his or her office. (emphasis added)

It seems the most reasonable interpretation of this language as it relates to chief deputies is that they would be exempt, not just from those provisions of a collective bargaining agreement which conflict with the authority of the constitutional officers to appoint and discharge deputies, but from MERA as well.

Webster's Third International Unabridged Dictionary defines the phrase "apart from" as "besides." That dictionary defines the word "besides" as "in addition." So I understand the court in *EAU CLAIRE* to say that chief deputies are exempt from MERA coverage as a result of statutory harmonization and that in addition other deputized employees are exempt from MERA coverage only when they are also managerial or supervisory.

The next question is whether the noted language constitutes the holding of the case or is merely dicta.

In CHASE V. AMERICAN CARTAGE CO., 176 Wis. 235, 238 (1922), the Wisconsin Supreme Court held that “when a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a dictum but is a judicial act of the court which it will thereafter recognize as a binding decision.”

I believe that in EAU CLAIRE, the question of whether a chief deputy is exempt from MERA coverage is “germane to, though not necessarily decisive of, the controversy . . .” The reason I think that is true is because the chief deputy exception is as a result of the court in EAU CLAIRE reconsidering what it meant to hold in CRAWFORD, and in so doing announced that CRAWFORD applied to chief deputies who, it noted, were MERA exempt.

However, while the question may be germane to the controversy, I cannot conclude that the EAU CLAIRE court “intentionally took up, discussed and decided the question.” There is language in these cases which causes me to think that the court may believe that even in an office with few employees where there is no need for a manager or supervisor other than the elected constitutional officer, there are times when the elected constitutional officer ought to be able to leave the office in charge of a person, i.e. the chief deputy, which person is not reliant on the union for his or her level of compensation etc. While this reading is consistent with the language of the cases it is not express and must be inferred. The court in EAU CLAIRE simply modified CRAWFORD by stating that only chief deputies are exempt from MERA, although that was not the question before the court in EAU CLAIRE or the holding of the court in CRAWFORD. While the court went to the extraordinary effort of checking the CRAWFORD record in the state archives with the result of reading “deputies” out of Secs. 59.38 [now 59.40(1)] and 59.50 [now 59.43(3)], Wis. Stats., the court did not explain its observation that chief deputies are exempt. This lack of an explanation leads me to conclude that the EAU CLAIRE court did not intentionally “take up, discuss and decide” the exemption from MERA issue. Therefore, I would find the subject language of EAU CLAIRE to be dicta.

Dated at Madison, Wisconsin this 12th day of January, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson