

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DRIVERS, WAREHOUSE AND DAIRY
EMPLOYEES, LOCAL 75,

Complainant,

vs.

SHAWANO COUNTY,

Respondent.

Case 129

No. 51605 MP-2940

Decision No. 28250-A

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Ms. Marianne Goldstein Robbins, 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin 53212, appearing on behalf of Drivers, Warehouse and Dairy Employees, Local 75.

Godfrey & Kahn, S.C., Attorneys at Law, by Mr. Dennis W. Rader, 333 Main Street, P. O. Box 13067, Green Bay, Wisconsin 54307-3067, appearing on behalf of Shawano County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Drivers, Warehouse and Dairy Employees, Local 75 filed a complaint with the Wisconsin Employment Relations Commission on September 27, 1994, alleging that Shawano County had committed prohibited practices in violation of Secs. 111.70(3)(a)1 and 4, Stats., by eliminating the position of Assistant Register in Probate and creating the position of Deputy Register in Probate and transferring the work of the Assistant Register to it and excluding the Deputy Register in Probate from the posting/promotion and discharge clauses of the parties' collective bargaining agreement without bargaining with the Union. On December 2, 1994, the Commission appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. No hearing was held and the parties submitted a stipulation of facts on March 13, 1995. The parties filed briefs and reply briefs, the last of which were exchanged on May 9, 1995. The Examiner, having considered the

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stipulation of the parties and the arguments of counsel, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Drivers, Warehouse and Dairy Employees, Local 75, hereinafter referred to as the Union, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and is the exclusive collective bargaining representative for certain employes of Shawano County, and its offices are located at 1546 Main Street, Green Bay, Wisconsin 54302.

2. Shawano County, hereinafter referred to as the County, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and its offices are located at 311 North Main Street, Shawano, Wisconsin 54166.

3. At all times material herein, the Union and the County have been parties to a collective bargaining agreement which includes the position of Assistant Register in Probate. That position was covered by all the terms of the collective bargaining agreement including the seniority clause, Article 6, the discipline clause, Article 7, and the grievance clause, Article 8.

4. By a letter dated July 20, 1994, County Administrative Coordinator, Gordon Ellis, sent the Union a letter which stated as follows:

Based on the Court of Appeals decision in Manitowoc County, our Judges have decided to fill the Assistant Register in Probate position on an open and competitive basis. They will advertise internally and externally but have no intention to post this position.

In reviewing the Manitowoc and Iowa County cases, it appears that County Circuit Judges can and have named a Register in Probate as well as "assistants" or "deputies" under Wis. Stats. 851.75. The court decisions covering this include 170 Wis. 2d 692 and 489 N.W. 2d 722.

My understanding also includes consideration of removing this position from the existing collective bargaining group although this aspect has not been requested at this point. An order has been drafted and will be signed if necessary.

5. On July 22, 1994, the Union filed a grievance protesting the County's failure to follow the contractual posting procedure in filling the position of Assistant Register in Probate.

6. On August 23, 1994, the Circuit Court for Menominee/Shawano Counties, Shawano County Division, Branch #1, issued an Order appointing Sheila K. Martin as Deputy Register in Probate for the Circuit Court of Menominee/Shawano Counties.

7. On or about August 24, 1994, the Shawano County Board of Supervisors, by resolution, abolished the position of Assistant Register in Probate and created the position of Deputy Register in Probate.

8. By letter dated August 25, 1994, the County informed the Union that it would agree that the position of Deputy Register in Probate was subject to the parties' collective bargaining agreement in all respects except with regard to appointment or removal, and would be compensated at the rate of the Assistant Register in Probate.

9. On September 9, 1994, the County denied the July 2, 1994 grievance by letter of Gordon Ellis to Dan McGowan.

10. The Assistant Register in Probate was Genevieve Bartlien from the time the Union was first certified as bargaining representative of Shawano County Courthouse employes until her resignation in 1994. Genevieve Bartlien was not appointed to the position of Assistant Register in Probate by the circuit court judges nor was her appointment approved by the circuit court judges.

11. The newly titled Deputy Register in Probate position performs the same duties as the Assistant Register in Probate position under the labor agreement prior to the summer of 1994.

12. The newly titled Deputy Register in Probate position does not perform any supervisory duties and the position is not supervisory within the meaning of Sec. 111.70, Wis. Stats.

13. The newly titled Deputy Register in Probate position created in the summer of 1994, does not perform managerial duties in such combination and degree such that the position would be excluded from the bargaining unit under Sec. 111.70, Wis. Stats.

14. There is only one Deputy Register in Probate in Shawano County. There are no other employes in the office of the Register in Probate other than the Register in Probate and the Deputy Register in Probate in Shawano County.

15. The Register in Probate position is excluded from the bargaining unit represented by the Union.

16. The parties disagree concerning whether the Deputy Register in Probate position is subject to the removal and appointment provisions of the parties' collective bargaining agreement.

The parties agree that the newly titled Deputy Register in Probate is subject to all other provisions of the parties' collective bargaining agreement.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. The County, by retitling the position of Assistant Register in Probate to Deputy Register in Probate, did not refuse to bargain collectively with the Union and therefore has not violated Secs. 111.70(3)(a)4 and 1, Stats.

2. By harmonizing Secs. 111.70 and 851.71(2), Stats., the posting and discharge provisions of the parties' collective bargaining agreement are inapplicable to the Deputy Register in Probate and the County's failure to apply these provisions do not constitute a violation of Secs. 111.70(3)(a)4 or 5, Stats.

3. The County's refusal to proceed to arbitration over the grievance on the failure to post the Deputy Register in Probate position does not constitute a prohibited practice in violation of Secs. 111.70(3)(a)4 or 5, Stats.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER 1/

IT IS ORDERED that the complaint be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin, this 7th day of July, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

1/ (See footnote on Page 5.)

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- 1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

SHAWANO COUNTY

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint initiating these proceedings, the Union alleged that the County committed prohibited practices by unilaterally transferring the work of the Assistant Register in Probate to the new position of Deputy Register in Probate and excluding the new position from the coverage of the posting/promotion and discharge clauses of the parties' collective bargaining agreement without bargaining with the Union. The County denied that it committed any prohibited practices.

UNION'S POSITION

The Union contends that the County violated its MERA obligations by transferring the Assistant Register in Probate's duties to a new position of Deputy Register in Probate and by its refusal to apply the posting/promotion and discharge clauses of the parties' collective bargaining agreement to the position. It submits that in reality, the position is that of an Assistant Register in Probate which had been included in the bargaining unit and was covered by all provisions of the collective bargaining agreement. It claims that as the Deputy Register in Probate is the identical position, all provisions of the agreement should apply to it and the County's failure to post it is in direct violation of the posting provision of the contract. It asserts that the County cannot avoid the contract simply by changing the name of a position. It argues that, in the alternative, the change in positions constitutes a refusal to bargain. It submits that the County unilaterally removed the position from coverage of the posting provisions and failed to bargain over said removal or terms of employment applicable to the new position. It insists that the procedure utilized to fill vacancies is a mandatory subject of bargaining as is the standard for discharge. It maintains that the County cannot unilaterally remove a position by retitling it merely to avoid its obligations under the contract and under MERA.

The Union contends that the provisions of Sec. 851.71, Stats., do not alter its position that the County violated MERA. It notes that Sec. 851.71, Stats., addresses the appointive authority of judges to a specifically identified position. In this case, the Union claims that the conduct of the County, not the judges, is at issue. It asserts that the County would not apply the posting provisions even while the position remained Assistant Register in Probate and it was the County which later abolished the Assistant Register in Probate position and created the Deputy Register in Probate. It submits that it was the County's actions here that are central to the case. It points out the Deputy Register in Probate is a subordinate position in the office of the Register in Probate. The Union relies on County of Eau Claire v. AFSCME Local 2223, 190 Wis.2d 299 (CtApp III, 1994), for the proposition that the Deputy Register in Probate,

which is neither supervisory or managerial, is included in the bargaining unit and subject to all clauses of the collective bargaining contract. It maintains there is no basis for removing the position from the protections of the posting and discharge provisions of the parties' collective bargaining agreement and it seeks an order returning the position to the status quo ante and it be posted in accordance with the terms and conditions of the collective bargaining agreement.

COUNTY'S POSITION

The County contends that the elimination of the Assistant Register in Probate and the creation of the Deputy Register in Probate are permissive subjects of bargaining and it had no duty to bargain over these actions. The County cites Commission decisions that the unilateral elimination of a position and the creation of a position are permissive subjects of bargaining and these actions relate more to management and its operation than to wages, hours and other conditions of employment, thus the County was not obligated to bargain over these actions. The County argues that the two positions have the same job duties so the wages, hours and conditions of employment were unaffected. The County alleges that it changed the position title to come in compliance with statutory language and availed itself of its rights under law and by doing so did not commit any prohibited practices.

The County claims that because of Sec. 851.71, Stats., it was not obligated to follow the job posting procedures of the parties' collective bargaining agreement. It notes that Sec. 851.71(2), Stats., provides the procedure to fill the Deputy Register in Probate (appointment by the Court) and the job posting provisions of the parties' agreement cannot usurp the Court's authority under the statute. The County relies on Iowa County v. Iowa County Courthouse, 166 Wis.2d 614 (1992), pointing out that circuit court judges are not municipal employers and cannot be bound by any agreement between the County and the Union. It submits that the contract and the statute cannot be harmonized because the judge's power of appointment would be transferred to a municipal employer. It maintains that the job posting provisions which purport to regulate the power of the circuit court to appoint are void and unenforceable and not subject to arbitration. The County asserts that the Commission has long followed this rule.

The County contends that the grievance is not arbitrable because a contract provision that violates the law is void and a grievance over such provision is not arbitrable. It asks that the complaint be dismissed.

UNION'S REPLY

The Union contends that the County's assertion that the abolishment of the Assistant Register in Probate and the creation of the Deputy Register in Probate are permissive subjects, must be rejected. It notes that whether these actions are permissive or mandatory depends on

whether the action is primarily related to the formulation or management of public policy or whether the action is primarily related to wages, hours and conditions of employment. The Union asserts that the decision was not related to public policy as the duties of the eliminated and created positions are identical and the only difference is the method of appointment. The Union points out that the overwhelming case law is that the procedure to be utilized in filling vacancies is a mandatory subject of bargaining. The Union notes that there is nothing in the stipulated record that the County made the change to comply with statutory language and nothing in Sec. 851.71(2), Stats., requires the County to take any action. It asserts that the County refused to follow the posting procedure as early as July, 1994, a full month before the change in job titles. It submits that it appears that the County took the action to change the appointment procedure and this is a mandatory subject of bargaining.

The Union argues that Sec. 851.71, Stats., does not alter the conclusion that the County violated MERA. It alleges that the County's reliance on Iowa County, supra, is misplaced. It claims that the conduct at issue is not that of the circuit court judges but of the County. It maintains that the dispute commenced with the County's failure to comply with the posting provisions in filling the Assistant Register in Probate position and a month later the County abolished that position and created a new position for the purpose of avoiding the posting requirement. The Union further argues that Sec. 851.71(1), Stats., applies to the appointment of Register in Probate which is not at issue here and is outside the bargaining unit. It points out that Sec. 851.71(2), Stats., is permissive and not mandatory and the cases relied on by the County only address the Register in Probate and not the Assistant or Deputy. It insists that the position is covered by the posting provisions of the contract on the same basis as it always has been. It requests a return to the status quo ante and an order that the position be filled by posting in accordance with the terms of the collective bargaining agreement.

COUNTY'S REPLY

The County contends that contrary to the Union's characterization it did not simply change the title of the position but eliminated the Assistant Register in Probate and created the Deputy Register in Probate. It insists that the Union is attempting to muddy the waters and points out that the stipulated facts provide that the Assistant position was "abolished" and the Deputy position was "created." The County argues that however the County's actions are labelled, it acted well within its rights and did not commit a prohibited practice by availing itself of its right under the law. The County insists that it eliminated one position and created another and its actions were legitimate.

The County maintains that position elimination and creation are permissive and the Union's arguments to the contrary relate to subcontracting which is not an issue in this case. As the unilateral elimination of a position and subsequent creation of a position are permissive, the County concludes that it has no duty to bargain over such actions.

The County does not dispute the Union's argument that job posting and discharge are mandatory subjects of bargaining but claims that no provision of the agreement, even one involving a mandatory subject of bargaining, can supersede the statutory authority of a circuit court judge. The County submits the Union's reliance on County of Eau Claire v. AFSCME Local 2233, 190 Wis.2d 299 (CtApp III, 1994) is without merit because it mixes apples and oranges. According to the County, the "apples" are what a County has discretion to do and the "oranges" are what the circuit court has statutory authority to do after the County has acted. The County asserts that the Union confuses the chronology of events . It supposes that the Union believes that Sec. 851.71, Stats., would apply only if the County had waited until after the judges had acted before taking its elimination and creation actions. It insists that both the County and the circuit court acted properly. It notes that the actions of a County will always be at issue with respect to an action involving Sec. 851.71, Stats., because a County must establish a Deputy position before a circuit court can fill it.

The County maintains that the Union's attempt to distinguish Iowa County, supra, fails because the Union's assertion that Iowa County only applies to the Register in Probate ignores the fact that Secs. 857.71(1) and (2) are identical and the rationale and holding of Iowa County applies just as well to the Deputy position as to the Register position.

The County distinguishes Eau Claire County, supra, on the basis that while municipal employees can negotiate limitations on their own statutory powers as long as those limitations can be "harmonized" with the conflicting statute, the "harmonization" rule does not apply in this case because a circuit court judge is not a municipal employer. Additionally, the County notes that Eau Claire County involved appointment of positions below a Deputy and the instant case does not and the issues in Eau Claire County are immaterial here. In conclusion, the County asserts its decisions to eliminate the Assistant position and create the Deputy position are permissive and it has no duty to bargain over them. It relies on Sec. 851.71(2), Stats., which vests in the circuit court the power to appoint the Deputy as relieving the County from any obligation to post the position and as disputes about illegal contract provisions are not arbitrable, this case is not arbitrable and for these reasons, the County asserts the complaint should be dismissed.

DISCUSSION

The first issue involved in this matter is County Resolution No. 379-94 wherein it abolished the Assistant Register in Probate and created the Deputy Register in Probate. The Commission has held that the elimination of a position is a permissive subject of bargaining. 2/ Similarly, the

2/ Racine Unified School District, Dec. No. 25283-B (WERC, 5/89); Oak Creek-Franklin School District, Dec. No. 11827-D (WERC, 9/74); Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83).

creation of a position has been held to be a permissive subject of bargaining. 3/ The decision to create additional positions or to eliminate positions primarily relates to the formation and implementation of how the County is going to accomplish its goals and this is a public policy issue primarily related to the management and direction of the County's delivery of services and is a permissive subject of bargaining. The Union has argued and persuasively so that the County merely change the job title of the position. The stipulated facts establish that the position's duties were the same and is the only position in the Register in Probate's office. It can be concluded that the County's Resolution which speaks of abolishing one position and creating another really was just a change in title. However, the mere change in classification title is also permissive because there was no change in wages, hours and conditions of employment. 4/

The Union has argued that there was a change because the position was not subject to the posting or discharge provisions of the parties' collective bargaining agreement. These conditions were not imposed on the position by the County but were imposed by statute under Sec. 851.71(2), Stats. The Union asserted that the Assistant Register in Probate was not appointed by the circuit court judges and the position was occupied by Genevieve Bartlien from the time the Union was certified as bargaining representative. The stipulated facts don't establish when the position was first occupied by Bartlien but she could have been in the position before the passage of Sec. 851.71, Stats. Furthermore, whether the position is titled Assistant or Deputy makes no difference. Sec. 851.71(2) provides for the appointment of one or more deputies by the circuit court judges and "deputies" is in the lower case. The definition of deputy is an "assistant" to another. 5/ Therefore, whether the position title was changed or not, the provisions of Sec. 851.71(2), Stats., were applicable. Therefore, even if the County did nothing, the circuit court judges had the power to appoint someone to the position pursuant to Sec. 851.71(2), Stats., and the posting and discharge provisions of the contract would not apply.

The Union has argued that the County notified the Union that it was not going to comply with the posting provisions before the circuit court judges appointed anyone and before the County changed job titles. A review of the County's letter of July 20, 1994, 6/ clearly states in the first paragraph that the "Judges have decided to fill the Assistant Register in Probate

3/ Id.

4/ City of Sheboygan, Dec. No. 11877-A (Fleischli, 8/76), aff'd by operation of law, Dec. No. 11877-B (WERC, 9/76).

5/ Webster's New World Dictionary, Second College Edition, 1974.

6/ Ex. 2.

position on an open and competitive basis. They will advertise internally and externally but have no intention to post this position." 7/ It is clear that the circuit court judges were exercising their statutory right under Sec. 851.71(2), Stats., and the County did nothing to either violate the contract or its duty to bargain as the circuit court judges are not municipal employers under Sec. 111.70(1)(j), Stats. nor agents of the County. 8/ The Union has argued that Sec. 851.71(2), Stats., is not applicable and has relied on County of Eau Claire v. AFSCME Local 2223, 190 Wis.2d 299 (CtApp III, 1994); however, that case involved Secs. 59.38 and 59.50, Stats., respectively, and the court held that the size and function of the particular office would determine the scope of the power to appoint and remove. The court noted that in Crawford County v. WERC, 177 Wis.2d 66 (CtApp IV, 1993), which involved the appointment of a single deputy, the bargaining agreement could not be reconciled with the statutory authority to appoint and remove deputies. Here, there is only a single deputy involved but more importantly, there is a different statute involved. The undersigned finds that County of Eau Claire is not applicable to this case. Rather the undersigned finds that this case is controlled by Kewaunee County v. WERC, 141 Wis.2d 347 (CtApp III, 1987) which involved a Register in Probate, wherein the court stated:

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 (sic) 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. 9/

7/ Id.

8/ Iowa County v. Iowa County Courthouse, 166 Wis.2d 614 (1992).

9/ Pages 358 and 359. See also Manitowoc County, Dec. No. 8152-E (WERC, 7/81).

In this case, the Deputy Register in Probate was appointed in accordance with the statutory authority vested in the circuit courts and any provision in the parties' collective bargaining agreement which conflicts with the circuit court's authority is void and unenforceable.

The County cannot enforce these void provisions any more than can the Union. Thus, it is concluded that the County acted in accordance with the law and its obligations under Sec. 111.70, Stats. It did not violate Secs. 111.70(3)(a)1 or 4 nor did its refusal to proceed to arbitration violate the contract. Therefore, for these reasons, the complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin, this 7th day of July, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner