STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 279-A, AFSCME, AFL-CIO,

Complainant,

vs.

BURNETT COUNTY and
JAMES H. TAYLOR,

Respondents.

Case 75
No. 50938 MP-2887
Decision No. 28262-A

Appearances:

Mr. Bruce F. Ehlke, Shneidman, Myers, Dowling & Blumenfield, Attorneys at Law, 217 South Hamilton, P. O. Box 2155, Madison, Wisconsin 53701-2155, appearing on behalf of Local 279-A, AFSCME, AFL-CIO, referred to below as the Union.

Mr. Joel L. Aberg, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 715 South Barstow Street, P. O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Burnett County and James H. Taylor, collectively referred to below as the Respondents.

ORDER GRANTING, IN PART, MOTION TO DEFER

On April 28, 1994, the Union filed a complaint of prohibited practices alleging the Respondents had violated Secs. 111.70(3)(a)1, 3, 4, 5 and Sec. 111.70(3)(c), Stats., by a series of acts culminating in Taylor's issuance of an Order removing the incumbent of the position of Register in Probate/Probate Registrar from the bargaining unit represented by the Union. After informal attempts to resolve the matter proved unsuccessful, the Wisconsin Employment Relations Commission (the Commission), on December 19, 1994, appointed Richard B. McLaughlin, a member of its staff, to act as Examiner. Hearing on the complaint was set for February 23, 1995. On January 31, 1995, the Respondents filed a "Motion For Deferral And Continuance," contending that the complaint should be postponed indefinitely in deference to a "Complaint For Declaratory Judgement And Injunctive Relief" filed by Respondents in Burnett County Circuit Court. Due to the unavailability of Counsel for the Respondents, the February 23, 1995 hearing was postponed until March 16, 1995. Counsel for the Respondents, in a letter filed with the Commission on March 6, 1995, stated the following regarding the then-pending hearing:

I have received a notice of rescheduling of hearing in the above-

> referenced matter. It is my understanding that this is not a hearing on the merits of the prohibited practices complaint but is rather a hearing with respect to our motion for continuance and deferral because of a pending circuit court action. Frankly, I do not see the need of having a hearing for that purpose. . . .
>
> My feeling is that no hearing at all is required because we are really dealing with a matter of comity between the WERC and the courts. In the past, I have requested that cases before the WERC be held in abeyance pending a determination by a circuit court when the issues that will be determined in the prohibited practices complaint are similar if not identical to the issues before the circuit court. I certainly believe that is the case here. . . .
>
> Therefore, I can see no point in listening to Attorney Ehlke present a factual case when the issue before the Examiner does not turn on the facts but rather turns on a matter of comity, and an interpretation of law. . . .

I responded in a letter, dated March 8, 1995, which states:

> I write in response to Mr. Aberg's letter dated March 3, 1995. In that letter, he requested a postponement of the March 16, 1995 hearing. He also noted his "understanding that this is not a hearing on the merits of the prohibited practices complaint . . .
>
> I anticipated the March 16, 1995 hearing to be a hearing on the merits. . . . That Mr. Aberg does not share this view of the March 16, 1995 hearing poses a potentially significant procedural issue.
>
> More significantly, however, the authority cited by Mr. Aberg rests on case law, McEwen v. Pierce County, 90 Wis.2d 256 (1979), which arguably controls the case posed here. Mr. Ehlke's February 10, 1995 letter notes that "this case falls squarely within the primary jurisdiction of the (WERC)." The McEwen Court discussed "primary jurisdiction" at some length. The applicability of that case to this complaint poses a significant enough issue regarding my authority to direct evidentiary hearing that I have concluded the matter needs to be addressed before evidentiary hearing can be directed.

> Against this background, I am postponing the March 16, 1995 hearing until the issue of my authority to direct evidentiary hearing can be resolved. To resolve that issue, I will contact each of you to set a briefing schedule. I stress that the considerations set forth above reflect only my preliminary review of the issue. That review has been no more extensive than to confirm the plausibility of Mr. Aberg's contention that significant issues regarding my authority to direct evidentiary hearing are posed. I have noted the potential applicability of McEwen. That applicability is, however, "potential" at this point. Without argument from both of you, I cannot determine whether McEwen is the sole applicable precedent, or whether it applies as Mr. Aberg appears to assert. On this point I note the McEwen case did "not raise any factual issues" nor issues "within the special competence of the WERC" (90 Wis.2d at 274). I express no final opinion, pending your written argument, on these points.
>
> . . .

The Union, in a letter issued on March 8, 1995, prior to the receipt of my letter of March 8, stated:

> We just have received a copy of Attorney Aberg's letter of March 3, 1995. It is our understanding that the hearing scheduled for March 16, 1995 is a hearing regarding the merits of the above indicated matter, and it is our position that hearing should not be held in abeyance. The issues presented here are factual issues, for example, whether the actions of James Taylor constituted an interference with the rights guaranteed to municipal employees and whether there was a failure to bargain regarding a change in the conditions of employment of a municipal employee. These are not issues, factual issues, that any Circuit Court is going to address.

After receipt of the Union's letter of March 8, I confirmed, in a letter dated March 9, 1995 that:

> . . . I continue to believe that legal doubt concerning my authority to proceed must be resolved before I proceed. The presence of potentially applicable Supreme Court precedent cannot be dismissed without argument on its applicability. . . .

In a conference call held on March 13, 1995, a briefing schedule was established. The last of the briefs called for in that schedule was received at the Commission on April 26, 1995.

ORDER

Those allegations of the April 28, 1994 complaint of prohibited practices asserting Respondent violations of Secs. 111.70(3)(a)4 and 5, Stats., and of Sec. 111.70(3)(c), Stats., are deferred to the litigation of a declaratory judgment action pending before Burnett County Circuit Court. Those allegations of the April 28, 1994 complaint of prohibited practices asserting Respondent violations of Secs. 111.70(3)(a)1 and 3, Stats., will be set for hearing.

Dated at Madison, Wisconsin, this 12th day of May, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

BURNETT COUNTY

MEMORANDUM ACCOMPANYING
ORDER GRANTING, IN PART, MOTION TO DEFER

BACKGROUND

Attached to Respondents' Complaint for Declaratory Judgment and Injunctive Relief is a copy of a letter, dated November 15, 1993, from Taylor to the County Personnel Office and to Cathy Ingalls, the President of the Union, which states:

> I sent a letter requesting the positions of Register in Probate and Probate Registrar be removed from the Collective Bargaining Agreement. Cathy returned a letter indicating the Union opposed removing the position from the collective bargaining agreement. Cathy suggested the correct procedure would be to file a petition with the WERC.
>
> A petition to the WERC would lead to litigation over issues that have been previously decided by the Wisconsin Court of Appeals. Therefore, rather then petition the WERC, I have issued the enclosed Order. In my opinion, the legal issues surrounding this order have already been resolved and proceeding in this manner will avoid needless litigation. I expect the County and the Union to obey this Order because this is an administrative position and the intent of the Order is to specifically remove the position from the scope of the definition of municipal employee.

A copy of the Order was also attached to the Declaratory Judgment Complaint, and is dated "this 15th day of November, 1993." The Order appoints "Dorothy Richard Register in Probate for the Circuit Court of Burnett County," and grants "pursuant to Section 757.72 of the Wisconsin Statutes" to the Register in Probate "the duties and powers of a Probate Court Commissioner." The Order lists those duties and powers, then states "that in addition to the duties specified in Section 851.72 of the Wisconsin Statutes the Register in Probate" will:

> (1) Supervise all deputy registers in probate and probate registrars, including part time or temporary employees of the office,

in the performance of their duties, work schedules and discipline.

(2) Supervise the affixing of the signature of the Register in Probate and Probate Registrar by Deputy Register in Probate to documents requiring the signature of the Register in Probate and Probate Registrar.

(3) Act as department head in all contacts with the Burnett County Board and its committees.

(4) Prepare and administer the annual budget for the office of Register in Probate and Probate Registrar.

The Order then "pursuant to Section 856.065 of the Wisconsin Statutes" appoints Richard "Probate Register for the Circuit Court for Burnett County," and concludes thus:

IT IS FURTHER ORDERED, pursuant to the holding of Manitowoc County vs. Local 986A, AFSCME, AFL-CIO, 170 Wis.2nd 692 (1992); Eau Claire County vs. WERC, 122 Wis.2d 363 (1984) and Kewaunee County v. WERC, 141 Wis.2d 347 (Court of Appeals 1987) and Iowa County vs. Iowa County Courthouse/Social Services Employees, Local 413, 166 Wis.2d 614 (1992) and the Doctrine of Separation of Powers that the Register in Probate and Probate Registrar not be considered a Municipal employee as defined by Section 111.70(1)(i) of the Wisconsin Statutes for collective bargaining purposes.

The Union responded by filing the Prohibited Practice Complaint which started this proceeding. The Prohibited Practice Complaint reads thus:

. . .

4. Since September 15, 1967, and at all times material hereto, AFSCME Local 279-A has represented a duly certified and recognized bargaining unit . . . At all times material hereto the Burnett County Register in Probate/Probate Registrar has been among the employees represented AFSCME Local 279-A. At all times material hereto the wages, hours and other conditions of employment of said employees, including those of the Register in

Probate/Probate Registrar, have been governed by the collectively bargained Agreement between Burnett County and AFSCME Local 279-A.

5. Commencing during the fall of 1993, Taylor, acting as the agent of Burnett County or, in the alternative, in some sort of capacity altogether independent of the County, interrogated the then incumbent Register in Probate/Probate Registrar, Dorothy Richard, regarding her desire to continue to be represented by AFSCME Local 279-A. Thereafter, purporting to act for the Circuit Court for Burnett County, and without having bargained the same with AFSCME Local 279-A, on November 15, 1993, Taylor caused to be issued what he denominated an "Order", by the terms of which, among other things, he declared that the incumbent Burnett County Register in Probate/Probate Registrar no longer was a "municipal employe" within the meaning of Sec. 111.70 (1) (i), Wis. Stat., and that her wages, hours and other conditions of employment no longer were governed by any collectively bargained agreement between the County and AFSCME Local 279-A.

6. On said same date, Burnett County, without having bargained the same with AFSCME Local 279-A, adopted Taylor's actions, the actions set forth at Paragraph 5 of this Complaint, as its own, and announced that effective as of November 15, 1993 the Register in Probate/Probate Registrar "will no longer be considered a bargaining unit position". Since then, and to date, the County unilaterally has eliminated the union dues deduction for the Register of Probate/Probate Registrar, in breach of the collectively bargaining agreement between the County and AFSCME Local 279-A, denied said labor organization's grievance regarding said breach and otherwise refused to recognize the labor organization's certified right to represent the position of Register in Probate/Probate Registrar.

7. The actions of Taylor set forth at Paragraph 5 of this Complaint constitute a tortious interference with the contractual relationship between Burnett County and AFSCME Local 279-A, an interference with the rights guaranteed to municipal employees at Sec. 111.70(2), Wis. Stat., and discrimination and a refusal to bargain collectively, and prohibited practices in violation of Secs. 111.70(3)(a)1, 3 and 4, and, or in the alternative, Sec. 111.70(3)(c), Wis. Stat. The actions of Burnett County set forth at Paragraph 6 of this Complaint constitute a civil conspiracy with Taylor, an interference with the rights of municipal employees guaranteed at

Sec. 111.70(2),

Wis. Stat., and discrimination, a refusal to bargain collectively and a breach of a collective bargaining agreement, and prohibited pactices in violation of Secs. 111.70(3)(a)1, 3, 4 and 5, Wis. Stat.

. . .

The Declaratory Judgment Complaint, dated January 23, 1995, states:

. . .

4. That on November 15, 1993, Judge Taylor, pursuant to statutory authority and the inherent power of the Judge's office, issued an Order which appointed Dorothy Richard to be the Register in Probate for Burnett County and also removed the position of the Register in Probate from the courthouse workers' collective bargaining unit, Local 279-A. . . .

5. That on April 28, 1994, Local 279-A, by its legal counsel, filed a prohibited practice complaint against Burnett County and Judge Taylor claiming that each had independently and in concert violated §§111.70(3)(a) 1, 3, 4 and 5, Wis. Stats. . . .

6. That, inter alia, Local 279-A specifically alleged that Judge Taylor tortiously interfered with a contractual relationship between it and the County; and, that Burnett County "conspired" with the judge to interfere with rights "guaranteed" by MERA.

7. That an actual, bona fide and justifiable controversy exists between the plaintiffs and the defendant as to the legal effect and interrelationship between the parties relative to the power of the circuit court and its judges and public employee rights under MERA.

8. That this action and the rights of the parties hereto can be determined by means of a declaratory judgment pursuant to §806.04, Wis. Stats., and Judge Taylor is entitled to injunctive relief.

WHEREFORE, the plaintiffs demand a declaratory judgment and injunctive relief in their favor and against the defendant as follows:

A. For a permanent injunction against Local 279-A and AFSCME prohibiting the Union now and in the future from filing prohibited practice complaints against state circuit judges in Wisconsin which make any of the following claims:

i. That circuit court judges are agents of the County in which they are elected to serve;

ii. That circuit court judges are municipal employers for the purposes of MERA; and

iii. That circuit court judges are subject to the enforcement power of the Wisconsin Employment Relations Commission (WERC) under §111.70(3), Wis. Stats.

B. For a determination by the Court that circuit court judges do not act as agents of the County in which they are elected to serve, that circuit court judges are not municipal employers under MERA, and that circuit court judges are not subject to the enforcement power of the WERC under §111.70, Wis. Stats.

C. For a determination by the Court that at all times relative hereto Burnett County acted in compliance with a lawful directive and Order from Judge Taylor.

D. For a declaratory order from this Court commanding that the parties conduct any pending actions before the WERC, including the action under Exhibit B in a manner consistent with this Court's declaratory judgment.

. . .

The Union's Initial Brief

After a review of the allegations of the Prohibited Practice Complaint, and the procedures preceding the filing of the Respondents' motion, the Union argues that its complaint focuses on the "conduct of James Taylor relating to the employment of a bargaining unit employee represented by the union." The Union argues that "Taylor is not above the law merely because he is employed as a circuit judge." Even if Taylor had acted in his judicial capacity, the Union contends that federal case law indicates that not all acts within the scope of a judge's authority can be considered judicial acts.

The Union contends that Taylor is a "person" within the meaning of Secs. 111.70(1)(k), 111.70(3)(c) and 990.01(26), Stats. From this it follows, the Union concludes, that his interrogation of a unit employe or his unilateral alteration of a unit employe's conditions of employment can be considered prohibited practices within the meaning of Secs. 111.70(3)(a) or (c), Stats. This conclusion is, according to the Union, well founded on Commission and NLRB case law.

Beyond this, the Union argues that case law of the Wisconsin Supreme Court establishes that "factual issues such as these presented here" should be heard by the Commission 1/ and that this principle should be honored even "where a circuit court and the Commission have concurrent jurisdiction to hear a case." 2/

Because "(f)actual issues predominate in the case at hand" and because those issues "are distinctly different from the issues presented in the Circuit Court lawsuit commenced by Burnett County and James Taylor," the Union concludes that "(t)here is no reason to defer hearing the prohibited practices charges that are at issue here."

The Respondent's Initial Brief

After a review of the factual and legal background to its motion, the Respondents state the issues posed thus:

> Whether an Examiner, appointed by the Wisconsin Employment Relations Commission, should defer to the guidance of the state's judiciary system in determining the rights power and authority of a sitting circuit judge who has exercised his powers pursuant to (Sec.) 851.71, Wis. Stats.?

Contending that "deferral is appropriate," the Respondents argue that the Commission's primary jurisdiction should be deferred, since the Circuit Court "is hearing the same case" and has not indicated "it is unwilling to hear the case." Noting McEwen is "not necessarily . . . a controlling legal precedent," the Respondents argue that the case must be read "as a judicial recognition of an expressed practice and policy of the WERC" which "continues to the present day."

1/ Citing WERC v. Evansville, 69 Wis.2d 140 (1975).

2/ Citing Browne v. Milwaukee Board of School Directors, 83 Wis.2d 316 (1978).

The Prohibited Practice Complaint "does not challenge the Court's power to appoint a register in probate . . . even if . . . that power conflicts with provisions found in the collective bargaining agreement," according to the Respondents. No such challenge could, Respondents argue, be made under Iowa County. The sole issues posed by the Prohibited Practice Complaint are, the Respondents contend, Taylor's removal of the Register in Probate position from the bargaining unit and the County's compliance with that act.

The Respondents contend that the legality of Taylor's actions "has already been addressed." 3/ The Order issued by Taylor is the type of Order discussed in Manitowoc County and there are, according to the Respondents, "no other material facts which need to be determined, whether they are in dispute or not." Because the issues posed are legal, the Respondents conclude that deferral is appropriate. That the statute under which Taylor acted is outside of the Commission's "normal area of expertise" underscores this conclusion. The Respondents conclude that an Order deferring the Prohibited Practice Complaint or dismissing it should be entered.

The Union's Reply Brief

The Union contends that the Respondents' motion presumes the issues posed by the Prohibited Practice Complaint are identical to those posed by the Declaratory Judgment Complaint and that those issues are legal in nature. These presumptions would be accurate, the Union argues, only if "the Respondents mean to stipulate that James Taylor, in fact, interrogated a bargaining unit employee . . . that he unilaterally changed her conditions of employment for the purpose of justifying her removal from the bargaining unit . . . and that Burnett County endorsed and adopted said actions as its own." Presuming no such stipulation is possible, the Union concludes that "factual issues predominate in this case, and it should be scheduled for hearing, after only a year's delay, forthwith."

The Respondents' Reply Brief

Noting that "there is no attempt on the part of the Respondents to indicate that Judge Taylor is above the law," Respondents argue that their "declaratory judgment action is to determine whether and to what extent the Judge can lawfully exercise his rights . . ." Federal law cited by the Union is, the Respondents contend, inapposite to deciding the State law issues posed here. Beyond this, the Respondents note that Taylor cannot be considered a "municipal employer" under Sec. 111.70(3)(a), Stats., and does not appear to be a person covered by any other provision cited by the Union, thus depriving the Commission of any jurisdiction over him. The case law cited by the Union regarding the Supreme Court's handling of the primary jurisdiction issue is, the Respondents

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3/ Citing Manitowoc County, 170 Wis.2d at 698-699.

argue, inapplicable here, since those cases are directed to lower courts and presume the ongoing validity of the Commission's ongoing policy to defer such cases. The Respondents conclude that only "if the circuit court, in which this case is currently pending, is willing to decline jurisdiction, would it be appropriate for the WERC not to defer the matter to the courts."

DISCUSSION

The Prohibited Practice Complaint alleges Respondent violations of Secs. 111.70(3)(a)1, 3, 4, 5 and (c), Stats. Respondents' motion seeks a dismissal of those allegations or a deferral of their determination to a Declaratory Judgment Complaint pending before the Circuit Court for Burnett County.

Respondents' motion is based on the doctrine of primary jurisdiction. As a judicial construct, the doctrine is applicable where a court and an administrative agency have concurrent jurisdiction. The doctrine guides courts in the considerations of comity which define when a court should retain jurisdiction over actions which could also be heard by an administrative agency. The Supreme Court, in Wisconsin Collectors Asso. v. Thorp Finance Corp., detailed those considerations thus:

> If the issue presented to the court involves exclusively factual issues within the peculiar expertise of the commission, the obviously better course would be to decline jurisdiction and to refer the matter to the agency. On the other hand, if statutory interpretation or issues of law are significant, the court may properly choose in its discretion to entertain the proceedings. The trial court should exercise its discretion with an understanding that the legislature has created the agency in order to afford a systematic method of fact-finding and policy-making and that the agency's jurisdiction should be given priority in the absence of a valid reason for judicial intervention. 4/

Respondents persuasively note that the doctrine is to be applied by courts and is not directed to an administrative agency. The Commission, however, in Pierce County, stated an administrative equivalent:

4/ 32 Wis.2d 36, 45; cited with approval at Browne, 69 Wis.2d 169 at 176; Browne, 83 Wis.2d at 329; and McEwen, 90 Wis.2d at 272.

> It is the Commission's policy not to assert its jurisdiction over issues which may also have been submitted to a court, even though the Commission may have primary jurisdiction over the issue. It is for the court to decide whether to honor the Commission's primary jurisdiction. 5/

This statement of Commission policy was incorporated into the Supreme Court's application of the primary jurisdiction doctrine. 6/

With this as background, the Union's contention that the application of the primary jurisdiction doctrine can turn on an examiner's original application of the comity considerations set forth by the Supreme Court is unpersuasive. Those considerations are directed to courts, not examiners, and the Commission's statement of policy reserves the determination to the courts.

That this case involves the action of a Burnett County Circuit Judge placed before the Circuit Court for Burnett County would seem to pose a complicating factor in the application of the doctrine. The immediate interest of circuit judges in determining the scope of their employment based authority over subordinates is apparent, and at least arguably impacts the appearance of impartiality over those issues. A certain partisan zeal would seem to be apparent in the Order and the cover letter which prompted the Prohibited Practice Complaint. The cover letter notes the Order avoids "litigation over issues that have been previously decided by the Wisconsin Court of Appeals." The Order cites precedent from the Supreme Court, the Court of Appeals and "the Doctrine of Separation of Powers." This would appear to be something less than accurate. The Iowa County Court found it unnecessary to address Constitutional issues, 7/ as did the Court of Appeals in Eau Claire and in Manitowoc County. 8/ The Kewaunee Court did consider constitutional considerations, but declined to conclude that the separation of powers doctrine was irreconcilably opposed to an application of MERA to a Register in Probate position. Rather, the Kewaunee Court concluded:

5/ Pierce County and William McEwen, Dec. No. 16067 (WERC, 1/78) at 2.

6/ McEwen, 90 Wis.2d at 262.

7/ "However, we need not address whether the circuit court judge's power is an inherent constitutional power because . . . we conclude that the collective bargaining agreement cannot supersede the statutory authority given to the circuit court judge." 166 Wis.2d at 618.

8/ Manitowoc County, 170 Wis.2d at 696; Eau Claire County, 122 Wis.2d at 369.

> The doctrine does not, however, prohibit the legislature from exercising its legislative powers in areas that may in some way affect the judicial branch . . . The legislature's declarations must be implemented insofar as they do not embarrass the courts or impair their constitutional function . . . 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 agreement that are contrary to law are unenforceable. 9/

The Order posed in this case glosses over the potential issues of fact or of mixed fact and law which may exist in the application of the precedent it cites.

These considerations do not, however, translate into authority exercisable by an examiner. Pierce County resulted in a Commission deferral to an action brought by a Pierce County Judge in the Circuit Court for Pierce County. As an examiner, I exercise the Commission's jurisdiction, and must apply its case law. Any other conclusion undercuts any certainty to the application of Commission case law, and encourages litigation. Their case law requires that a court, even a court with an institutional interest in the litigation, determines whether to hear the allegations litigable before it and the Commission.

This conclusion does not, however, end the examination of the primary jurisdiction issue. Pierce County turned on litigation in which the judicial and administrative bodies faced "the same issue of statutory construction." 10/ In this case, a review of the pleadings of each action establishes they do not share issues of statutory construction and that the Prohibited Practice Complaint poses factual issues. Thus, deferral in this case must distinguish between those legal issues which must be reserved for the Circuit Court and those issues of fact or law which are not posed in the declaratory judgment action. The former must be deferred to the Circuit Court, the latter issues must be set for hearing.

Drawing this line focuses on the alleged violations of Secs. 111.70(3)(a)1, 3, 4, 5 and (c), Stats. The Prohibited Practice Complaint does refer to "tortious interference" and "civil conspiracy." An administrative agency can, however, act only to the extent of the authority granted it by statute. 11/ Whatever implications those references may have as a matter of civil law, the only allegations litigable here must be rooted in MERA.

9/ 141 Wis.2d at 358.

10/ Dec. No. 16067 at 2.

11/ Browne, 83 Wis.2d at 333.

Sec. 111.70(3)(a)1, Stats., makes it a prohibited practice for a municipal employer to "interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed" by Sec. 111.70(2), Stats. Those rights are "to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." To demonstrate an independent violation of Sec. 111.70(3)(a)1, Stats., the Union must meet, by a clear and satisfactory preponderance of the evidence, 12/ the following standard:

> Violations of Sec. 111.70(3)(a)1, Stats. occur when employer conduct has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights . . . If after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere . . . 13/

Under Paragraph 5 of the Prohibited Practice Complaint, the municipal employe rights at issue appear to be those of Richard, the "then incumbent Register in Probate/Probate Registrar." Paragraph 7 of the Prohibited Practice Complaint may bring in the rights of unit members generally. Under Manitowoc, Richard's rights as a municipal employe may not have the significance the Union asserts, if Taylor's November 15, 1993 Order made her a "managerial" employe, thus removing her from the definition of "Municipal employe" stated at Sec. 111.70(1)(i), Stats.

The Declaratory Judgment Complaint does not expressly seek a factual determination from the Circuit Court regarding whether Richard's duties are those of a managerial employe. Presumably, however, such a determination must be made to address Paragraphs B and C of the Declaratory Judgment Complaint. If the Circuit Court did not anticipate making such a determination, then that determination would warrant the setting of a hearing. 14/ Because this determination appears to be central to the Declaratory Judgment Complaint, it has been deferred.

Richard's status as a managerial employe is not, however, central to the issues posed by the Motion. Under Manitowoc, 15/ and under the terms of the Order, Richard acquired the duties of a

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12/ Sec. 111.07(3), Stats., made applicable by Sec. 111.70(4)(a), Stats.

13/ Cedar Grove-Belgium Area School District, Dec. 25849-B (WERC, 5/91) at 11-12.

14/ See Jackson County, Dec. No. 17828-F (WERC, 4/95).

15/ See 170 Wis.2d at 700 (footnote 4).

managerial employe on November 15, 1993. The Declaratory Judgment Complaint reflects this, focusing on events as of November 15, 1993. Paragraph 5 of the Prohibited Practice Complaint, however, focuses on events in the "fall of 1993," including an interrogation preceding any action on Taylor's part to appoint Richard as Register in Probate/Probate Registrar or to remove her from the bargaining unit. Thus, Paragraph 5 does focus on the rights of a municipal employe, since that status was not affected until November 15, 1993. That the rights of other unit members, as municipal employes, may also be called into question only underscores that the Prohibited Practice Complaint poses factual/legal issues not contemplated by the Declaratory Judgment Complaint. Whether the events of the fall of 1993 constitute violations of Sec. 111.70(3)(a)1, Stats., thus pose an issue not posed by the Declaratory Judgment Complaint.

Whether Taylor is a municipal employer or not is, for purposes of the Motion, irrelevant. There is no dispute that the County is a municipal employer subject to Sec. 111.70(3)(a), Stats. If the County participated in or relied upon an interrogation violative of Richard's or another unit member's rights under Sec. 111.70(2), Stats., that conduct is proscribed by Sec. 111.70(3)(a)1, Stats.

Similar considerations govern the Prohibited Practice Complaint's allegations regarding Sec. 111.70(3)(a)3, Stats., which makes it a prohibited practice for a municipal employer to "encourage or discourage a membership in any labor organization by discrimination in regard to . . . tenure or other terms or conditions of employment." To prove a violation of this section the Union must establish that: (1) a municipal employe was engaged in activity protected by Sec. 111.70(2), Stats., (2) the Respondents were aware of this activity; (3) the Respondents were hostile to the activity, and (4) the Respondents acted, at least in part, based upon hostility to the employe's exercise of protected activity. 16/ The conclusions noted above are applicable here. Paragraph 5 of the Prohibited Practice Complaint puts these allegations outside the scope of the Declaratory Judgment Complaint. Sec. 111.70(3)(a)3, Stats., requires proof of proscribed intent, but the existence of such proof is the purpose of a hearing. The Motion seeks to preclude an evidentiary hearing, and for purposes of addressing the Motion it is sufficient to note that the issue of intent with regard to the events of the fall of 1993 prior to November 15 is a factual matter which falls beyond the scope of the Declaratory Judgment Complaint. Whether Taylor can be considered a Respondent subject to Sec. 111.70(3)(a)3, Stats., poses a troublesome issue, but one more readily considered regarding the alleged violation of Sec. 111.70(3)(c), Stats.

Section 111.70(3)(a)4 enforces a municipal employer's duty to bargain, and Sec. 111.70(3)(a)5, Stats., enforces labor agreements reached through collective bargaining. Paragraphs B and C of the Declaratory Judgment Complaint pose issues concerning these sections

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16/ The "in-part" test was applied by the Wisconsin Supreme Court to MERA cases in Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 35 Wis.2d 540 (1967) and is discussed at length in Employment Relations Dept. v. WERC, 122 Wis.2d 132 (1985).

for the Circuit Court. If Richard is a municipal employe, then the Union is her majority representative for collective bargaining and for contract enforcement purposes. If she is not, as Respondents note, Manitowoc County addresses the Union's allegations. As touched upon above, these points appear to be posed for the Circuit Court's determination by the Declaratory Judgment Complaint. Accordingly, alleged violations of these sections must be deferred.

The potential applicability of Sec. 111.70(3)(c), Stats., to the Prohibited Practice Complaint poses troublesome issues. That section makes it "a prohibited practice for any person to do . . . on behalf of or in the interest of municipal employers . . . or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by par. (a) . . ." The parties dispute whether Taylor can be considered a "person" within the meaning of this section. That dispute poses the fundamental question whether Sec. 111.70(3)(c), Stats., requires a determination whether Taylor, in the "fall of 1993" acted within or outside of the scope of his authority as a Judge. Beyond this lies the issue of primary jurisdiction, and specifically whether Paragraph A iii of the Declaratory Judgment Complaint poses the determination for the Circuit Court, not the Commission.

On this record, this issue is best deferred. Paragraph 5 of the Prohibited Practice Complaint arguably puts this issue outside of the scope of the Declaratory Judgment Complaint as a factual matter. The breadth of the request at Paragraph A iii of the Declaratory Judgment Complaint, however, may sweep this factual consideration away. If Taylor cannot be considered "subject to the enforcement power of the . . . (WERC)" as a matter of law, it is not clear what factual issue can be posed by Sec. 111.70(3)(c), Stats., regarding his conduct in the fall of 1993.

More significantly, Sec. 111.70(3)(c), Stats., presumes the existence of "any act prohibited by par. (a) . . ." This predicates any finding of a violation of Sec. 111.70(3)(c), Stats., on a finding of a violation of the prohibited practices listed at Sec. 111.70(3)(a), Stats. This provides, on this record, a means of assuring that the Prohibited Practice Complaint can be heard without infringing the Circuit Court's legitimate interests in its own independence. It is undisputed that the County is a municipal employer, and, as noted above, there is no reason to doubt that prior to November 15, 1993, Richard was a municipal employe. It is undisputed that unit employes other than Richards are municipal employes. From this basis, Richard's "interrogation" can be litigated, without unnecessarily posing issues concerning the scope of Taylor's authority as Judge. Only if "any act prohibited by par. (a)" is found, is any issue concerning the scope of Sec. 111.70(3)(c), Stats., posed. If such an act is found, Subsection (c) comes into question only if the Circuit Court does not reach the point in the course of the litigation of the Declaratory Judgment Complaint, or if the Circuit Court determines hearing on the point before the Commission is appropriate.

In sum, the alleged violations of Secs. 111.70(3)(a)4 and 5, and Sec. 111.70(3)(c), Stats., must be deferred to the Declaratory Judgment Complaint pending before the Circuit Court for Burnett County. The alleged violations of Secs. 111.70(3)(a)1 and 3, Stats., will be set for hearing. None of the deferred allegations have been dismissed. This reflects the uncertainty underlying the scope of the litigation before the Circuit Court. Dismissal becomes appropriate only when it becomes apparent the court has asserted its jurisdiction to determine the same issues posed by the

Prohibited Practice Complaint. 17/

The line between the administrative and the judicial actions is not as bright as the parties have argued. Respondents' attempt to defer or dismiss the entire matter has the benefit of simplifying the litigation. This simplification, however, presumes the only matters of significance posed reflect the Commission's and the Circuit Court's relationship. This ignores the significance of the underlying individual employe rights granted by the Legislature under Sec. 111.70(2), Stats., and enforced by Chapters 111 and 227, Stats. The institutional interests of the Courts or the Commission cannot be dismissed as irrelevant, but should not be construed to the exclusion of individual rights. The Union focuses on those individual rights, but does so by belittling the impact of judicial and Commission precedent. Ignoring that precedent invites unnecessary institutional conflict and unnecessary litigation. The distinction between deferrable and non-deferrable allegations seeks to balance the legitimate concerns of each party.

Dated at Madison, Wisconsin, this 12th day of May, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

17/ See Pierce County and William McEwen, Dec. No. 16067-A (WERC, 7/79).