

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-B

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.

ORDER AFFIRMING AND MODIFYING EXAMINER'S FINDINGS OF FACT,
MODIFYING EXAMINER'S CONCLUSIONS OF LAW,
AND AFFIRMING EXAMINER'S ORDER

On July 7, 1995, Examiner Lionel L. Crowley issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-captioned matter wherein he dismissed a complaint filed by Drivers, Warehouse and Dairy Employees, Local 75, alleging that Shawano County had committed prohibited practices within the meaning of Secs. 111.70 (3)(a)1, 4, and 5, Stats., by eliminating the position of Assistant Register in Probate; creating the position of Deputy Register in Probate; refusing to apply the posting/promotion and discharge clauses of the parties' collective bargaining agreement to the Deputy Register in Probate position; and refusing to arbitrate a grievance over said refusal.

On July 27, 1995, Complainant timely filed a petition with the Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which

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was received October 10, 1995.

Having considered the matter, and being fully advised in the premises, the Commission makes and issues the following

ORDER 1/

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).

(Footnote 1 continues on page 3)

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

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A. Examiner's Findings of Fact 1-10 are affirmed.

B. Examiner's Finding of Fact 11 which states:

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

is affirmed and supplemented as follows:

(Footnote 1 continues on page 3)

On August 23, 1994, the judges issued an Order of

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.

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Appointment and Delegation of Duties of Deputy Register in Probate which stated:

WHEREAS at present there is no Deputy Register in Probate for Menominee/Shawano Counties; and

WHEREAS Section 851.71(2), Wisconsin Statutes, authorizes the judges of the counties to appoint one or more Deputy Registers in Probate subject to the approval of the Chief Judge.

NOW, THEREFORE, ON THE MOTION OF THE CIRCUIT JUDGES OF MENOMINEE/SHAWANO COUNTIES:

IT IS HEREBY ORDERED pursuant to Section 851.71(1), Wisconsin Statutes, that Sheila K. Marten be appointed Deputy Register in Probate for the Circuit Court of Menominee/Shawano Counties.

IT IS FURTHER ORDERED that in addition to the duties specified in Sections 851.72 and 865.065, Wisconsin Statutes, that the Deputy Register in Probate:

- I. Act as a department head in all dealings with the Shawano County Board and all of its Committees in coordination with the Register in Probate; and
- II. Act as a department head in all dealings with the Menominee County Board and all of its Committees in coordination with the Register in Probate; and
- III. Prepare and administer the annual budget for

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the office of Register in Probate and Probate Registrar in coordination with the Register in Probate.

IV. Perform other duties as required by the Circuit Judges of Menominee/Shawano Counties.

On August 24, 1994, the County abolished the position of Assistant Register in Probate and created the position of Deputy Register in Probate through the following resolution:

RESOLUTION NO. 379-94

WHEREAS, with the resignation of Genevieve Bartline there is an opening in the Register of Probate Office; and

WHEREAS, where previously the position had been titled Assistant Register in Probate; and

WHEREAS, such position could be converted to Deputy Register in Probate and include such additional duties as administering oaths, taking and certifying acknowledgements and other duties given to the Register in Probate under Wis. Stats. 851.72 in the absence of the Register in Probate.

NOW, THEREFORE, BE IT RESOLVED BY THE SHAWANO COUNTY BOARD OF SUPERVISORS that:

1. The position of Assistant Register in Probate is hereby abolished.
2. The position of Deputy Register in Probate is hereby created and a new job description defining the new responsibilities is attached.

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C. Examiner Findings of Fact 12-16 are affirmed.

D. Examiner Conclusion of Law 1 which states:

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.

is modified to read as follows:

1. The County had no duty to bargain with Complainant over the abolition of the position of Assistant Register in Probate and the creation of the position of Deputy Register in Probate. Therefore, the County's unilateral abolition/creation of these positions did not violate Secs. 111.70(3)(a)4 or 1, Stats.

E. Examiner Conclusion of Law 2 which states:

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.

is modified to read as follows:

2. The posting and discharge provisions of the parties' collective bargaining agreement cannot be harmonized with the language of Sec. 851.71(1) and (2), Stats. Therefore, these contractual provisions are null and void as to the Deputy Register in Probate. Thus, the County's refusal to apply these provisions to the Deputy Register in Probate and to arbitrate a grievance over the failure to apply these provisions to the Deputy Register in Probate does not violate Secs. 111.70(3)(a)4, 5, or 1 Stats.

F. Examiner's Conclusion of Law 3 which states:

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.

is set aside.

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G. Examiner's Order is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin,
this 7th day of February 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
James R. Meier, Chairperson

A. Henry Hempe, Commissioner

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SHAWANO COUNTY

MEMORANDUM ACCOMPANYING
ORDER AFFIRMING AND MODIFYING EXAMINER'S FINDINGS OF FACT,
MODIFYING EXAMINER'S CONCLUSIONS OF LAW,
AND AFFIRMING EXAMINER'S ORDER

The Pleadings

Complainant asserts that the Respondent County committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 1, Stats., by abolishing the bargaining unit position of Assistant Register in Probate and creating the position of Deputy Register in Probate. Complainant further alleges that Respondent County violated Sec. 111.70(3)(a)4, 5, and 1 Stats., by refusing to apply the job posting provisions of an existing collective bargaining agreement to the Assistant Register in Probate/Deputy Register in Probate position and refusing to arbitrate a grievance over said refusal.

Respondent County denies that it committed any prohibited practices. Respondent contends that it has the right to unilaterally eliminate and create positions without bargaining and further that the provisions of Sec. 851.71(2), Stats., preclude the County from applying the job posting provisions of the collective bargaining agreement to a Deputy Register in Probate position.

The Examiner's Decision

Looking first at the elimination of the Assistant Register in Probate position and the creation of the Deputy Register in Probate position, the Examiner concluded that the elimination or creation of positions primarily relates to the management and direction of the County's delivery of services and thus are a permissive subject of bargaining. Therefore, he concluded that the County did not violate its duty to bargain with Complainant Union when it eliminated the Assistant Register in Probate position and created the Deputy Register in Probate position. The Examiner further reasoned that he even if it were concluded that the Respondent County had merely changed the job title of a position, said action also would not create a duty to bargain because there would have been no change in wages, hours, and conditions of employment.

As to the County's refusal to apply the job posting or discharge provisions of the collective bargaining agreement to the Assistant/Deputy Register in Probate position, the Examiner concluded that the provisions of Sec. 851.71(2), Stats., give circuit judges the power to appoint "deputies" and that the posting/discharge provisions of a contract cannot override that statutory power. The Examiner determined that the Judges' statutory power applied whether the position in question was titled "Assistant" or "Deputy." Therefore, the Examiner reasoned that even if the County had taken no action herein, the circuit court judges had the power to override the posting/discharge provisions of the contract as to the position in dispute. The Examiner rejected Complainant Union's argument that County of Eau Claire v. AFSCME Local 2223, 190 Wis. 2d 299 (1994) rendered Sec. 851.71(2), Stats., inapplicable to this case. Instead, the Examiner concluded that this case is

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controlled by Kewaunee County v. WERC, 141 Wis. 2d 347 (1987).

Given all the foregoing, Examiner concluded that the County acted in accordance with law and did not commit any prohibited practices. He therefore dismissed the complaint in its entirety.

Discussion

Section 851.71, Stats., provides:

851.71 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 in 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.

In Iowa County v. Iowa County Courthouse, 166 Wis. 2d 614 (1992), the Wisconsin Supreme Court held that it was not possible to harmonize Sec. 111.70 collective bargaining with the statutory power of the circuit court judge to appoint a register in probate under Sec. 851.71(1), Stats., and thus that:

For the reasons set forth above, we conclude that the provisions within the agreement which purports to regulate the statutory power of the circuit court judge to appoint a register in probate are void, unenforceable, and not subject to arbitration.

Iowa County echoes an earlier holding regarding a register in probate by the Wisconsin Court of Appeals in Kewaunee County v. WERC, 141 Wis. 2d 347 (1987) that:

Furthermore any contractual provision that conflicts with the authority invested in a judge to appoint or remove someone from such a position would also be void.

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In Shawano County at the time this dispute arose, the register in probate's office consisted of the Register (who was excluded from the bargaining unit represented by the Complainant Union) and a position identified in the contract between Complainant and Respondent as Assistant Register in Probate (which was included in the bargaining unit represented by Complainant Union). The Assistant position became vacant.

Relying in part upon the holding in Iowa County, Shawano County circuit court judges decided to fill the vacant bargaining unit position of Assistant Register in Probate with a Deputy Register in Probate without regard to the job posting provisions in the contract between the Respondent County and Complainant Union. The judges advised the County of their intentions and the County in turn advised the Complainant Union by letter dated July 20, 1994, 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.

On July 22, 1994, Complainant Union filed a grievance with the Respondent County which stated:

The County is in violation of but not limited to Article 6. Seniority, Section 2 & 3 of the current labor agreement by not following the job posting procedure in filling the position of Assistant Register in Probate and removing this position from the collective bargaining group. We are requesting that said position be posted per the collective bargaining agreement and remain in the group.

On August 23, 1994, the judges issued an Order of Appointment and Delegation of Duties of Deputy Register in Probate which stated:

WHEREAS at present there is no Deputy Register in Probate for Menominee/Shawano Counties; and

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WHEREAS Section 851.71(2), Wisconsin Statutes, authorizes the judges of the counties to appoint one or more Deputy Registers in Probate subject to the approval of the Chief Judge.

NOW, THEREFORE, ON THE MOTION OF THE CIRCUIT JUDGES OF MENOMINEE/SHAWANO COUNTIES:

IT IS HEREBY ORDERED pursuant to Section 851.71(1), Wisconsin Statutes, that Sheila K. Marten be appointed Deputy Register in Probate for the Circuit Court of Menominee/Shawano Counties.

IT IS FURTHER ORDERED that in addition to the duties specified in Sections 851.72 and 865.065, Wisconsin Statutes, that the Deputy Register in Probate:

- I. Act as a department head in all dealings with the Shawano County Board and all of its Committees in coordination with the Register in Probate; and
- II. Act as a department head in all dealings with the Menominee County Board and all of its Committees in coordination with the Register in Probate; and
- III. Prepare and administer the annual budget for the office of Register in Probate and Probate Registrar in coordination with the Register in Probate.
- IV. Perform other duties as required by the Circuit Judges of Menominee/Shawano Counties.

On August 24, 1994, the County abolished the position of Assistant Register in Probate and created the position of Deputy Register in Probate through the following resolution:

RESOLUTION NO. 379-94

WHEREAS, with the resignation of Genevieve Bartline there is an opening in the Register of Probate Office; and

WHEREAS, where previously the position had been titled Assistant Register in Probate; and

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WHEREAS, such position could be converted to Deputy Register in Probate and include such additional duties as administering oaths, taking and certifying acknowledgements and other duties given to the Register in Probate under Wis. Stats. 851.72 in the absence of the Register in Probate.

NOW, THEREFORE, BE IT RESOLVED BY THE SHAWANO COUNTY BOARD OF SUPERVISORS that:

1. The position of Assistant Register in Probate is hereby abolished.
2. The position of Deputy Register in Probate is hereby created and a new job description defining the new responsibilities is attached.

On August 25, 1994, the County advised Complainant Union as follows:

You requested the County's position regarding the appointment of Sheila Marten as Deputy Register in Probate for the Circuit Court for Menominee/Shawano Counties.

As the Order of Appointment and Delegation of Duties of the Deputy Register in Probate document signed by Judges Schmidt and Grover indicate, the appointment is made pursuant to Sec. 851.71(2) of the Wisconsin Statutes. The County concurs with the Judges' authorization for such action under that statute.

The County shall not change any wage or benefit of the Deputy Register in Probate position as compared with the former Assistant Register in Probate position. The County further agrees that the Deputy Register in Probate position is subject to the Collective Bargaining Agreement of the Courthouse Paraprofessionals represented by Teamsters Local No. 75 in all respects except for the appointment or removal of the person holding the Deputy Register in Probate position. The compensation for this position will be reviewed as part of the current Compensation Study that is being conducted at present.

It is further the County's position that the appointment of the Deputy Register in Probate is not subject to challenge under the grievance and arbitration provision.

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The County will not process any grievance of this issue since the right to appoint or remove the Deputy Register in Probate arises from powers of the Judicial Branch and is not subject to the provisions of the municipal collective bargaining law.

The Examiner concluded that the Respondent County did not commit any prohibited practices by failing to follow the job posting procedures and refusing to arbitrate the Complainant Union's grievance over same, and by abolishing the Assistant Register in Probate position and creating the Deputy Register in Probate position.

We affirm his conclusion for the following reasons.

We begin by noting our disagreement with Complainant's assertion that this case does not implicate the exercise of judicial power under Secs. 851.71(1) and (2), Stats., because: (1) Complainant is not litigating the conduct of the judges, but rather that of the County; and (2) in any event, neither the Assistant nor the Deputy qualify as a "deputy" within the meaning of Sec. 851.71(2), Stats. That may be Complainant's wish. In our view, however, any discussion of this case necessarily touches on the exercise of judicial power.

While it is true that it is the County's conduct which is before us, it is apparent from the record that the County's conduct was driven by and responsive to an exercise of judicial power which both the judges and the County concluded was appropriate under Secs. 851.71(1) and (2), Stats.

Thus, while the County can and should be held accountable as a "municipal employer" in this case, an analysis of the propriety of the County's conduct must include an analysis of whether the judges' conduct was an appropriate exercise of authority under Secs. 851.71(1) and (2), Stats., and if so, how, if at all, that exercise of authority can be harmonized with collective bargaining under Sec. 111.70, Stats.

As noted above, Complainant argues that the Deputy in question is not a "deputy" under Sec. 851.71(2), Stats., and thus that there is no legitimate exercise of judicial power in this case. More specifically, Complainant contends that the old Assistant was not a "deputy" because the incumbent was not appointed by the judges. The Complainant then argues that because the Assistant was not a "deputy" and the new Deputy performs the same duties as the Assistant, the new Deputy is also not a "deputy."

We disagree. Whatever the status of the Assistant might have been, we think it clear from the text of the judicial Order of August 23, 1994, and the County Resolution of August 24, 1994, that this Deputy is a "deputy" under Sec. 851.71(2), Stats. The text of the Judicial Order clearly reflects the judges' view that they were appointing a "deputy" under Sec. 851.71(2), Stats. The text of the Order further indicates the position has been given significant statutory responsibilities under Sec. 851.72, Stats. (Duties of registers in probate) and Sec. 865.065, Stats, (Probate registrar

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definition and powers). Just as clearly, the County Resolution set forth

in Finding 11 clearly specifies that the new Deputy has additional duties above and beyond those of the Assistant including "administering oaths, taking and certifying acknowledgements and other duties given to the Register in Probate under Wis. Stats. 851.72 in the absence of the Register in Probate (emphasis added)."

Given the foregoing, we think it clear that the new Deputy occupies a position created pursuant to the provisions of Sec. 851.71(2), Stats. We further believe that the judges thus were exercising their power under Sec. 851.71(1) and (2), Stats., when they appointed the Deputy.

We turn next to the issue of whether this exercise of judicial power can be harmonized with collective bargaining over the manner in which a "deputy" is appointed or removed.

When determining whether the judicial appointment of a deputy register in probate is subject to the same analysis and result reached by the Court in Iowa County as to the judicial appointment of a register in probate, we look first at the empowering language of Secs. 851.71(1) and (2), Stats., itself. It is apparent that the statutory language provides no basis for concluding the appointments under (1) and (2) should be viewed differently than appointments under (1). The appointment power and procedure is identical.

When the scope of the statutory language considered is broadened to include Sec. 851.71(4), Stats., it becomes even more pellucid that the same analysis and result must be reached. Subsection (4) specifies that in counties with a population of 500,000 or more, the removal of a deputy register is subject to an "applicable collective bargaining agreement." From this provision, we infer the Legislature intended that in counties of under 500,000 population, judicial appointment and removal powers are not subject to collective bargaining agreements. 2/

Complainant correctly notes that in County of Eau Claire supra, the Court of Appeals (1) limited to a single chief deputy the unfettered statutory power of the clerk of court and register of deeds, respectively, to appoint deputies and (2) allowed collective bargaining agreements to cover the appointment and removal of other deputies unless those deputies were in fact managerial or supervisory employees. The Complainant urges us to take a similar approach here. We reject

2/ The doctrine of express mention/implied exclusion is appropriately used as a tool of statutory construction in Wisconsin to discover legislative intent. In Interest of Angel Lace M. 184 Wis. 2d 492 (1994); Teamsters Union Local No. 695 v. Waukesha County, 57 Wis. 2d 62 (1973).

Complainant's invitation for several reasons. 3/

First, even under County of Eau Claire, the exclusion of a single chief deputy from coverage by the posting/removal provisions of a bargaining agreement remains appropriate. In the two-person Shawano County register of probate office, the new Deputy would seem to qualify as the chief deputy inasmuch as she acts for the Register in the Register's absence and has certain administrative/department head duties. Thus, our result is consistent with County of Eau Claire. Second, the statutory language giving appointive power to the register of deeds (Sec. 59.50, Stats.) does not contain a provision equivalent to Sec. 851.71(4), Stats. Lastly, we think it noteworthy that Eau Claire involved the appointment power of elected officials not judges.

Given the foregoing, we reach several conclusions: (1) an Iowa County analysis of the instant case is appropriate; (2) that when such an analysis is applied to the judicial appointment of a deputy register in probate, contract provisions restricting the judicial appointive and removal power cannot be harmonized with Sec. 851.71(1) and (2), Stats.; (3) that such contract provisions thus are null and void; and (4) that a grievance over the appointment of a deputy register therefore is not subject to arbitration. Thus, the County's refusal to apply the existing contractual posting provision to the Deputy position and subsequent refusal to arbitrate the grievance over the Deputy's appointment does not violate Secs. 111.70(3)(a)4 or 5, Stats. 4/

Remaining for disposition is the Complainant's allegation that the Respondent County was obligated to bargain over the abolition of the Assistant position and the creation of the Deputy position. We have held that the decision to establish or abolish positions need not be bargained where such a decision primarily related to policy and organizational structure determinations. 5/ We think it clear that such determinations predominate here over the impact on wages, hours, and conditions of employment. The judges persuaded the County that a "deputy" should exist in the Register's office. The County passed a resolution reflecting this policy determination/agreement. The judges and the County made the concurrent determination that the additional duties appropriate to a "deputy" should be performed. We are satisfied these policy/organizational determinations make the abolition/creation decision a permissive subject of bargaining. Thus, the County's conduct did not violate Sec. 111.70(3)(a)4, Stats.

3/ Complainant also cites Winnebago County v. Courthouse Employees Association, 196 Wis. 2d 733 (1995), in support of its invitation. However, we find Winnebago inapplicable inasmuch as it involved the employer's duty to arbitrate the discharge of an employee from a position as to which neither a judge nor an elected official had statutory power to terminate.

4/ The County and the Union agree that the Deputy continues to be in the bargaining unit and covered by all but the posting/removal provisions of the contract. Their agreement is consistent with the Court's decisions in Kewaunee and Iowa County.

5/ Racine Unified School District, Dec. No. 25283-B (WERC, 5/89); Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83); Oak Creek-Franklin School District, Dec. No. 11827-D (WERC, 9/74) No. 28250-B

Given all of the foregoing, we affirm the Examiner's dismissal of the complaint.

Given under our hands and seal at the City of Madison, Wisconsin,
this 7th day of February 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
James R. Meier, Chairperson

A. Henry Hempe, Commissioner