

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ASSOCIATION OF MENTAL HEALTH
SPECIALISTS,

Complainant,

vs.

ROCK COUNTY,

Respondent.

Case 289

No. 52841 MP-3052

Decision No. 28494-A

Appearances:

Mr. John Williamson Jr., Attorney at Law, 103 West College Avenue, Suite 611, Appleton, Wisconsin 54911, appearing on behalf of the Complainant.

Mr. Thomas Schroeder, Corporation Counsel, Rock County, Rock County Courthouse, 51 South Main Street, Janesville, Wisconsin 53545, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Association of Mental Health Specialists, hereinafter referred to as the Association, filed a complaint on June 23, 1995, with the Wisconsin Employment Relations Commission alleging that Rock County and Bruce Patterson had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 2, 3, 4 and 5, Stats., when it removed a position from the Association's bargaining unit without notice to, negotiations with, or agreement from, the Association. The complaint further alleged that this action was taken to improperly influence election petitions which are pending. On August 2, 1995, the Association withdrew Patterson as a named Respondent. The Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5), Stats. On September 28, 1995, the Respondent County filed an Answer to the complaint. On September 29, 1995, the Complainant filed a motion seeking interim orders and a ruling that the factual allegations in the complaint be deemed admitted as a result of the County's failure to file an answer by September 20, 1995. September 20, 1995 was the date

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specified in the Notice of Hearing as the date for filing an answer. A hearing was held in Janesville, Wisconsin, on October 4, 1995. At the start of the hearing the Examiner denied the Complainant's motion on the grounds that the Complainant had not shown it was prejudiced by Respondent County's tardy answer. The parties then presented their evidence and arguments. Afterwards, the parties filed briefs whereupon the record was closed October 20, 1995. The Examiner, having considered the evidence and arguments of counsel and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Association of Mental Health Specialists, hereinafter referred to as the Association, is a labor organization located at Rock County Health Care Center, Highway 57, North Parker Drive, Janesville, Wisconsin 53545. At all times material hereto, the Association has been the exclusive collective bargaining representative for certain employes employed at the Rock County Health Care Center. The Association has a nursing division and a psycho-social division. The psycho-social division mainly consists of social workers. Each division has their own officers. As of the time of the hearing there were 69 employes in the psycho-social division and 41 employes in the nursing division.

2. Rock County, hereinafter referred to as the County, is a municipal employer with its offices located at 51 South Main Street, Janesville, Wisconsin 53545. Among its many governmental functions, the County operates a Human Services Department. That Department has several divisions. One of the divisions is the Children and Family Services division. A sub-unit of that division is the Adolescent Services Center (ADC). The ADC is an out-patient mental health clinic where a variety of services administered by the Department are located, to wit: CHIPS (children in need of protective services) case management, in-home family treatment, Learn Fare, Children Come First project, and child welfare services.

3. The employes in the County's Human Services Department are represented by five different unions, to wit: the Association of Mental Health Specialists, Machinists Local 1266, Teamsters Local 579, AFSCME Local 1258 and AFSCME Local 2489. Two of these unions represent the Department's social workers: the Association and the Machinists. Thus, some social workers in the Department are represented by the Association and some social workers are represented by Machinists Local 1266.

4. The Association and the County have been parties to a series of collective bargaining agreements. The parties' most recent agreement covered 1994 and 1995. The 1994-1995 agreement contained, among its provisions, the following:

ARTICLE I - RECOGNITION

- 1.01 The County recognizes the Association as the exclusive collective bargaining representative for all regular full-time and regular part-time employees in classifications listed in Appendix A employed by the Rock County Health Care Center, but excluding supervisors, craft employees, physicians, non-professional employees, temporary employees and independent contractors, on all questions of wages, hours and conditions of employment.

ARTICLE II - MANAGEMENT RIGHTS

- 2.01 Except as otherwise specifically provided herein, the management of the County of Rock and the direction of the workforce is vested exclusively in the County, including, but not limited to the right to hire, the right to promote, demote, the right to discipline or discharge for proper cause, the right to transfer or lay-off because of lack of work, discontinuance of services, or other legitimate reasons, the right to abolish and/or create positions, the right to create job descriptions and determine the composition thereof, the right to plan and schedule work, the right to make reasonable work rules and regulations governing conduct and safety, the right to subcontract work (when it is not feasible or economical for County employees to perform such work), together with the right to determine the methods and processes and manner of performing work are vested exclusively in the management. In exercising these functions management will not discriminate against any employee because of his/her membership in the Association.

...

ARTICLE VII - GRIEVANCE PROCEDURE

- 7.01 Definition. Any dispute which may arise from an employee or Association complaint with respect to the effect, interpretation or application of the terms and conditions of this Agreement, shall be subject to the following grievance procedure, unless expressly excluded from such procedure by the terms of this Agreement.

...

7.06 Step 4. If a satisfactory settlement is not reached in Step 3 within fourteen days after the County Administrator's decision the Association or the County may serve written notice upon the other that the difference of opinion or misunderstanding shall be arbitrated. Within seven days thereafter, the parties shall meet and attempt to agree upon an arbitrator. If the parties fail to agree upon an arbitrator within ten days following said notice of arbitration the parties shall request the Wisconsin Employment Relations Commission to submit a panel of five arbitrators. In the event the parties do not agree on one of the five, the parties shall meet and alternatively strike names from the panel until one name is left, such person being the arbitrator. The party having the first strike is to be the moving part. (sic) The decision of the arbitrator shall be final and binding upon the parties. The cost of arbitration shall be borne equally by the parties, except that each party shall be responsible for the cost of any witnesses testifying on its behalf. Upon the mutual consent of the parties, more than one grievance may be heard before one arbitrator.

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APPENDIX A
WAGE APPENDIX - PSYCHO-SOCIAL DIVISION

Effective 1/1/94

CLASSIFICATION	0-6 <u>Mos.</u>	7-18 <u>Mos.</u>	Over <u>18 Mos.</u>	Over <u>60 Mos.</u>
Psychologist, Phd	18.3953	19.6707	20.9152	21.5416
Psych. MS or MA Clinical Pastoral Fellow (Chaplain)	14.0239	16.2991	17.0971	17.6092
Social Worker (MA, MS, MSW) Vocational Educator Community Education	13.5036	14.6923	17.0969	17.6090

Specialist
Inservice Coordinator
OTR

Registered Record Administrator	11.6118	12.9869	14.2925	14.7204
Social Worker (BA/BS) Admissions Officer Inservice Instructor Recreational Therapist	11.0622	12.5405	14.0239	14.4391

5. There is no classification or class description in Appendix A of the parties' current labor agreement known as CHIPS case manager. There are a number of social worker positions though that have enumerated task lists that include CHIPS case management duties. The individuals who perform these CHIPS case management duties are commonly referred to as CHIPS case managers. CHIPS case managers supervise children in need of protection and services who are placed on supervision by a court as a result of their being beyond parental control, truant or a runaway.

6. The first person in the Department who was known as a CHIPS case manager was Don Winkler. Winkler worked in the Department from May 12, 1992 through September 8, 1992. He did not make it through his probation period. Winkler was supervised by Robert Sperling, the juvenile probation supervisor. Winkler was in the bargaining unit represented by Machinists Local 1266. After Winkler left, the next person in the Department who was known as a CHIPS case manager was Terry Haines. Haines' actual job title at the time he was a CHIPS case manager was "Masters Level Social Worker--Juvenile Justice and AODA Specialist." Haines was the CHIPS case manager for about two years. During that time Haines was in the bargaining unit represented by the Association. By 1995, there were three people in the Department who were known as CHIPS case managers: Janet Poff, Ken Harwood and James Gay. Poff's actual job title was "Bachelor Level Social Worker--Family Component and Aftercare case manager"; Harwood's actual job title was the same as Poff's; and Gay's actual title was "Masters Level Social Worker--Family Based Services." All three of these individuals were supervised by Kathy Lichtfuss, a supervisor in the Department's Children and Family Services division. All three of these individuals were represented by the Association.

7. In March, 1995, Poff transferred to another position in the Department. The Employer then posted a vacancy notice dated March 17, 1995. Postings are County-wide, so employes from all County bargaining units can bid on positions. The position which was posted was "Bachelor Level Social Worker--CHIPS case manager." Attached to the posting was the job description entitled "Social Worker" and a document entitled "Enumerated Task List." Poff had signed both of these documents when she had filled the position. It was implicit from the job title (i.e. "Bachelor Level Social Worker--CHIPS case manager"), the rate of pay listed on the posting and the attached job description (i.e. "Social Worker") that the position being posted was represented by the Association and was included in the Association's bargaining unit. Lichtfuss

indicated that the position which was posted was Poff's former position. Seven internal applicants signed the posting, one of whom was Tom Hess. The applicants were then interviewed by supervisor Lichtfuss. Afterwards, Lichtfuss decided that Hess was the most qualified applicant because he had eight years of previous CHIPS case management experience, and she offered him the position. Hess declined the offered position. Lichtfuss indicated that Hess' stated reason for declining the offered position was that the (social worker) position he occupied at the time (in the Machinists' bargaining unit) paid more than the new position he was being offered. Hess wanted his existing wage rate to be portable (i.e. to go with him into the new position). The record indicates that the pay schedule for social workers covered by the Machinists' contract differs from the pay schedule for social workers covered by the Association's contract.

8. On April 13, 1995, County Personnel Analyst Connie Beth and Association President John Hanewall discussed the position Poff had left which had just been posted. In this discussion Beth told Hanewall that Hess was interested in the position, but he (Hess) wanted to stay in the Machinists' bargaining unit because he (Hess) was president of Machinists Local 1266. Beth asked Hanewall if the Association would agree to let the position move into the Machinists' bargaining unit. Hanewall replied that the Association was not willing to give up that position. Hanewall indicated that Beth never asked about Hess' pay, nor did they ever discuss same.

9. On April 18, 1995, Hess met with Association President Hanewall to discuss the posted position. Hess told Hanewall he was interested in the position but he wanted to move it (i.e. the position) to the Machinists' bargaining unit because he was president of the Machinists' local. Hanewall told Hess that the Association would not agree to removing the position from the Association's bargaining unit and placing it in the Machinists' bargaining unit, but that the Association had no objection to him (Hess) keeping his existing rate of pay (which was higher than the posted rate of pay) if the County would agree to same.

10. Sometime later, Michael Hornby, Business Agent for Machinists Local 1266, contacted County Personnel Director James Bryant about the vacant CHIPS case manager position. Bryant indicated that Hornby wanted the Employer to re-post the position as one in the Machinists' bargaining unit. Bryant indicated that the basis for Hornby's request was that a CHIPS case manager position had once been in the Machinists' bargaining unit.

11. In late April, 1995, the position which Poff had vacated was re-posted. This time it was posted as "Social Worker I - II: CHIPS case manager." Attached to the posting were job descriptions entitled "Social Worker I" and "Social Worker II" and a document entitled "Enumerated Task List." These job descriptions and the document entitled "Enumerated Task List" were different documents from the ones attached to the first posting. It was implicit from the job title (i.e. "Social Worker I - II: CHIPS case manager"), the rate of pay listed on the posting and the attached job descriptions (i.e. "Social Worker I" and "Social Worker II") that the position being re-posted was represented by the Machinists and was included in the Machinists' bargaining unit. Hess and another person signed the posting. Lichtfuss decided Hess was the most qualified

applicant and offered him the position, which he accepted. After

he accepted the position, Hess was paid at the applicable wage rate per the Machinists' contract. As a result, Hess kept his existing rate of pay and did not have to take a pay cut after he moved into the CHIPS case manager position.

12. In May, 1995, Hanewall asked the Personnel Department about the status of the posted CHIPS case manager position. He was informed that Hess had gotten the position and that it (i.e. the position) had been moved into the Machinists' bargaining unit. This was the only notice the Association received concerning same.

13. The Union never filed a grievance over the matter referenced above; instead, it filed the instant complaint.

14. About May 1, 1995, election petitions were filed on behalf of the County with the Wisconsin Employment Relations Commission (WERC) which sought, inter alia, to combine all the County's social workers into one bargaining unit. Those election petitions are now pending before the Commission. If the County's position (i.e. combining the social workers into one bargaining unit) is ultimately sustained by the Commission, the existing bargaining units for social workers will be eliminated and the Association and the Machinists will be pitted against each other to represent the County's social workers.

15. The County unilaterally moved the position of CHIPS case manager which Poff vacated from the Association's bargaining unit to the Machinists' bargaining unit without first bargaining with the Association on the proposed change.

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

CONCLUSIONS OF LAW

1. Inasmuch as the 1994-95 collective bargaining agreement between Complainant and Respondent provides for arbitration of disputes and that contractual procedure has not been exhausted, the Examiner will not assert the Commission's jurisdiction over the allegation that the Respondent violated the terms of the parties' 1994-95 agreement and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats.

2. By unilaterally moving the position of CHIPS case manager from the bargaining unit represented by the Association of Mental Health Specialists to the bargaining unit represented by Machinists Local 1266, the County did not violate Sec. 111.70(3)(a)2, Stats.

3. By unilaterally moving the position of CHIPS case manager from the bargaining unit represented by the Association of Mental Health Specialists to the bargaining unit represented by Machinists Local 1266, the County did not violate Sec. 111.70(3)(a)3, Stats.

4. By unilaterally moving the position of CHIPS case manager from the bargaining unit represented by the Association of Mental Health Specialists to the bargaining unit represented by Machinists Local 1266 without first bargaining with the Association on the proposed change, the County violated Secs. 111.70(3)(a)4 and 1, Stats.

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

ORDER 1/

1. Those portions of the Association's complaint alleging violations of

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).

Secs. 111.70(3)(a)2, 3 and 5, Stats., are dismissed.

2. To remedy its violation of Secs. 111.70(3)(a)4 and 1, Stats., the County, through its officers and agents, shall immediately:

- a. Cease and desist from unilaterally moving the position of CHIPS case manager from the bargaining unit represented by the Association of Mental Health Specialists to the bargaining unit represented by Machinists Local 1266 without first bargaining with the Association on the proposed change.
- b. Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:
 - (1) Immediately return the CHIPS case manager position now filled by Tom Hess to the bargaining unit represented by the Association of Mental Health Specialists.
 - (2) Make the Association of Mental Health Specialists whole with interest ^{2/} by paying it the amount of dues it lost during the time period that the CHIPS case manager position in question was in the bargaining unit represented by Machinists Local 1266.
 - (3) Notify all employees by posting in conspicuous places on its premises, where notices to its employees are usually posted, a copy of the notice attached hereto and marked "Appendix A." That Notice shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken to ensure that said Notice is not altered,

^{2/} The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the agency. The instant complaint was filed on June 23, 1995, when the Sec. 814.04(4) rate was "12 percent per year." Section 814.04(4), Wis. Stats. Ann (1992). See generally Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83) citing Anderson v. LIRC, 111 Wis.2d 245, 258-9 (1983) and Madison Teachers Inc. v. WERC, 225 Wis.2d 623 (CtApp IV, 1983).

defaced, or covered by other material.

- (4) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the date of this Order regarding what steps it has taken to comply with this Order.

Dated at Madison, Wisconsin, this 18th day of January, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Raleigh Jones /s/
Raleigh Jones, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

Pursuant to an order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employees that:

WE WILL NOT unilaterally remove positions from the bargaining unit represented by the Association of Mental Health Specialists without first bargaining with the Association on the proposed change.

WE WILL immediately return the CHIPS case manager position now filled by Tom Hess to the bargaining unit represented by the Association of Mental Health Specialists.

WE WILL make the Association of Mental Health Specialists whole with interest by paying it the amount of dues it lost during the time period that the CHIPS case manager position was in the bargaining unit represented by Machinists Local 1266.

ROCK COUNTY

By _____

Dated this _____ day of _____, 1996.

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HERETO

AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

ROCK COUNTY

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

In its complaint, the Association alleged that the County committed prohibited practices in violation of Secs. 111.70(3)(a)1, 2, 3, 4 and 5, Stats., when it removed the position of CHIPS case manager from the Association's bargaining unit without notice to, negotiations with, or agreement from the Association. The complaint further alleged that this action was taken to improperly influence election petitions which are pending. The County denies it committed any prohibited practices by its conduct herein.

POSITIONS OF THE PARTIES

The Association's position is that the County's actions herein constituted prohibited practices. The Association contends at the outset that the position involved here (CHIPS case manager) was in the Association's bargaining unit. To support this premise, it notes that the person who previously held the position (Poff) was in the Association's bargaining unit. The Association asserts that the County unilaterally removed that position (i.e. CHIPS case manager) from the Association's bargaining unit without notice to, negotiations with, or agreement from the Association. The Association argues that the County's alteration of the scope of the agreed-upon bargaining unit was an unlawful unilateral change. The Association notes that as part of that unilateral change, the County placed the position in question in the Machinists' bargaining unit, gave it to the president of that local and paid him a higher wage than it had paid to the employee who had transferred out of the position (Poff). The Association argues that by reducing the Association's bargaining unit by one and enlarging the Machinists' bargaining unit by one, the County interfered and discriminated against the Association and its members. The Association also argues that these same facts violated the parties' labor agreement (specifically the recognition clause, the posting provision and the wage provision). The Association submits that even if the County's stated motive for taking these actions were true (i.e. that Hess, the president of Local 1266, was the best candidate for the job and the County felt it could only employ him in the position by removing it from the Association's bargaining unit and placing it in the Machinists' bargaining unit), the Association argues that is not a valid defense. The Association further submits that the County did not need to use an illegal means to pay Hess the higher salary because the Association's position was that the County could pay Hess the higher rate so long as the position remained in the Association's bargaining unit. The Association notes that the County took all these actions at a time when it was preparing to file election petitions with the WERC which, if successful, would pit the Association

and the Machinists against each

other for a unit of social workers. According to the Association the County took these actions to cause conflict between the Association and the Machinists, to embarrass the Association, to show its preference for the Machinists and the needs of its president, and to show its hostility to the Association. In short, the Association believes the County's actions were part of a conspiracy to influence the election that might ultimately be held as a result of the County's election petitions. As a remedy for these alleged prohibited practices, the Association asks that the County be ordered to cease and desist from violating MERA and post the appropriate notices. The Association also asks the Examiner to order the County to: (1) return the CHIPS case manager position to the Association's bargaining unit; (2) re-post the position again and make the employee selected whole; (3) make the Association whole for the dues it lost as a result of the County's actions; (4) withdraw its pending election petitions until such time as the effects of the County's prohibited practices have been dissipated; and (5) bargain in good faith with the Association.

The County's position is that its actions herein did not constitute prohibited practices. For background purposes, the County notes at the outset that there are five unions which represent employees in the Department of Human Services, two of which represent social workers, namely the Association and the Machinists. According to the County there are many overlapping class descriptions between them. The County submits that the position which is involved herein (namely CHIPS case manager) is arguably includible within the corresponding class descriptions of positions contained in both the Association's and Machinists' bargaining units. That being the case, the County asserts it has been flexible in the past in filling the position. It notes in this regard that at one point or another, both the Association and the Machinists have had positions in their bargaining units which are known as CHIPS case managers. In the County's view, this case shows the confusion that exists concerning CHIPS case managers and their placement. The County goes on to note that there is no position or class description in the Association's contract known as CHIPS case manager. Instead, there are several classifications wherein the incumbent performs CHIPS case management duties. That said, the County argues it did not unilaterally remove a position from the Association's bargaining unit. According to the County it simply filled a vacant CHIPS case manager position in the Machinists' bargaining unit. The basis for this contention is as follows. The County notes that the first CHIPS case manager (Winkler) was in the Machinists' bargaining unit. The County contends that when Winkler left the position, it (the position of CHIPS case manager) was not refilled. The County asserts that by not refilling the position, it remained in the Machinists' bargaining unit. According to the County the second CHIPS case manager in the Department, Haines, filled a brand new CHIPS case manager position and did not fill the position which Winkler vacated. The County further contends that when Poff left, her position was not filled, nor was it moved from the Association's bargaining unit into the Machinists' bargaining unit. Instead, the County avers that Hess simply filled the CHIPS case manager position in the Machinists' bargaining unit which had been vacant since Winkler left. The County does not deny that an effort may have been made to accommodate Hess. It submits that as a practical matter, filling the vacant CHIPS case manager position in the Machinists' bargaining unit solved Hess' problem of not wanting to have to take a pay cut and Lichtfuss'

concern about wanting Hess for the position because he was the only qualified individual for the position. Next, the County notes that while the Association contends it did not post the position, it submits it did -- not once but twice. The County submits that contrary to the Association's contentions, the second posting was not a Machiavellian tactic nor a grand conspiracy designed to discredit the Association and influence the election(s) that might be eventually held in the Department. Instead, it submits that the second posting was done simply to get a qualified individual to provide CHIPS case management services. Finally, the County argues the Association failed to meet its burden of proof in proving any violation of MERA. It therefore requests that the complaint be dismissed.

DISCUSSION

Alleged Violation of Sec. 111.70(3)(a)5

Attention is focused at the outset on the Association's contention that the County's actions herein violated the parties' labor agreement. Section 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer to "violate any collective bargaining agreement previously agreed upon by the parties . . ." The Commission's long-standing policy regarding breach of contract allegations has been to not assert jurisdiction to determine the merits of breach of contract allegations where the parties' collective bargaining agreement provides for final and binding arbitration of such disputes and such procedure has not been exhausted.^{3/} Here, the parties' labor agreement provides for arbitration of disputes in Article VII and that contractual mechanism has not been exhausted. In fact, no grievance was ever even filed by the Association. At the hearing, the Association's counsel indicated that one reason no grievance was filed in this matter was that "the scope of a bargaining unit is not something an arbitrator can determine."^{4/} Assuming for purposes of discussion herein that such is the case and an arbitrator would not rule on a unit's composition, the same must likewise follow for an examiner in a (3)(a)5 case. This is because in a (3)(a)5 case, the examiner acts as a defacto arbitrator when determining if the employer's conduct violates the parties' collective bargaining agreement. In light of the foregoing, plus the fact that there was no

3/ Joint School District No. 1, City of Green Bay, et al., Dec. No. 16753-A, B (WERC, 12/79); Board of School Directors of Milwaukee, Dec. No. 18525-B, C (WERC, 6/79); and Oostburg Joint School District, Dec. No. 11196-A, B (WERC, 12/79).

4/ Transcript, p. 81.

agreement by the parties to waive the arbitration procedure and have the Examiner decide the contractual issue(s), the Examiner will not assert the Commission's jurisdiction to determine whether the County's actions herein violated the parties' labor agreement. Accordingly, the Examiner expresses no views on the merits of any contractual claims.

Alleged Violation of Sec. 111.70(3)(a)4 and 1

The Association contends that by unilaterally removing the position of CHIPS case manager from the Association's bargaining unit, the County violated its duty to bargain in good faith. The MERA duty to bargain is enforced by Sec. 111.70(3)(a)4, Stats., and derivatively by Sec. 111.70(3)(a)1, Stats. The duty to bargain in good faith is broad, and the standards which define it are fact-driven. Pursuant to that duty, the municipal employer must bargain with the employees' bargaining representative during the term of a contract on all mandatory subjects of bargaining except those which are covered by the contract or as to which the union has waived its right to bargain through bargaining history or specific contract language. 5/ Thus, an employer may not normally make a unilateral change during the term of a contract to existing wages, hours or conditions of employment without first bargaining on the proposed change with the collective bargaining representative. 6/ Absent a valid defense then, a unilateral change in existing wages, hours or conditions of employment is a per se violation of the MERA duty to bargain. 7/ Unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining because each of those actions undercuts the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. 8/ In addition, an employer's unilateral change evidences a disregard for the role and status of the majority representative, which disregard is inherently inconsistent with good faith bargaining. 9/

The first line of inquiry then is whether the subject involved here is a mandatory subject of

5/ School District of Cadott, Dec. No. 27775-C (WERC, 6/94); City of Richland Center, Dec. No. 22912-B (WERC, 8/86); Brown County, Dec. No. 20623 (WERC, 5/83); and Racine Unified School District, Dec. No. 18848-A (WERC, 6/82).

6/ City of Madison, Dec. No. 15095 (WERC, 12/76) at 18 citing Madison Jt. School Dist. No. 8, Dec. No. 12610 (WERC, 4/74), City of Oak Creek, Dec. No. 12105-A, B (WERC, 7/74) and City of Menomonie, Dec. No. 12564-A, B (WERC, 10/74).

7/ School District of Wisconsin Rapids, Dec. No. 19084-C (WERC, 3/85).

8/ City of Brookfield, Dec. No. 19822-C (WERC, 11/84) at 12 and Green County, Dec. No. 20308-B (WERC, 11/94) at 18-19.

9/ School District of Wisconsin Rapids, supra.

bargaining. Under Wisconsin law, the principle determining mandatory or permissive status is whether the subject is primarily related to wages, hours and conditions of employment or whether it is primarily related to the formation and choice of public policy; the former subjects are mandatory and the latter permissive. 10/

10/ City of Brookfield v. WERC, 87 Wis.2d 819 (1979); Unified School District No. 1 of Racine County v. WERC, 81 Wis.2d 89 (1977); and Beloit Education Association v. WERC, 73 Wis.2d 43 (1976).

It is held that what happened here involves a mandatory subject of bargaining. This conclusion is based on the following rationale. The Association considers CHIPS case management work to be its work. This contention is based on the following. The record indicates that prior to the situation involved here, five department employees have been CHIPS case managers. The first employee was represented by the Machinists. The other four employees have been represented by the Association. Thus, four of the five previous CHIPS case managers have been included in the Association's bargaining unit. Given this numerical pattern, the Association's contention that CHIPS case management work is its work has a sound factual and historical footing. What happened here is that after an Association represented CHIPS case manager (Poff) transferred to another position, the County ultimately decided that her replacement would be represented by the Machinists. Not surprisingly, the Association objected to the loss of the position from its unit. Unions traditionally seek to protect work which they view as their work from being assigned to non-bargaining unit personnel. Such is the case here as well. The Commission has previously held that absent evidence that the employer's decision represents a choice among alternative social or political goals or values, the decision to substitute non-unit for unit personnel is a mandatory subject of bargaining. 11/ In this case, the County has not shown that any value choice is at stake in its decision to have the CHIPS case manager position in question be represented by the Machinists rather than the Association other than its expressed desire to have the best qualified person in the job. That desire though does not outweigh the Association's legitimate interest in protecting what has historically been (Association) unit work. 12/ Application of that holding here means that the County's decision to substitute Machinists' represented personnel for Association represented personnel in a CHIPS case manager position is a mandatory subject of bargaining.

Having so found, the focus now turns to whether the County has a valid defense which allowed it to make a unilateral change. The County's defense is that it did not actually move a CHIPS case manager position out of the Association's bargaining unit into the Machinists' bargaining unit. According to the County it simply filled a vacant CHIPS case manager position which existed in the Machinists' bargaining unit, namely the one vacated by Winkler (the first CHIPS case manager) in September, 1992. The Examiner does not find this contention persuasive for the following reasons. To begin with, there is no question that the position which was posted first was Poff's old position, and not Winkler's old position, since the documents attached to the posting (i.e. the job description entitled "Social Worker" and a document entitled "Enumerated Task List") had been signed by Poff when she held that position. Next, some of the Employer's own representatives made statements which undercut the contention that the position which was ultimately filled was Winkler's. First, Lichtfuss testified that the position which was posted was Poff's former position. Second, when Hanewall contacted the County Personnel Department about the status of the vacant CHIPS case manager position, he was told that Poff's former position had been moved into the Machinists' bargaining unit. Nothing was said to him at the time that

11/ Milwaukee Board of School Directors, Dec. No. 20093-B (WERC, 8/83) at 11.

12/ Milwaukee Board of School Directors, *supra*, at 12.

Winkler's old position had been filled. Insofar as the record shows, the contention that it was Winkler's old position which was filled (and not Poff's) was not raised until the hearing. Finally, since the Employer's contention that it filled Winkler's old position rather than Poff's is based on the premise that Winkler's old position was left vacant for over two and one-half years before it was filled, the Examiner believes it was incumbent upon the County to show that it has previously left positions vacant for over two and one-half years before filling them (as it allegedly did here). The record does not contain any such examples. Given the foregoing, the Employer's defense that it did not move the CHIPS case manager position in question into the Machinists' bargaining unit is rejected.

Having held that the County does not have a valid defense which allowed it to make a unilateral change, the County was required to first bargain with the Association before it unilaterally moved the CHIPS case manager position in question from the Association's bargaining unit into the Machinists' bargaining unit. The evidence clearly shows that never happened. What did happen was that after the County learned from Hanewall that the Association would not agree to let the CHIPS case manager position in question move into the Machinists' bargaining unit, the County simply moved it anyway from the Association's bargaining unit into the Machinists' bargaining unit. Obviously the Association never gave its consent or approval to same. Additionally, the Association was never given advance notice of this action either. The only notice the Association ever received was when Hanewall contacted the Personnel Department to inquire about the status of the posted CHIPS case manager position and was informed that the position had been moved into the Machinists' bargaining unit. Finally, although the argument has not been raised by the County, it is held that the Association never waived its right to bargain about this matter, either by its conduct or via existing contract language.

To summarize then, the County had a mandatory duty to bargain with the Association before it moved the CHIPS case manager position in question from the Association's bargaining unit into the Machinists' bargaining unit. Additionally, the County does not have a valid defense which allowed it to make such a unilateral change. However, it did just that by unilaterally moving the CHIPS case manager position in question from the Association's bargaining unit into the Machinists' bargaining unit without notice to, bargaining with, or agreement from, the Association. This conduct violated Sec. 111.70(3)(a)4 and derivatively Sec. 111.70(3)(a)1. (3)(a)1 prohibits interference with the protected rights of employees. A derivative (3)(a)1 violation has been found here because an unlawful unilateral change interferes with and minimizes the influence of collective bargaining.

Alleged Violation of Sec. 111.70(3)(a)2

The Association also contends that the Employer's actions here violated Sec. 111.70(3)(a)2, Stats. That section makes it a prohibited practice for a municipal employer to "initiate, create, dominate or interfere with the formation or administration of any labor or employee organization . .

." "Domination" involves the actual subjugation of the labor organization to the employer's will. A dominated labor organization is so controlled by the employer that it is presumably incapable of effectively representing employe interests. 13/ In this case, there is no evidence that the County took control of any of the unions involved, nor is there any evidence that the County asserted such control to impair the Association's independence as the employes' chosen representative. That being so, there is no behavior in the record which threatens the independence of the Association as the representative of employe interests. Even if the County showed favoritism to the Machinists, favoritism does not constitute a (3)(a)2 violation. Accordingly, no violation of Sec. 111.70(3)(a)2, Stats., has been found.

Alleged Violation of Sec. 111.70(3)(a)3

Finally, the Association contends that the County's action herein violated Sec. 111.70(3)(a)3. That section makes it a prohibited practice for a municipal employer "to encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment . . ." This subsection prohibits employment practices that are in part motivated by hostility toward a union or a protected activity. In order to prevail on a (3)(a)3 claim, the complainant must establish (1) that the employe or union was active in union affairs; (2) that the employer had knowledge of such activities; (3) that the employer was hostile to the union activities; and (4) that the employer's stated reasons for its actions were pretextual in nature and that the employer acted, at least in part, based on its hostility to the union's exercise of union activity. 14/ It is the employer's motives in making labor relations decisions that are subject to scrutiny under this provision.

In the context of this case, points (3) and (4) above require that the Association prove that the County was motivated by hostility toward the Association when it unilaterally moved the position of CHIPS case manager out of the Association's bargaining unit and into the Machinists' bargaining unit.

While the record indicates that the County took this action about the same time as it filed

13/ Kewaunee County, Dec. No. 21624-B (WERC, 5/85).

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

election petitions with the WERC which sought, inter alia, to combine all the County's social workers into one bargaining unit, the timing of these actions is probative but certainly not determinative. Other than the County's timing in taking these actions, there is no evidence of any actual hostility toward the Association on the part of the County nor is there any basis in the record for inferring same. Additionally, there is no basis in the record for concluding that the County's actions were part of a grand conspiracy designed to undermine the Association. Accordingly, no violation of Sec. 111.70(3)(a)3 has been found.

Remedy

Having found that the County committed a unilateral change violation, the Examiner is obligated to rectify that misconduct by granting relief in the form of remedial and affirmative orders. In crafting remedies, the Examiner is to order that relief necessary to restore the status quo that existed prior to the Employer's unlawful conduct and effectuate the purposes of MERA. Generally speaking, such remedies are designed to cure, not to punish.

The Examiner has chosen the following remedies which he believes will restore the status quo herein and effectuate MERA. First, the County has been directed to cease and desist from unilaterally moving the position of CHIPS case manager from the Association's bargaining unit to the Machinists' bargaining unit without first bargaining with the Association on the proposed change. Second, the County has been directed to return the CHIPS case manager position now filled by Tom Hess to the Association's bargaining unit. Third, the County has been directed to make the Association whole with interest by paying it the amount of dues it lost during the time period that the CHIPS case manager position in question was in the Machinists' bargaining unit.

All other proposed remedies sought by the Association (including reposting of the CHIPS case manager position and an order directing the County to withdraw their pending election petitions) are expressly denied.

Dated at Madison, Wisconsin, this 18th day of January, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Raleigh Jones /s/
Raleigh Jones, Examiner