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-B

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, 4330 Golf Terrace, Suite 205, 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.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The procedural background of this case is set forth in Dec. No. 28262-A (McLaughlin, 5/95). Hearing within the scope of the Order entered in that decision was conducted on August 29, 1995, in Siren, Wisconsin. A transcript of that hearing was provided to the Commission on September 25, 1995. The parties filed briefs and reply briefs. By the parties' agreement, the last of those briefs was to be filed by the Union by February 26, 1996. The Union chose not to file such a brief, and I confirmed the closing of the record in a letter to the parties issued on April 19, 1996. On May 6, 1996, Respondents filed with the Commission a copy of the order referred to in Finding of Fact 10 below. With the agreement of the parties, this document was included in the record.

FINDINGS OF FACT

1. Local 279-A, AFSCME, AFL-CIO, referred to below as the Union, is a labor organization which maintains its offices in care of P.O. Box 364, Menomonie, Wisconsin 54751. The President of the Local, at all times relevant here, was Cathy Ingalls. The business representative for the Local, at all times relevant here, was Steve Hartmann.

2. Burnett County, referred to below as the County, is a municipal employer which maintains its principal offices at the Burnett County Government Center, 7410 County Road K, Siren, Wisconsin 54872. At all times relevant here, Myron Schuster was employed by the County as its County Administrator/Personnel Director.

3. At all times relevant here, James H. Taylor was the elected Circuit Judge for Burnett County. He first assumed this position in August of 1990.

4. Since September 15, 1967, the Union has served as the exclusive collective bargaining representative for a bargaining unit of County employes described thus:

> . . . all regular full-time and all regular part-time employees in the Burnett County Courthouse, Burnett County Department of Social Services, Home Health Aide and Outreach Worker positions in the Public Health Department and Forestry and Parks Workers in the Forestry Department, but excluding elected officials, supervisory, confidential, managerial or executive personnel . . .

Ingalls is a member of this bargaining unit. From September 15, 1967 until November 15, 1993, the position of Register in Probate was treated by the Union and the County to fall within this unit description. Dorothy Richard has been the County's Register in Probate from roughly November of 1977 through at least August of 1995.

5. Richard attended conventions involving individuals employed in positions similar to hers. At these conventions, she learned that at least one other Register in Probate earned more than she did, and that several Registers in Probate were not in a bargaining unit. One of those individuals was employed by Iowa County, and was affected by litigation concerning judicial authority to appoint the occupant of her position. She supplied Richard with copies of decisions flowing from that litigation. Richard took this precedent and spoke to Taylor. She had previously approached both Taylor and his predecessor about her desire for a wage increase. She supplied Taylor with the precedent and asked him to do anything he could to assist her. Taylor understood, from his conversation with her, that she felt that she was an administrator who should not be included in the bargaining unit. Taylor understood, from his conversation with her, that she felt being a member of the bargaining unit held her below the conditions of employment her position

warranted. Taylor informed Richard he would look into the matter to determine if he had any authority to assist her.

6. After the discussion noted in Finding of Fact 5 above, Taylor issued the following letter, dated August 20, 1993, to Schuster and to Ingalls:

> The collective bargaining agreement between Burnett County and Local 0279 includes the Register in Probate. The case of Iowa County vs. Iowa County Courthouse, 166 Wis.2d 614, 480 NW2d 499 (1992) tells us why the provisions of such an agreement are not enforceable as they pertain to the Register in Probate.
>
> I request the position of Register in Probate be removed from the collective bargaining unit effective 9/1/93.

7. Ingalls responded to Taylor's August 20, 1993 letter in a memo to Taylor and Schuster dated September 3, 1993, which states:

> The request to remove the position of Register in Probate from the collective bargaining unit effective 9/1/93 is opposed by the Union.
>
> It is our position that the Iowa County vs. Iowa County Courthouse case only establishes that the circuit judge has the right to appoint the Register in Probate, not that the position itself does not belong in the bargaining unit.
>
> If you wish to pursue this matter further, the correct procedure would be to file a petition with the Wisconsin Employment Relations Commission for a unit clarification.

8. Taylor, after considering the Union's position and reviewing statutory and case law, determined that the easiest means to remove Richard from the unit would be to issue an order to that effect. He issued the following order, dated November 15, 1993, to do so. His order, referred to below as the Order, reads thus:

> WHEREAS, section 851.71(1) of the Wisconsin Statutes authorizes the Circuit Judge of the County to appoint a Register in

Probate subject of the approval of the Chief Judge and Section 865.065 of the Wisconsin Statutes authorize (sic) a Circuit Judge of the County to appoint a Probate Register:

NOW, THEREFORE, On motion of James Taylor, Circuit Court Judge for Burnett County;

IT IS HEREBY ORDERED pursuant to Section 851.71 (1) of the Wisconsin Statutes that Dorothy Richard be appointed Register in Probate for the Circuit Court of Burnett County.

IT IS FURTHER ORDERED pursuant to Section 757.72 of the Wisconsin Statutes that the Register in Probate shall have the duties and powers of a Probate Court Commissioner to; (sic)

(1) Handle all probate matters over which the Burnett County Circuit Court has jurisdiction, decide any and all issues and sign any order or certificate required in such determinations, and to advise the public in the handling of informal probate matters, and advise attorneys on the handling of any formal probate matters, and establish rules and regulations for the filing of probate matters, except the following matters shall be within the exclusive jurisdiction of the Circuit Court Judge:

(a) Will contests;

(b) Disputed claims against estates;

(c) Any formal hearing requiring a factual finding based upon evidence received a (sic) formal hearing.

(2) Administer oaths, take depositions and testimony, and certify and report depositions and testimony, take and certify acknowledgements, allow accounts and fix the amount and approve the sufficiency of bonds, waive bond in appropriate cases and appoint personal representatives and remove personal representatives for cause and,

(3) Affix the stamped signature of the Circuit Court to all documents required for the handling of probate matters.

IT IS FURTHER ORDERED, that in addition to the duties

specified in Section 851.72 of the Wisconsin Statutes the Register in Probate:

(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.

IT IS FURTHER ORDERED, that pursuant to Section 865.065 of the Wisconsin Statutes that Dorothy Richard be appointed Probate Register for the Circuit Court for Burnett County.

IT IS FURTHER ORDERED, pursuant to the holding of Manitowoc County vs. Local 986A, AFSCME, AFL-CIO, 170 Wis.2nd (sic) 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.

Taylor sent the following letter, also dated November 15, 1993, to Schuster and Ingalls:

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.

Schuster, in a letter to Ingalls dated November 15, 1993, stated:

> The County has received a Court Order, issued by Judge James H. Taylor, dated November 15th, 1993 in The Matter of the Position of Register in Probate and Probate Registrar.
>
> As a result of this Order, effective November 15th, 1993 the County will no longer be deducting union dues from Dorothy Richard, Register in Probate. Also, as a result of this Order, effective November 15th, 1993, the position of Register in Probate for Burnett County will no longer be considered a bargaining unit position.
>
> . . .

Schuster met with the County Board's Personnel Committee on November 16, 1993. He recommended to the Board that it follow the Order. He advised them that the alternative would be a contempt proceeding. The Committee took the following action:

> Milt Stellrecht moved to abide by the Court Order received from Judge Taylor and change the Register in Probate position to non-union status placed in Grade 12 of the non-union pay plan . . . Motion carried.

9. Taylor, early in his tenure as Judge, informed Richard she could handle non-contested probate matters without routinely reporting to him. He also advised her that she should

handle budget and other administrative responsibilities relating to the probate function. The November 15, 1993 Order confirmed this delegation of authority, but did not add any duties to Richard's position that she had not been performing since the Spring of 1991.

10. In a decision dated October 12, 1995, Circuit Judge James R. Erickson issued a decision, referred to below as the Declaratory Judgment, which stated, among other points, the following:

> This court believes the legal issues are:
>
> 1. Is a duly elected Circuit Judge legally entitled to appoint a Register in Probate and a Probate Registrar despite provisions of a collective bargaining agreement with the county?
>
> 2. Is the Burnett County Register in Probate a managerial employee and therefore an exception to the definition of municipal employe defined at Section 111.70(1)(i), Wis. Stats.?
>
> Both questions are answered, "Yes," and, therefore, plaintiffs' motion for summary judgment must be granted.

In an Order for Declaratory Judgment and Judgment dated April 23, 1996, Erickson stated the following:

> . . .
>
> IT IS HEREBY ADJUDGED:
>
> 1. That Wisconsin circuit court judges do not act as agents of the County in which they are elected to serve in employment matters, that Wisconsin circuit court judges are not municipal employers under the Municipal Employment Relations Act (MERA), and that Wisconsin circuit court judges are not subject to the enforcement power of the Wisconsin Employment Relations Commission (WERC) to the extent that the conduct of the circuit court judge is within the lawful limits of the judge's authority pursuant to statute, regulation or existing common law and case precedent.
>
> 2. That at all times relative to this action Burnett County

> acted in compliance with a lawful directive and order of the Honorable James Taylor, circuit court judge for Burnett County.
>
> 3. That this Order for Declaratory Judgment and Judgment is binding upon the parties from the date of entry and the parties are hereby directed to conduct their pending prohibited practice complaint before the WERC in a manner that is fully consistent with this Court's judgment.

. . .

11. Richard, at all times relevant here, sought to advance her personal interests in having her position upgraded. At no point in her discussions with Taylor did she or Taylor act to affect any employe other than Richard. The Union and Richard have not discussed her conversations with Taylor. Neither Taylor nor any County agent bore hostility against Ingalls for her opposition to Richard's removal from the bargaining unit. Taylor and the County did not act cooperatively to remove Richard from the bargaining unit.

CONCLUSIONS OF LAW

1. The Union is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

2. At least until the issuance of the Order, Richard was a "Municipal employe" within the meaning of Sec. 111.70(1)(i), Stats. The Order, standing alone, does not establish whether Richard is a "managerial" employe within the meaning of Sec. 111.70(1)(i), Stats.

3. The County is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

4. Circuit Judge Taylor is not a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

5. Circuit Judge Taylor is a "person" within the meaning of Sec. 111.70(1)(k), Stats.

6. Taylor's and Richard's discussions regarding Richard's desire to be removed from the bargaining unit represented by the Union do not constitute a prohibited practice within the meaning of Sec. 111.70(3)(a)1 or 3, Stats., or within the meaning of Sec. 111.70(3)(c), Stats.

7. Neither the issuance of the Order nor the County's compliance with the Order constitute a prohibited practice within the meaning of Sec. 111.70(3)(a)1 or 3, Stats., or within the meaning of Sec. 111.70(3)(c), Stats.

ORDER 1/

The complaint, filed originally on April 28, 1994, is dismissed.

Dated at Madison, Wisconsin, this 10th day of May, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

1/ See footnote on Page 9.

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).

BURNETT COUNTY

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

Dec. No. 28262-A (McLaughlin, 5/95), deferred to the then-pending declaratory judgment action the alleged violations of Secs. 111.70(3)(a)4 and 5, Stats. The Declaratory Judgment determined Richard was a managerial employe. This determination ostensibly addresses those allegations, thus removing them from consideration here under the terms of Dec. No. 28262-A. The alleged violations of Secs. 111.70(3)(a)1 and 3, Stats., and of Sec. 111.70(3)(c), Stats., concern events preceding the issuance of the Order and were not deferred in Dec. No. 28262-A.

Threshold to an examination of the not-deferred issues is the County's contention that the Declaratory Judgment mandates dismissal of the complaint. As noted in Dec. No. 28262-A, dismissal of the complaint's allegations turns on whether they are addressed by the Circuit Court. The two issues resolved by the Court have no bearing on an application of Secs. 111.70(3)(a)1, 3 or (c), Stats., to the events preceding the issuance of the Order. Those allegations remain to be addressed.

THE PARTIES' POSITIONS

The Union's Initial Brief

After a review of the evidentiary background, the Union asserts that Taylor's questioning of Richard constitutes an interference with rights protected at Sec. 111.70(2), Stats., in violation of Secs. 111.70(3)(a)1 and 4, Stats. Contending that the "evidence in the case at hand is not disputed," the Union argues that sometime prior to November 15, 1993, Taylor questioned Richard regarding her wages and regarding "her desire to continue to be represented by the local union." Richard at the time viewed Taylor as her "boss," and Taylor took no action to advise her that she should discuss matters concerning her wages with her bargaining representative. This context, the Union concludes, "inherently was coercive, in part because their power relationship was unequal in every way."

Noting that interference with rights protected by Sec. 111.70(2), Stats., does not turn on an employer's intent, the Union contends that Taylor's questioning of Richard "reasonably would tend to interfere with the free exercise of the employee rights at stake." It necessarily follows, the Union

concludes, that Taylor's conduct violated Sec. 111.70(3)(a)1, Stats. Since the subject matter under discussion was wages, a mandatory subject of bargaining, the Union concludes that the conduct also violated Sec. 111.70(3)(a)4, Stats. These conclusions stand, according to the Union, "regardless who initiated the conversation."

Acknowledging that Taylor had "the authority to appoint or confirm the appointment of Richard as Register in Probate and Probate Register," the Union argues that his removal of her position from the unit violated Secs. 111.70(3)(a)1, 3 and 4 Stats., or Sec. 111.70(3)(c), Stats. Citing precedent from the National Labor Relations Board, the Union concludes that neither an employer nor any person acting in the employer's interest can unilaterally change job duties for the sole purpose of removing an employe from a bargaining unit.

Noting that the County "adopted Taylor's actions as its own, without questioning what Taylor had done," the Union asserts that the Sec. 111.70(3)(a), Stats., violations demonstrated above also apply to the County.

The Union concludes by requesting the following relief:

> Taylor and the County should be ordered to cease and desist from their unlawful conduct, and directed to restore Richard to the bargaining unit represented by AFSCME Local 279-A, with whatever adjustments in her employment as may be necessary to accomplish said reinstatement in the bargaining unit.

Events Following the Filing of the Union's Brief

On December 4, 1995, Respondents filed a letter with the Commission, attached to which was the Declaratory Judgment. Respondents assert that the decision "found that Judge Taylor has in all respects acted lawfully and exercised his rights pursuant to statute," and that "Burnett County has acted lawfully in all respects in obeying the order issued by Judge Taylor." The Union's contention that the County could commit a prohibited practice by obeying a lawful order "does not make sense," according to Respondents. Respondents conclude by requesting that "those portions of the prohibited practices complaint which have not been deferred in this matter should be decided in favor of the County."

The Union responded in a letter received by the Commission on December 28, 1995. In that letter the Union asserts that the issues posed by the court do not address the issues posed by the complaint. The Union contends the complaint questions "whether James Taylor, donning the mantle of a circuit judge, exercised an otherwise lawful authority in order to accomplish an unlawful purpose." If the County adopted this unlawful purpose, then its conduct is also unlawful.

Noting that the Respondents' letter was filed after its responsive brief was due, the Union asks that the record be closed and a decision be issued.

Respondents filed a response with the Commission on December 29, 1995. That response denies any waiver of the right to submit written argument and characterizes the Union's position as "without merit." The response requests that action on the complaint be deferred until the court's decision is made "a controlling order."

In a letter filed with the Commission on January 3, 1996, the Union notes that the reduction of the court's decision to an order and judgment is no more than a technical point not warranting further delay. Respondents' December 29, 1995 response failed, the Union argues, to respond to the fundamental issue of whether the complaint points to a civil conspiracy.

In a letter to the parties dated January 9, 1996, I noted:

. . .

> I do not see any reason to defer the processing of this case regarding the briefing schedule. It may be that the court's decision must be considered in addressing the merits of the complaint. Waiting for the final order would not, however, seem to further any purpose. If this agency is bound by the court's determination, the actual dismissal of the complaint can await the final order of the court, and the brief would state only the authority and argument necessary to demonstrate the binding nature of the court's action. Completion of the briefing schedule in this case can do no worse than prepare this record for a dismissal. If, however, the binding nature of the court's order is itself an arguable point, suspending the briefing schedule adds delay to an already tortuous path of litigation which may not result in a dismissal of the complaint.

. . .

I requested, in that letter, that the parties complete the responsive briefing schedule.

The Respondents' Reply Brief

The Respondents note that the sole subject of the complaint hearing was the determination of "two issues which were not to be deferred to the pending declaratory judgment action between

the parties." Those issues turn on the application of Secs. 111.70(3)(a)1 and 3, Stats., to the County.

After a review of the case law governing an application of Sec. 111.70(3)(a)1, Stats., the Respondents argue that "undisputed" evidence establishes that Richard "independently, without solicitation" approached Taylor, seeking her removal from the collective bargaining unit and providing him with "precedent setting cases she had been told about by other registers in probate around the State." Arguing that there is no evidence that the County had any input into the resulting contacts between Taylor and Richard, Respondents conclude that "the complainant Union has failed to show that an unlawful 'interrogation' has taken place in this case."

After a review of the case law governing an application of Sec. 111.70(3)(a)3, Stats., the Respondents assert that "(n)o reasonable review of the record in this case supports the Union's contention that it has" met any of the applicable elements of proof. The record establishes only that the County "merely complied with the lawful directive it received from Judge Taylor." The County concludes that the complaint must be dismissed.

The Union's Reply Brief

The Union waived the filing of a response to the County's reply brief.

DISCUSSION

The legal standards governing the complaint's allegations were set forth in Dec. No. 28262-A, and need not be repeated. The deferral granted in Dec. No. 28262-A noted the Sec. 111.70(3)(c), Stats., allegations turn on a violation of some section of Sec. 111.70(3)(a), Stats. The Sec. 111.70(3)(a), Stats., allegations must, then, be addressed first. Also as noted in Dec. No. 28262-A, there is no dispute the County is a municipal employer, while significant questions surround whether Taylor can be considered to fall within either Sec. 111.70(3)(a) or (c), Stats. Thus, the application of Secs. 111.70(3)(a)1 and 3, Stats., to the County must be examined first.

The Alleged Violation of Sec. 111.70(3)(a)1, Stats.

Central to any application of Sec. 111.70(3)(a)1, Stats., is employer conduct having an adverse impact on employe rights protected by Sec. 111.70(2), Stats. The record will not support a finding of improper County conduct or of adversely affected concerted activity.

Improper County conduct can be found on this record only if Taylor can be linked to the County. The evidence shows, however, no greater link between the County and Taylor than the County's acquiescence in Taylor's action. As the County argues, it played no role in Richard's "interrogation." There is no demonstrated connection between the County and this conversation, whether Taylor or Richard initiated it.

The Union points to a conspiracy and notes that Schuster acted to remove Richard from the unit even before the matter had been discussed with the Personnel Committee. This fact is potentially significant, but that significance turns on its connection to an adverse impact on employe exercise of concerted rights and on a connection between Taylor and the County. No such connection is apparent. It is difficult to find a conspiracy when it is not apparent what the County could be perceived to gain from it. There is no persuasive evidence the County cared whether Richard was in the unit. Her removal, if Richard's and Taylor's views are credited, would raise County costs for her position. There is no evidence which contradicts Schuster's testimony that the Order gave the County the choice to obey or to be held in contempt. His conduct is as readily explained by this testimony as by the assertion the County played an active role in a shared plan to remove Richard from the unit. Even if it is assumed that represented employes were aware of the swiftness of the County response to the Order, it is not apparent how this response can be perceived to have an adverse impact on protected employe rights.

More significantly, the record shows no concerted activity that Taylor's conduct could interfere with. Richard acted alone, and sought to advance solely her own interests. Her desire to be removed from the unit is protected under Sec. 111.70(2), Stats., which grants municipal employes the right to "refrain from . . . concerted activities for the purpose of collective bargaining." Whatever may be said of her desire to secure a wage increase by being removed from the unit, her attempts to further it with Taylor and Taylor's predecessor were personal acts, not concerted activity. 2/

It is arguable that the Order adversely impacted the rights of other unit employes. This point lacks, however, a demonstrated factual basis. Ingalls sought to have the dispute addressed as a unit clarification. This forum choice is, however, a legal point with no demonstrated impact on employe exercise of concerted rights. There is no evidence that unit employes were aware of, or affected by, the forum choice articulated by Ingalls. That the primary jurisdiction doctrine may route a unit clarification not to the Commission but to a court cannot, standing alone, support a finding of a County violation of Sec. 111.70(3)(a)1, Stats.

Focusing only on County conduct, the most troublesome aspect of the evidence is the appearance that an employe profits from being removed from the bargaining unit. The evidence is not, however, sufficient to support the finding of a prohibited practice. The Personnel Committee moved Richard into "Grade 12 of the non-union pay plan" the day after the issuance of the Order. It is not, however, clear whether this afforded her a raise. The appearance of the County's immediate acquiescence in the Order coupled with an instantaneous pay increase has, without regard to the County's intent, clear implications regarding the wisdom of remaining in the unit. These

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2/ Cf. City of La Crosse et al., Dec. No. 17084-D (WERC, 10/83).

implications could ground a finding of an independent violation of Sec. 111.70(3)(a)1, Stats. The implications are, however, speculative on this record. Beyond

this, it should be noted that if Richard is a managerial employe, as determined in the Declaratory Judgment, her unilateral removal from the bargaining unit would not, standing alone, warrant finding of a violation of Sec. 111.70(3)(a)1, Stats. 3/

The most troublesome aspect of the evidence, however, focuses less on the County's conduct than Taylor's. As noted above, some link between the two is necessary to find a violation of Sec. 111.70(3)(a)1, Stats. If Taylor is a County agent and if he initiated the conversation, a finding of a Sec. 111.70(3)(a)1, Stats., violation would follow. An employer initiated conversation which conditioned, or appeared to condition, a pay raise on an employe's opinion of Union representation is coercive. 4/

Taylor cannot, however, be considered a County agent: "The judge is not a county employee or an agent of the county." 5/ The evidence supports this conclusion. Taylor regarded his authority as superior to the County's. At no time during the events at issue here did he consider himself bound in any way by the County.

Although the evidence on the content of the conversation is troublesome, it will not support a conclusion Taylor initiated it. Hartmann's testimony is credible, but stops short of contradicting Taylor's on this point. 6/ Viewed as a whole, the evidence establishes Richard approached Taylor, seeking a pay raise. The conversation was private, with no coercive overtones. Neither participant cared about any employe other than Richard, or sought to affect any employe other than Richard.

3/ See State of Wisconsin, Dec. No. 18696 (WERC, 5/81); City of Greenfield, Dec. No. 27606-B (McLaughlin, 8/94) aff'd by operation of law Dec. No. 27606-C (WERC, 9/94). It should be noted that the Greenfield case discussed the significance of procedural safeguards Respondents seek to deny the Union in this case.

4/ See, generally, WERC v. Evansville, 69 Wis.2d 140 (1975); and Juneau County (Pleasant Acres Infirmary), Dec. No. 12593-B (WERC, 1/77).

5/ Iowa County, 166 Wis.2d at 619.

6/ Transcript at 32.

The record supports, then, no finding of a County violation of Sec. 111.70(3)(a)1, Stats. The delicacy of this conclusion should not, however, be overlooked. It is arguable that the County could not authorize its employes to conduct themselves as Taylor did. This points to the troublesome implications of this complaint. Those implications are discussed below.

The Alleged Violation of Sec. 111.70(3)(a)3, Stats.

The evidence will not support a finding that the four elements necessary to establish a violation of this section have been demonstrated. As noted above, what evidence there is of concerted activity would appear to involve Richard. Her actions, however, cannot be considered concerted. Ingalls' stated opposition to the removal of Richard's position from the bargaining unit is concerted activity. The County, however, took no hostile action against her.

The record establishes, then, no County violation of Secs. 111.70(3)(a)1 or 3, Stats.

The Alleged Violation of Sec. 111.70(3)(c), Stats.

This section requires that the Union establish (1) the act of "(a)ny person;" (2) which is undertaken in the interest or on behalf of a municipal employer; and (3) which is violative of Sec. 111.70(3)(a), Stats. There are difficulties with each element of proof. As noted above, no act violative of Sec. 111.70(3)(a), Stats., has been found, and there is no demonstration of a common purpose or interest between Taylor and the County.

The final element, however, points to the troublesome implications of this case. Specifically, those implications turn on whether Taylor can be considered a "person" subject to Sec. 111.70(3)(c), Stats. This issue pulls with it the Union's assertion that Taylor, if not considered a "person," must be considered a "Municipal employer" subject to Sec. 111.70(3)(a), Stats. The Union asserts that failing to make either of these findings creates a legal void which places judges beyond the law they administer. The Order and the Declaratory Judgment ignore this point. The point should not, however, be ignored.

The Declaratory Judgment notes that the County is "the 'municipal employer' in this case." This conclusion is both persuasive and consistent with existing law. 7/ Beyond this, a judge's power to appoint a Register in Probate is settled law under Iowa County. Iowa County did not, however, address the implications posed by the Union in this case.

The implications noted by the Union turn on how, if at all, employment based actions by a judge can be reviewed. The Union points out that if the County unilaterally and with anti-Union

7/ Iowa County, 166 Wis.2d at 619.

hostility removed Richard from the unit, then granted her a pay increase, it would have committed violations of Secs. 111.70(3)(a)1 and 3, Stats. Concluding that a judge cannot be a "Municipal employer" or a "person" under Chapter 111, Stats., means that if the proscribed hostility is the judge's or is shared by the municipal employer and the judge, the otherwise illegal acts become legal when cloaked by a judicial order.

These implications need not be troublesome under current law. They become troublesome in this case because the Circuit Court chose to undertake action broader than that supported by the authority it cites.

Before addressing this point, it is necessary to sketch some background. The Commission has noted the "authority to employ and fix compensation" are "the hallmarks of the status of employer." 8/ This conclusion is rooted in judicial precedent. 9/ This precedent does not, however, make a Circuit Judge the employer of a Register in Probate, because the conditions of employment for that position which do not impact the Circuit Court's power under Chapter 851, Stats., are set by the County under Chapter 59, Stats. Thus viewing the issue balances the Circuit Court's and the County's statutory authority. This balance can also preserve the individual rights of a Register in Probate under Chapter 111, Stats. If the Register in Probate is a managerial employe, thus excluded from the rights established by Sec. 111.70(2), Stats., then the County can set the conditions of employment for the position which do not impinge on the Circuit Court's Chapter 851 powers. If the Register in Probate is not a managerial employe, then the County, under Chapters 59 and 111, can bargain with the Union regarding the conditions of employment for the position which do not impinge on the Circuit Court's Chapter 851 powers. This analysis has been detailed in Kewaunee County.

While the Circuit Court chose to cite Kewaunee County, its conduct is not consistent with it. The fundamental difficulty posed by the Order is that Taylor chose not to assert his authority to appoint Richard, but to remove her from the bargaining unit. Richard's desire for an upgrade could have been pursued within the collective bargaining process. If the County was receptive to granting the position an increase based on the Judge's recommendation, it is difficult to conclude it would have denied a Union request for the same increase. In the absence of proscribed hostility to the Union, the request is the same.

The authority for Richard's removal from the unit is not, as the Order and the Declaratory Judgment assert, established by the cases each cites. None of the authority cited reaches the constitutional and quasi-constitutional level asserted by the Circuit Court. 10/ No attempt can be made here to speculate on constitutional points. However, the statutory issues cannot be ignored.

As touched upon above, balance between the potentially conflicting demands of Chapters 59, 111 and 851, Stats., was achieved in Kewaunee County. That balance was, potentially, sacrificed by the actions of the Circuit Court in this case. The balance of Kewaunee County is based on judicial restraint. The power to appoint does not become the power to employ because the conditions of employment not impacting the power to appoint are left to the County. The Order manifests no such restraint, and that lack of restraint poses troublesome implications regarding the County's and a municipal employe's rights.

8/ City of Clintonville (Utility Commission), Dec. No. 18747 (WERC, 6/81) at 4.

9/ Schroeder v. City of Clintonville, 90 Wis.2d 457 (1979).

10/ See Dec. No. 28262-A at 13-14.

Those troublesome implications flow from Taylor's summary removal of Richard from the bargaining unit. Taylor's August 20, 1993 letter asserts Iowa County "tells us why the provisions of such an agreement are not enforceable as they pertain to the Register in Probate." The Iowa County Court, however, stated the issue before it thus:

> The issue before us is whether the provisions of a collective bargaining agreement . . . which deal with the hiring of covered employees can regulate a circuit judge's power to appoint a register in probate. 11/

The Iowa County Court resolved this issue thus:

> (W)e conclude that the provisions within the agreement which purport to regulate the statutory power of the circuit court judge to appoint a register in probate are void . . . 12/

The Order was not, however, restricted to the Judge's statutory power to appoint Richard. Rather, the Order swept with it all of her employment rights and duties, ranging from seniority to sick leave and from vacation to dues deduction/fair share. Support in Iowa County for this sweeping action is, at best, debatable.

As noted above, Kewaunee County balances the County's and Circuit Court's authority by leaving the County as the municipal employer which sets those conditions of employment not impacting the Circuit Court's authority to appoint or to remove the Register in Probate. If the Order and the County's unquestioning compliance with it produced a wage increase for Richard, and if, as noted above, the authority to employ and to fix compensation are the hallmarks of employer status, then the Order arrogated to the Circuit Court the authority of an employer. Once this has been done, the balance achieved in Kewaunee County is sacrificed. The County's authority under Chapter 59 has been eviscerated and the employe rights of Chapter 111 have been read out of existence. As used by the Circuit Court, Iowa County, which did not reach these points, becomes a shield to place the Circuit Court above scrutiny even though the Circuit Court may have chosen to act in the capacity of an employer.

The implications of the Circuit Court's actions are ameliorated in this case if Richard is a

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11/ 166 Wis.2d at 618.

12/ Ibid., at 621.

managerial employe, and thus not entitled to the rights granted by Sec. 111.70(2), Stats. The Circuit Court's actions, however, make this issue troublesome. The application of the definition of "managerial employe" can involve statutory construction and thus issues of law, 13/ but the determination of managerial status inevitably involves scrutiny of fact. 14/

The Order is not, however, based on any factual determination. The record underlying the Declaratory Judgment has not been detailed here, but no evidentiary basis for the Circuit Court's conclusion that Richard is a managerial employe is apparent on its face. The County could not pull Richard from the unit without putting that action to the factual test of a unit clarification decision. The Circuit Court can exercise no greater statutory power over this issue than its concurrent jurisdiction with the Commission. How the Circuit Court can pull an employe from a bargaining unit in the presence of disputed fact and in the absence of an evidentiary hearing is not apparent. No employer subject to Chapter 111 can determine, without challenge, which of its employes falls within the statutory definition of "employe." The Circuit Court's desire to do so in this case is apparent. Its authority is not.

On its facts, the complaint involves no more than one employe's quest for a pay raise. The implications of those facts have, however, assumed a life of their own. That the Union has played a role in this cannot be denied. The partisan zeal behind the assertion this matter involves a civil conspiracy is apparent. This is, however, no less than one can expect of an advocate. More significantly here, that zeal was provoked. Taylor chose not just to appoint Richard, but to effectively order the establishment of her conditions of employment. The most troublesome aspect of this case is the partisan zeal of the Circuit Court. Through the Order and the Declaratory Judgment, one employe's quest for an upgrade has been parlayed into statutory and constitutional issues.

The complaint has been argued less on its facts than on its implications. If, however, bad facts are not to make bad law, the complaint must be restricted to its facts. No prohibited practice has been proven on the facts of this complaint. Having found no violation of Sec. 111.70(3)(a)1 and 3, Stats., it is impossible to find a violation of Sec. 111.70(3)(c), Stats.

The implications of the Order and the Declaratory Judgment cannot, however, be wished away. The Conclusions of Law stated above address those implications by stating that Taylor can be considered a "person" within the meaning of Sec. 111.70(1)(k), Stats., and thus subject to Sec.

13/ Eau Claire County, 122 Wis.2d at 365.

14/ Kewaunee County, 141 Wis.2d at 353. Manitowoc County did not involve "an administrative evidentiary record for review." 170 Wis.2d at 698. This does not mean the determination of managerial status can ignore disputed fact. In Manitowoc County "the parties . . . did not seek an evidentiary hearing at which the duties of the register in probate could have been more fully probed." Ibid.

111.70(3)(c), Stats. This conclusion confirms Commission jurisdiction over prohibited practice or unit clarification litigation. 15/ More significantly, it confirms that County authority under Chapter 59, Stats., and employe rights granted under Chapter 111, Stats., were not written out of existence by the Order.

None of the implications noted above would have been posed had the Circuit Court followed the analysis set forth in Kewaunee County. If and when Richard is proven a managerial employe, the propriety of her removal from the unit is established. The Order's attempt to avoid that necessary step is the complicating factor of this litigation. The Declaratory Judgment attempts to redress that difficulty, but does so with no apparent evidentiary basis. This dilemma does not, however, make this record into that appropriate to a Declaratory Ruling or a Unit Clarification. Because no prohibited practice has been demonstrated, the complaint has been dismissed. Whether she is a managerial employe cannot be determined on this record.

Dated at Madison, Wisconsin, this 10th day of May, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

15/ Cf., for example, Jackson County, Dec. No. 17828-F (WERC, 4/95).