

3. That the Union and the County have been parties to a series of collective bargaining agreements commencing with an agreement for 1977-1978; that the parties' collective bargaining agreement for the period January 1, 1985 through December 31, 1985 was pursuant to a Mediation/Arbitration award dated January 31, 1986; and that said agreement contained the following provisions:

ARTICLE IX - HOURS OF WORK

9.01 - Workday. The normal workday for full-time employees shall consist of eight (8) consecutive hours, excluding one (1) hour lunch period, between the hours of 8:00 a.m. and 5:00 p.m.

9.02 - Workweek. The normal workweek for full-time employees shall consist of forty (40) hours, Monday through Friday.

. . .

9.04 - Scheduling Adjustments. The parties recognize that the nature of the services provided by the Department may require adjustments in employee work schedules to meet the requirements of specific departmental programs, services mandated by law or exceptional circumstances requiring the Department to provide services at times other than normal work hours. Accordingly, the County shall have the right, notwithstanding the provisions of Section 9.01 and 9.02, to assign different workdays or workweeks to particular employees in order to provide coverage for such situations.

9.05 - Adjustments Within Pay Periods. Notwithstanding the provisions of Section 9.01 and Article X, upon the mutual consent of the employee and his immediate supervisor, hours of work may be adjusted on a straight-time basis within a pay period.

ARTICLE X - OVERTIME

10.01 - Professional Employees. Professional employees (those employees classified as Social Worker and Senior Social Worker) shall receive compensation for all hours earned in excess of forty (40) paid hours per week and in excess of eight (8) paid hours per day as follows:

(A) Employees shall have the option of receiving compensatory time off at the rate of one (1) hour for each hour of overtime worked, or elect to be paid at their appropriate straight-time rate for each hour of overtime worked.

. . .

ARTICLE XXV - MANAGEMENT RIGHTS

25.01 - Rights. The Union acknowledges the sole right of the County to exercise the power and authority necessary to operate and manage its affairs, but such right must be exercised consistent with the other provisions of this Agreement and Section 111.70, Wis. Stats. Such powers and authority include, but are not limited to, the following:

- A. To direct all operations of County government including the Department of Social Services.
- B. To manage and direct the working force, to make assignments of jobs, to determine the size and composition of the work force, to determine the work to be performed by employees, and to review and evaluate the competence and qualifications of employees.

. . .

- F. To determine the methods, means and personnel by which such operations are to be conducted.

. . .

25.02 - Not Inclusive. The rights of management set forth above are not all inclusive, but indicate the type of matters or rights which belong to and are inherent to management.

4. That the language of Secs. 9.04 and 9.05 has remained unchanged since the 1977-78 agreement; that in negotiations leading to the 1977-78 agreement, the Union initially proposed the following:

9.04 Flexible Scheduling: The parties recognize that the nature of the service provided by the Department requires flexibility in the scheduling of the hours of work in order to meet the needs of clients. The normal work day and work week noted above may, therefore, be modified to meet client needs upon mutual consent of the employee and his immediate supervisor.

Article X OVERTIME

10.01 Professional Employees: Professional employees (those employees classified as Social Worker I through Social Worker V) shall receive compensatory time off for all hours worked in excess of eight (8) per day, for all hours worked on a Saturday or Sunday, and for all hours worked on a holiday (in addition to payment for said holiday). Such compensatory time off shall be computed on the basis of one and one half (1-1/2) hours off for each overtime hour worked, and shall be scheduled at the request of the employee, subject to the approval of his immediate supervisor.;

that the County's initial proposals were as follows:

Flexible Scheduling: The parties recognize that the nature of the service provided by the Department requires flexibility in the scheduling of the hours of work in order to meet the needs of the Department. Accordingly, it is understood that the Department head or an employee supervisor may modify or adjust an employees (sic) hours of work to meet the needs of the department.

Substitute the following language for Section 10.01:

Professional Employees: Professional employees (those employees classified as Social Worker I through Social Worker V) shall receive compensatory time off for all hours worked in excess of forty (40) paid hours per week and in excess of eight (8) paid hours per day. Compensatory time shall be at the rate of one (1) hour for each hour of overtime worked. The maximum number of compensatory overtime hours which an employee may accumulate at any one time shall be twenty (20) hours. The maximum number of compensatory overtime hours which an employee may accumulate during one (1) year shall be forty (40) hours.;

that for Section 10.01, the County later modified its proposal so that the accumulation at any one time would be 80 hours and the last sentence of its proposal set out above was dropped and this proposal was agreed to by the Union; that the Union continued to request time and one-half for Saturday and Sunday but

circumstances."; that the Union responded by proposing that the word "circumstances" be replaced by "emergency situations"; that the Union later proposed language that permitted changes to meet the requirements of "specific departmental programs, services mandated by law, or exceptional circumstances requiring the Department to provide services at other than normal work hours"; and that the County agreed to this proposal which became Sec. 9.04 in the 1977-78 agreement.

5. That on March 20, 1986, Ryd sent a memo to all Social Service staff which provided, in part, as follows:

For some time we have been contemplating how to fulfill our statutory responsibility to the community pertaining to child abuse and neglect services. Because of our lack of weekend coverage, we have been unable to formalize a system that would accommodate the reporting of emergency situations and to initiate an investigation within the 24-hour time limit. Thus, we have decided to formally establish Saturday work hours for Social Service staff, beginning April 5, 1986.

The plan is to have two Social Workers on duty every Saturday from 8:00 a.m. to 5:00 p.m. with an hour lunch period. Social Workers will be assigned to Saturday duty on a rotating basis. The Social Workers assigned to a particular Saturday will be permitted to choose another day off during the same pay period with supervisory approval. If a worker does not choose a day off in advance, the Supervisor will assign another day off within the pay period.;

that on March 25, 1986, Gonwa, on behalf of the Union, sent a letter to Ryd which provided as follows:

Persuant (sic) to your letter of March 20, 1986, regarding initiation of Saturday work schedule, Local 1199 - AFSCME, AFL-CIO demands that the county enter into immediate negotiations with the union in order to bargain the impact of the county's unilateral decision on the wages, hours and working conditions of bargaining unit employees.

Further, the union demands that the county not implement the Saturday work schedule until such time as we have had full and complete opportunity to bargain these matters. In the event that the county implements on April 5, 1986, prior to the time we have had the opportunity to negotiate, we will have no choice other than to file prohibitive (sic) practice charges persuant (sic) to Section 111.70 Wis. Statutes.

Please contact me at your earliest convenience to set up a time to negotiate.;

and that on March 26, 1986, Moschea gave Gonwa the following response:

Please be advised it is the County's position that there is no legal obligation to negotiate with your organization regarding the Saturday work schedule. However, in response to Don's letter dated March 26, we would be willing to discuss your concern either on April 1 or April 11.

It is my understanding that Don has moved the implementation of the Saturday work schedule to April 19, so that there is time.

6. That the parties met on April 1, 1986 but the change in work schedules was not addressed; that the parties met on April 11, 1986 in negotiations for a successor to the 1985 agreement; that the County indicated it would discuss but would not bargain the matter of the Saturday work schedule; and that on April 19, 1986, the County implemented the Saturday work schedule and the Union filed the instant complaint.

7. That the Union by its agreement to terms of the parties' collective bargaining agreement, particularly Articles IX and X, has waived its right to bargain with the County over its decision to implement the Saturday work schedule as well as the impact of that decision.

Based upon the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

1. That the County had no duty to bargain collectively with the Union within the meaning of Sec. 111.70(1)(a) of MERA with respect to its decision to implement a Saturday work schedule as well as the impact of this decision because provisions relating to the decision and the impact thereof are included in the collective bargaining agreement between the parties or have been waived in bargaining the collective bargaining agreement, and therefore, the County did not violate Sec. 111.70(3)(a)4 of MERA by its refusal to bargain with the Union.


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

ORDER 1/

IT IS ORDERED that the complaint be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 26th day of March, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Lionel L. Crowley, Examiner

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.

WASHINGTON COUNTY (DEPARTMENT OF SOCIAL SERVICES)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

In its complaint, the Union alleged that the County committed prohibited practices in violation of Sec. 111.70(3)(a)4, Stats., by unilaterally changing the hours and working conditions of bargaining unit employees by implementing a Saturday work schedule and by refusing to bargain on the impact of the change upon said employees. The County did not dispute the facts in this matter but denied that it committed any prohibited practices and alleged that it had no obligation to bargain the decision and impact because the Union by its agreement to the parties' collective bargaining agreement waived its right to bargain and the entire matter was subject to the contractual grievance arbitration procedure.

Union's Position:

The Union does not challenge the County's right to initiate a Saturday work schedule and that decision is not the subject of the instant complaint. The Union contends that the County's failure to negotiate on the impact of this decision violated Sec. 111.70(3)(a)4, Stats. It submits that the Union timely demanded that the County bargain the impact of its decision and that the County refused to bargain the impact. The Union asserts that Sec. 9.04 of the parties' agreement was the culmination of bargaining where initially the Union had insisted that changes in hours would be by mutual consent and the County had sought changes in schedules by unilateral discretion of the supervisor. It points out that Sec. 9.05 took care of adjustments within a pay period by mutual consent and the parties agreed to a change in schedule under the specific circumstances set forth in Sec. 9.04. It notes that Sec. 9.04 contains no language on how a different shift was to be staffed or how it was to affect wages, hours and working conditions. It claims that these matters were never even discussed in bargaining. The Union argues that the County has only the right to establish a different shift under Section 9.04 and the Union has not waived its right to bargain impact items, such as staffing, compensation and alternative hours. It insists that it has the right to bargain on these items and other impact issues and requests an order that the County cease and desist its implementation of the Saturday work schedule and pay employees at overtime rates for work on Saturday and for such other relief as is deemed appropriate.

County's Position:

The County contends that by the parties' agreement to Section 9.04, the County has met all its obligations to bargain with the Union over the impact of its decision to change the workweek and the Union has waived its right to bargain on the impact of a change in workweek. The County argues that contrary to the Union's assertion that the agreement does not speak to staffing and compensation for a new shift, Sec. 9.04 when read in conjunction with the Management Rights clause and the overtime provisions covers these areas. It submits that the Union had ample opportunity to propose limitations on the County's right to assign employees as well as obtain special compensation for those assigned but it failed to do so, and thus, the County has fully satisfied its obligations to bargain on the change in schedule. It maintains that while the agreement may be silent on a particular impact item or an impact item is handled in a manner different from that now preferred by the Union is immaterial because where the Union is not aware that a particular managerial decision was a greater impact than anticipated at the time, such is not a valid basis to permit renegotiation of the provision. Noting that these principles have been applied to mid-term changes, the County nevertheless contends that even though the issue here arose after the agreement expired, the outcome of the case is the same. During the "hiatus period", the County acknowledges that it must maintain the status quo until a new agreement is reached or until a mediator/arbitrator issues a decision. It submits that the status quo requires adherence to Section 9.04 which gives the County the right to unilaterally change schedules, to determine who will be assigned to these schedules and to pay them in accordance with the agreement. It concludes that it maintained the status quo and was not obligated to bargain the impact of this decision as there has been a contractual waiver. It requests the complaint be dismissed.

Discussion:

A municipal employer has a duty to bargain collectively with the representative of its employees with respect to mandatory subjects of bargaining during the term of an existing collective bargaining agreement, except as to those matters which are embodied in the provisions of said agreement, or bargaining on such matters had been clearly and unmistakably waived. 2/ Section 9.04 of the parties' collective bargaining agreement provides that the County has the right to assign different workdays or workweeks to particular employees under certain enumerated circumstances. The Union concedes that the County's change in work schedules is embodied in the terms of the agreement and any failure to comply with this agreement is subject to the contractual grievance procedure. It argues that the impact of this change is not embodied in the agreement and the Union has not waived its right to bargain on the impact of the change.

A review of the collective bargaining agreement leads to the conclusion that the Union has waived its right to bargain not only the change in work schedules but also the impact of this change. Section 9.04 gives the County the right to assign different workdays or workweeks to "particular employees". The contractual management rights clause provides that the County has the right to assign jobs and to determine the personnel by which to conduct its operations. When these clauses are read together, it is implicit that the County has the right to change the schedules of particular employees as determined by it. Section 10.01 of the agreement provides for overtime compensation for professionals who work over forty hours a week or eight hours per day. Compensation for a change in schedule is therefore also embodied in the terms of the agreement. Although the contractual language does not specifically and expressly address all the impact concerns expressed by the Union, the parties could have negotiated and included such items as time and one-half pay for Saturday work, rotating schedules or permanent schedules, work schedules by seniority, etc. The agreement is not silent on schedule changes or overtime, it simply does not address all the ramifications of a change which the Union now seeks to negotiate. The fact that these additional items were not included in the agreement is not a basis for finding that these items were not waived. 3/ The language of the agreement encompasses these items and although the Union was unaware that the change of schedule under Section 9.04 had a greater impact than anticipated, renegotiation is not permitted. Thus, it is concluded that the collective bargaining agreement deals with the impact limitations now sought by the Union and it has waived bargaining on them during the term of the agreement.

The bargaining history supports this conclusion. Initially, the Union had sought a Monday through Friday schedule with changes only upon mutual agreement between the employee and his/her supervisor. The County's initial proposal allowed it to retain complete discretion to change an employee's hours of work. During the bargaining, the Union modified its position allowing changes in the Monday through Friday schedule under certain enumerated circumstances. In going from changes only upon mutual consent to changes under certain conditions, the Union did not insist on further limitations of the County's discretion, such as changes based on seniority or on other factors. In short, it did not limit the County's discretion on changes where the enumerated conditions were met. Also, the Union initially proposed time and one-half for all Saturday work. It dropped this proposal as there is no mention of Saturday work in the overtime provision which provides for overtime after forty hours per week and eight hours per day. The Union by modification of its initial proposals dropped items it now claims are impact items over which the County must bargain such as compensation for Saturday work and limitations on the County's discretion to change certain employee's work schedules. Additionally, the Union could have sought more limitations on the County's discretion than those that were eventually agreed to but as it didn't, it has

waived the right to raise them during the contract term. 4/ Thus, the bargaining history supports the conclusion that the Union has waived bargaining on the impact of the County's changes in work schedules.

The County changed the work schedule after the contract had expired by its terms. The County correctly noted that it was obliged to maintain the status quo during the contractual hiatus period, which as discussed above, provided it the right to change workdays and workweeks and it was not obligated to bargain either the change or the impact. Thus, the County was not obligated to negotiate the impact of the change separate from negotiations for the successor to the agreement which expired on December 31, 1985, 5/ and therefore, it did not violate Sec. 111.70(3)(a)4, Stats. by its refusal to bargain the impact of the change in hours. Thus, the complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin this 26th day of March, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

4/ Id.

5/ It is noted that the Union is not precluded from proposing any impact item of a change in hours as well as the change itself in bargaining for a successor agreement to the 1985 agreement as the waiver only applies to in-term bargaining and its continuance during the hiatus period by application of the status quo.