STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ASSOCIATION OF MENTAL HEALTH SPECIALISTS, Complainant,

vs.

ROCK COUNTY, Respondent.

Case 306
No. 55845
MP-3373

Decision No. 29281-A

Appearances:

Mr. John S. Williamson, Jr., Attorney at Law, 103 West College Avenue, Suite 1203, Appleton, Wisconsin 54911, appearing on behalf of the Complainant.

Ms. Charmian J. Klyve, Deputy Corporation Counsel, Rock County, 51 South Main Street, Janesville, Wisconsin 53545, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On November 26, 1997, the Association of Mental Health Specialists, hereafter Complainant, filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission alleging that Rock County, hereafter Respondent, had committed prohibited practices in violation of the Municipal Employment Relations Act. Hearing was held in Janesville, Wisconsin, on January 27, 1998. The hearing was transcribed. The record was closed on March 3, 1998, upon receipt of the transcript and post-hearing written argument.

FINDINGS OF FACT

1. Rock County, hereafter the Respondent or County, is a municipal employer and has its principal offices located at 51 South Main Street, Janesville, Wisconsin 53545.

2. Association of Mental Health Specialists, hereafter AMHS or Complainant, is a labor organization and has its principal offices located at the Rock County Health Care Center, Highway 57, North Parker Drive, Janesville, Wisconsin 53545. AMHS is the collective bargaining representative of certain employes of the County, including Psycho-Social Workers a/k/a Intensive Case Managers. Since 1990, John Hanewall and Ron Krueger have alternated as President and Vice President of AMHS.

3. The parties' most recent collective bargaining agreement, by its terms, expired on December 31, 1995. This collective bargaining agreement included the following provisions:

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.

Time limits stated herein, (sic) may be waived by the mutual agreement of the parties. Saturdays, Sundays and holidays are excluded in computing the time limits specified in this section as is the day in which the act or acts (or omission) being grieved allegedly occurred.

7.02 A member of the Association Grievance Committee and the aggrieved shall be permitted to spend the necessary amount of time during their scheduled working hours in handling grievances under the outlined grievance procedure.

7.03 Procedure.

Step 1. Grievances shall be filed within fourteen days of the occurrence leading to the grievance or within fourteen days of such time as the aggrieved should reasonably have been expected to be aware of the occurrence. An earnest effort should be made to settle the matter informally between the employee, the appropriate Association representative and the appropriate managerial representative. If the matter is not resolved within five days the aggrieved and/or the authorized Association representative shall present the grievance in writing to the appropriate managerial representative.

7.04 Step 2. If the grievance is not satisfactorily settled in Step 1 of the grievance procedure, it may be appealed in writing to the Nursing Home Administrator/Director of Social Services & Community Programs. The Nursing Home Administrator/Director of Social Services & Community Programs will meet with the employee and his/her authorized Association

representative(s) and attempt to resolve the matter. A written decision will be placed on the grievance and returned to the employee within ten work days from its presentation to the Nursing Home Administrator/Director of Social Services & Community Programs. No decision within such ten day period shall be deemed a denial of the grievance.

7.05 Step 3. If the grievance is not satisfactorily settled in Step 2 of the grievance procedure, it may be appealed in writing to the County Administrator. The County Administrator and/or his/her authorized representative(s) shall meet with the employee and his/her authorized representative(s) and attempt to resolve the matter. A written decision shall be placed on the grievance and returned to the employee within fourteen work days from its presentation to the County Administrator.

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.

The arbitrator shall have jurisdiction and authority only to interpret the specific provision grieved and shall not amend, delete or modify any of the express provisions of this Agreement.

. . .

ARTICLE XV – HOURS OF WORK, CLASSIFICATION, PREMIUM PAY

15.01 A. Psycho-Social Workers – Regular Workweek. The regularly scheduled workweek for full-time employees shall be forty hours per week, excluding regularly scheduled hours on Saturday and Sunday.

. . .

E. When the County establishes new job descriptions, the County shall negotiate with the Union as to the proper wage classification, hours and conditions of work for said descriptions.

. . .

15.03 Overtime Pay.

1. All hours worked in excess of forty hours per week by regular full-time employees of the Psycho-Social Division shall be compensated at the rate of time and one-half the regular rate of pay if money is available within the appropriate salary budget, or time and one-half compensatory time, at the option of the employee.

2. All hours worked in excess of eight hours per day, or forty hours per week, by members of the Nurses Division shall be compensated at the rate of time and one-half the regular rate of pay. Overtime pay may be taken in cash or compensatory time off, time and one-half in lieu of cash by mutual agreement of the nurse and the Director of Nursing.

3. Mandation shall result in two times a nurses wage rate for all hours he/she is required to work after he/she has completed two hours worked beyond his/her initially scheduled shift, except when replacing a regularly scheduled registered nurse.

. . .

4. In early 1993, the County placed two Psycho-Social Worker positions into the collective bargaining unit represented by AMHS. On January 11, 1993, the County posted a notice of position vacancy for these two positions. This notice stated that the hours of work of one position would be "Sunday through Thursday 8:00 a.m. to 5:00 p.m." and that the hours of work for the other position would be "Tuesday through Saturday 8:00 a.m. to 5:00 p.m." Each position was filled by the end of March, 1993. When the incumbent of the Sunday through Thursday position vacated this position, it was not posted, but rather, Dryw Anderson was placed into the position. Anderson assumed the position in January of 1995 and remains in that position. Since assuming that position, Anderson's regular 40-hour workweek has been Sunday through Thursday. When the incumbent of the Tuesday through Saturday position vacated the position in the fall of 1994, the County posted the position. The posted notice of position vacancy stated that the hours of work for the position would be "Tuesday through Saturday 8:00 a.m. to 5:00 p.m." James Patterson occupied this position from October 17, 1994 through May 27, 1997. On June 2, 1997, the County posted a notice of vacancy for this position that stated that the hours of work would be "Tuesday – Saturday: 8:00 a.m. to 4:30 p.m." Gina Washburn assumed this position on June 30, 1997, and remains in this position. The County posts notice of position vacancies at four or five

County worksites. The posting locations have not changed during the last five years. AMHS has not grieved the assignment of a Tuesday through Saturday or Sunday through Tuesday work schedule to Psycho-Social Workers.

5. At the end of 1994, County representatives Kathy Lichtfuss, Robert Sperling, and Connie Beth met with Dryw Anderson, a member of the AMHS bargaining unit, to discuss the fact that Anderson was being "bumped" out of his position. AMHS Representative John Hanewall was present during the latter portion of this meeting. There were no discussions of work hours during the time that Hanewall attended this meeting. During this meeting, the parties reached an agreement that states as follows:

> It is agreed between the parties that Dryw Anderson, Bachelor Social Worker, shall be permitted to fill a new Bachelor Social Worker position, created in the 1995 Human Services budget, without following the normal posting procedure. This agreement, which establishes no practice or precedent, was reached to avoid a lay-off.

Hanewall executed the agreement on behalf of the AMHS. The County's files contain a letter to Anderson, dated December 29, 1994, which states as follows:

> This will confirm that per Section 23.01 of the AMHS Labor Agreement, your position has been bumped into by an employee with more seniority than yourself. A side agreement between AMHS and Rock County will allow you to fill a newly created Bachelor-Level Social Worker position with the Adolescent Services Division of the Human Services Department, without following the normal posting procedure. You can expect to move into this position on Sunday, January 8, 1995. Your new hours will be Sunday through Thursday, 8:00 – 4:30. Your salary and fringe benefits will remain the same. Your probationary period in this new position will end March 14, 1995, as agreed by Kathy Lichtfuss and John Hanewall. If you have any questions, please feel free to call me at 757-5524.
>
> Sincerely,
>
> Connie Beth
> Personnel Analyst
>
> cc: John Hanewall
> Kathy Lichtfuss
> Personnel Files

At the expiration of the parties' 1994-95 collective bargaining agreement, the practice was that one Psycho-Social Worker worked a regular 40-hour workweek of Tuesday through Saturday and another Psycho-Social Worker worked a regular 40-hour workweek of Sunday through Thursday. This practice is inconsistent with the clear language of Sec. 15.01(A) of the expired 1994-95 agreement. In its complaint of prohibited practices and arguments in furtherance of the complaint, AMHS placed the County on notice that AMHS did not agree to the practice of scheduling one Psycho-Social Worker to a regular 40-hour workweek of Tuesday through Saturday and another to a regular 40-hour workweek of Sunday through Thursday and that AMHS expected the County to schedule the regular 40-hour workweek of Psycho-Social Workers in accordance with the clear language of Sec. 15.01(A). The parties are negotiating a successor agreement and, as part of these negotiations, are discussing the work hours of Psycho-Social Workers.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. Rock County is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats.

2. The Association of Mental Health Specialists is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.

3. Within the one year statute of limitations set forth in Sec. 111.07(14), Stats., Rock County violated Sec. 111.70(3)(a)4, Stats., and derivatively violated Sec. 111.70(3)(a)1, Stats., by not adhering to the clear language of Sec. 15.01(A) of the expired 1994-1995 agreement between AMHS and the County after AMHS had repudiated an inconsistent practice of assigning Psycho-Social Workers a regular 40-hour workweek which included a Saturday or a Sunday.

4. Inasmuch as the 1994-95 collective bargaining agreement between Rock County and AMHS provides for final and binding arbitration of disputes over alleged violations of the agreement, the Commission will not assert jurisdiction over the allegation that Rock County has violated Sec. 111.70(3)(a)5, Stats.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

1. Complainant's allegation that Rock County has violated Sec. 111.70(3)(a)5, Stats., is dismissed in its entirety.

2. IT IS ORDERED that Rock County, its officers and agents, shall immediately:

1. Cease and desist from refusing to bargain with AMHS by taking unilateral action.

2. Take the following affirmative action, which the Examiner finds will effectuate the purposes and policies of the Municipal Employment Relations Act:

a. Immediately cease and desist from failing to comply with the language of Sec. 15.01(A) of the expired 1994-95 collective bargaining agreement between AMHS and Rock County.

b. Notify all of its employes represented by AMHS, by posting in conspicuous places where such employes work, copies of the Notice attached hereto and marked "Appendix A." The Notice shall be signed by a responsible representative of Rock County; shall be posted immediately upon receipt of a copy of this Order; and shall remain posted for thirty (30) days thereafter. Rock County shall take reasonable steps to ensure that said notices are not altered, defaced or covered by other material.

c. Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from the date of this Order as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin, this 7th day of August, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYES

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 employes that:

1. WE WILL immediately cease and desist from refusing to bargain with AMHS concerning hours of work of the Psycho-Social Workers.

2. WE WILL not unilaterally change the status quo required to be maintained by the language of Sec. 15.01(A) of the expired 1994-1995 collective bargaining agreement between AMHS and Rock County.

Dated this _____ day of _____, 1998.

_____
Rock County

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

ROCK COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Prior to hearing, AMHS withdrew all but the first cause of action, which alleges that the County has violated "Sec. 111.70(a)(3)1, 4 and 5." The Examiner believes this to be a typographic error and understands AMHS to be alleging that the County has violated Sec. 111.70(3)(a)1, 4 and 5, Stats. The County denies that it has committed the prohibited practices alleged by AMHS.

POSITIONS OF THE PARTIES

Complainant

The most recent collective bargaining agreement expired on December 31, 1995. Therefore, at the time that AMHS filed its prohibited practice, it was not entitled to arbitrate the dispute.

Under applicable Wisconsin law, a party relying on a Statute of Limitations claim must affirmatively plead it or make a motion to dismiss on the grounds of untimeliness. The County did neither.

The Municipal Employment Relations Act requires the County to follow the agreement of the AMHS after the expiration of the 1994-1995 collective bargaining agreement. Section 15.01(A) of that agreement clearly and unambiguously prohibits the regularly scheduling of weekend work. Inasmuch as AMHS was not aware of the regular assignment of weekend work, the County's assignment of weekend work was not based on any mutual understanding. Moreover, Sec. 28.01 of the expired agreement provides that, to be enforceable, an amendment to the collective bargaining agreement must be in writing and attached to all executed copies of the agreement.

By regularly scheduling Psycho-Social Workers to work weekends, the County violated its duty to bargain in good faith and its agreement with the AMHS concerning weekend work. The County's justifications for its conduct have no basis in fact or law. The County violated Sec. 111.70 and should be required to remedy its violation.

Respondent

From the time that the two Psycho-Social Worker positions were placed in the AMHS bargaining unit in 1993, the two positions have worked weekends. Thus, there has been no change in the status quo.

Section 111.07(14), Stats., provides that "the right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged." Inasmuch as the status quo has remained unchanged since 1993, the prohibited practices complaint is untimely and should be dismissed.

It is well established that the contractual grievance and arbitration procedures are presumed to be the exclusive remedies for a breach of contract claim, unless the parties to the agreement expressly agree that they are not. AMHS concedes that it has not filed a grievance alleging a violation of the contract. Since there has not been an exhaustion of remedies, the County has not violated Sec. 111.70(3)(a)5, Stats.

There is no evidence to support the claim that the County has interfered with, restrained, or coerced any employe in the exercise of their rights. There has not been any violation of Sec. 111.70(3)(a)1, Stats.

An Employer has a duty to maintain the status quo with respect to wages, hours and conditions of employment during contract negotiations. The County has done so by continuing the same weekend work schedule that has been in effect since January, 1993. AMHS concedes that the parties are currently bargaining the days/hours of work for the two disputed positions. The County has not violated Sec. 111.70(3)(a)4, Stats.

Complainant has the burden of proving that the County has engaged in the alleged prohibited practices. There is insufficient evidence to support any of the alleged violations. The complaint should be dismissed.

DISCUSSION

Alleged Violation of Sec. 111.70(3)(a)4, Stats.

Section 111.70(3)(a)4, Stats., states that it is a prohibited practice for a municipal employer, individually or in concert with others:

> 4. To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. Such refusal shall include action by the employer to issue or seek to obtain contracts, including those provided for by statute, with individuals in the collective bargaining unit while collective bargaining, mediation or fact-finding concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such individual contracts contain express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement. Where

> the employer has a good faith doubt as to whether a labor organization claiming the support of a majority of its employes in an appropriate bargaining unit does in fact have that support, it may file with the commission a petition requesting an election to that claim. An employer shall not be deemed to have refused to bargain until an election has been held and the results thereof certified to the employer by the commission. The violation shall include, though not be limited thereby, to the refusal to execute a collective bargaining agreement previously agreed upon. The term of any collective bargaining agreement shall not exceed 3 years.

A municipal employer who violates Sec. 111.70(3)(a)4, Stats., derivatively interferes with the Sec. 111.70(2), Stats., rights of bargaining unit employes in violation of Sec. 111.70(3)(a)1, Stats. GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84).

Generally speaking, a municipal employer has a duty to bargain collectively with the representative of its employes with respect to mandatory subjects of bargaining during the term of an existing collective bargaining agreement, except at to those matters which are embodied in the provisions of said agreement, or where bargaining on such matters has been clearly and unmistakably waived. RACINE COUNTY, DEC. NO. 26288-A (SHAW, 1/92). Absent a valid defense, a unilateral change in the status quo wages, hours, or conditions of employment during negotiation of a first collective bargaining agreement, or during the hiatus period between collective bargaining agreements, is a per se violation of the Sec. 111.70(3)(a)4, Stats., duty to bargain. SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85). Waiver and necessity have been recognized to be valid defenses to a charge of unilateral implementation in violation of Sec. 111.70(3)(a)4, Stats. RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 23904-B (WERC, 9/87).

The employer's status quo obligation only applies to matters that primarily relate to employe wages, hours and conditions of employment. MAYVILLE SCHOOL DISTRICT, DEC. NO. 25144-D, (WERC, 5/92). The Commission has found unilateral changes in the status quo wages, hours and conditions of employment to be tantamount to an outright refusal to bargain about a mandatory subject of bargaining because such a unilateral change undercuts the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. 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. SCHOOL DISTRICT OF WISCONSIN RAPIDS, SUPRA.

Status quo is a dynamic concept that can allow or mandate change in employe wages, hours and conditions of employment. Thus, application of the dynamic status quo principle may dictate that additional compensation be paid to employes during a contract hiatus period upon attainment of additional experience or education, or may give the employer the discretion to change work schedules during a contract hiatus period. MAYVILLE SCHOOL DISTRICT,

SUPRA. The dynamic status quo is defined by relevant language from the contract as historically applied or as clarified by bargaining history, if any. VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96).

Complainant argues that Sec. 15.01(A) of the expired 1994-95 agreement clearly and unambiguously prohibits the County from regularly scheduling Psycho-Social Workers to work on Saturday and Sunday; that the language of Sec. 15.01(A) determines the status quo which is required to be maintained during the contract hiatus period; and that Respondent violated its Sec. 111.70(3)(a)4 duty to bargain when it regularly scheduled Psycho-Social Workers to work on Saturday and Sunday. Respondent replies that the disputed work schedules have been in effect since at least 1993 and, thus, Complainant's claim is barred by the statute of limitations.

Section 111.07(14), Stats., which is made applicable to these proceedings by Sec. 111.70(4)(a), Stats., provides:

> The right of any person to proceed under this section shall not exceed beyond one year from the date of the specific act or unfair labor practice alleged.

Where, as here, a party relies upon conduct which occurs within and without the statute of limitations period, the Commission has relied upon LOCAL LODGE 1424 V. NLRB (BRYAN MFG. CO.), 362 US 411 (1960); CESA NO. 4, DEC. NO. 13100-E (YAFFE, 12/77), AFF'D DEC. NO. 13100-G (WERC, 5/78). Under the BRYAN analysis, the Examiner may consider evidence of events occurring outside the one-year statute of limitations which will "shed light" on the alleged prohibited practices occurring within the one-year statute of limitations. However, the Examiner does not have jurisdiction to determine whether or not events occurring outside the statute of limitations constitute prohibited practices.

Contrary to the argument of the Complainant, the language of Sec. 15.01(A) of the expired agreement does not prohibit the County from regularly scheduling Psycho-Social Workers to work on Saturday and Sunday. Rather, Sec. 15.01(A) defines the regularly scheduled workweek to be forty hours per week and excludes regularly scheduled Saturday and Sunday hours from this 40-hour workweek.

The regular work schedule of an employe is primarily related to the wages, hours and conditions of employment of affected employes and, thus, is a mandatory subject of bargaining. CITY OF BROOKFIELD, DEC. NO. 17947 (WERC, 7/80). Thus, Respondent has a Sec. 111.70(3)(a)4 duty to maintain the status quo on the regular work schedule of bargaining unit employes during the contract hiatus period.

Inasmuch as the regularly scheduled 40-hour workweek of the two Psycho-Social Worker positions has included Saturday and Sunday hours, the employes occupying these two Psycho-Social Worker positions have been assigned a regular workweek which is inconsistent with the language of Sec. 15.01(A) of the expired agreement. However, as discussed above, the dynamic status quo is defined by relevant language from the contract as historically applied or as clarified by bargaining history, if any. It is appropriate, therefore, to consider bargaining history and the historic application of language of Sec. 15.01(A).

Two AMHS representatives testified at hearing, i.e., Hanewall and Ron Krueger. Since 1990, these two individuals have alternated as President and Vice-President of AMHS. Each denies that he was involved in any negotiations with the County regarding the establishment of either the Sunday through Thursday or Tuesday through Saturday Psycho-Social Worker work schedule. Kathy Lichtfuss' testimony that other County representatives had engaged in such negotiations is based upon unsubstantiated hearsay and has not been credited.

Since early 1993, when the two Psycho-Social Worker positions were placed in the AMHS unit, one position has been assigned a regular 40-hour workweek of Sunday through Thursday and the other has been assigned a regular 40-hour workweek of Tuesday through Saturday. The record does not demonstrate that the County and AMHS representatives had any discussions concerning these positions prior to the end of 1994.

Kathy Lichtfuss, a supervisor for the County Department of Human Services, and AMHS representative John Hanewall agree that, at the end of 1994, County and AMHS representatives met to discuss Dryw Anderson, an employe in the AMHS bargaining unit who had been "bumped" out of his position. Lichtfuss and Hanewall agree that, during this meeting, the parties reached an agreement in which Anderson was permitted to fill an AMHS position without following the normal posting procedures. This agreement, which was reduced to writing and signed by Hanewall, does not identify the work hours of the position which Anderson was permitted to fill.

Lichtfuss recalls that, during this meeting, and in the presence of Hanewall, it was discussed that the work hours of the position would be Sunday through Thursday. Hanewall is "absolutely sure" that there was not any discussion regarding the work hours of the position.

While other individuals were present at the meeting, only Lichtfuss and Hanewall testified at hearing. Having no reasonable basis to believe that either of these two individuals would fabricate testimony, the undersigned is persuaded that one of the two is mistaken.

Lichtfuss' testimony suggests that the discussion of work hours occurred at the beginning of the meeting, during the time that Anderson and County representatives discussed the fact that there was a vacancy in intensive services for which Anderson was qualified. Lichtfuss' testimony further suggests that Hanewall was present at the end of the meeting, when discussions focused on the issue of whether or not AMHS would waive the posting

requirement and permit Anderson to transfer into the intensive services position. Given Lichtfuss' belief that there had been a prior agreement with AMHS on the Sunday through Thursday work hours and the fact that these Sunday through Thursday work hours had been in effect for approximately two years, it is plausible that work hours were not addressed during the discussion with Anderson.

The County's files contain a letter from County Personnel Analyst Connie Beth to Dryw Anderson, dated December 29, 1994, which confirms several agreements reached with AMHS. This letter identifies the hours of work as being "Sunday through Thursday 8:00 – 4:30," but does not confirm that these hours of work were part of the agreement reached between AMHS and the County. The record, as a whole, supports the conclusion that Lichtfuss is mistaken when she recalls that Hanewall was present during the discussion of work hours.

Neither the evidence of this 1994 meeting, nor any other record evidence, demonstrates that AMHS and County representatives negotiated and agreed upon any Psycho-Social Worker work schedule other than that which is reflected in Sec. 15.01(A) of the collective bargaining agreement. Thus, the Examiner turns to the evidence of the historical application of this contract language.

The letter of December 29, 1994, addressed to Anderson, indicates that Hanewall was copied on the letter. Hanewall does not recall receiving this letter and claims that a search of AMHS files has failed to produce either a copy of this letter or the signed agreement involving Anderson. Krueger and Hanewall each claim that he did not have notice of the Sunday through Thursday and Tuesday through Saturday work schedules until the time that AMHS filed this complaint in November of 1997.

On January 11, 1993, the County posted a Notice of Position Vacancy for two positions of Intensive Case Manager, also known as a Psycho-Social Worker. This notice stated that the hours of work for one position would be "Sunday through Thursday 8 am to 5 pm" and that the hours of work for the other position would be "Tuesday through Saturday 8 am to 5 pm." Each of the two positions was filled by the end of March, 1993.

When the incumbent of the Sunday through Thursday position vacated this position, it was not posted, but rather, by agreement of the parties, was filled by Anderson in January of 1995. Anderson remains in that position.

When the incumbent of the Tuesday through Saturday position vacated the position in the fall of 1994, the County posted the position. The posted Notice of Position Vacancy stated that the hours of work for the position would be "Tuesday through Saturday 8 a.m. to 5 p.m." James Patterson filled this position from October 17, 1994 through May 27, 1997. On June 2, 1997, the County posted a Notice of Position Vacancy for the position vacated by Patterson which stated that the hours of work would be "Tuesday-Saturday: 8:00 a.m. to 4:30 p.m." Gina Washburn assumed this position on June 30, 1997 and remains in this position.

Each Notice of Position Vacancy is posted in four or five different worksite locations. The posting locations have not changed during the last five years.

The postings, as well as the duration of the consistent scheduling practice, persuade the Examiner that AMHS had constructive, if not actual, knowledge of the fact that one Psycho-Social Worker position has had a regular 40-hour workweek of Sunday through Thursday and that another has had a regular 40-hour workweek of Tuesday through Saturday. Where a union has constructive knowledge of the fact that an employer is violating its rights and does not offer protest with respect to such employer conduct, the employer may reasonably believe that its conduct is fully concurred in. However, repeated violations of an express right by one party, or acquiescence to such violations on the part of the other party, does not ordinarily waive a union's right to object to future violations of its rights.

In the present case, the evidence of the historical application of Sec. 15.01(A) persuades the undersigned that, at the expiration of the 1994-95 collective bargaining agreement, the practice was that one Psycho-Social Worker worked a regularly scheduled 40-hour workweek of Sunday through Thursday and that another worked a regularly scheduled 40-hour workweek of Tuesday through Saturday. As stated above, this practice is at odds with the clear language of Sec. 15.01(A). The Commission has stated that "Where a party has previously bargained a clear right, it is consistent with the dynamic nature of the status quo to conclude that said party is entitled to exercise that right during a contract hiatus and repudiate a contrary practice." OUTAGAMIE COUNTY, DEC. NO. 27861-B (WERC, 8/94).

It is not evident that AMHS raised any objection to the scheduling practice until it filed this prohibited practice complaint. The complaint, and the arguments made by AMHS in furtherance of the complaint, placed the County on notice that AMHS did not agree to the practice of scheduling one Psycho-Social Worker to a regular 40-hour workweek of Tuesday through Saturday and another to a regular 40-hour workweek of Sunday through Thursday and that AMHS expected the County to schedule these Psycho-Social Workers in accordance with the clear language of Sec. 15.01(A). By this conduct, AMHS repudiated the scheduling practice that was contrary to a clear contractual right.

The repudiation of the inconsistent practice occurred within the applicable one-year statute of limitations period. Having received notice of this repudiation, the County violated Sec. 111.70(3)(a)4, Stats., and derivatively violated Sec. 111.70(3)(a)1, when it continued to schedule one Psycho-Social Worker to a regular 40-hour workweek of Tuesday through Saturday and another to a regular 40-hour workweek of Sunday through Thursday. The fact that the parties are negotiating hours of work within the context of their negotiations on a successor agreement does not relieve the County of its obligation to comply with the clear language of Sec. 15.01(A). The status quo doctrine continues the allocation of rights and opportunities reflected in the expired agreement while the parties bargain a successor agreement and until such time as the parties reach a new agreement on the issue. SAUKVILLE, SUPRA.

At hearing, Complainant argued that an appropriate remedy for the County's unlawful conduct would be to order the County to pay time and one-half for time worked on Saturday or Sunday. Sec. 15.03, the provision of the expired 1994-95 collective bargaining agreement which governs the payment of overtime to Psycho-Social Workers, does not require the payment of time and one-half for all hours worked outside of "the regularly scheduled workweek" as defined in Sec. 15.01(A). Rather, this provision requires the payment of time and one-half to Psycho-Social Workers for hours worked "in excess" of forty hours per week "if money is available within the appropriate salary budget, or time and one-half compensatory time, at the option of the employee."

The disputed Saturday and Sunday work does not involve hours worked in excess of forty hours per week. It is not appropriate to order the County to pay time and one-half for the time worked on Saturday or Sunday. The appropriate remedy is a cease and desist order.

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

Sec. 111.70(3)(a)l, Stats., makes it a prohibited practice for a municipal employer:

> 1. To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2).

Sec. 111.70(2), Stats., describes the rights protected by Sec. 111.70(3)(a)l, Stats., as being:

> (2) RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

Violations of Sec. 111.70(3)(a)1, Stats., occur when employer conduct has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec.111.70(2) rights. WERC V. EVANSVILLE, 69 WIS.2D 140 (1975). If after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec.111.70(2) rights, a violation will be found even if the employer did not intend to interfere and even if the employe did not feel coerced or was not in fact deterred from exercising Sec.111.70(2) rights. BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84). However, in recognition of the employer's free speech rights and

of the general benefits of "uninhibited" and "robust" debate in labor disputes, employer remarks which inaccurately or critically portray the employe's labor organization and thus may well have a reasonable tendency to "restrain" employes from exercising the Sec. 111.70(2) right to support their labor organization generally are not violative of Sec. 111.70(3)(a)1, Stats., unless the remarks contain implicit or express threats or promises of benefits. MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO 27867-B (WERC, 5/95). Similarly, employer conduct that may well have a reasonable tendency to interfere with employe exercise of Sec. 111.70(2) rights will not be found violative of Sec.111.70(3)(a)1, Stats., if the employer had valid business reasons for its actions. MILWAUKEE BOARD OF SCHOOL DIRECTORS, SUPRA.

As stated above, the Examiner has found that the County derivatively violated Sec. 111.70(3)(a)1, Stats., when it violated Sec. 111.70(3)(a)4, Stats. Complainant, however, has not demonstrated that the County has committed any other violation of Sec. 111.70(3)(a)1, Stats.

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

Complainant argues that the regular assignment of weekend work to Psycho-Social Workers is contrary to the clear language of Sec. 15.01(A) of the parties' 1994-95 collective bargaining agreement. Section 111.70(3)(a)5, Stats., recognizes that it is a prohibited practice for a municipal employer to violate a term of a collective bargaining agreement.

Generally, the WERC will not exercise its jurisdiction to determine the merits of breach of contract allegations in violation of Sec. 111.70(3)(a)5, Stats., where the parties' collective bargaining agreement provides a grievance procedure that culminates in final and binding arbitration. ROCK COUNTY, DEC. NO. 28494-A (JONES, 1/96); OOSTBURG JOINT SCHOOL DISTRICT, DEC. NO. 11196-B (WERC, 12/72). A grievance arbitration procedure is presumed to constitute a grievant's exclusive remedy unless the parties to the agreement have express language that provides it is not. MAHNKE V. WERC, 66 WIS.2D 524, 529 (1975).

The parties' expired 1994-95 collective bargaining agreement contains a grievance procedure that culminates in final and binding arbitration. Complainant's breach of contract claim is a grievance under the terms of the expired agreement. Since it is undisputed that Complainant did not file a grievance on the claimed breach of contract, Complainant has failed to exhaust the contractual grievance procedure.

There are certain exceptions that excuse the failure to exhaust the contractual grievance procedure such as the employer's repudiation of the grievance procedure, unfair representation by the union and futility. CITY OF MADISON, DEC. NO. 28864-A (CROWLEY, 1/97). None of these

exceptions are present in this case. As the Respondent argues, it is not appropriate for the Examiner to assert jurisdiction over Complainant's claim that the Respondent has violated a collective bargaining agreement in violation of MERA.

Dated at Madison, Wisconsin, this 7th day of August, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/
Coleen A. Burns, Examiner

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