

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**ASSOCIATION OF MENTAL HEALTH SPECIALISTS**

and

**ROCK COUNTY**

Case 324  
No. 58531  
MA-10979

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Appearances:

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

**Mr. Eugene R. Dumas**, Assistant Corporation Counsel, Rock County Courthouse, 51 South Main Street, Janesville, WI 53545, appearing on behalf of the County.

**EXPEDITED ARBITRATION AWARD**

The parties named above jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned to hear a dispute and issue an expedited arbitration award over the transfer of intake work. A hearing was held on February 15, 2000, and the parties filed briefs by March 8, 2000. The parties agreed that an arbitration award would be rendered by April 3, 2000.

**ISSUE**

The parties stipulated to the following as the issues to be decided:

1. Whether the County's contemplated and realized decisions to transfer the after-hours intake work from the Juvenile Probation Officers or Child Protective Services employees, or both, to Crisis Intervention workers to perform such work violate the collective agreement? If so, what should the remedy be?

2. Whether the County's contemplated and realized decisions to transfer the after-hours intake work from the Juvenile Probation Officers or the Child Protective Services employees, or both, to Crisis Intervention workers to perform such work violate Section 111.70, Wis. Stats? If so, what should the remedy be?

### **BACKGROUND**

This dispute centers around the County's decision to transfer the after-hours intake work from the Juvenile Probation and Child Protective Service employees and give that work to Crisis Intervention employees. There are about eight Crisis Intervention workers, some of them part-timers.

A quick bit of the history of the bargaining unit. The Child Protective Service employees had previously been in a unit of Social Workers represented by the Machinists. The Juvenile Probation officers were in a unit by themselves and represented by the Teamsters. The Crisis Intervention workers were in a unit with nurses and represented by the Association, or AMHS herein. The Wisconsin Employment Relations Commission combined the units in the Human Services Department in February of 1997, and AMHS became the bargaining representative of the bargaining unit involved in this case in a directed election.

Judy Schultz has been the president of the Association for four terms, and she took part in negotiating the 1996-97 collective bargaining agreement that covers the bargaining unit as currently composed. She recalled the bargaining over the language at issue for intake procedures and the use of volunteers or using seniority if there were not enough volunteers. Schultz recalled that she proposed that all members of the unit to be voluntarily trained for intake duties. In November of 1999, Schultz learned that the Crisis Intervention workers were to be a backup service for Juvenile Probation intake after-hours, and that they would be required to go to juvenile justice training in January and February of 2000 and begin intake work in April of 2000.

Schultz recalled that in bargaining during 1987 and 1988, the crisis intervention and adolescent services programs were being developed. The hours and shift differentials were negotiated at that time, with a 35 cents per hour differential and an 11-7 shift that correlated with nurses on the 5<sup>th</sup> floor. The hours for Crisis Intervention workers were later changed to 8:00 p.m. to 4:00 a.m. because of a lack of use between 4:00 and 7:00 a.m. When Crisis Intervention workers are not on duty, nurses on the 5<sup>th</sup> floor psychiatric unit answer the phones.

Arbitrator William Houlihan ruled in September of 1999 that the County was to reimburse employees for wages lost as a result of the change in the administration of Section 15.08(E). During negotiations for the current contract, the Association made proposals to work out payment of Section 15.08, and at that time, the Association learned that

the County intended to transfer the intake work to Crisis Intervention workers. Schultz testified that she filed a grievance because someone in Child Protective Services was not paid in accordance with the Houlihan Award. CPS Supervisor Sally Biddick sent a memo saying that as a resolution to the grievance, the work would be transferred to Crisis Intervention.

Crisis Intervention workers will have to take additional college courses to be qualified to perform intake duties. On April 29, 1999, the County Personnel Director, Karen Galbraith, sent a memo to Schultz listing the priority for employees to be trained for intake, which included Crisis workers. Schultz thought that all training was on a voluntary basis, and filed an objection in July of 1999.

Jon Moldenhauer is a Juvenile Probation Officer with the County. The job description for his position requires previous professional experience with the juvenile justice client population. Moldenhauer explained that he has to assess a juvenile, the juvenile's family and the offense committed to decide whether to detain or release the juvenile. That's part of the intake duty responsibilities as well. Moldenhauer takes calls while on after-hours intake duty and in certain types of offenses, meets with the juvenile and law enforcement officers. The list of duties and responsibilities includes responding by phone and in person, and being available to appear in court for detention hearings if they put someone in custody.

Jody Kliscz is a Social Worker II connected with Child Protective Services. This position requires one to be a certified Social Worker or certifiable within a year. Kliscz works with the family preservation team that helps keep children in their homes and makes conditions safer for them. Kliscz and another co-worker handle after-hours intake for the family preservation project, working as a team with Kliscz taking the lead. They have a relationship with families that they've been working with. Kliscz has also done Child Protective Service after-hours intake, which ranges from taking phone calls, taking physical custody of a child, going out to assess whether a child is safe, removing a child, transporting and placing a child in a foster home, etc.

Darla Denman is a Crisis Intervention worker and a certified Social Worker. Not all of the Crisis Intervention workers are Social Workers. Denman works a night shift from 4:00 p.m. to 12:30 a.m. when two Crisis workers are on duty. There is only one Crisis worker on duty between 12:30 a.m. and 4:00 a.m., as well as from 7:30 a.m. to 2:00 p.m. There is no Crisis worker on duty between 4:00 a.m. and 7:30 a.m. The Crisis workers have a variety of duties, including taking phone calls from people seeking referrals or services, pursuing protective custody in certain cases, making suicide assessments, delivering medications and welfare checks, screening admissions to the Rock County Psychiatric Hospital, etc. The job description for Denman's position requires a minimum of one year of experience working with adults who have severe and persistent mental illness. Denman was not required to be trained as a Juvenile Probation Officer and does not provide juvenile intake work, child protective services or family preservation services.

Rebecca O'Leary is a Crisis Intervention worker but not a certified Social Worker. She does not believe she could be certified in a year due to the credits needed for the social work certification program. She has been in her position for four years, and there was no requirement when she started that she become certified as a Social Worker or a Juvenile Probation Officer.

Crisis Intervention workers were told in a meeting on November 2, 1999, that juvenile intake training would be held in January and February, and that it was required training for Crisis workers as a new part of the job.

Donald Mulry is the Director of the Human Services Department. He reports to the County Administrator, Craig Knutson, and to the Human Services Board that reports to the County Board. Mulry is responsible for making policy and budgets for the Department. On August 20, 1997, Mulry submitted his budget requests for 1998, which indicate that he was looking into reducing overtime expenses for after-hours work and looking into having Crisis workers certified for billing purposes. Mulry noted that there were three intake systems – Crisis, Juvenile Justice, and Child Protective Services. He wanted to combine them but would have to upgrade Crisis workers. Mulry testified that the Knutson did not agree to add enough Crisis workers to combine the intake systems for 1998. Mulry reintroduced the proposal for 1999. He wanted to start transferring intake duties from Probation Officers and Child Protective Service employees by July 1, 1999. Knutson's written comments for the 1999 budget noted that the Department asked for three case manager positions to be added to the Crisis Intervention Unit. That would allow the Crisis workers to handle juvenile intake after-hours and eliminate the need to pay a Social Worker to be on call after regular hours.

One of Mulry's goals was to have one point of contact for after-hours services. He also wanted the bill third parties and Medical Assistance to pay for more caseworkers. The target date of July 1, 1999, to transfer work to the Crisis workers passed, and the new target date is April 3, 2000. Mulry testified that Crisis workers would first start taking after-hours intake calls for Probation, and when that is up and running, they would start taking intake calls for Child Protective Services. Mulry thought that an initial screening would be handled by a Crisis worker, and then a second person such as a Child Protective Service worker would be covered by the intake procedure in Section 15.08 of the collective bargaining agreement. One of the purposes of the planned transfer of work would be to save money by reducing the payouts for after-hours intake under Section 15.08. The effect would be that Juvenile Probation Officers and Child Protective Service employees would earn less money for after-hours intake. Mulry testified that the main purpose was to improve services to families in the community.

On October 7, 1999, the Association filed a grievance on behalf of Jody Kliscz for compensation for after-hours coverage. Mulry received that grievance in late January or early February of 2000 in Step 2 of the grievance procedure, and granted the grievance. After the grievance was filed, the work was removed from Child Protective Service employees and given to Crisis Intervention workers. Work previously performed by bargaining unit members is now performed by supervisors if necessary.

On December 8, 1999, the Association filed a grievance over requiring Crisis Intervention workers to train for work performed by Juvenile Probation Officers. On December 9, 1999, the Association filed a grievance over requiring Crisis Intervention workers to train for work performed by Child Protective Services team Social Workers and family preservation Social Workers.

Mulry has been present during the current negotiations and testified that the County has not refused to negotiate the impact of the proposal to combine all intake systems and have Crisis workers handle after-hours intake. He testified that he thought he could change the *status quo* without reaching an agreement with the Association on this matter.

Sally Biddick is the Division Manager for Child Protective Services. She testified that a combined phone number for after hours services would be efficient, and if there is a need for face-to-face contact, a Child Protective Services Social Worker and supervisor should be available. Biddick testified that Jody Kliscz was the after-hours intake person at least once a month or so because she was working with families in the family preservation program on a regular basis. Biddick sent a memo out on November 22, 1999 that in response to the recent grievances, the plan to cover the family preservation team's on-call duties would be assumed by Crisis Intervention on November 29, 1999.

### **THE PARTIES' POSITIONS**

#### **The Association**

The Association asserts that the language of Section 15.08 of the bargaining agreement sets forth in comprehensive detail the parties' agreement concerning after-hours intake procedures for Child Protective Services and Juvenile Justice, as well as the employees who shall perform that work, their hours and their compensation. Section 15.08 also authorizes the County to assign qualified employees on a rotating basis starting with the least senior employee if there are too few volunteers.

The Association states that the parties rejected the procedure the Machinists and the County adopted to handle Child Protective Services after-hours intake – a voluntary system that gave the County the authority to install a shift system if the voluntary system failed to provide coverage. In exchange for the Association's commitment to ensure there would be sufficient employees to cover 24 hours, the County gave to up the right create shifts for after-hours intake work. The parties also agreed to change the Teamsters' procedure that permitted the County to designate on an equitable basis the employee who would handle Juvenile Justice after-hours intake.

Under the County's plan to transfer this work to Crisis Intervention workers, the after-hours intake work will no longer be voluntary, and the Crisis workers will not receive any additional compensation for performing the work. Section 15.08 would no longer apply to

Juvenile Justice work and would only apply when Child Protective Services employees go to the site once a Crisis worker determines that a child may be in danger. Thus, the County has repudiated Section 15.08 and intends to substitute a different method of handling after-hours intake than what was agreed to. The County argues that Section 15.08 is permissive language, that having Crisis workers handle calls is a matter primarily related to the policy and direction of the Department. Therefore, the County will only negotiate the impact of its decision to transfer the work, not the decision itself, and it is not willing to maintain the *status quo* during negotiations.

The Association points out that nothing in the WERC's decision creating the existing unit supports the County's position on the transfer of work. The Association states that even if portions of Section 15.08 were permissive (and it is not), the County would still be required to comply with Section 15.08 as long as the collective bargaining agreement remains in effect. A party has no more right to violate an agreement on a permissive subject of bargaining than it has to violate an agreement on a mandatory subject of bargaining.

The Association would object to the County's argument that Section 15.08 is evaporated on January 1, 2000, and points to Section 26.05 which states that the agreement shall be continued in full force and effect until a new agreement is reached. Thus, actions the County plans to take after January 1, 2000, must conform to Section 15.08, even if portions of it were permissive subjects of bargaining. Moreover, the County cannot unilaterally change the hours of bargaining unit employees, nor may it mandate overtime for Crisis workers.

Section 15.07 sets forth the shifts for Crisis workers and the shift differential, the Association notes. The County now plans to add additional shifts to cover the period from 4:00 a.m. to 8:00 a.m., despite the fact that it gave up the right it had under the Machinists' contract to create shifts covering after-hours intake. The County's plan to unilaterally determine a shift differential is contrary to Section 15.07, as well as the practice of the parties.

Turning toward potential statutory violations, the Association argues that the County's unilateral actions violate its duty to bargain in good faith and maintain the *status quo* during negotiations with regard to mandatory subjects of bargaining. The legality of the County's actions under Sec. 111.70, Stats., turns on whether the portion of Sec. 15.08 specifying after-hours intake work shall be performed by Child Protective Services employees and Juvenile Probation Officers is a permissive or a mandatory subject of bargaining.

The Association maintains that the County's plan is mandatory. The policies and functions of the County in providing 24-hour intake service are unaffected by the decision of who shall perform the work. State law determined those policies and functions. The County now merely wants to substitute Crisis workers for Child Protective Service employees and Juvenile Probation Officers. Even if the matter of who does the work were a matter significantly related to questions of management prerogative, the Arbitrator would have to balance the interest of the County with employees' interests in bargaining wages and conditions of employment.

Accordingly, the Association continues, the transfer of work has a negative impact on the earnings of Juvenile Probation Officers and Child Protective Service employees. The adverse impact on Crisis Intervention workers is the greatest. They must take special training in two disciplines and become certified to perform intake in Child Protective Services or certifiable within a year. Those Crisis workers who are not certified and who cannot become certified within the year may lose their jobs. Without a doubt, the shifts Crisis workers work and the shift differentials they receive are mandatory subjects of bargaining. The transfer of work affects several mandatory subjects of bargaining that the parties have agreed upon in Sections 15.01, 15.03, 15.07 and 15.08.

The Association contends and another reason the transfer is a mandatory subject of bargaining is because a municipal employer may only unilaterally assign duties which fall fairly within the scope of an employee's regular job duties. Here, the duties of the Juvenile Probation Officers and Child Protective Services employees are clearly outside the scope of the Crisis Intervention workers, and therefore, the County must bargain over the change. The Crisis workers have never done this work and must get special training to do it.

Finally, the Association asserts that the County's actions are in retaliatory. In November of 1997, Mulry asked for more positions to have Crisis workers handle all calls, but the County Administrator denied the request. On September 2, 1998, the Association filed a grievance over the County's refusal to pay Child Protective Service employees and Juvenile Probation Officers certain compensation. Shortly thereafter in November of 1998, the County Administrator recommended that more Crisis workers be hired to eliminate the need to pay Social Workers overtime for after-hours work. On October 7, 1999, the Association filed a second grievance about paying a Child Protective Service employee certain compensation for after-hours intake. The County swiftly transferred the family preservation team's "on call" to Crisis Intervention workers in November of 1999.

The Association concludes by stating that the Arbitrator should rule that the County's actions and plans violate Sections 15.01A, 15.03, 15.07, and 15.08 of the collective bargaining agreement, as well as Sections 111.70(a)1, 3, 4 and 5, Wis. Stats. The Association asks for a cease and desist order preventing the transfer of after-hours intake work, as well as returning the work of after-hours intake of family preservation to Child Protective Services until there is a new agreement permitting such transfers.

### **The County**

The County contends that its proposal for a single point of contact after-hours intake human services program is a permissive subject of bargaining. The proper test is a balancing test of competing interests. If the employees' legitimate interest in wages, hours and conditions of employment outweighs the employer's concerns about the restriction on managerial prerogatives or public policy, the proposal is a mandatory subject of bargaining. If the management and direction of the governmental agency or the formulation of public policy

predominates, the matter is not a mandatory subject of bargaining. The impact of the implementation of permissive subjects of bargaining is a separate issue from the policy decision, and the County has consistently been willing to bargaining the impact of its proposed policy change.

The County has made a policy decision to attempt to offer after-hours intake services through a single point of contact staffed by qualified employees during the normal working hours. This will provide a higher quality service to citizens and contribute to better coordination with other agencies such as law enforcement. The effect that the proposal has in reducing expenses hardly compares in significance with the implications for service delivery, the County asserts.

Contrary to the Association, the County states that the record does not support the notion that the proposal arose from the Houlihan Award nor from the filing of the grievance in that or any other case. The proposal has evolved as it made its way through the formal budget process. Looking back from 1980, the County states that the record shows ongoing efforts to evaluate the Human Services Department staffing and programs in terms of cost effectiveness and service delivery as part of the budget process. The plan for increasing Crisis Intervention staff functions was under consideration by August of 1997.

The County believes the record shows that the issues consist largely of attempts by the Association to preserve separate realms of work and compensation which are inconsistent with the existing statutory Human Services Department model for which the County applied and received State approval to establish in 1994, along with the bargaining unit structure established by the WERC in 1997. The County believes that what is truly being arbitrated here is whether the public policy choices may be thwarted by the insistence of the Association based on narrowly conceived visions of separate self interest.

The County asserts that its proposal will substantially improve service by having just one number to call to assist law enforcement officers, family members and others trying to get help for children. It is often unclear to parties seeking assistance what type of services they should seek. One number will be provided to receive intake calls outside normal working hours, which will put callers into contact with trained staff. Mulry testified how he looked at the three intake systems and wanted to combine them. Law enforcement people told him that there was some confusion and an inability to get a hold of workers through the paging system. Biddick's testimony offered more support that the proposal is a *bona fide* matter of policy and judgment as to how best to improve the services offered by the County. Biddick testified that improvement in service was more important than just the dollars that might be saved, and the Crisis workers could handle the intake functions as long as Child Protective Service employees remained available on call.

Sperling's testimony further supported the reasonableness and advantages of the single point of contact proposal. Guisleman identified factors that convinced him that the Crisis workers are appropriate to handle intake calls for Juvenile Probation Officers and Child



Protective Service workers. He noted that Crisis workers have always handled calls regarding children and determined what type of services were needed. The County submits that Moldenhauer's testimony speaks volumes in supporting the conclusion that the employees obstruct change. His testimony explains why the Association has refused to negotiate the impact of the proposal.

The County contends that its proposal has less of an impact on wages, hours and conditions of work than it has on policy and service delivery. The Association has not shown that the County is making a radical change, and intake has always involved a need for all employees to be able to perform a basic level of screening and recognize matters that call for specialization outside their own areas of expertise. The degree of change in the work performed by Crisis workers is relatively minor. The County has also recognized that additional staffing would be needed, and while some staff has been added, there are limits to resources available to deliver all the types of services needed by citizens.

The County further asserts that the record reveals that Crisis workers have had to make professional judgments about children who are referred by law enforcement or family members. In other instances, Crisis workers become aware of children in a home or family affected by a person brought to their attention for psychiatric screening. Crisis workers testified that they were commonly asked to assess children in the non-secure youth shelter facilities, many of whom had been placed there by Juvenile Probation Officers. Thus, the record shows that Crisis workers have historically had to make intake and screening determinations regarding children. Moreover, the County has made a commitment to see that Child Protective Service employees continue to be available and assigned to intake where an initial intake indicates that child abuse or neglect is an issue. The County has always intended to comply with Section 15.08 to compensate employees who perform intake duties outside their regular hours.

The County claims that its proposal does not violate any provision of the collective bargaining agreement. There is no language in Section 15.08 that indicates that the procedure established by that section is exclusive. There is no language in the bargaining agreement that indicates that no policy or practice can be adopted by the County which would have the effect of reducing the potential earnings of bargaining unit members. Employees would continue to have opportunities to participate in backing up the Crisis workers, and the after-hours intake procedure to Juvenile Probation Officers may also have to be used in the future. Section 15.08 does not guarantee wage-earning opportunities.

Section 15.01 of the contract is not violated, the County states, as Crisis workers are recognized as a distinct class of employees with more flexible scheduling requirements. The County's proposal will not result in any new job descriptions, since the required qualifications for hire and general duties of Crisis workers as described in current job descriptions are not affected.

The County argues that it has not violated any statute, because it has simply developed a proposed course of action regarding a permissive subject of bargaining and has given the Association a chance to negotiate the impact of the plan. The testimony of the bargaining unit members was that the County was making poor choices. The County has the right under the Management Rights clause in Section 2.01 to determine the methods and processes and manner of performing work.

The County asks that the Arbitrator declare its proposal a permissive subject of bargaining and find no violation of any lawful obligation.

### DISCUSSION

The relevant contract language includes a section under Article XV of the 1998-1999 collective bargaining agreement, called "Hours of Work, Classification, Premium Pay":

15.01 A. Regular Workweek. The regularly scheduled workweek for full-time employees shall be forty hours per week, 8 or 10 designated daily hours (10 hr./day, 40 hr. Monday-Thursday), excluding regularly scheduled hours on Saturday and Sunday. Any permanent change for employee, unit, classification or employees in said hours will be mutually agreed upon by the employee/employees, administration and the union. Any employee may request a flexible change in schedule in any two week time/pay period with approval from his/her supervisor.

...

C. Crisis Workers. Regularly scheduled work week of full time workers will be a total of eight hours within a regularly recurring fourteen day pay period.

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#### 15.07 Shift Differential – Crisis Intervention Unit.

Crisis Intervention Unit – The following shift differential schedule is established:

1. Full-time personnel whose regular hours of work are 1:45 p.m. to 10:15 p.m., shall receive \$2.00 per hour in addition to their regular hourly rate.
2. Full-time personnel whose regular hours of work are 8:00 p.m. to 4:00 a.m., shall receive \$2.00 per hour in addition to their regular hourly rate.

3. All personnel working part-time during the hours specified in (1) and (2) above shall receive the differentials cited above.

15.08 An after hours intake procedure for Protective Services and Juvenile Justice and all those employees whose job duties include carrying a pager is established in accordance with the following:

After hours are designated as:

Monday, 5:00 pm to Tuesday, 8:00 am	(15 hrs.)
Tuesday, 5:00 pm to Wednesday, 8:00 am	(15 hrs.)
Wednesday, 5:00 pm to Thursday, 8:00 am	(15 hrs.)
Thursday, 5:00 pm to Friday, 8:00 am	(15 hrs.)
Friday, 5:00 pm to Saturday, 5:00 pm	(24 hrs.)
Saturday, 5:00 pm to Sunday, 5:00 pm	(24 hrs.)
Sunday, 5:00 pm to Monday, 8:00 am	(15 hrs.)

A. All Non-Nursing Professionals will be trained to perform intake duties. The County will provide in-house training at no cost to the employee.

B. Pagers will be provided by the County to all employees on call during after-hours.

C. An initial schedule will be established covering a minimum three (3) month period of time. Such schedule may be lengthened to meet the needs of the employees. Using seniority, employees who have been trained may sign up for after-hours duty on a daily or weekly basis for any after-hours shifts during the schedule period. The maximum number of days scheduled in succession will not exceed seven (7) days. If no employee signs up for on-call duty, employees will be assigned on a rotating basis starting with the least senior employee.

D. In addition to the normal scheduled work hours, employees will be paid \$3.41 per hour for hours they are on-call. Employees will be paid \$3.41 per hour for hours they are on-call on holidays.

E. Employees required to respond to after-hours intake duties during their off hours shift will be paid at the applicable overtime or compensatory times rate, however, no less than a minimum of one (1) hour.

F. A back-up pool of volunteers will be established to provide coverage if the employee scheduled cannot be available.

The above sections were negotiated when the bargaining units were combined. The 1994-1995 labor agreement between the Teamsters and the County provided that: "Probation

Officers shall be designated Intake Workers on a revolving schedule and said assignments will be made on an equitable basis . . .” The 1994-1995 labor agreement between the Machinists and the County provided for a voluntary after hours intake procedure.

I agree with the Association that the parties have negotiated a comprehensive procedure for after-hours intake that designates who will do the work and how they will be compensated for doing it. The County cannot take that work away from two groups of employees, give it to another group of employees, designate new shifts, determine levels of compensation, all without bargaining a resolution of this matter. To do so violates Sections 15.01, 15.07 and 15.08. The creation of any new or different shifts to cover after-hours would also violate Sections 15.01A, 15.07 and 15.08.

The requirement that Crisis workers be trained to perform intake duties does not violate Section 15.08A, since the language does not state that all non-nursing professionals may be trained to perform intake duties. Rather, it says that all will be trained. These parties are well-known to this Arbitrator, and they are sophisticated enough to know that the language used in Section 15.08A is not voluntary language but mandatory language.

The parties both ask for a decision on whether the planned transfer of work is a mandatory or permissive subject of bargaining, because they correctly assess their duties to bargain or maintain the *status quo* turns on this determination. Absent a valid defense, a unilateral change in the *status quo* of wages, hours, or conditions of employment during negotiations of a first collective bargaining agreement or during the hiatus period between bargaining agreements is a *per se* violation of the duty to bargain in Sec. 111.70(3)(a)4, Stats. NORTHWEST UNITED EDUCATORS VS. ST. CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-B (BURNS, 1/93), *aff'd* CT.APP. (1994). In disputes subject to final and binding interest arbitration, the statutory duty to bargain requires that the parties maintain the *status quo* on mandatory subjects of bargaining until a settlement or arbitration award is reached, but there is no such duty regarding permissive subjects of bargaining.

Therefore, the resolution to the issue of whether the County may legally make a unilateral change and transfer the intake work depends on whether it is a mandatory or permissive subject of bargaining. A mandatory subject of bargaining relates primarily to wages, hours and conditions of employment. A permissive subject relates primarily to the formulation or management of public policy.

I agree with the Association that on balance, the County’s plan relates primarily to wages, hours and conditions of employment. The County is not establishing any policy change but shifting work from one group of employees to another group without bargaining over it. Whether the County’s goals are lofty (better service to the community, an aid to law enforcement) or self-serving (saving money) is of no effect in this determination. The goals may well be mixed. The fact remains that the State has determined that the County provide this service. Who does the work, when they do it and how much they are paid for it are all mandatory subjects of bargaining. Wages, hours and conditions of employment. The

Association correctly points out that two groups of employees lose earning opportunities, while one group will have to be trained in both juvenile justice and child protective service areas to be qualified to continue in their present jobs. They may need to be certified as Social Workers or certifiable in a year. The shifts they work and wages they receive are obviously mandatory subjects of bargaining.

The County has tried to minimize the impact on Crisis workers and called the degree of change in the work performed by them as relatively minor. I disagree. The change is significant. The Crisis workers have to be extensively trained to handle intake work. They will have to become certified as Social Workers or certifiable in a year, which could cause significant hardship to those not certified or without the kind of educational credits necessary to be certifiable. There is even the possibility that one person could lose her job, and the County has made no offer to accommodate this person. Surely this change in work is not “relatively minor” but is a major change.

To prevail on an allegation of retaliation for engaging in protected concerted activity, the Association must show by a clear and satisfactory preponderance of the evidence that the County was hostile to the bargaining unit employees engaging in protected concerted activity and decided to transfer the work in question, at least in part, because of this hostility. The Association has shown not only that a grievance was filed, but also that some work involving the family preservation project was transferred to Crisis workers by the County as a response to the grievance. This would clearly be retaliatory and must be restored to the *status quo ante*.

The decision itself – the main issue regarding transfer of after-hours intake – is not retaliatory, insofar as the Arbitrator can determine. The Director of Human Services started the process in 1997. There is no contention that Mulry was hostile to any union activity when he proposed this as part of his 1998 budget requests. While the Association is suspicious about the timing of approval for the budget request, the evidence falls short of clear and satisfactory preponderance of the evidence needed to sustain this charge of retaliation.

### CONCLUSIONS

The transfer of after-hours intake work from Juvenile Justice and Protective Services to Crisis Intervention employees violates the collective bargaining agreement, in particular, Sections 15.01, 15.07 and 15.08.

The County may require all non-nursing employees to be trained on intake work without violating the collective bargaining agreement, in accordance with the language in Section 15.08(A).

The transfer of work is a mandatory subject of bargaining, relating primarily to wages, hours and conditions of employment, on balance, rather than a change in policy or change in the nature of the operations.

The transfer of work would violate the *status quo* and therefore, if done, would violate Sec. 111.70(3)(a)4, Stats.

There is no clear and satisfactory preponderance of evidence on the record that the County's decision to transfer the work was in retaliation for union activity or the filing of grievances, and therefore, the County has not violated Sec. 111.70(3)(a)3, Stats., with the exception of the work of the family preservation unit done by Child Protective Service employees that was transferred to Crisis workers in response to a grievance. This work must be restored to the *status quo ante*.

### AWARD

The Arbitrator has found potential violations of both contract and law in accordance with the conclusions noted above, while dismissing some of the other allegations of violations of both contract and law. The parties have asked that I hold jurisdiction indefinitely while they attempt to arrive at a resolution of this matter. Accordingly, no remedy will be ordered with this Award, but I will hold jurisdiction indefinitely or until otherwise notified that the parties have reached a resolution of this matter.

Dated in Elkhorn, Wisconsin, this 31<sup>st</sup> day of March, 2000.

Karen J. Mawhinney /s/  
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Karen J. Mawhinney, Arbitrator