STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of CRAWFORD COUNTY Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and CRAWFORD COUNTY EMPLOYEES LOCAL 3108, WCCME, AFSCME, AFL-CIO	Case 55 No. 44262 DR(M)-478 Decision No. 26863

Appearances:

Brennan, Steil, Basting & MacDougall, S.C., Attorneys at Law, by Mr. Dennis M. White, 119 Martin Luther King, Jr. Boulevard, P.O. Box 990, Madison, Wisconsin 53701-0990, appearing for the County.

Lawton & Cates, S.C., Attorneys at Law, by Mr. Bruce F. Ehlke, 214 West Mifflin Street, Madison, Wisconsin 53703-2594 appearing for the Union.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

Crawford County having on July 11, 1990, filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to whether the County has a duty to bargain with Crawford County Employees Local 3108, WCCME, AFSCME, AFL-CIO, as to certain matters; and, in lieu of hearing, the parties having filed a stipulation of facts with the Commission on October 16, 1990; and the parties thereafter having filed written argument, the last of which was received on December 14, 1990; and the Commission having considered the matter and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. Crawford County, herein the County, is a municipal employer having its principal offices at 220 North Beaumont Road, Prairie du Chien, Wisconsin.

2. Crawford County Employees Local 3108, WCCME, AFSCME, AFL-CIO, herein the Union, is a labor organization having its principal offices at Route 1, Sparta, Wisconsin.

3. The Union is the collective bargaining representative of certain County employes.

4. In November, 1984, Elisabeth Atwell was elected as County District Attorney. Upon assuming office in January, 1985, she refused to appoint the incumbent Administrative Law Clerk, Shryl Nelson, as her Clerk and instead hired an individual from outside the bargaining unit. Since there was no vacant position available for Nelson, the County and the Union negotiated to create a new job classification for Nelson as a floating secretary within the bargaining unit. That position has since disappeared.

5. In 1985, the County Board passed a resolution that all clerks and deputies appointed by incoming newly elected officials from outside the bargaining unit did not have employment rights which extended beyond the term of the elected official. Since the passage of the resolution, the County Board has required such clerks and deputies to sign an agreement upon their hire stating that they waive any claim to further employment beyond the term of the elected official. The positions of Administrative Law Clerk in the District Attorney's office, the Chief Deputy Register of Deeds, and the Chief Deputy Clerk of Court have been covered by this resolution. Until 1989, these three positions were not included in the Union's bargaining unit.

6. In 1987, the County laid off a number of employes in the bargaining unit represented by the Union. Pursuant to provisions of the then existing collective bargaining agreement, employes were allowed to bump into job classifications that were either higher or lower in labor grade, depending on their qualifications. A Deputy Clerk of Court, Dee Baker, was bumped out of her job by Mary Picha, a clerk in the Extension Office.

7. In 1989 pursuant to Dec. No. 16931-B, the Wisconsin Employment Relations Commission clarified the Union's collective bargaining unit to include the positions of Chief Deputy Clerk of Court, Administrative Law Clerk and Chief Deputy Register of Deeds.

8. During collective bargaining between the County and the Union, a dispute has arisen as to whether the following proposal is a mandatory subject of bargaining:

> Deputies including accreted deputies, to be included in all terms and conditions of the collective bargaining agreement.

9. The proposal set forth in Finding of Fact 8 primarily relates to wages, hours and conditions of emplyment.

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

CONCLUSIONS OF LAW

1. The proposal set forth in Finding of Fact 8 does not improperly limit the statutory power of the Clerk of Courts, Register of Deeds, or District Attorney.

2. The proposal set forth in Finding of Fact 8 is a mandatory subject of bargaining.

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

DECLARATORY RULING 1/

The County and the Union have a duty to bargain within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats., as to the proposal set forth in Finding of Fact 8.

Given under our hands and seal at the City of Madison, Wisconsin this 17th day of April, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairman

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

(See Footnote 1/ on Page 3)

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed

within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

POSITIONS OF THE PARTIES

The County

The County does not dispute the Union's right to negotiate over the wages, benefits and certain conditions of employment which apply to deputies appointed by elected officials. However, the County submits that the Union's proposal, as worded, sweeps too broadly and unduly conflicts with the statutory appointive powers of elected officials. To that extent the County argues that the proposal is a prohibited subject of bargaining. In the alternative, the County contends that the proposal is a permissive subject of bargaining because it unduly intrudes upon the ability of the County to manage the size of its work force.

The County contends that the three specific positions which are at issue herein all serve "at the pleasure" of an elected official. The County notes these deputies represent the elected official in his/her absence and therefore must be accountable to the official. In addition, the County asserts that the elected official presumably will want to ensure that his/her deputy will continue to serve during his/her term and not be bumped from the position pursuant to the collective bargaining agreement. In the County's view, several of the provisions of the existing collective bargaining agreement which are made applicable to these deputies through the Union's disputed proposal obstruct the interests of the elected officials noted above and conflict with the statutory power of the elected officials to appoint and remove their deputies.

More specifically, the County notes that pursuant to the following language in Article 8.03, a deputy selected by an elected official has been bumped in the past by a bargaining unit employe.

> 8.03 The Employer shall have the right to reduce the number of jobs in any classification and/or department but such reduction shall not be considered a disciplinary procedure. Employees whose jobs have been eliminated shall have the right to bump any junior employee provided they are qualified to perform the junior employee's job. Qualifications are determined by the Employer. Such junior employees who have lost their positions as a result of a bump, shall have the right to exercise their seniority in the same manner as if their job had been eliminated. Employees who are without jobs as a result of a bump or a reduction in the number of positions shall be placed on a re-employment list. Employees who do not choose to exercise their bumping rights shall also be placed on the re-employment list.

Under Article 8.05 which provides:

> 8.05 Employees shall be recalled from layoff in accordance with their seniority to jobs for which they are qualified. The Employer shall not employ any new employees or temporary or part-time employees in positions for which there exist a qualified employee on the re-employment list. Notice of recall shall be sent by the employer to the laid off employee's last known address. Employees who do not respond to such recall notices, shall be dropped from the list and all rights shall be lost.

the County argues that an elected official could not exercise his/her statutory right to appoint an individual from outside the bargaining unit if a qualified employe was on layoff. Instead, the County asserts that under Article 8.05, the elected official would be required to appoint the most senior qualified person on layoff.

Articles 10.02 and 10.03 provide:

> 10.02 All vacancies shall be posted on Union bulletin boards. Such notice shall be posted for at least seven (7) calendar days in overlapping weeks, and shall state the prerequisites for the job, the job title, rate of pay and a place for each interested employee to sign. However, it is understood that signing for the vacancy is not limited to members of the bargaining unit. Eligibility of bargaining unit employees will be assessed prior to and separate from the consideration of applicants outside the bargaining unit. A copy of

> the notice shall be furnished to the Union president.
>
> 10.03 Employees desiring to apply for such vacancies shall sign the posted notice. In filling open vacancies, the Employer shall make the appointment on the basis of qualification and abilities of those persons applying for said positions. When qualifications and abilities are relatively equal, the vacancy shall be filled on the basis of seniority. Said employee shall demonstrate his/her ability to perform the job during a thirty (30) calendar day training period. Should such employee not qualify or should he/she desire to return to his/her former position, he/she shall be reassigned to his/her former position without loss of seniority .

The County argues that under these Articles, when a deputy position becomes vacant, the position must be posted and unit members have priority when the vacancy is to be filled. Thus the County argues that the ability of an elected official to appoint persons from outside the bargaining unit can be eliminated by this Article.

Article 3.01 provides:

> ARTICLE III - FUNCTIONS OF MANAGEMENT
>
> 3.01 The Union recognizes the County of Crawford as having the right to plan, direct, and control the operation of the work force; to hire, layoff; to demote, discipline, suspend (with or without pay), discharge for just cause, to promote or to establish and enforce reasonable rules of conduct, work and safety; to change, modify, or terminate methods, procedures and controls for the performance of work; to abolish jobs which are no longer needed; to determine and enforce reasonable minimum standards of performance; and to determine the table of organization.

The County alleges that under this Article a deputy can only be discharged for just cause and that, under other contract provisions, the discharge can be arbitrated. The County contends that this provision conflicts with the elected official's ability to terminate the deputy "at pleasure."

The County acknowledges that, whenever possible, the provisions of a collective bargaining agreement negotiated pursuant to the Municipal Employment Relations Act must be harmonized with other provisions of the law. However, the County argues that harmonization is only possible where a proposal limits, but does not eliminate, the statutory power of an elected official.

The County further acknowledges that in Crawford County, Dec. No. 20116 (WERC, 12/82), the Commission concluded that it was possible to harmonize a Sheriff's statutory right to appoint deputies with layoff/recall and discharge/arbitration proposals. However, the County argues that subsequent to the Commission's Crawford County decision, the courts have addressed the appointive statutory powers of elected officials in a manner in which requires that Crawford County be overruled. The County argues that in Kewaunee County v. WERC, 141 Wis.2d 347 (Ct.App. 1987), the Court held that a collective bargaining agreement could not conflict with the power of a judge to appoint or move a Register in Probate and that any provision which so conflicted with the judge's appointive/removal powers would be void. The County asserts that the Court's holding was not dependent upon the constitutional power of a court but instead involved the judge's statutorily created appointive power. Thus, the County argues that the statutory appointive power of the Court in Kewaunee County must be treated in the same fashion as the statutory appointive powers of the elected officials at issue herein. In the County's view, it follows that Crawford County must be overruled and the Union's proposal here declared to be a prohibited subject of bargaining. The County also notes that in Manitowoc County, Dec. No. 8151-E (WERC, 7/81) the Commission itself concluded that contract provisions which conflicted with the judge's power to appoint a Register of Probate were void.

Should the Commission conclude that Kewaunee County does not require that Crawford County be overruled, the County nonetheless argues that harmonization cannot occur under the Union's proposal because, unlike the situation in Glendale Professional Policeman's Association v. City of Glendale, 83 Wis.2d 90 (1978), the Union's proposal herein does not limit but totally eliminates the discretion of the elected official to appoint and retain a person of his/her choice. Unlike Glendale, the provision here specifies "who and how" a deputy is to be selected by an elected official, particularly in layoff situations. In Glendale, the County argues that it was easier to harmonize because the dispute therein focussed upon statutory provisions applicable to promotions from within the bargaining unit whereas the proposals herein prevent the elected official from exercising a statutory right to appoint someone from

outside the bargaining unit as a deputy. The County contends that the Union's proposal not only eliminates the officials initial hiring discretion, but also may require removal of the appointed deputy through a bump.

In Crawford County, the County notes that the Commission relied upon Fortney v. School District of West Salem, 108 Wis.2d 169 (1982). The County argues that Fortney is inapposite because it involved the question of whether a school board could waive its statutory hiring authority whereas herein the question is whether the County has the authority to impose restrictions upon the rights of elected officials. The County also notes that in Fortney the school board's authority was not "at pleasure" as is the standard present under the statutes at issue herein.

Given the foregoing, the County asks that the Union's proposal be declared to be a prohibited subject of bargaining.

In the alternative, the County asserts that this proposal is a permissive subject of bargaining because it infringes upon the County's service level decisions. The County contends that elected officials could expand the work force by making numerous hires of deputies when elected. The County argues that the Union's proposal would negate the County's ability to control the size of its workforce because appointed deputies would acquire seniority rights and only be terminable for just cause. The County asserts that when appointed employes acquire such rights, the County loses control over the size of its workforce. Therefore, the County contends that application of the Union's proposal to the areas of seniority, bumping rights, layoff, recall and discharge for deputies should be held to be a permissive subject of bargaining.

The Union

The Union asserts that the proposed language is a mandatory subject of bargaining because the statutorily delegated authority of a Clerk of Courts, District Attorney and Register of Deeds to appoint and remove subordinate employes may be modified by a collective bargaining agreement negotiated pursuant to Sec. 111.70, Stats.

The Union argues that under Secs. 59.15(2)(c) and 59.15(4), Stats., the County is empowered to modify the authority of the elected officials at issue herein to appoint and remove subordinate employes or deputies. The Union contends that Sec. 111.70, Stats., further modifies the power of the County Board granted under Sec. 59.15, Stats., and allows the County Board to bargain contractual provisions which modify the discretionary appointive authority of the Clerk of Courts, District Attorney and Register of Deeds.

Under Sec. 59.15(4), Stats., the Union argues that any conflict between the statutory authority of elected officials and the County's authority under Sec. 59.15(2)(c), Stats., to make "regulations of employment for any person paid from the county treasury" must be resolved in favor of the County Board's exercise of its powers, including by means of a collective bargaining agreement.

As to the impact of Kewaunee County on this case, the Union argues that the question of harmonizing a circuit judge's statutorily delegated authority to appoint or remove a Register in Probate with the terms of a collective bargaining agreement was not before the Court in Kewaunee County and that the Court's comment regarding this issue is thus of no precedential value. In any event, the Union further argues that the elected officials whose authority is disputed herein are not circuit judges but rather are members of the Executive Branch whose authority is subject to legislative definition and limitation.

The Union asserts that the authority at issue herein is not constitutional but exclusively statutory. The Union argues that it is clear that the Legislature may define and limit the authority of such elected officials to appoint and remove deputies. The Union contends that the statutory authority of elected officials at issue herein may not be exercised independent of or in addition to the County Board's authority to limit same by means of a collective bargaining agreement negotiated pursuant to Sec. 111.70, Stats.

Given the foregoing, the Union asks that the Commission find the proposal to be a mandatory subject of bargaining.

DISCUSSION:

The first issue raised is whether the County Board can modify the statutory appointive and removal powers of the Clerk of Courts, Register of Deeds, and the District Attorney by ratification of a collective bargaining agreement which includes such modification. 2/

2/ The Union's proposal is as follows: "Deputies including accreted deputies, to be included in all terms and conditions of the collective bargaining agreement." On its face, such language does not seem applicable to the Administrative Law Clerk of the District Attorney. The parties have, however, both argued this case as if the language would

"The relationship between public sector bargaining agreements and other statutes governing terms and conditions of employment can be one of the most difficult issues in public sector labor law." Glendale Professional Policeman's Association v. Glendale, 83 Wis.2d 90, 105, (1978). Nonetheless, we think it reasonably clear that the Union's proposal in the instant case would, if agreed to by the County Board, constitute a legitimate modification of the statutory authority of the three elected officers in question to appoint and remove subordinate employes or deputies.

Section 59.15(2)c, Stats., gives the County Board the authority to both establish the wages to be paid subordinate employes or deputies to elected officials as well as "...regulations of employment for any person paid from the County Treasury." Section 59.15(2)d, Stats., additionally authorizes the County Board to contract for the services of employes, and establish "hours, wages, duties and terms of employment."

As a municipal employer, a County is statutorily mandated to bargain collectively with the authorized representatives of their employes as to wages, hours, and conditions of employment. Sec. 111.70(1)(a), Stats. Final ratification of the bargaining results -- a collective bargaining agreement -- by the County Board is not only a logical extension of its duty to bargain collectively arising under Sec. 111.70(1)(a), Stats., but is also an exercise of the powers it is granted by virtue of Sec. 59.15(2)(c) and (d), Stats.

The Legislature has been explicit in specifying its intended interpretation of Sec. 59.15, Stats., and leaves little room for doubt. Section 59.15(4), Stats., provides:

> "INTERPRETATION. In the event of conflict between this section and any other statute, this section to the extent of such conflict shall prevail."

Thus, even if the provisions of a contract bargained by the County under its Sec. 59.15 authority conflict with statutory appointment and removal powers, by virtue of Sec. 59.15(4), Stats. the provisions of the collective bargaining agreement must prevail.

The statutory provision relied upon by the County as to the position of Chief Deputy Clerk of Court states in pertinent part:

> **59.38 Clerk of court; deputies; chief deputy; division chief deputies; calendar deputy clerk in certain counties. (1)** COUNTIES OF LESS THAN 500,000 POPULATION. Every clerk of the circuit court shall appoint one or more deputies and the appointments shall be approved by the majority of circuit judges for the county, but shall be revocable by the clerk at pleasure, except in counties having a population of 500,000 or more. The appointments and revocations shall be in writing and filed in the clerk's office. The deputies shall aid the clerk in the discharge of the clerk's duties. In the absence of the clerk from the office or from the court they may perform all the clerk's duties; or in case of a vacancy by resignation, death, removal or other cause the deputy appointed shall perform all such duties until the vacancy is filled.

The question of whether the County can modify the Clerk of Court's statutory appointive and removal power through a collective bargaining agreement was addressed in 63 Op. Atty. Gen. 147 (1974). Said opinion stated in pertinent part:

> The county board has power to contract for the services of employes, setting up "hours, wages, duties and terms of employment" under sec. 59.15 (2) (d), Stats., and may establish "regulations of employment for any person paid from the county treasury" and establish the number of employes in each department "including deputies to elective officers" under sec. 59.15 (2) (c), Stats. Therefore, I am of the opinion that the board can enter into a collective bargaining agreement with a duly certified bargaining unit of employes under sec. 111.70, Stats., which establishes a grievance procedure relative to discharge, without the express consent of the elected officials under whom such deputies serve. To the extent that such bargaining agreement is consistent with powers granted to the county board under secs. 59.15 (2) and 111.70, Stats.,

(..continued)

apply to such position. On that basis, we are willing to examine the question of whether the District Attorney's powers of appointment and removal can be modified by a collective bargaining agreement.

> it modifies the provisions of a statute such as sec. 59.38 (1), Stats., which permits a clerk of circuit court to remove a deputy clerk of court at pleasure.

We find this opinion both persuasive and consistent with our earlier discussed view of Chapter 59. Sections 59.15(2)(c),(d), and (4), Stats., continue to empower the County to regulate and contract as to terms of employment of deputies. Thus, the County continues to be authorized to enter into contracts with the bargaining representative of such deputies which modify the otherwise applicable appointive and removal power of the Clerk of Court. Therefore, we reject the County's contention that the proposal in question is a prohibited subject of bargaining as to the Chief Deputy Clerk of Court position.

Our result is consistent with the obligation under Muskego-Norway Schools v. WERB, 35 Wis.2d 540 (1967) to harmonize the provisions of Sec. 111.70, Stats. with other provisions of the law whenever possible. Where deputies are not represented for the purposes of collective bargaining or are not covered by a civil service system established under the authority of Sec. 59.07(20), Stats., the appointive and removal powers remain viable. However, where a county exercises the authority granted by the Legislature to regulate the hiring and termination of deputies by civil service or collective bargaining agreement, the county's exercise of such authority governs.

Our result is also consistent with our holding in Crawford County, Dec. No. 20116 (WERC, 12/82) where we concluded that just cause and layoff protections did not irreconcilably conflict with the sheriff's statutory appointive and removal powers. We therein concluded that such provisions served to limit but not eliminate the sheriff's statutory authority. When reaching our result in Crawford, we relied in part upon the analysis of the Wisconsin Supreme Court in Glendale, supra. In that case, the municipality had argued that Sec. 62.13(4)(a), Stats., gave the police chief unfettered discretion concerning promotion of subordinates (subject only to the requirement of board approval) and that this discretion could not be limited by a collective bargaining agreement. The Court rejected this argument. Invoking the Muskego-Norway doctrine, the Court found that a City may lawfully limit the unfettered discretion previously enjoyed by the chief and the board concerning promotions through the adoption of a collective bargaining agreement reached pursuant to the provisions of Sec. 111.70, Stats.

As to the position of Chief Deputy Register of Deeds, Sec. 59.50, Stats., provides:

> **59.50 Register of deeds; deputies.** Every register of deeds shall appoint one or more deputies, who shall hold their office during his pleasure. Such appointment shall be in writing and filed and recorded in his office. Such deputy or deputies shall aid the register in the performance of his duties under his direction, and in case of vacancy or the register's absence or inability to perform the duties of his office such deputy or deputies shall perform the duties of register until such vacancy is filled or during the continuance of such absence or inability.

Sections 59.07(20) and 59.15(2)(c), (d) and (4), Stats. are all equally applicable to a deputy of a register of deeds as to a deputy clerk of court. Thus we conclude that the County is statutorily authorized to limit the hiring and termination rights the appointive and removal power of the Register of Deeds through a collective bargaining agreement. 3/ Therefore, we reject the County's contention that the proposal in question is a prohibited subject of bargaining as to the Deputy Register of Deeds position.

As to the position of Administrative Law Clerk, the County relies on Sec. 59.45, Stats., which was repealed effective January 1, 1990 by 1989 Act 31. Section 978.05(8)(b), Stats., provides that the District Attorney shall:

> (b)Hire, employ and supervise his or her staff and make appropriate assignments of the staff throughout the prosecutorial unit. The district attorney may request the assistance of district attorneys, deputy district attorneys or assistant district attorneys from other prosecutorial units or assistant attorneys general who then may appear and assist in the investigation and prosecution of criminal matters in like manner as assistants in the prosecutorial unit and with the same authority as the district attorney in the unit in which

3/ See also 41 Op. Atty. Gen. 105 (1952) to the effect that a county civil service ordinance can supercede the Register of Deed's statutory appointive and removal power.

> the action is brought. Nothing in this paragraph limits the authority of counties to regulate the hiring, employment and supervision of county employes.

Presumably, this statutory provision generally empowers the District Attorney to hire an Administrative Law Clerk. However, as the text of Sec. 978.05(8)(b), Stats., makes clear: "Nothing in this paragraph limits the authority of counties to regulate the hiring, employment and supervision of county employes." Consistent with our earlier holdings, we think it is apparent from this statutory provision that the County can regulate the hiring and employment of the Administrative Law Clerk through a collective bargaining agreement. Therefore, we reject the County's contention that the proposal in question is a prohibited subject of bargaining as to the Administrative Law Clerk position.

The County has placed substantial reliance herein upon the result of litigation in Manitowoc County, Dec. No. 8152-E, (WERC, 7/81) Kewaunee County v. WERC, 141 Wis.2d 347 and Iowa County 89 CV 90, involving the relationship between provisions of a collective bargaining agreement and a circuit judge's power to appoint the register in probate. As we have no dispute before us as to the register in probate and as the statute regarding the appointment of registers in probate has provisions which are distinct from those at issue herein, 4/ we do not find the County's reliance on these cases persuasive.

However, we would note that the duty to harmonize Sec. 111.70, Stats. with statutory provisions relating to appointment and removal of a register in probate also requires the additional consideration of the separation of powers doctrine and the constitutional functions of the circuit court. These additional considerations are not present before us in this case.

Accordingly, we do not find the Union's proposal to be a prohibited subject of bargaining.

* * *

Finally, we turn to the County's contention that the proposal is permissive because it may require the County to retain more employes than its service needs require.

The determination of whether a proposal is a mandatory or permissive subject of bargaining requires us, on a case by case basis, 5/ to decide whether the proposal is primarily related to wages, hours and conditions of employment or primarily related to the management and direction of the employer, or the formulation and management of public policy. 6/ In making this decision, we must examine all sides of the question -- the impact of the proposal on the employer, the relation of the proposal to wages and conditions of employment, and the impact of the proposal on questions of management prerogatives and public policy. 7/

4/ Section 851.71, Stats., provides:

> **Appointment and compensation of registers in probate. (1)** 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. Before entering upon duties, the register in probate shall take and subscribe the constitutional oath of office and file it, together with the order of appointment, in the office of the clerk of circuit court.
> **(2)** One or more deputies may be appointed in the manner specified in sub. (1).
> **(3)** The salary of the register in probate and of any deputies shall be fixed by the county board and paid by the county.
> **(4)** In counties having a population of 500,000 or more, the appointment under subs. (1) and (2) shall be made as provided in those subsections but the judges shall not remove the register in probate and deputy registers, except through charges for dismissal made and sustained under s.63.10 or an applicable collective bargaining agreement.

5/ Unified School District #1 of Racine County v. WERC, 81 Wis. 2d 89, 95, 96, (1977), citing Beloit Education Association v. WERC, 73 Wis. 2d 43, 55, (1976).

6/ West Bend Education Association v. WERC, 121 Wis. 2d 1, 8, (1984); also see Unified School District #1 of Racine County v. WERC, Ibid, at 96, 102.

7/ West Bend Education Association v. WERC, Ibid, at 14.

Our examination of these questions leads us to conclude that the proposal made by the Union is primarily related to employes' "conditions of employment." Since the County continues to have the right under Sec. 59.15(2)(c), Stats., 8/ to determine the number of jobs in each department (including the number of deputies for elected officials) and the right to layoff under Article 8.03 of the contract, we do not perceive the proposal as requiring the County to retain unneeded employes. Under this circumstance, we do not find the proposal significantly affects the management and direction of the County or the County's formulation and management of public policy because the County retains the ability to determine the number of employes it needs to provide service. On the other hand, the proposal's impact on the affected employes' conditions of employment is substantial.

Based on the aforesaid, we find the proposal in question to constitute a mandatory subject of bargaining.

Dated at Madison, Wisconsin this 17th day of April, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairman

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

8/ Section 59.15(2)(c), Stats., provides in pertinent part:

> (c) The board may ... establish the number of employes in any department or office including deputies to elective officers, ...