STATE OF WISCONSIN | IN THE SUPREME COURT

In the Matter of the Amendment of SCR 70.03 and 70.12(1)(c)3. and the creation of SCR 70.12(5), SCR 70.12(6) and SCR 70.16, relating to the Supreme Court Finance Committee

PETITION
12-07

Now comes the petitioner, Justice Patience Drake Roggensack, and in response to comments made by Chief Justice Abrahamson in her filing of December 13, 2012 and in response to concerns raised by Justice Bradley at the open administrative conference on January 15, 2013, responds as follows:

The supreme court created a supreme court finance committee on February 4, 2011, comprised of the chief justice, two additional justices elected by the supreme court, the chief judge of the court of appeals, and the chief judge of the chief judges of the circuit court judges. The committee was formed to provide more financial information to more justices. However, the way in which the supreme court finance committee would fulfill this role was not determined at that time.

On October 10, 2011, the supreme court finance committee held its first meeting wherein, with the assistance of John Voelker, Director of State Courts, the supreme court finance committee discussed and reached a consensus on how it could best assist the supreme court with regard to the court's biennial budget, operating budgets and annual plan for grants that the supreme court administers.

On July 6, 2012, I filed Rule Petition 12-07, which proposes amendments to SCR ch. 70, which implements the consensus reached on October 10, 2011, by broadly describing the role of the supreme court finance committee. Subsequent to the filing of Rule Petition 12-07, I filed a copy of the transcript of that October 10, 2011, meeting of the supreme court finance committee as a comment to the petition. I did so because the discussion among the members of the supreme court finance committee and the facilitation by John Voelker shed light on the helpful role that will be played by the supreme court finance committee. I also filed the transcript because Chief Justice Abrahamson's comment of August 3, 2012, repeatedly refers to the supreme court finance committee as "the exploratory judge group."

On October 18, 2012, the court solicited comments on Rule Petition 12-07 from interested persons, with December 3, 2012, as the last day for comments. The petitioner was given until December 10, 2012, to respond to the comments received. Comments were received from Chief Judge William Dyke, on behalf of the committee of chief judges; Judge Juan Colas, on behalf of the Planning and Policy Advisory Committee; John Voelker, director of state courts; Chief Justice Abrahamson, who filed two lengthy comments, including one comment that contained a draft of proposed changes to SCR ch. 70 that Chief Justice Abrahamson favored; and me. I filed an IOP amendment to draw to the court's attention to internal operating procedures that may be affected as we proceed with Rule Petition 12-07.

On December 10, 2012, I amended Rule Petition 12-07 as I believed appropriate after considering all of the filed comments. Amended Rule Petition 12-07 changes the description of the supreme court finance committee so that the representative from the circuit court judges will be either the chief judge of the circuit court judges or his or her designee. This amendment was made at the request of the chief judges conference filed as a comment on September 5, 2012.

I did not adjust the petition to accommodate PPAC's comment that the supreme court did not need a committee to give the justices more financial information, the chart prepared by John Voelker and submitted by Chief Justice Abrahamson on August 3, 2011, or the ch. 70 revisions that Chief Justice Abrahamson seemed to favor.

First, PPAC's comment ignores the court's decision to create a vehicle to provide the court with more financial information. Second, because the supreme court finance committee should be described in the ch. 70 rules in broad terms, just as PPAC's and the Judicial Conference's roles are described in broad terms, John Voelker's chart and ch. 70 revisions that Chief Justice Abrahamson submitted are too narrow. In addition, they contain some inconsistencies with the consensus reached by the supreme court finance committee on October 10, 2011, including but not limited to the supreme court's election of the supreme court justices who will serve on the finance committee. Accordingly, I concluded that the amended petition filed on December 10, 2012 is consistent with the consensus of the supreme

court finance committee about its role and the amended petition continues to employ broad terms similar to the broad terms used in ch. 70 to describe PPAC's role.

On December 13, 2012, Chief Justice Abrahamson filed a cover sheet and what she asserts is a rule petition, stating the pending petition "comes before the Wisconsin Supreme Court upon the petition of Shirley S. Abrahamson, Chief Justice of the Wisconsin Supreme Court." Her December 13, 2012, filing is simply a late comment on a pending rule petition that was filed after the December 3 deadline for filing comments. Her comment asserts that, "the purpose of this rule petition is to take into account all comments filed to the rule petition." She appears to wish to discuss the IOP filed earlier. Her comment is for the court's consideration, as are all the comments that have been submitted.

However, the merits of amendments to particular Internal Operating Procedures (IOPs) are not debated at open administrative conferences because IOPs are not Supreme Court Rules. IOP Introduction ("It should be reemphasized that these are not rules."). Open administrative conferences are limited to the court's consideration of Supreme Court Rules unless the court decides in closed conference or by email to add an additional item to a particular open administrative conference. IOP III.B. However, the comment that Rule Petition 12-07 may cause the court to consider changes to the court's IOPs will be considered at the open administrative conference that decides where and how best to describe the role of the Supreme Court Finance Committee.

On January 15, 2013, in open administrative conference, Justice Bradley questioned the court's ability to create the supreme court finance committee. She asserted:

> I think it may be unconstitutional, not only in terms of having concurrent powers with the Chief Justice, of course, the constitution provides that the Chief Justice is the administrative head of the court, and under Thompson v. Craney, it seems to me that this proposal gives concurrent power to this concept of a finance committee so that concerns me. It also concerns me that it seems to be creating, what in my mind is like a category of people on this finance committee that are super justices. You know they control the purse, they control the information. I raised that before and I just want to know the procedure. I don't intend to put those comments in writing. I don't think justices should, or have to, put our comments in writing. When we come to discuss this stuff, I want to be able to talk about how I think it's unconstitutional, how I think it's unworkable because it conflates the operating budget with the biennial budget

> and then that limit of $3,000 the chief judges said, you know, that can't work. That's not practical.

Based on Justice Bradley's belief that the formation of the supreme court finance committee was unconstitutional, I reviewed numerous documents that affected the court reorganization of 1977-78, including the 1973 final report of the "Citizens Study Committee on Judicial Organization" provided to then Governor Lucy; the drafting records for 1975 Enrolled Joint resolution 13 and 1977 Enrolled Joint Resolution 7, which are the legislative precursors to the 1977 constitutional amendment to Article VII of the Wisconsin Constitution; and various commentaries and judicial decisions that consider the supreme court's administrative authority. I chose that focus for my research because it was in the 1977 constitutional amendments that the chief justice was first mentioned as the administrative head of the judicial system who performs that function under procedures established by the supreme court.

Furthermore, given Justice Bradley's concern about the powers of the chief justice and her reference to Thompson v. Craney, as a source for her belief that the supreme court finance committee is unconstitutional, I paid particular attention to legislative history and commentary relating to the amendment of Section 4(3), which states, "The chief justice of the supreme court shall be the administrative head of the judicial system and shall exercise this administrative authority pursuant to procedures adopted by the supreme court." I also read Thompson v. Craney, 199 Wis. 2d 674, 546 N.W.2d 123 (1996), and numerous other cases concerning the supreme court's administrative authority.

A major focus of the 1977-78 court reorganization was to provide the courts of Wisconsin with a unified structure. To that end Article VII, Section 2 of the Wisconsin Constitution was created to "vest" the judicial power of the state in "a unified court system consisting of one supreme court, a court of appeals, a circuit court, such trial courts of general uniform state-wide jurisdiction as the legislature may create by law, and a municipal court if authorized by the legislature under section 14," thereby firmly establishing the court system as a third branch of Wisconsin government.

In regard to court administration, Article VII, Section 3(1) provides that, "The supreme court shall have superintending and administrative authority over all courts." These dual supreme court powers of supervision and administration are significant. Prior to the 1977 amendment, the constitution provided the supreme court with only superintending authority. The superintending authority has been held to permit the supreme court to limit other state courts' actions. See Stark, Jack, The Wisconsin State Constitution, (1997) 140-41. However, in the 1977 amendment, the people granted the supreme court administrative authority over all the courts. It is by virtue of the supreme court's administrative authority that it approves the budgets for the court system. Id., 141; State ex rel. J. Denis Moran v. Dept. of Admin., 103 Wis. 2d 311, 317-18, 307 N.W.2d 658 (1981) (concluding that "the power to formulate and carry into effect the budget for the court system resides in this court under the constitutional grant of administrative control over the unified court system.").

The constitutional requirement that the administrative authority of the court system be vested in the supreme court was reaffirmed in Article VII, Section 4(3). There, while the constitution provided that the chief justice shall be the administrative head of the judicial system, it required that the exercise of that authority must be undertaken, "pursuant to procedures adopted by the supreme court." Stated otherwise, the administrative powers of the judicial branch of government are vested in the supreme court and the chief justice's exercise of that administrative role is undertaken as the court decides.

There is nothing in the Wisconsin Constitution nor in the history that underlies the 1977 amendments that grants the chief justice administrative authority independent of what the supreme court chooses that the chief justice should exercise. Furthermore, Thompson v. Craney has no relevance to whether the supreme court constitutionally formed the supreme court finance committee.

In Thompson v Craney, the supreme court interpreted parts of 1995 Wis. Act 27, the budget bill, which created a state Education Commission, a state Department of Education, and the position of state Secretary of Education. Thompson, 199 Wis. 2d at 677-78. The act made the state Superintendent of Public Instruction, a state-wide elected official, the chair and a member of the state Education Commission, but it delegated duties formerly held by the state

Superintendent of Public Instruction to other appointed state officers, "who are not subordinate to the superintendent." Id. at 678.

The Superintendent of Public Instruction claimed that the legislature had removed powers granted to him under Article X, Section 1 of the Wisconsin Constitution, to supervise education in Wisconsin. Id. at 679-80. His opponents asserted that Act 27 described the qualifications, powers and duties of "other officers" which was consistent with Article X. Id. at 681-82. Article X, Section 1 provided in relevant part:

> The supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct; and their qualifications, powers, duties and compensation shall be prescribed by law.

In concluding that Act 27 unconstitutionally impaired the Superintendent of Public Instruction's constitutional powers, we first concluded that Section 1 was ambiguous, in that it could reasonably be read as either the Petitioners or the Respondents contended. Id. at 684. We then looked to the debates of 1864 to examine what was then considered when the provisions at issue were ratified.

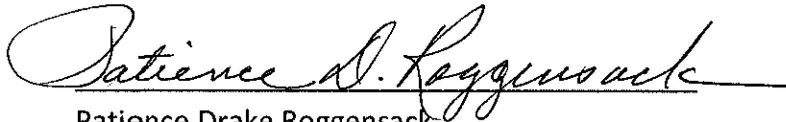
We concluded that in 1864 "public schools [were] to be under the supervision of the Superintendent of Public Instruction and that the Superintendent was to be an elected, not appointed, public official." Id. at 685. We also considered an 1848 law, the earliest passed after ratification, and concluded it supported the superintendent having supervision over all public instruction in Wisconsin. Id. at 694. The "other officers" mentioned in Article X were not mentioned in early legislation. Subsequent legislation was equally silent in regard to "other officers," while describing numerous powers of the superintendent relating to public schools. Id. at 697. And finally, according to the majority, amendments to Article X in 1902 did not limit the responsibility of the Superintendent of Public Instruction, a concern of the concurrence. Id. at 701, Wilcox, J. concurring.

The constitutional provisions of Article X relating to the powers of the Superintendent of Public Instruction, upon which our decision in Thompson v. Craney is based, and the constitutional provisions of Article VII relating to the administrative role of the chief justice are in stark contrast with one another. The Superintendent of Public Instruction is elected for the

administrative purpose of "supervision of public instruction." Wis. Const. Art. X § 1. The chief justice is the administrative head of the judicial system; however, this administrative authority is exercised "pursuant to procedures adopted by the supreme court." Wis. Const. Art. VII, § 4(3). Article VII is not ambiguous. It clearly cabins the chief justice's administrative authority. Furthermore, Art. VII Section 3(1) specifically provides that it is the supreme court that has administrative authority over the court system. The chief justice's administrative authority is not superior to the decisions of the court; rather, it is to be exercised in accordance with the procedures established by the supreme court.

The supreme court finance committee is a procedure established by the court in which the chief justice and other justices participate. I have found nothing that would cause me to conclude that the formation of the supreme court finance committee is unconstitutional.

Respectfully submitted this 28th day of August, 2013.



Patience Drake Roggensack
Justice, Wisconsin Supreme Court