

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petitions of
**FOND DU LAC COUNTY PROFESSIONAL SOCIAL SERVICES
EMPLOYEES UNION, LOCAL 1366K,
AFSCME, WISCONSIN COUNCIL 40**

and

**FOND DU LAC COUNTY SOCIAL SERVICES
EMPLOYEES UNION, LOCAL 1366E,
AFSCME, WISCONSIN COUNCIL 40,**

Involving Certain Employees of

FOND DU LAC COUNTY

Case 91
No. 51349
ME-3421
(Professionals)

Decision No. 22758-B

Case 92
No. 61923
ME-1063
(Non-professionals)

Decision No. 22811-C

Appearances:

Michael J. Wilson, Representative at Large, Wisconsin Council 40, AFSCME, AFL-CIO,
8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, appearing on behalf of Fond

No. 22758-B
No. 22811-C

du Lac County Professional Social Services Employees Union, Local 1366K, AFSCME, Wisconsin Council 40 and Fond du Lac County Social Services Employees Union, Local 1366E, AFSCME, Wisconsin Council 40.

James R. Macy, Attorney at Law, Davis & Kuelthau, S.C., 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of Fond du Lac County.

**FINDINGS OF FACT, CONCLUSION OF LAW
AND ORDER CLARIFYING BARGAINING UNITS**

On December 9, 2002, Fond du Lac County Social Services Employees Union, Local 1366E, AFSCME, AFL-CIO, filed a petition with the Wisconsin Employment Relations Commission by which it sought to clarify an existing bargaining unit of non-professional Fond du Lac County Social Services Department employees by the inclusion therein of four Case Management Assistants employed by the County's Care Management Organization, Creative Care Options (CMO).

On December 10, 2002, Fond du Lac County Professional Social Worker Union, Local 1366K, AFSCME, AFL-CIO, filed a petition with the Wisconsin Employment Relations Commission by which it sought to clarify an existing bargaining unit of professional Fond du Lac County Social Services Department employees by the inclusion therein of 23 Case Managers and 12 Registered Nurses employed by the County's CMO.

The County opposed both petitions.

On March 6, 2003, Local 1366K amended its petition to withdraw its request for inclusion of the Registered Nurses.

A consolidated hearing on the petitions was held in Fond du Lac, Wisconsin on March 17, 2003 by Commission Examiner Stuart Levitan. The parties filed post-hearing written argument, the last of which was received August 4, 2003.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Fond du Lac County, herein the County, is a municipal employer with offices at 160 South Macy Street, Fond du Lac, Wisconsin. In furtherance of its general governmental obligations, it employs approximately 1,000 individuals, 510 of whom are included in the seven existing bargaining units of County employees. American Federation of State, County and Municipal Employees (AFSCME) represents the following five bargaining units: the two Social Services employee units (one professional and one non-professional) involved in this proceeding; two Institution employee units (one professional and one non-professional); and one Highway Department employee unit. Wisconsin Professional Police Association/Law Enforcement Employees Division represents employees in two units in the Sheriff's Department (one law enforcement and one non-law enforcement). All of the seven existing units are organized along departmental lines. Employees in some County departments 1/ are unrepresented, as are those working under the elected officials. 2/ Among the County's unrepresented professional employees who are not the subject of this proceeding are Psychiatric Social Workers at its Department of Community Programs, Educational Service Coordinators, Social Workers and Occupational Therapists at the County Institutions, and Sanitarians, Psychologists, and Registered Nurses. Among the County's unrepresented non-professional employees that are not the subject of this proceeding are Home Health Aides at the Public Health Department, and several employees at the Department of Community Programs, including Social Worker Assistant, Medical Transcriptionist, Program Assistant and Administrative Secretary.

1/ Corporation Counsel, Office of Finance Department, Personnel, Tax Description, Maintenance, Purchasing, Fairgrounds, Land Conservation, University Extension, Golf Course, Parks, Planning, Surveyor, Airport, Code Enforcement, County Health, Medical Examiner, Emergency Government, Family Support, Senior Services, Veterans' Services, Information Systems, Department of Community Programs, Care Management Organization ("CMO"), Family Court Commissioner.

2/ Clerk of Courts, County Treasurer, District Attorney and Register of Deeds.

2. At all times material, Fond du Lac County Social Services Employees Union, Local 1366E, AFSCME, AFL-CIO, herein Local 1366E, has been the exclusive bargaining representative for a unit of non-professional County employees defined in the parties' 2001-2002 agreement as:

all regular full-time and regular part-time employees of Fond du Lac County Social Services Department, including clerical, eligibility consultants, eligibility consultant specialists, energy assistance workers, social services aides, home consultants, in-home trainers, Galow Group Home employees, Shelter Care employee and all other paraprofessional employees and excluding all

professional employees, the work supervisors, the director, the director's personal secretary and administrative assistants.

The Commission issued a Certification of Representative to the Fond du Lac County Social Services Employees Association on September 12, 1985, for a bargaining unit described as "all regular full-time and regular part-time non-professional employees of the Fond du Lac County Social Services Department, excluding the work supervisors, the director, the director's personal secretary and administrative assistants." On May 27, 1987, an affiliation agreement between the Association and Wisconsin Council 40, AFSCME, became effective, whereby the Association became AFSCME Local 1366E. Through the years, the parties have modified the recognition clause.

At the time of hearing, there were approximately 85 non-professional employees in the Local 1366E unit. Included in this bargaining unit are employees holding the position of Family Support Worker (DSS/FSW), described in County personnel documents as "part of an agency team to promote the development of independence, parenting skills and daily living competencies by families through direct instruction, support and guidance in the home." The normal tasks of the DSS/FSW include providing direct services in the home, assisting clients in performing household tasks, arranging and/or providing transportation, and supporting and assisting families in their interactions with various outside public and private agencies.

Other positions within this unit include Clerk Typist, Account Clerk, Social Services Specialist, Economic Support Specialist, Volunteer Services Coordinator, and Teen Court Coordinator. The Local 1366E unit also includes fiscal services personnel who perform support services for various County departments, including the CMO. There are also unrepresented fiscal services employees in the Community Programs Department.

3. At all times material, Fond du Lac County Professional Social Services Employees Union, Local 1366K, AFSCME, AFL-CIO, herein Local 1366K, has been the exclusive bargaining representative for a unit of professional County employees defined in the parties' 2001-2002 contract as:

...all regular full-time and regular part-time social workers of the Fond du Lac County Social Services Department, excluding the work supervisors, the director and the deputy director.

The Commission issued a Certification of Results of Election on August 19, 1985, identifying the Fond du Lac County Professional Employees Association as the representative for a bargaining unit defined as "all regular full-time and regular part-time professional

employees of the Fond du Lac County Department of Social Services, excluding supervisory, managerial and confidential employees...." On September 28, 1994, following a Petition for Election filed by Wisconsin Council 40, AFSCME, the County voluntarily recognized this unit as represented by AFSCME Local 1366K. Through the years, the parties have modified the recognition clause.

The DSS Social Workers and Senior Social Workers in this unit 3/ perform the normal duties of such positions, including formulating case plans and providing planned and unplanned services. As of the time of hearing, there were approximately 51 professional employees in the Local 1366K unit.

3/ The unit also includes an entry-level position of Case Worker, paid at 90% of the Social Worker rate, subject to termination if the incumbent has not attained state certification as a social worker within six months.

4. In the mid-1990's, the State of Wisconsin determined it needed a new delivery system for long-term care services targeted to the frail elderly, the physically disabled and the developmentally disabled. The State thereupon developed a pilot program known as a Care Management Organization (CMO), combining Medicaid Home and Community Based waivers such as the Community Integration Program and Community Options Program Waiver with Medicaid Card Services. The State chose Fond du Lac County to serve as the first CMO pilot program county in the State, effective in late 1998.

The CMO in Fond du Lac County is Creative Care Options (CCO), located at 50 North Portland Street, Fond du Lac, several blocks away from the DSS offices. The professional and non-professional staff positions in the CMO are CMO Case Manager and Case Manager Assistant, respectively. To staff the pilot CMO, the County both assigned existing employees and hired new employees. Among the existing employees assigned to the CMO were two DSS/FSW's represented by Local 1366E, four Senior Social Workers represented by Local 1366K and four unrepresented Developmental Disabilities Specialists employed at the Department of Community Programs. The County also hired seven Social Workers and two additional Family Support Workers through the 1366K and 1366E contracts, respectively, for immediate assignment to the CMO, along with four additional Case Managers, four additional Developmental Disabilities Specialists and approximately twelve Registered Nurses. The CMO Case Manager and Case Manager Assistant positions have duties which are roughly similar to those of the DSS Social Workers and Family Support Workers.

5. In October 2002, the County's consultant, Gerald Born, strongly advised that the CMO program be made permanent as an independent, stand-alone County department.

Born based this recommendation in part on his understanding that a waiver which the State received from the Federal Health Care Financing Administration to allow the County to receive certain funds required a separation between the DSS function of determining eligibility and the CMO function of providing client services. Accordingly, on November 12, 2002, the Fond du Lac County Board adopted Resolution 102-02, by which it resolved that the CMO "shall function as a permanent separate county department functioning under the direction of the County Executive with oversight from the CMO Governing Board." Also on that date, the Board adopted Resolution 104-02, adopting a CMO position allocation schedule, deleting positions in certain County departments, creating positions and revising position titles in the CMO and establishing a workweek standard for departmental positions. Specifically, by this resolution the County deleted three full-time and one regular part-time Senior Social Workers, seven full-time Social Workers, four full-time Family Support Workers (all 15 positions within the Department of Social Services) and four full-time Developmental Disabilities Specialists (within the Department of Community Options), created fifteen Case Managers (14 full-time, one regular part-time) and four full-time Case Manager Assistants in the CMO, and retitled six full-time and two regular part-time Developmental Disabilities Specialists in the CMO as Case Managers.

6. Following adoption of Resolution 102-02, County personnel director Richard Brzozowski wrote to DSS Family Support Workers and DSS/DCP employees assigned to the CMO to discuss the status of the CMO. He wrote to the non-professionals as follows:

This is to inform you that the CMO "pilot" project will cease at the conclusion of the current year. Accordingly, the Fond du Lac County Board of Supervisors has adopted a resolution creating the Care Management Organization (CMO) as a regular County department. As you are aware, the County has been utilized [sic] a number of positions from other departments to provide services to clients during the "pilot" period of CMO operation. This arrangement will not be continued with the establishment of the CMO as a new county department and therefore, effective January 1, 2003, these positions are being deleted in their respective departments.

You are currently employed in a position scheduled for deletion. As a Department of Social Services employee currently assigned to the CMO "pilot," you can rely on the layoff provisions of the collective bargaining agreement covering your current position and pursue the possibility of continuing employment with the Department of Social Services via those provisions. It is suggested that you confer with your union representative to explore this possibility.

In addition, with the creation of the new CMO department, the County Board authorized positions that would support the new agency and also established a 40 hour work week for the department. These new positions include four (4) Case Management Assistant positions for which the level of compensation has not yet been established. We anticipate that process to be completed in approximately two (2) weeks. At that point, if you wish to be employed in one of these positions, you will have an opportunity to advise the County of your interest.

Your immediate consideration of this matter will be appreciated.

Brzozowski later wrote the non-professional DSS employees assigned to the CMO as follows:

By previous communication you were advised that your current position with the Department of Social Services is scheduled for deletion effective January 1, 2003. You were also advised that you could exercise the layoff provisions of the collective bargaining agreement that covers your current position with the Department of Social Services (DSS), if you wish to pursue the possibility of continued employment in that department. Additionally you were informed that the County had created four (4) Case Management Assistant positions for the CMO and that once the compensation level for those positions was established, you would be given opportunity to let the County know if you wished to be employed in one of those positions.

At this time we wish to inform you that a pay range had been established and authorized as follows:

Brzozowski's undated letter then listed the pay range (\$11.95 to start, \$14.35 after 54 months), and added:

In the event that current Family Support Workers choose to be employed in one of the new positions we ask that the enclosed "letter of intent" be returned to our office no later than December 27, 2002.

(emphasis in original). All four non-professionals signed and returned the enclosed letter of intent, which read as follows:

Please consider this my "letter of intent" which serves to indicate my desire to be employed with the Fond du Lac County Care Management Organization

(CMO) effective January 1, 2003. I understand that my current position with Fond du Lac County ceases on such date and that this "letter of intent" provides that no break in service or interruption of benefits will occur.

At about the same time, Brzozowski wrote to the professional employees as follows:

This is to inform you that the CMO "pilot" project will cease at the conclusion of the current year. Accordingly, the Fond du Lac County Board of Supervisors has adopted a resolution creating the Care Management Organization (CMO) as a regular County department. As you are aware, the County has been utilized [sic] a number of positions from other departments to provide services to clients during the "pilot" period of CMO operation. This arrangement will not be continued with the establishment of the CMO as a new county department and therefore, effective January 1, 2003, these positions are being deleted in their respective departments.

In that you are currently employed in a position scheduled for deletion, you are hereby informed of the following options:

1. If you are a Department of Social Services employee currently assigned to the CMO "pilot," you can rely on the layoff provisions of the collective bargaining agreement covering your current position and pursue the possibility of continuing employment with the Department of Social Services via those positions. It is suggested that you confer with your union representative to explore this possibility.
2. If you are a Department of Community Programs employee currently assigned to the CMO "pilot," you may contact the County Personnel Department to discuss your County employment status beyond December 31, 2002.

In addition, with the creation of the new CMO department, the County Board authorized positions that would support the new agency and also established a 40 hour work week for the department. You may submit the enclosed letter of intent if you wish to be employed in one of these positions. We request that you respond no later than December 3, 2002.

Please give this matter your immediate attention so that CMO staffing can be facilitated effective January 1, 2003. Your timely cooperation will be appreciated.

The 15 professional employees were provided with the same "letter of intent," which fourteen returned with their signature. One employee returned to the Social Services Department. Of the 14 employees who returned the letter of intent, seven appended notes, in substantially identical language, stating they were "concerned about the inequity of my salary," which they asserted did not adequately reflect their service with the CMO. The CMO Case Managers are salaried rather than hourly employees, in a pay grade that in 2002 ranged from \$36,975 to \$47,228.

7. As of December 31, 2002, the CMO was staffed with 35 professionals and four non-professionals. Of the 35 professional employees, 11 were previously represented Social Workers from DSS, seven of whom were hired expressly for the CMO pilot program, four of whom were existing DSS employees assigned to the CMO. None of the remaining 24 CMO professional staff members as of December 31, 2002 had been members of the Local 1366K Social Services Department bargaining unit; four had been Developmental Disabilities Specialists from the Department of Community Programs, joined by four more Specialists hired expressly for the CMO pilot, four additional Case Managers hired outside the DSS process (one of whom had been a previous employee of the County), and twelve Registered Nurses. Neither the Nurses nor the employees of the Department of Community Programs had ever been organized.

Since the CMO became a stand-alone department, no management or supervisory employee of the DSS has played any role in supervising or hiring any CMO employee. Policy and administrative oversight for the entire CMO is provided by the CMO Governing Board, a separate body from the Social Services Committee, the Institutions Committee and the Community Programs Board, which provide policy and administrative oversight for the DSS, the County Institutions and the Community Options Program, respectively.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSION OF LAW

Because the scope of the bargaining units described in Findings of Fact 2 and 3 is limited to employees of the Department of Social Services, it is not appropriate to add non-Department of Social Services employees to those units through unit clarification petitions.

Based on the above and foregoing Findings of Fact and Conclusion of Law, the Commission hereby makes and issues the following

ORDER

The employees covered by the instant unit clarification petitions shall continue to be excluded from the bargaining units described in Findings of Fact 2 and 3.

Given under our hands and seal at the City of Madison, Wisconsin, this 20th day of February, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

FOND DU LAC COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT
CONCLUSION OF LAW AND ORDER CLARIFYING BARGAINING UNITS

POSITIONS OF THE PARTIES

AFSCME

In support of its position that certain non-professional and professional employees within the Care Management Organization (CMO) should be accreted into the Local 1366E and 1366K bargaining units, respectively, AFSCME asserts that, while prior case law indicates that the unit clarification petitions should be dismissed in favor of election petitions, the Commission should nevertheless accrete the various positions, as it has done under somewhat similar circumstances in the past. Under the unique circumstances of these cases, wherein represented employees from both bargaining units were assigned by the employer to the CMO pilot and performed work identical to the work now being performed by their counterparts, an accretion is appropriate.

Local 1366K has the added advantage that certain of its employees continue to be assigned to the CMO and constitute the majority of non-represented employees working at CMO. The addition of four positions to 85 does not call into question the existing unit's majority status.

While the Commission normally honors departmental parameters, deviations from these parameters have been directed in consideration of the anti-fragmentation policy. The CMO employees should be accreted into the Social Services Department bargaining units rather than being placed in a residual unit because of community of interest considerations.

The unique circumstance presented in the instant case was the assignment of Social Services Department employees to the CMO. The Social Services Department assigned its employees to the pilot CMO, and thus the County expanded the scope of these units to include the CMO. Social Services Department employees continue to be assigned to the CMO and constitute a majority of non-professional employees in the CMO. The departmental boundary is artificial and need not be respected.

The units sought by AFSCME will not result in undue fragmentation, because the instant bargaining units will be expanded by one department. The possibility of relatively large residual units remains unaffected. AFSCME does not claim that either proposed bargaining unit is the most appropriate unit, but does assert that each is an appropriate bargaining unit.

The County

In support of its position that the non-professional and professional employees within the Care Management Organization should not be clarified into the Local 1366E and 1366K bargaining units, respectively, the County contends that the subject employees of the CMO do not share a community of interest with those employees represented by AFSCME, in that they have different wages, different vacation schedules, work different schedules, work at different locations, and have different administrative and oversight systems.

Further, the narrow recognition clauses contained in the respective collective bargaining agreements (Social Services professionals and paraprofessionals) are specific and unambiguous, in covering only regular full-time and regular part-time employees of the Fond du Lac County Social Services Department, and do not permit inclusion of the CMO employees. Because these labor agreements constitute the "entire agreement between the parties," the Commission should not modify them to allow the recognition clauses to include professional and paraprofessional staff members of the CMO.

DISCUSSION

The bargaining units potentially affected by these proceedings were created, and have since been maintained, as units consisting exclusively of employees of the Fond du Lac County Department of Social Services. AFSCME now seeks to expand these units to include employees of another department, the Care Management Organization, a/k/a Creative Care Options. As AFSCME itself forthrightly acknowledges, our case law is not generally supportive of its effort to alter the departmental pattern of unit composition.

In MANITOWOC COUNTY, DEC. NO. 26743-B (WERC, 2/97), the Commission dismissed a union petition to place Health Care Center professionals in a unit defined as being comprised of professionals at the Human Service Department, stating, "Where units are defined by departments or other organizational units, we honor those departmental/organizational parameters when we are asked to clarify bargaining units." In support of that principle, the Commission cited WALWORTH COUNTY, DEC. NO. 18271-A (WERC, 12/90) (granting a petition to accrete former Public Health Department employees into the Hospital bargaining unit, where the County had reorganized its Public Health Department into its Hospital and the unit was defined as "employees employed by the Hospital); BROWN COUNTY (DEPARTMENT OF SOCIAL SERVICES), DEC. NO. 15559-A (WERC, 1/91), (granting a petition to accrete a position into the Department of Social Services unit after the position was removed from the County judicial branch and placed in the Department of Social Services, noting that the existing unit description encompassed all professional employees employed by Brown County Department of Social Services); and PIERCE COUNTY,

DEC. NO. 27487 (WERC, 12/92) (granting a petition to clarify a unit by removing a position from a Human Services Department unit to a Community Health Services Department unit after the County had moved the position from the Human Services Department to the Community Health Services Department).

In the case before us, AFSCME has put great stock in the similarity of the duties and skills of the CMO Case Managers and Case Manager Assistants with those of the DSS Social Workers and Family Support Workers, and the undeniable fact that several of the incumbent CMO personnel previously worked at DSS. But as the Commission commented in WALWORTH COUNTY, such an argument is not well-placed:

Where the scope of the unit is so defined, a change in the identity of an employee's employment unit is an intervening event which materially affects such employee's unit status. The absence of any significant change in job responsibilities or present work location is irrelevant under such circumstances. WALWORTH COUNTY, DEC. NO. 18271-A (12/90), at 7.

It is understandable why AFSCME has sought these accretions. Certainly, there is some similarity between the skills and duties of the employees currently in the DSS units and those working with the CMO. Moreover, the fact that certain of the incumbents at the CMO were themselves formerly DSS employees in their respective units adds an important emotional element to the proceeding. However, these reasons are not sufficient to overcome the Commission's long-standing rule of deference to voluntarily negotiated organizational parameters.

There are circumstances in which the Commission may not defer to such voluntarily negotiated unit parameters, traditionally stated as follows:

1. The position(s) in dispute did not exist at the time of the agreement;
2. The position(s) in dispute were voluntarily included or excluded from the unit because the parties agreed that the position(s) were or were not supervisory, confidential, etc; 4/ or

4/ The second exception is clearly inapplicable here, as it is not alleged that the employees at issue were excluded from the units because of their status as supervisors, confidential employees, etc.

3. The position(s) in dispute have been impacted by changed circumstances which materially effect their unit status.; or
4. The existing unit is repugnant to the Act.

See BARRON COUNTY, DEC. NO. 18583-A (WERC, 1/98); SAUK COUNTY, DEC. NO. 6762-A (WERC, 11/98); FOREST COUNTY, DEC. NO. 27552 (2/93); and CITY OF SHEBOYGAN, DEC. NO. 7378-A (WERC, 5/89). .

As to the first exception, the CMO positions in dispute did not exist at the time that the parties agreed to the scope of the bargaining units as reflected in the contractual recognition clauses. However, as the Commission explained when in addressing this exception in SAUK COUNTY, DEC. NO. 6762-A (WERC, 11/98):

Exception 1 is not to be applied in a literal manner. For instance, if clerical employees are excluded from a bargaining unit, that generic exclusion governs the bargaining unit status of a newly created clerical position, even though in a literal sense the newly created position did not exist at the time the parties agreed to exclude clerical employees. Where, as here, the parties have agreed to a departmental unit, they have necessarily also agreed that all non-department employees should be excluded. Thus, although the newly created Foreperson position obviously did not exist at the time the Highway Department unit was created in 1964, positions outside the Highway Department did exist. It is this generic view of Exception 1 which controls the outcome of this case. The Foreperson position is a non-Highway Department position. Non-Highway Department positions existed at the time of the creation of a Highway Department unit. Thus, the position in dispute existed at the time of the parties' agreement to a Highway unit and a unit clarification is not an available means by which to seek representation of the position.

Thus, although the newly created CMO positions obviously did not exist at the time the Social Services Department units were created, positions outside the Social Services Department did exist. Accordingly, where, as here, the parties have agreed to departmental units, they have necessarily also agreed that all non-department employees should be excluded. Thus, exception 1 is not applicable. See also, CITY OF RICHLAND CENTER, DEC. NO. 17950-A (WERC, 2/96).

As to exception 3, some Social Services Department positions were eliminated and new, permanent CMO positions were established. However, where the scope of the unit is defined by departmental structure, this type of change does not materially affect the bargaining

unit's structure. For example, in BARRON COUNTY, WERC DEC. NO. 18583-A (WERC, 1/98), Payment Counselor positions and a Crime/Victim Witness Coordinator position employed in the Social Services Department were moved to a new child support agency under a different organizational structure. The County sought to exclude those positions from the Social Services Department unit because the recognition clause defined the unit as "...Social Workers and all other...employees of the Department of Social Services..." Given the departmental structure of the unit, the Commission recognized the movement of the positions from the Department of Social Services to a separate agency as a change of circumstances that materially affected the unit status of those positions. It was the status of the positions that changed, not the unit. The Commission explained:

The unit was created as a departmental unit by stipulation of the parties in 1981 and we see no compelling reason to modify its departmental status now. Contrary to the argument of NUE, we are satisfied that the potential creation of a third professional unit will not constitute undue fragmentation and that there is no present compelling community of interest between the Social Workers, Payment Counselors and the Crime/Victim Witness Coordinator. Therefore, we do not modify the departmental nature of the existing unit and have excluded the disputed positions because they are not held by Department of Social Services employees.

Given all of the foregoing, we do not view the creation of the new CMO as the type of change of circumstance that would lead us to modify the departmental recognition clauses in the parties' collective bargaining agreements.

As to the fourth exception, the existing departmental units are not repugnant to the Municipal Employment Relations Act (MERA). Section 111.70(4)(d) 2.a., Stats. specifically authorizes departmental units. While exclusion of these positions creates the potential for additional bargaining units, this potential is not at odds with the statutory directive in Sec. 111.70(4)(d)2.a., Stats., to "avoid fragmentation" as roughly 500 County employees in many other departments are presently unrepresented.

AFSCME cites KEWAUNEE COUNTY, DEC. NO. 21344 (WERC, 1/84), as an example of a situation where fragmentation considerations led the Commission to modify a departmental unit. However, in KEWAUNEE COUNTY, the issue involved the only two unrepresented non-professional employees in the County. Based on the anti-fragmentation policy, the Commission found inclusion of the two solid waste positions in the Highway Department unit appropriate. Given the presence of 500 unrepresented employees in the matter before us, it is clear that KEWAUNEE is factually distinguishable. It is also important to note that in

KEWAUNEE the County did not advance the argument that inclusion was inappropriate because it was at odds with the departmental structure of the existing unit. Therefore, KEWAUNEE does not provide substantial support for the AFSCME position in this litigation.

AFSCME has also pointed to VERNON COUNTY, DEC. NO. 6163-C (WERC, 11/94) as support for accretion of the CMO employees to the Social Services units. In VERNON COUNTY, the Commission added non-Highway Department employees to a Highway Department unit. However, as in KEWAUNEE, the employer did not contend that the departmental structure of the unit should bar inclusion. Thus, VERNON COUNTY is not persuasive in the instant context where the County is making that assertion.

Lastly, AFSCME cites DANE COUNTY, DEC. NO. 15696-A (WERC, 12/88), in support of its argument. As in KEWAUNEE and VERNON COUNTY, in DANE COUNTY the Commission added a position to a unit even though the recognition clause seemingly excluded the position. However, as in KEWAUNEE and VERNON COUNTY, the employer in DANE COUNTY did not assert that the inclusion of the position would be at odds with the parties' agreed-upon scope of the unit. Further, the unit was not organized along departmental lines, as is the case before us. Thus, as was true for KEWAUNEE and VERNON COUNTY, DANE COUNTY does not provide persuasive support for inclusion in this case, where the employer does raise that argument.

In closing, we note that all existing County bargaining units are defined along departmental lines. Thus, were we to grant the AFSCME request for inclusion, we would be fundamentally changing the labor/management relationship developed by the County and the unions representing its employees. Predictability and stability are served by maintaining the approach the parties have thus far developed for themselves.

Dated at Madison, Wisconsin, this 20th day of February, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

