

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**AFSCME COUNCIL 40, LOCAL 2484, AFL-CIO**

and

**LaCROSSE COUNTY**

Case 159

No. 54762

MA-9781

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Appearances:

**Mr. Daniel R. Pfeifer**, Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 18990 Ibsen Road, Sparta, Wisconsin 54656-3755, appeared on behalf of the Union.

**Mr. William A. Shepherd**, Corporation Counsel, LaCrosse County, 400 Fourth Street, North, LaCrosse, Wisconsin 54601-3200, appeared on behalf of the County.

**ARBITRATION AWARD**

On December 27, 1996, the Wisconsin Employment Relations Commission received a request from AFSCME Council 40, Local 2494 and LaCrosse County to appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. An evidentiary hearing was conducted on April 30, 1997 in LaCrosse, Wisconsin. The proceedings were not transcribed. Briefs were submitted and exchanged by September 2, 1997.

This arbitration addresses the right of the County to subcontract social work.

**BACKGROUND AND FACTS**

The County and Union are signatories to a collective bargaining agreement, the relevant portions of which are set forth below. The bargaining relationship goes back many years. The collective bargaining provision in dispute in this proceeding was first negotiated into their 1973 contract. Sometime in late 1995, Sue Pfeifer, Union president, discovered that the County was subcontracting with an organization named Riverfront, Inc. for Vocational Specialists and

professional Case Managers to provide services under the auspices of the County's Community Support Program. Pfeifer discussed the matter with Mary Speltz, a co-worker and former Union president, and concluded that this subcontracting violated the collective bargaining agreement.

On February 7, 1996, Speltz filed a grievance, which alleges the following:

"Approximately nine (9) contractual employees from Riverfront, Inc. have been performing duties normally performed by social workers in the bargaining unit. . . The above-contracted employees are housed in the Department of Human Services, LaCrosse County. . ."

The grievance was denied, appealed through the grievance procedure, and has led to this proceeding.

The LaCrosse County Human Services Department exists for the purpose of administering to the needs of the dependent, infirm, aged, disabled and delinquent. The Community Support Program, a program serving people with serious and persistent mental illness, falls within the Department of Human Services. The Community Support Program (CSP) was developed and guided by Thor Sundberg, its only program manager. It was Sundberg's uncontradicted testimony that in approximately 1976 he initiated a community outreach program and began to work with his clients in their homes, with the assistance of a Nurse. No bargaining unit members worked in the nascent CSP program.

The program grew, and in 1978 a second position was added. Two aide positions were added in January, 1980.

Notwithstanding the growth in the program, the County Board was reluctant to authorize additional positions. Sundberg found it more expedient to contract for Community Support Program positions. He turned to ORC Industries, Inc. for purchase of a Vocational Specialist to work in the CSP. According to Thorsen, ORC Industries had the experience the County lacked, and contracting out proved a path of less resistance.

In November of 1985, the LaCrosse County Human Services Board determined to contract out for social worker services with Riverfront, Inc. The first of several contracts was a purchase of services contract entered into with Riverfront running from January 1 to December 31, 1986. The services purchased were those of a field worker to work in the CSP program. The contract was renewed in 1987 and involved a single position, that of field worker. Contracts with Riverfront were renewed annually from their 1986 origin through and including 1997. The number of positions grew over the course of time, and by 1997 included at least nine positions which are the subject of this dispute.

In 1989, four CSP employees were accreted into the then-existing collective bargaining unit. Prior to that time, there were no bargaining unit members in the CSP program. At the time of their accretion, there continued to exist two contracted employees supplied by Riverfront. The professional CSP workers accreted into the bargaining unit were titled Field Workers in 1990-91. In 1992 those employees were reclassified to Social Worker.

As of the date of the hearing, there were four Social Worker I bargaining unit employees and one AODA bargaining unit employee. As of the same date, there were two Riverfront supervisors, four Case Managers, and five Vocational Specialists. There is no meaningful dispute that the Case Manager position is the equivalent of the Social Worker position. Social workers employed by the County do not perform the kinds of vocational tasks assigned Vocational Specialists. There was a dispute as to the job content of the five Vocational Specialists. All five testified in this proceeding. All five essentially testified that 80 percent of their workload consisted of case management. I believe the great majority of work of the Vocational Specialists to be case management, work which parallels that performed by Social Workers employed by the County.

There were no new bargaining unit positions created since 1989. In that time, there has been no reduction in the number of bargaining unit positions which has grown to four. The workload has grown steadily, and has been met with contracted employees. Since 1986, there have been 20 Riverfront Social Worker employees employed.

Riverfront employees are housed in the same building as are CSP employees. The employees' mailboxes are in the same room and are arranged alphabetically, leading to an intermingling of employees of the County and employees of the contractor. The record establishes that Speltz knew the Riverfront employees were employed under the terms of a contract with the County. Three County employees were formerly Riverfront employees. Two were hired in 1994, one in 1995.

Notwithstanding the foregoing, it was the testimony of Sue Pfeifer that she was not aware that there were contracted employees. Pfeifer testified that they were not on the seniority list provided the Union. Pfeifer testified that she talked with Nikki Gyllander, Director of Human Services, who indicated "I cannot believe the Union hasn't picked up on this before now."

Gyllander testified that the County contracts with numerous private entities for the provision of case management/social work services. Gyllander produced an extensive list, and highlighted 15 organizations, with whom the County has contracts totalling over \$100,000, and which involve the provision of case management and/or social worker services. The majority of these arrangements have been in effect since before Gyllander was employed, in 1989. It was her further testimony that

County employed Social Workers, have travelled to the site of work performed by contracted Social Workers and worked together with their clients. She further

Page 4  
MA-9781

testified that at times employees of Gundersen Lutheran were housed in a County facility. It was her further testimony that employees of the Coulee Youth Center performed a good deal of their work in a County facility.

### **ISSUE**

The parties could not agree upon the issue. The Union states the issue to be:

Did the County violate the collective bargaining agreement by contracting out Community Support Program Case Manager and Vocational Specialist work to Riverfront, Inc.? If so, what is the appropriate remedy?

The County states the issue to be:

Did LaCrosse County violate the collective bargaining agreement by contracting out Community Support Program (CSP) services?

I agree with the Union's statement of the issue.

### **RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT**

#### **ARTICLE II**

#### **ADMINISTRATION**

- 2.01 Except as otherwise provided in this Agreement, the County retains all the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, transfer, demote, or suspend or otherwise discharge or discipline for proper cause; the right to decide the work to be done and location of work; to determine the services to be rendered, the materials and equipment to be used, the size of the workforce, and the allocation and assignment of work for workers; to schedule when work shall be performed; to contract for work not normally performed by Social Workers, and for services and materials; to schedule overtime work; to establish or abolish a job classification; to establish qualifications for the various job

classifications; and, to adopt and enforce reasonable rules and regulations. The current practice regarding contracting Nurses shall continue, provided that the County shall not establish any new contract with a Registered Nurse which would result in the layoff of a bargaining unit Nurse. The County shall retain the right to subcontract, provided

Page 5  
MA-9781

however, that the County shall not establish any new contract which would result in the layoff of a Health Educator, Nutrition Educator or Lab Technologist. 1/

### **POSITIONS OF THE PARTIES**

It is the Union's position that this decision turns on the meaning of Article II, Section 2.01. ". . .The County retains all the normal rights and functions of management. . .This includes the right. . .to contract for work not normally performed by Social Workers and for services and materials. . ." The Union takes issue with the Employer's characterization of its practice of contracting out. Prior to 1989, employees of the CSP were not bargaining unit members. The Union contends that no practice can pre-date 1989. Furthermore, the Union contends that contracts with other agencies to provide services to the County are not on point in this dispute. Riverfront provides employees, not services, to the County.

The Union does not take issue with the County's lawful authority to contract with Riverfront. It argues, however, that such authority must be exercised consistently with the terms of the collective bargaining agreement.

The Union contends that its prior presidents, Mallory and Speltz were both new employees, and new to the union. The Union points to testimony indicating that management representatives advised Union officials that the County had a right to do what it was doing, and Union officials believed these representations. The Union points to Gyllander's remark and contends that it and the representations noted above demonstrate a lack of good faith on the part of the County. The Union contends that with a bargaining unit consisting of 300 people, the mere fact that contracted employees worked in a common area should not be sufficient to impute knowledge to the Union. Finally, the Union contends that the only reasonable interpretation of Article 2.01 is that if the County can contract for work not normally performed by Social Workers, then it cannot contract for work normally performed by Social Workers. The Union contends that the language is clear and unambiguous, rendering other arguments superfluous.

It is the view of the County that its managements rights clause reserves to the County those rights that it has by law. Among those rights include a mandate to establish a Community Support Program. Wisconsin statutes authorize the County Department of Community Programs to "enter into contracts to render services, or to secure services from other agencies or resources including

out-of-state agencies or resources." Wis. Stat. Section 51.42(3)(ar). The County concludes that it has the statutory authority to contract for CSP services.

The County contends that it has not relinquished its management right to contract for CSP services. Nothing in Article 2.01 expressly prohibits the County from contracting for the services of Social Workers. The managements rights clause reserves to the County without any limitation, any right not specifically relinquished. Among those rights includes the right to

Page 6  
MA-9781

contract for services. In support of its claim, the County lists the various organizations with whom it has purchase of services contracts for social worker services. The County contends that should I grant the Union's grievance the ability of LaCrosse County to provide numerous mandated services to its citizens would be seriously impaired.

The County argues that should I determine that the contract provision is ambiguous, the County's right to contract for services is supported by the past practice of the parties. The County points to its history of contracting with Riverside, and its other various agreements, and citing arbitral authority, contends that it has established a long-standing practice of contracting for Social Workers.

The County contends that its various contracts with Riverfront have not undermined or endangered the bargaining unit. In support of this claim, the County indicates that it has proceeded to contract based on sound business and program needs. The CSP program has grown, and in so doing has served an increasing number of clients, and has resulted in the hire of additional County employes. It is the view of the County that should the various contracted Social Workers be eliminated, current bargaining unit members would not be able to handle the resultant workload.

### **DISCUSSION**

Section 2.01 entitles the Employer to: ". . .contract for work not normally performed by Social Workers. . ." On its face, the language implies that the Employer cannot subcontract out work that is performed by social workers. This is the prime argument advanced by the Union in this dispute. However, the context in which this argument is made includes the fact that the CSP was not meaningfully regulated at the time the language was contractualized. In 1973, there were no bargaining unit members in the CSP. At that time, the subcontracting restriction had no practical consequence for the operation of the CSP during its early years. The parties have subsequently reiterated the County's right to subcontract, subject to certain specific limitations, in the last sentence of Section 2.01.

Subcontracting began in approximately 1982 with a contract with ORC for services. The

first contract with Riverfront was signed in late 1995 and existed for calendar year 1996. It was not until 1989 that the first CSP employees were accreted into the bargaining unit. Between 1973 and 1989 (or 1992 when the CSP employees were reclassified to social workers) no CSP work was "normally performed by social workers".

This is the environment in which the County entered into early contracts with Riverfront. The addition of the last sentence in Section 2.01 is general and would normally give way to the more specific provision found in the original paragraph. However, the reiteration of this

Page 7  
MA-9781

subcontracting right appears to have occurred in an environment where the employer was subcontracting social work in the CSP.

I believe the provisions of 2.01 are sufficiently ambiguous, under all the circumstances surrounding this dispute, to permit an examination of the practice by the parties.

The Union contends that pre-1989 events ought not be treated as a practice binding against the Union. Assuming that to be the case, it is certainly evidence of the Employer's view of its rights. By 1989, four CSP workers had been accreted into the unit. Riverfront was a signatory to its fourth annual contract in 1989. By 1992, certain CSP positions had been reclassified to social worker. The Riverfront subcontracting was in its seventh year as of 1992, and was growing. In 1994, two Riverfront employees were hired into the CSP. Another was added in 1995.

During this entire period of time, the subcontracted employees and County employees worked in a common building and shared a common mailbox area. I believe a strong practice involving a fundamental condition of employment and the essence of the operation of the Department exists. The practice is unequivocal. There is no doubt as to what this employer did. Subcontracting occurred prior to the existence of bargaining unit employees in the CSP. The Employer's action was open and obvious. The core substance of the CSP unit work was performed by non-bargaining unit employees.

The practice was clearly enumerated. The contracts with Riverside were the product of open meetings/open records regulation. Contracted employees openly performed Case Manager work.

The subcontracting period with Riverside began in 1985 and ran uninterrupted to 1997, a period of 12 years. Each year, the contract grew in size, the number of contracted employees grew in number. Contracts were renewed annually. Bargaining unit members and subcontracted Social Workers were intermingled. Their mailboxes were arranged alphabetically. They had an essentially common worksite. Ms. Speltz, prior president of the union, was aware of the existence of subcontracted Social Workers. By 1994, there were bargaining unit members who had previously been employed as subcontracted employees. I credit Gyllander's testimony that bargaining unit

members and subcontracted Social Workers worked together in certain projects.

It is my conclusion that the Union knew of the subcontracting and acquiesced.

The consequence of the foregoing is that notwithstanding the language found in Article 2.01, the CSP program has evolved in a fashion which draws its primary social worker component from Riverfront. I believe the Union had a much stronger case in 1985, 1989, or 1992; but failed to bring that case forward. Now, the consequence of the Union's prevailing in this matter include the potential destruction of the CSP program, and a significant impact on

Page 8  
MA-9781

the contract existing between the County and Riverfront. I am unwilling to bring about that result. I regard the Union as estopped from making such a claim.

It is my conclusion that the provisions of Article 2.01 are sufficiently ambiguous as to warrant an examination of the historic practice in this dispute. I believe the practice overwhelmingly supports the Employer's position. It is my conclusion that the County does not violate the collective bargaining agreement by contracting out Community Support Case Manager/Vocational Specialist work to Riverfront. This award is intended to be specific to this question.

### **AWARD**

The grievance is denied.

Dated at Madison, Wisconsin, this 23rd day of February, 1998.

William C. Houlihan /s/  
William C. Houlihan, Arbitrator



**ENDNOTES**

1/ This Article is identical to that which appeared in the parties' 1973 Agreement, with the exception of the last two sentences. Those sentences did not exist in the 1973 Agreement, and have apparently been incorporated into the Agreement subsequent to 1973.

