

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**BROWN COUNTY (HUMAN SERVICES)**

and

**PROFESSIONAL EMPLOYEES ASSOCIATION OF  
BROWN COUNTY, HUMAN SERVICES**

Case 646  
No. 58928  
MA-11116

(Fazer Grievance)

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Appearances:

**Mr. Frederick J. Mohr**, Attorney at Law, 414 East Walnut Street, Suite 261, P. O. Box 1015, Green Bay, WI 54305, on behalf of the Association.

Crivello, Carlson, Mentkowski & Steeves, S. C., by **Attorney Anna M. Pepelnjak**, 710 North Plankinton Avenue, Suite 500, Milwaukee, WI 53203, on behalf of the County.

**ARBITRATION AWARD**

According to the terms of the 1999-2001 collective bargaining unit between Brown County (County) and Brown County Human Services Professional Employees (Union or Association), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and resolve a dispute between them regarding the County's refusal to return Grievant David Fazer to his position in the Community Integration Program (CIP) following a leave of absence. The Commission designated Sharon A. Gallagher to hear and resolve the dispute. Hearing was held on October 5, 2000, at Green Bay, Wisconsin. A stenographic transcript of the proceedings was made and received by October 19, 2000. The parties filed their initial briefs directly with each other and then filed reply briefs by December 26, 2000, whereupon the record was closed.

**To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.**

## ISSUES

The parties stipulated that the following issues should be determined in this case:

Did the County violate Article 19, Long Term Disability, by refusing to return the Grievant to his former position in the Community Integration Program? If so, what is the appropriate remedy?

## RELEVANT CONTRACT PROVISIONS

### ARTICLE 2. DISCRIMINATION

The Employer agrees not to discharge or discipline against any member of the Association because of Association activities and agrees to reinstate any such member of the Association in accordance with the terms for settlement of any dispute between the Employer and the Association, as hereinafter provided. The Employer agrees to grant the necessary time off without pay to an employee who has been delegated to perform a service for the Association.

Neither the Employer nor the Association shall discriminate in any manner against any employee because of race, creed, color, national origin, sex, age, or handicap. The Employer and the Association agree to comply in all respects with the provisions of the Age Discrimination in Employment Act of 1967.

### ARTICLE 3. MANAGEMENT RIGHTS

Through its management, the Employer retains the sole and exclusive right to manage its business, including but not limited to the right to direct its work force, to hire, assign, suspend, promote, discharge or discipline for just cause, to maintain discipline and efficiency of its employees, to determine the extent to which the Employer's operations shall be conducted, the size and composition of the work force, the number of offices and locations of such offices, equipment requirements and location of such equipment and the right to change methods, equipment, systems, or processes, or to use new equipment, products, methods or facilities and to reduce the work force if, in the Employer's sole judgment, the new equipment, methods, systems or facilities require fewer personnel. In no event shall the exercise of the above rights and responsibilities of the Employer violate the terms and conditions of this Agreement or restrict any rights of the employee under Wisconsin Statute 111.70. Management shall be notified through the employee's supervisor before that employee conducts any Association activity during working hours, and the occupation of such offices.

ARTICLE 8. DISCIPLINE

No employee shall be reprimanded, suspended or discharged except for just cause. The following shall be just cause for disciplinary action ranging from a warning to immediate discharge depending upon the seriousness of the offense in the judgment of the Employer.

- (1) Dishonesty or falsification of records.
- (2) Intemperate use of alcoholic beverages or drugs which affect job performance.
- (3) Unauthorized use or abuse of County equipment or property.
- (4) Theft or destruction of County equipment or property.
- (5) Work stoppages such as strikes or slowdowns.
- (6) Insubordination or refusal to comply with the proper order of an authorized supervisor.
- (7) Unlawful conduct defined as a violation of or refusal to comply with pertinent laws and regulations when such conduct impairs the efficiency of the County service.
- (8) Habitual tardiness, unauthorized or excessive absence or abuse of sick leave.
- (9) Use of official position or authority for personal or political profit or advantage.
- (10) Disregard or repeated violations of safety rules and regulations.
- (11) Failure to adequately perform assigned job duties.
- (12) Failure to follow duly established work rules, policies and procedures.
- (13) Professional unethical conduct or behavior.
- (14) Statutory client abuse or neglect.
- (15) Breach of client confidentiality pursuant to guidelines.

Other circumstances may warrant disciplinary action and will be treated on a case-by-case basis.

- (a) **SUSPENSION:** Suspension is defined as the temporary removal without pay of an employee from his designated position. The Employer may, for disciplinary reasons, suspend an employee. Any employee who is suspended, except probationary employees, shall be given written notice of the reasons for the action, and a copy of such notice shall be made a part of the employee's personal history record, and a copy shall be sent to the Association.
- (b) **DISMISSAL:** No employee shall be discharged except for just cause. Any employee who is dismissed, except probationary, shall be given a written notice of the reasons for the action and a copy of the notice shall be made

part of the employee's personal history record and a copy sent to the Association. Any employee who has been discharged may appeal such action through the grievance procedure and shall initiate grievance action by immediate recourse to Step 3 within five (5) calendar days of notice of discharge.

- (c) **DISCIPLINARY PROCEDURE:** The progression of disciplinary action normally is 1) oral, 2) written, 3) suspension, 4) dismissal. However, this should not be interpreted that this sequence is necessary in all cases, as the type of discipline will depend on the severity of the offense. In all such cases, the employee shall have the right to recourse to the grievance procedure.

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#### ARTICLE 19. LONG TERM DISABILITY

Long-term disability—Brown County's Long Term Disability (LTD) Plan provides for eligible employees, employees who work 10 hours or more per week, to receive two-thirds pay after 180 days of disability to age 65 with offsets for Social Security disability benefits, Wisconsin Retirement System disability benefits, and Worker's Compensation benefits.

- 1) LTD begins after 180 days of disability; however, the offsetting benefits must be requested by the disabled employee within 30 days of beginning LTD.
- 2) The Wisconsin Retirement System requires that the Employer certify that all earnings, including service and pay for vacation and sick leave, have been paid and that the employee is on leave-of-absence and not expected to return to work, or has been terminated because of a disability. Therefore, once it has been terminated on the basis of a report from the employee's doctor that an employee is not reasonably expected to return to work, the employee will be terminated from the payroll and paid all appropriate accrued benefits. If the employee is expected to be able to return to work, the employee will be granted a leave of absence up to two years but not to exceed his/her length of service with the County.
- 3) When the employee is able to return to work after being on LTD, the employee will be reinstated to an available position for which s/he is qualified. Such determination will be made by the employer on a case-by-case basis. While on LTD, the employee will continue to accrue seniority

for job posting purposes only. Seniority for other purposes will be frozen at the beginning of the LTD leave and shall begin accruing upon the employee's return to work.

#### **ARTICLE 27. JOB POSTING**

Whenever any vacancy occurs due to a retirement, termination, new position, or whatever reason, and in the judgment of the Employer the need to fill such vacancy continues to exist, the job vacancy shall be posted for five (5) working days. In the event the Employer determines not to fill any job vacancy, the Employer agrees to post a notice of discontinuance for a period of (5) working days. The job requirements and qualifications shall be a part of the posting and sufficient space provided for interested parties to sign said posting. Probationary employees shall not be eligible to sign job postings.

Employees desiring such posted jobs shall sign posted notice. Employees older in seniority shall have preference on all jobs, provided that the employee meets the qualifications required for the job. Employees who receive a posted job shall demonstrate their ability to perform the job during a thirty (30) work day trial period.

If said employee is deemed qualified by the Employer, he/she shall be assigned to fill the vacancy and he/she shall receive the classification rate of pay as in Schedule A or B. However, the classification rate will be paid retroactively after the trial period. Should such employee not qualify within the aforementioned thirty (30) work day trial period, he/she shall be reassigned to his/her former position without loss of seniority. In the event the employee does not desire to retain the posted position, he/she will have ten (10) working days from the starting date on the new position to return to his/her former position. In these events, the applicant next in line of seniority shall be given preference pursuant to the above procedure until the vacancy is filled. If there is any difference of opinion as to the qualifications of an employee, the employee may utilize the grievance procedure.

The Employer reserves the right to make immediate temporary assignments to fill any vacancy until such time as said vacancy is filled pursuant to the procedures outlined herein. Employees who have successfully received a job through job posting are not eligible to sign another job posting for twelve (12) months.

#### **BACKGROUND**

In November, 1992, David Fazer was hired as a permanent part-time employee at the Brown County Shelter Care facility. The Shelter Care is a facility, which includes living

accommodations on an around-the-clock basis for troubled juveniles as well as some limited office space and one meeting or conference room for the staff. While Fazer was employed at the Shelter Care he was a direct care worker in the male wing of the Shelter Care, providing care and assistance to troubled male juveniles. The facility has two wings, one which can house eight girls in private rooms (all of which are locked from the outside) and a separate wing where eight boys can be housed in private rooms (also each locked from the outside). The boys' wing has a separate bathroom facility and the girls' wing has its own separate bathroom facility. The position that Fazer occupied beginning November, 1992 at Shelter Care, was not a social work position.

In approximately 1994, Fazer took an offered LTE social work position in the Access Unit of Brown County. That unit provides assessment and referrals to a variety of clients including developmentally disabled clients of the County. On June 15, 1995, Fazer was offered and accepted a full-time social work position in the Community Integration Program (CIP) unit as a case manager. In this position, Fazer essentially brokered services for his clients who were developmentally disabled. No direct care was involved in this position. From approximately the time of his hire until he left the CIP in 1998, Fazer's supervisor was John Cornette.

On September 30, 1997, Cornette gave Fazer a memo regarding areas of Fazer's work performance that needed improvement. That memo read in relevant part as follows:

. . .

Per your request, the following are work performance areas which I feel you need to address. These are not to be interpreted as Unit case manager policies/expectations relative to work performance standards.

**Professional demeanor when working directly/indirectly with vendors**

When you are meeting with either administrative or direct care staff of any vendor (or related members of a client's family), you are to conduct your business in a manner which is objective and specifically addressing the issues at hand. If there are emotional issues, innuendoes, or allegations brought into such discussions, you document the information if you feel it is having a negative effect on the provision of services to your client. If you feel these are serious enough to warrant further review/attention, you are to discuss the matter(s) with me prior to furthering any other discussions/actions related to these matters.

You are not to have ancillary discussions with other staff of vendor agencies to gain support for your position on any issue unless you receive approval from me to pursue the matter(s).

**Financial inquiries into client matters with vendors**

If you have concerns about a client's financial matters such as usage of unearned or earned income, you shall discuss the subject only with administrative fiscal personnel of the vendor agency. You will not seek additional information from program staff of agencies unless you first request permission to do so from me. If you contact fiscal administrative staff and continue to have issues regarding your client, you will then discuss the matter with me and I will pursue the matter for you.

**Advocacy for clients**

Your role as a case manager in the area of advocacy is to protect a client from potential physical/emotional harm; assure that his/her rights under Chapter 51.61, the Medicaid waiver program, or the rights under various residential services such as CBRF.

While fulfilling this responsibility you shall conduct all direct and indirect contacts, with all parties involved, in a professional manner which is void of emotional overreaction to possible disagreements or confrontative behavior of those you are working with to resolve a problem.

It is my role to interpret whether you may or may not have violated this standard. If you so choose, I will assist you in reviewing any incident in which there are allegations made by other parties and how you may have considered other alternative responses to these types of situations.

**Responses to directives given to you by your supervisor**

You have a right to question a decision which I make relative to any client on your caseload. However, unless that decision violates the client's rights or is contrary to Human Service Department policy, you will be expected to carry out directives in a professional manner. This is meant to include not passing on your misgivings or lack of support for my decisions to clients, vendors or their staffs, or any other party directly or indirectly involved in that decision.

It is my position that once a decision is made, you as a casemanager have the responsibility to carry out directives in an objective, professional manner.

**Independent decision-making regarding client matters**

You are expected to carry out your duties in an independent manner and a professional manner as noted in your job description responsibilities. You will not be expected to consult with me on matters which are not identified above in this document.

However, if you feel that a situation requires my consultation, or you feel there may be a conflict of interest, you certainly can discuss such matters with me. As with other case managers, this is a standard of your overall performance as a professional.

**Letter writing to vendors or client related parties**

For the next few months, you will be expected to provide me with drafts of all letters which you send out with the exceptions of: State personnel such as the developmental disability follow along staff persons, guardians for signatures on Individual Service Plans, etc.

On April 3, 1998, Cornette issued a follow-up memo regarding Fazer's work performance since September, 1997, which read in relevant part as follows:

. . .

The following are updated comments by me regarding Dave's performance since September 1997.

**Professional demeanor when working directly/indirectly with vendors**

. . .

Since September of 1997, I am only aware of the dissonance which occurred regarding two of your clients at Curative's Head Injury Program. I do not feel some of your comments you made during that meeting were appropriate given the purpose of the meeting: 1) Implying that there was a violation of rights which might occur if things did not change for your clients; 2) Criticizing a program which you had one visit; 3) Making inferences of your inability to case manage your cases because one of your peers was holding onto reports from Curative.



Other than the occurrences related to Curative's Head Injury program, I am not aware of any other situations/scenarios which would suggest that you have not been working within the parameters of your job responsibilities as it relates to interagency relations.

**Financial inquiries into client matters with vendors**

. . .

I have not seen any clear problems here. However, David, at least implied/suggested in a meeting I had with him on 3/19/98 that he may have direct or indirect knowledge of an alleged misuse of a consumer's SSI funds. I asked Dave to clarify what he was talking about and he would not expand on his comments. If Dave has such information and is withholding it for whatever reasons he may have, this might well be quite problematic. I told Dave that the review of allegations/suspicious of misuse of such funds is my responsibility to deal with.

**Advocacy for clients**

. . .

Dave puts a great deal of passion and energy into individual cases where he feels a client has unmet needs or is being taken advantage of. There are times when he gets quite emotional as he can make allegations or attributes motives to others that are not always accurate. I have talked to him regarding controlling what he says in an appropriate manner which does not antagonize or threaten individuals or agencies. However, he has told me that "we will never agree on some of these matters until water freezes over. This thing goes deeper than you want to admit."

**Responses to directives given to you by your supervisor**

. . .

I have not directly seen or heard of any situation(s) where Dave has violated Departmental policies.

**Independent decision making regarding client matters**

As noted above, Dave is very emotional and committed to the clients he serves. However, it also has to be noted that, in my opinion, Dave has trouble compromising, negotiating and accepting direction when he feels that his position is the only proper one to follow. There have been occasions where Dave has also acted in a very immature manner, particularly with regards to his supervisor—drawing a devil caricature in a staff meeting, talking to staff from another agency when I was attempting to start a meeting, telling me I was being “conned” by an agency in front of the staff, etc.

The latest incident where he brought up one of his peer’s names in an agency staff meeting to justify a point was inappropriate. Clearly, during the meeting, the rhetoric between both parties was being measured (i.e., controlled emotion); however, I feel Dave has made some remarks that are best reserved for private discussions between himself, his supervisor, and the party in question, rather than making abrasive and accusatory remarks in the front of others.

I believe Dave has a long way to go yet regarding the controlling of his emotions and behavior, particularly when he experiences disagreement with vendor agencies or his supervisor.

**Letter writing to vendors or client-related parties**

. . .

The letters Dave has sent out during the last few months have not had to be edited by me...at least to the best of my recollection. There have been letters in the past which I have instructed Dave to amend. He can independently write letters again; however, it is expected that he will remain consistent with the manner in which he has written letters during the last few months.

On approximately April 13, 1998, Fazer left the CIP unit on disability leave. His family doctor, Dr. Meade, issued him an excuse from work for April 13 - 17, 1998, stating that he could return to work on April 20, 1998. Effective April 22, 1998, and through the end of August, 1998, Dr. Thomas (Fazer’s psychiatrist) excused Fazer from work. After Fazer left the CIP unit in April, 1998, he filed an equal rights claim against his supervisor, John Cornette, alleging sexual harassment.

Thereafter, Fazer was on short-term disability leaves for depression and panic attacks as well as post-traumatic stress syndrome. On September 8, 1998, Fazer was released by

Dr. Thomas to return to work and on October 19, 1998, Fazer returned to the CIP unit to resume his employment. However, Fazer suffered a panic attack and was off work again until November 20, 1998, when he again returned to the CIP unit for a brief period before going on long-term disability leave beginning December 13, 1998. It was in December, 1998, that Dr. Thomas diagnosed Fazer with post-traumatic stress syndrome. On June 23, 1999, Dr. Thomas issued the following return to work order for Fazer:

You may return to work without restriction. I strongly recommend against returning to your work environment at Brown County Human Services as this will exacerbate your medical illness increasing your chance of sickness and death.

On August 26, 1999, Dr. Thomas wrote Fazer a letter regarding his return to work status which read in relevant part as follows:

. . .

I am writing you at this time to clarify the events that took place between June 23, 1999 and August 9, 1999 with regard to your return to work status. Several documents were generated and without knowing the context of the situation, these documents appear to be confusing. The purpose of this letter is to put those documents in the context of the events.

I saw you for an appointment on June 23, 1999. At that time you informed me that in order have food to eat you needed to do some work of some kind to generate some money. You told me that the only thing you were going to try to do would be to tend the cash register at a local liquor store for few hours a week. You reported that owing to the fact that a friend of yours owned the liquor store, this would be a good environment for you to try and see if you could tolerate work of any kind. I told you that in order to be able to do that, that I needed to give you a Return to Work slip. I generated a Return to Work slip dated June 23, 1999 with the understanding that this was the only employment that you were going to try and I strongly advised you against going back to Brown County Human Services in your medical state at that time. It was my opinion that returning to Brown County Human Services would exacerbate your medical illness.

Between 06/23/99 and 06/25/99 you contacted me to tell me that the very thought of returning to work of any kind had caused your symptoms to worsen and the decision was made to leave you on medical leave.

I then generated two Disability reports on 06/25/99 and 06/29/99 documenting your medical status. I opined that based on your reaction to having any vocational task expectation or vocational interpersonal interaction, that you remained totally disabled for your job or any job.

I saw you for an appointment on July 9, 1999. At that time you revealed to me that you had indeed proceeded with work at Pappy's Liquor Store and that were doing this part-time. We agreed that this would be a test of at least minimal task expectation and we would see how you tolerated this.

You had an appointment with me on July 26, 1999. At that time you reported to me that the work you were doing at Pappy's Liquor Store was being fairly well tolerated.

You had an appointment with me on August 9, 1999. At that time it was apparent that you were tolerating some level of task expectation from a vocational standpoint. It also became apparent that over the previous month your symptoms had been significantly improving. While your symptoms continued, it was my opinion that they had improved to the point that it was reasonable for you to attempt a work trial. At that time you stated that you wanted to try to return to your usual job at Brown County Human Services. Owing to the fact that your condition had improved, I opined that you were now stable enough to see if you could tolerate that job or any job. I made it clear to you at that time that going back to work at Brown County Human Services would obviously place you at a higher risk of having your medical symptoms worsen than if you were to go to work at any other place.

Ultimately I told you on August 9, 1999 that I would release you to return to work without restriction for any job. This remains my current opinion. This is with the understanding that it would be a work trial which may or may not be successful.

. . .

Prior to August, 1999, Fazer had filed a worker's compensation claim against the County. In conjunction with this claim, Fazer agreed to be deposed by the County on September 15, 1999. That deposition was aborted, however, when Fazer made suicidal comments and his attorney (Linda Vanden Heuvel) had Fazer committed to a mental hospital.

In January, 2000, the Worker's Compensation proceeding was put before Dr. Grunert. On February 24, 2000, 1/ Grunert issued his independent psychological re-evaluation of Fazer. Dr. Gunert's re-evaluation read in relevant part as follows:

Mr. Fazer was referred for independent psychological re-evaluation by Ms. Mary Beth Callan of Denissen, Kranzush, Mahoney & Ewald, S.C. I have previously seen him for independent psychological evaluation on February 23, 1999. Additional medical records forwarded are all records since February 23, 1999, regarding Mr. Fazer, from Dr. Thomas and Dr. Lund. Records are also available from St. Joseph Community Hospital of West Bend. Additionally, a deposition transcript from Dr. Thomas dated August 17, 1999 was available for review. Mr. Fazer's deposition transcripts dated September 15, 1999 and December 30, 1999, were also available for review. Records now available for review that were not available at the time of the February 23, 1999 IME are records from Dr. Mead dating from December 8, 1987 through March of 1998. The general gist of the records from Dr. Thomas felt he was capable of return to work with no restrictions in August of 1999. He continues to show stabilization of his PTSD symptoms as well as reduction of his panic disorder and depressive symptoms steadily from August of 1999 to the more recent note dated January 5, 2000. Of note is the fact that Dr. Thomas indicates that the patient understands that anything related to the Brown County Department of Social Services may exacerbate his symptoms of PTSD and depression. He notes that the patient understands this and elects to proceed with attempt to return to work. He also notes that the patient continues to refuse medications and understands that this increases his chance of sickness and death. This is reflected in the note of November 8, 1999. His note of December 1, 1999 indicated the patient is tolerating his medications and there remains no contrary indication to the patient returning to work in any job. In his note of January 5, 2000, Dr. Thomas notes that Mr. Fazer continues to have PTSD although he is convalescing. Depressive symptoms are stable.

Dr. Lund notes in his note of August 30, 1999, that Mr. Fazer is doing better in regards to his depression, panic attacks and post-traumatic stress disorder. He is thinking logically and his mood appears to be better. The next available note for review is October 11, 1999, which basically just states that he was in for therapy. He was again seen on November 3, 1999 and on December 29, 1999.

The notes from St. Joseph's Community Hospital of West Bend were also reviewed. These records indicate that Mr. Fazer was hospitalized, as he had made an apparent suicidal statement. This apparently occurred during the deposition when he became exasperated with the proceedings. Apparently, at the deposition he had stated something to the effect that he should just put a bullet in his head and the next thing he knew police were there and he was under a Chapter 51. Throughout his hospitalization he denied wanting to actually end his life. He stated on several occasions that he had just made a "stupid" statement. He was discharged home and returned to reside with his wife in Green Bay. His diagnosis of discharge was one of adjustment disorder not

otherwise specified, rule out post-traumatic stress disorder, rule-out major depressive disorder-recurrent, moderate to severe without psychosis, rule-out panic disorder without agoraphobia.

. . .

I will now address the interrogatories that were posed to me.

**1. Please identify as to whether Mr. Fazer has reached an end of healing for his psychological condition.**

As of today in my office, he is asymptomatic for panic disorder, post-traumatic stress disorder and depression. He clearly has reached an end of healing as it related to his psychological condition.

**2. Please advise as to whether Mr. Fazer may return to work and, if so, under what restrictions? Please specify whether Mr. Fazer is capable of returning to work as a social worker and whether he is authorized to return to work at Brown County.**

I would have no restrictions on Mr. Fazer at this time regarding return to work. He certainly appears capable of returning to work as a social worker and capable of returning to work at Brown County at the present time. I would hope that he would be reintroduced into the workplace with a reduced caseload initially. He will also undoubtedly require some orientation time to reacquaint himself with any changes to state regulations which would come into play as a result of his job. I would estimate that this could be accomplished within four to six weeks of return to work.

**3. Please provide your opinion as to whether the alleged psychological injury has resulted in any permanency and, if so, to what extent?**

I do not believe that he has sustained any permanency as a result of this alleged psychological injury. He appears quite capable of resuming all of his job duties at this time without any limitations. He is, therefore, rated at 0% permanent partial disability to the body as a whole as a result of psychological factors.

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*1/ Approximately one year earlier, Grunert had evaluated Fazer as a part of his worker's compensation claim.*

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In March, 2000, the County began preparing for Fazer's return to County employment. On March 23, 2000, Human Resources Director Kalny wrote to Fazer regarding his return to work as follows:

. . .

As I informed you by previous correspondence, we have been in the process of coordinating your return to work. The fact that there have been two unsuccessful attempts to return in the past, together with concerns that you and your coworkers have raised, need to be addressed. It also is noted that your doctor recommended your returning to work on a trial basis and that Dr. Brad Grunert recommended a phase-in period. Our goal is to bring about your return to work in a manner that will minimize stress and potential conflict for you and your coworkers.

To address those issues, we will phase in your return to work by placing you in a social worker position at Shelter Care. For the past several years, the Human Services Department has requested a social worker position at the Shelter Care facility. A review of your background indicated that you would be particularly qualified for such a position based on your past experience as a shelter care worker. We also understand that you have had a good working relationship with Jim Hermans, the Director of the Shelter Care facility, in the past. Of course, as a social worker position there would be no change in compensation and benefits. We look at this as an opportunity to expand our service in a meaningful way and expect that you will accept that challenge.

We have discussed this matter with the Union and they will waive posting issues to permit this placement.

To facilitate this placement, I would like to set up a meeting with you and Jim Hermans next week to review the job description and to discuss hours, duties, etc. This position will be a phase-in position, with the possibility that, if it works well, it will become permanent.

We also are in the process of looking into some training and refresher matters for your return. We hope to be able to address these issues next week.

. . .

On March 27, 2000, Fazer responded to Kalny's March 23, 2000 letter as follows:

. . .

I would also like to address the issues contained in the 3/23/2000 letter from you. As far as the two alleged unsuccessful attempts to return in the past, both

attempts did not fail due to my job performance. In addition, I have no concerns regarding my coworkers. If my coworkers have concerns related to me, I am more than willing to address those through counseling with them or any other means management might see fit. Dr. Grunert's report of 2/24/2000, recommended an orientation period but did not recommend placement in a different area. He also mentioned a reduced workload during the orientation period to aid in the assimilation process. In his report, he does not mention stress or potential conflict with coworkers in the CIP unit. You reference my doctor's recommendations of a trial basis. At this point in time, my doctor recommends return to work at Brown County with no restrictions, no mention of a trial basis is noted.

In attending the meeting this morning I understand the union is not in agreement with placing me in a position without posting the open position. The union board also expressed that they felt the most appropriate course of action would be to place me directly into the CIP unit. This historically has been the practice when an employee returns from medical leave according to the union attorney, Fred Mohr.

I feel that placing me outside of my unit and area of expertise would be unfair. I also feel that placing me in a temporary (LTE) position is unfair. My current position in the CIP unit is a permanent position; the proposed position is temporary. This leaves me with grave concerns as to my future with Brown County Human Services. I feel that placing me in a position without testing is not fair to my fellow union members. At some point in time I would be forced to test and post for either that job or one in a different area. This posting might cause harsh feelings due to having to bump another employee with less seniority. I feel that I should be given the opportunity to prove that I have no issues or problems with my coworkers in the CIP unit. Using anonymous complaints from my coworkers or anyone else to justify moving me out of the unit is unacceptable. It would be more appropriate to deal with those "complaints" and gain understanding and foster teamwork within the unit. My relationship with my CIP coworkers has never been an issue.

...

On March 29, 2000, Fazer met with County officials and the Union in regard to his placement (proposed by the County) into a new position created at the Shelter Care facility. Following this meeting, Fazer wrote the following letter dated March 30, 2000, to Human Resources Director Kalny:

...

I am writing to express my strong objection and disagreement with placing me in the proposed Shelter Care position discussed in the meeting of 3/29/2000. I



feel this is direct retaliation in relation to my filing my discrimination complaint with the Equal Employment Opportunity Commission (EEOC). My current position in the Community Integration Program is open and available, this would be the appropriate position for me to return to, according to the Professional Employees Union. The Professional Employees Union (PEA) has stated clearly through their attorney, Fred Mohr, that historically when an employee returns from leave he is placed in the position he left. I am being treated differently and separately from the rest of my union members.

I would also like to address the unfounded allegations or anonymous complaints that the Human Services Deputy Director, Bill Jones, used to justify placing me outside of my job and area of expertise. Bill Jones stated very clearly and emphatically that many people, clients and vendors, had voiced complaints regarding how I conducted myself in the past. Bill Jones refused to give any examples of my alleged unprofessional conduct and in fact both Jones and yourself stated there was nothing that I could be written up on and disciplined for formally. Then why are the "allegations" the basis for the decision to place me outside of my area of expertise? I also feel this is direct retaliation related to my pursuing the EEOC investigation as some of these allegations have not been made in the past. In fact there is no documentation that supports Jones and your claim that I acted in an unprofessional manner in the past. If there are personal issues to be dealt with, I prefer to deal with those separately from my return to work issue. I feel that I should be given the opportunity to address those issues and be provided with that documentation to support your allegations. The fact remains, I should not be judged on anonymous complaints that can not be provided to me, this is not fair and I view it as direct retaliation.

The position at Shelter care would also involve hours of service that are much different than those currently involved in the CIP position that I currently possess. . . . I also view this as direct retaliation in relation to my current decision to pursue the EEOC investigation. I have pursued a position with hours that fit my family and myself, my current position in the CIP unit provides for those hours.

The Shelter Care position that Human Resources has fabricated is only a temporary position of six months to one year according to your description. At the end of that time period I would be forced to post, test and possibly have to bump someone with less seniority. This is not fair to me or the person that has to be bumped in the future. Brown County is setting me up for problems in the future. The PEA union has also expressed that they will grieve my placement and request that the position be posted and offered to everyone in the PEA union per contract. This placement at Shelter Care sets me up for controversy and also ridicule from my fellow union members. Instead of solving Brown

County's perceived, alleged issues, this placement creates another whole set of issues. I perceive this as discrimination based on my action of pursuing the federal EEOC investigation.

In addition, I feel that placing me in a position against my will is direct retaliation in relation to my EEOC complaint. I decided to move on from the Shelter Care position in 1995 due to personal reasons. I desired work with a different population of clients. Now, the county Human Resources Department and the county Human Services department are forcing me into a position that I feel does not fit my skills, interests and desires.

...

In summary, I feel I am being singled out and discriminated against due to my filing and pursuing a federal discrimination complaint and also due to the fact of my being a federal whistleblower. By not placing me back into my current position in the Community Integration Program, Brown County is blatantly singling me out with separate and different treatment from the rest of the social workers at Brown County Human Services.

I will follow the direction of Brown County Human Services and Brown County Human Resources. I will report for duty when asked and will perform whatever function Brown County desires me to perform. I also, am voicing my strong opposition to the current position Brown County is attempting to force me to accept. I am not in agreement with my placement in the Shelter Care position.

...

By letter of March 31, 2000, Human Resources Director Kalny responded to Fazer's letter of March 27, as follows:

...

In regard to your comment concerning the "two alleged", unsuccessful returns in the past I am referring to the two attempted returns to the CIP unit. Both attempts resulted in further leave after only a short return. Regardless of the reasons for the failure, avoiding the reoccurrence of that result should be a mutual goal.

The concerns voiced by your coworkers are not anonymous. I have the names of the coworkers. The fact that I do not believe it is appropriate to share names with you at this time does not render them anonymous or lessen the validity of their concerns.

You have made many recent public statements alleging wrongdoing on the part of John Cornette and Mark Quam. If you returned to the CIP unit, you would be working in close proximity to these individuals. Immediately placing you in that environment would decrease our chances of making a successful return.

In returning you to work, we are required to take your doctor's advice into consideration. In reviewing your medical records, I note that on June 23, 1999, Dr. Thomas stated that he would strongly recommend against your returning to the work environment at Brown County, as that would exacerbate medical illness, increasing your chances of sickness and death. In September 1999, you made suicidal comments resulting in the need for an immediate assessment and hospital admission. In [sic] October 6, 1999, after you began refusing your medication, which Dr. Thomas said increases your change of sickness and death, Dr. Thomas reported that you wished to proceed with your case and to return to work, although you understood that you were at risk of worsening depression. On November 8, 1999, Dr. Thomas reported you understood that anything related to Brown County Human Services may exacerbate you symptoms of PTSD and depression and that you continued to refuse medications, even though you understood this increased your chances of sickness and death. On January 5, 2000 Dr. Thomas commented that, although there was no contraindication to a work trial, it was his position that your working in your usual job in the usual department would increase the possibility of medical exacerbation. On February 24, 2000, you reported to Dr. Meade that you had no symptoms and Dr. Meade then released you to work without restriction. Based on the above, immediately placing you in your old position is not logically consistent with returning you to work for the long term.

Given the foregoing, I do not think it is wise personnel policy to put you back in the CIP unit at this time. It makes much more sense to place you in a position away from the environment that you have alleged contributed to your leaves in the past.

In regard to your statement that the union attorney, Fred Mohr, said that historically when a person returns from medical leave, they are placed back into their old position. That statement is incomplete and misleading. Upon return from *short-term disability*, we have generally returned employees to their same position. In fact, that is what we did in both of your unsuccessful returns. The contract language differs in regard to *long-term disability*. As the union recognized, the contract provisions governing return from long term leave allow management to place people in "any available position" and allow management to make the determination of what placement is appropriate on a "case-by-case basis". Your union acknowledged that your case is unprecedented. Under the unique circumstances of this case we are making available a transitional position for your return. This is consistent with the contract.

In regard to your statement that your return to Shelter Care is unfair to your fellow employees, the fact remains that the Shelter Care position is being made available to address the concerns brought about by your return. As I have made clear, although this has been a position that we have wanted to get in the table of organization for some time, there is a good possibility we will not gain approval for its continuance. This placement would not even occur but for the unique circumstances of this matter. As such, no other employee has a claim to the position. In any case the principal concern here should be a successful return to work.

In regard to your concerns about bumping in the future, I will continue to attempt to address these concerns to the union.

I am pleased that you are interested in working out the concerns your coworkers have with you. We have contacted EAP and they are willing to help us with these issues, but believe that such assistance would be effective only if all parties are willing to participate.

The foregoing reasons form the basis for what I believe to be a sound conclusion that it is more likely you will be able to successfully return to work outside the CIP unit. The ultimate goal, of course, is to bring you back to work in a successful manner. I hope this correspondence has clarified the rationale for how we are proceeding in this matter.

...

On April 2, 2000, Fazer responded to the County's letter of March 31, 2000, as follows:

...

In regard to the two attempts at returning to the CIP unit that you mention. These attempts were not successful due to the actions of both Mr. John Cornette and Mr. Mark Quam. Both of these individuals used their positions of power to harass, intimidate and discriminate against me which ultimately led to my medical issues and medical leaves. You state, "Regardless of the reasons for failure, avoiding the reoccurrence of that result should be a mutual goal". I fail to recognize how punishing the victim of harassment, intimidation and discrimination should be a "mutual goal".

In addition you state, "The concerns by your coworkers are not anonymous". You further state that you have the names of my coworkers. I also have the names of my coworkers. As long as the alleged issues will not be brought to my attention, their status remains anonymous and not dealt with appropriately.

Again, using anonymous complaints to justify treating me in a separate and different manner than my union members is discriminatory treatment.

Regarding your statement that I have made many public statements alleging wrongdoing on the part of John Cornette and Mark Quam. I do not know what statements you are referring to, but any statement that I might have made has factual basis. As far as working in close proximity to the Mr. Cornette or Mr. Quam, I do not feel this is a problem on my part. I have attended many Human Services Committee meetings with Mr. Quam in attendance, I have not had a problem. I have also been in close contact with Mr. Cornette at his deposition and at hearings in the courthouse and I did not have a problem. In addition I have attended several meetings in the Sophie Beaumont Building and have had no issues. I feel the problems might be on the side of these two managers. My chances of a successful return will be fine as long as management acts appropriately. This is definitely discriminatory treatment towards me based on my pending federal complaints.

I take offense that you have used my medical records from the past to justify not placing me back into my position in the CIP unit. You systematically list out notes from Dr. Thomas going back as far as 6/23/99 in which Dr. Thomas does not recommend my return to Brown County Human Services. I have made great progress in my recovery from the medical issues caused by discriminatory treatment by supervisors in the Brown County Human Services Department. I feel punishing the victim for actions of managers and the director of Brown County Human Services is inappropriate and of course discriminatory. Dr. Thomas, Dr. Meade, Dr. Lund and of course the County's doctor, Dr. Grunert have approved my return to Brown County Human Services without restriction. I feel you are using my medical history to discriminate based on disability and also based on the fact of my having filed a federal discrimination complaint.

Given the foregoing, I feel it would not be wise for Brown County Human Resources to punish me by placing me in a position other than the one I currently possess. You state that placing me away from an environment that I have alleged contributed to my leaves in the past would make more sense. I feel that protecting me from harassment, intimidation and discrimination would be much wiser personnel policy.

In regards to my concerns of this being a temporary position, the position is temporary by your own admission. Due to the nature of this position I would be placed in a position of having to post and test for another position in the not so distant future. This would make it so I would have to test to retain employment, of course Brown County controls the testing process. The situation with

bumping concerns me greatly as this sets me up for problems in the near future. As I have stated in previous communication, this position creates as many problems as it allegedly solves. This temporary position also leaves my future with Brown County in jeopardy.

In regard to Fred Mohr's statement of historically placing a worker back into their old position when returning from leave. This has been the practice in the past. You state that my case is unprecedented, this might be true. Fred Mohr also stated that 99 out of 100 workers would have quit by now and thus the reason why my case is unprecedented. Why should I be punished for exercising my rights under employment discrimination law?

As far as the position at Shelter Care being created to address the concerns related to my return. What are those issues and why is Brown County addressing them through me instead of addressing the issues with the managers who created the issues initially? In addition, why wasn't a new job away from other employees created for John Cornette back when myself and my coworkers complained about him extensively? The principal concern is for me to be treated fairly and in a non-discriminatory manner, not just my return to work.

You state that you will "continue to attempt to address" my concerns regarding bumping in the future. This very clearly shows that no definite language has been written down to address my valid concerns.

You also state in relation to my willingness to work out any issues with my coworkers that such assistance would be effective only if all parties are willing to participate. I am willing, thus my coworkers or managers must not be willing to participate. In the past I attended the EAP when asked by management, my supervisor, John Cornette would not attend. Once again, I am being treated in a separate and different manner than other in the department.

I feel that all reasons given for placing me in a position against my will are not valid and in fact are based on retaliation for my filing a federal discrimination complaint and being a federal whistleblower. Thus, I will follow whatever direction Brown County gives me but am voicing my strong opposition to the planned position at Shelter Care.

. . .

On April 7, 2000, Human Services Director Kalny responded to Fazer's letters of March 30 and April 2, as follows:

. . .

In regard to the first paragraph of your March 30, 2000 letter, I emphatically state that I have absolutely no retaliatory intent in regard to your placement at Shelter Care. The entire rationale for placing you outside of the CIP unit is to facilitate your successful return to work. In your claim for worker's compensation, you specifically argue that your work environment increased your stress and was the cause for your medical leaves. I do not want the work environment to be the alleged cause for additional leaves. I also recall from the record that you have stated that you have received death threats from John Cornette. While your allegations were never corroborated, it still makes sense to avoid the opportunity for similar alleged confrontations. I am confident that anyone taking an unbiased look at this case would come to the conclusion that placing you back in the CIP unit is not likely to promote a successful return to work.

As to the second paragraph of your letter, your statement concerning Bill Jones' comments is taken out of context. If you review the tape, you will note that we were in the process of discussing our expectations for your return to work and had informed you that we did not want you discussing your past concerns with John Cornette and Mark Quam during work hours. Mr. Jones was making it clear that we were talking in terms of you discussing these matters during work hours with members of the public, coworkers and vendors. You agreed with that directive and stated that in the interest of successfully coming back to work, it would not be wise for you to have such discussions during work hours. Mr. Jones made it clear that he was talking about vendors and the public, as well as coworkers. He stated that we have heard that you had discussions regarding some of your concerns about Mr. Cornette with vendors in the past. While we did have a discussion concerning vendor's comments, any comments that vendors may or may not have made concerning you were not considered by me in regard to your return to work.

In regard to the third paragraph of your letter, I have addressed that issue in earlier correspondence. We will be using an 8:00 a.m.-4:30 p.m. work schedule. However, should this position change or evolve in the future, you will be treated like any other employee in regard to additional hours.

In regard to the fourth paragraph of your letter, you have misunderstood the creation of this position. As we repeatedly informed you, we would like to see this become a permanent position in the table of organization. Currently, it is not. The position was created specifically to address the issue of returning you to work successfully. However, it is a position that we have requested in the budget for the last two years and which, I believe all parties would agree, would

be an advantageous and desirable position to the County and the union. As you are aware, we have discussed this matter with the union in some depth. As your union representative stated at the meeting, we have had a history of working these matters out with the union and I have every confidence that we will work this out as well. There is no intent to subject you to ridicule here. There is the intent to place you back to work.

In regard to the fifth paragraph of your letter regarding placing you outside your area of expertise, as I have stated in earlier correspondence, you will have all posting rights in the future. You will therefore be in a position, once we have made a successful transition, for you to post into another position.

In regard to the request for the signing of an authorization, as mentioned in my prior correspondence, I reviewed my file and I concur, I do not need additional releases. I also stated that I would be happy to see what your doctor has to say on this issue and will wait for response on that before I take any further action. Again, in making this decision I have relied on the comments of your physicians, as well as Dr. Grunert, over the past several months.

In regard to the seventh paragraph of your letter, a review of my file does not show much, if any, "whistle blowing" that you have made this office aware of. Your original complaint, if you recall, had to do with your concern that you were going to be discharged by Mr. Cornette and did not set forth complaints concerning illegalities in the department. You would not cooperate with our attempts to investigate your December 5, 1998 complaint concerning Mr. Quam. Much of what I am hearing in the media has not been previously forwarded to this department. Nor do I have any record of your claimed attempts to get that information to us.

It is not in any way unfair to demand that you inform us of the grounds for the charges of wrongdoing that you have alleged through the media. I would require any employee in the same situation to provide this office with evidence of wrongdoing. I will permit the recording of these statements. I would think you would welcome this chance.

It is true that your case is being handled on a case-by-case basis, as the law requires. You are the only person that I am aware of in the Human Services Department that has been on various sorts of leave on a practically continuous basis for an almost two year period. There are also concerns that have been raised by co-workers, concerns that you have raised and concerns that your medical care providers have raised with your return to the CIP position. In light of all those concerns, I have made what I believe will be a workable solution to



getting you back to work. Frankly, I believe it is time that your posturing stop and that you return to work in a manner which is reasonably calculated to be successful.

Accordingly, we will continue to direct you to report to the Shelter Care facility, upon receipt of any medical consideration that your care providers would like to give us.

I am now also in receipt of your letter of April 2, 2000 and rather than write another correspondence wish to briefly respond.

This office has absolutely no intent to punish or retaliate against you. Our intent is to facilitate the best possible means of returning you to work. We would be happy to address your concerns with our plans for your return so long as they are constructive. I see no reason to engage you in debate over your mistaken impressions concerning our intent.

In all other respects you know our rationale and direction in regard to your return. Upon receipt of the information from your doctor, I will finalize preparation for your return to work at Shelter care. A prompt reply is expected.

. . .

On April 13, 2000, Dr. Grunert issued an addendum to the independent psychological re-evaluation of Fazer, which read as follows:

. . .

This is an addendum for the independent psychological re-evaluation that was conducted on Mr. David Fazer. I have had additional records provided to me since the time of the reevaluation. These have included past medical records as well as a variety of Internet communications and a tape recording and transcript of a radio talk show that Mr. Fazer participated in with Bill LuMaye. I have also been provided with a job description for the shelter unit at the Department of Social Services for Brown County. Based on my review of all these records, I would restrict Mr. Fazer from returning to work for his previous job placement and would recommend that he be placed in the shelter unit for initial accommodation. As I outlined previously, his caseload should gradually be increased. It is my understanding that this would be a temporary placement. As such, I would like to have the opportunity to reevaluate Mr. Fazer following one or two months in this placement to make further recommendations regarding the

suitability of this accommodation and any further restrictions that may be necessary in terms of this ability to return to work within Brown County Social Services.

...

On April 13, 2000, the County responded to Fazer's April 7<sup>th</sup> letter of which, *inter alia*, directed Fazer to report to the Shelter Care to begin his employment as the social worker/case manager at Shelter Care on April 20, 2000, at 8:30 a.m. Kalny's letter read in relevant part as follows:

...

I am in receipt of your correspondence dated April 7, 2000, which was received in my office on April 12, 2000. Enclosed in that correspondence was a note from Dr. Jonathan Thomas stating that you could return to your old job. I can only assume that you discussed with Dr. Thomas the Shelter Care placement and that he has no further input in that regard.

I am also informed that Dr. Brad Grunert is in agreement with the proposed placement at Shelter Care and continues to recommend a phase-in of your caseload. We are prepared to do that.

I must confess that I have some concern in regard to the last two paragraphs of your April 7, 2000 letter. When we met, I was left with the impression that while you did not prefer the Shelter Care position, you were anxious to get back to work and would give that position your best shot. Your other correspondence has stated that while you would rather not go back to the Shelter Care position, you will do what you are directed to do by the County. Your last letter indicates that you "have no desire" to work at Shelter Care.

The reasons for this placement have been explained to you at some length and will not be reiterated in this letter. However, I wish to make it very clear that we will expect you to perform your duties at Shelter Care in a professional and efficient manner. So that there is no question, by this letter, you are directed to report to Shelter Care on **Thursday, April 20, 2000 at 8:30 a.m.** to meet with Jim Hermans and Bill Jones for the purpose of returning to work. Your failure to appear at that time will be deemed as a refusal to return to work and will be viewed as an unauthorized absence and as a refusal to return to work.

...

The job description for the social worker/case manager at Shelter Care (created in March, 2000) reads in relevant part as follows:

. . .

**JOB SUMMARY:**

Provides assessment, case management, counseling, and referral services to residents of Shelter Care and their families in order to help each resident achieve a positive stay and a successful transition to their next living arrangement.

**ESSENTIAL DUTIES:**

Assesses residents and families to determine program needs, including initial screen for mental health and AODA issues.

Provides case management services for residents who do not have a Human Services case manager, including assessment, service planning, monitoring, and evaluation.

Coordinates Shelter Care programming for residents with Human Services case managers and other community agencies.

Develops service plan for residents.

Refers residents and families to appropriate community services.

Provides court testimony on residents when indicated.

Prepares reports to assist in the preparation for disposition for court.

Conducts individual counseling and group work with residents including social skill development, daily living skills, and decision making.

Orientates residents upon admission as to shelter services and expectations.

Assists Superintendent of Shelter Care in developing and implementing ongoing program of community presentation.

Attends staff meetings, attends in-service and outside agency training sessions.

Completes and maintains necessary documentation according to applicable requirements, codes and responsibilities.

Maintains the confidential nature of client and business information.

Complies with all local, state, and federal laws governing residents and rendering of services.

**NON-ESSENTIAL DUTIES:**

Performs related functions as assigned.

**MATERIALS AND EQUIPMENT USED:**

General office equipment  
Computer

**MINIMUM QUALIFICATIONS REQUIRED:**

**Education and Experience**

Bachelor's degree in social work or related human service field.

**Licenses and Certifications:**

Valid Wisconsin Driver's License  
State Social Worker Certification preferred

**Knowledge, Skills and Abilities:**

Knowledge of principles, methods and practices of social work.

Knowledge of current social and economic problems and the effect of these problems on families and individuals.

Knowledge of laws, regulations and practices pertaining to federal and state public welfare programs.

Knowledge of federal, state and local resources, their organization and the ways in which these resources can assist individuals and families.

Knowledge of living conditions, values and behavior of the ethnic and subcultural groups served by the agency.

Knowledge of and ability to utilize a computer and the required software.

Ability to provide environmental and supportive social services to individuals and/or families.

Ability to diagnose and provide appropriate treatment services.

Ability to plan and organize work to achieve objectives.

Ability to relate to people in an unprejudiced and understanding manner.

Ability to establish and maintain working relationships within agency and the community.

Ability to communicate effectively both orally and in writing.

Ability to participate in and appropriately use available supervision.

**PHYSICAL DEMANDS:**

Lifting 20 pounds maximum with frequent and/or carrying of objects weighing up to 10 pounds.

Intermittent standing, walking and sitting; occasional driving.

Using hand(s)/feet for repetitive single grasping, fine manipulation, pushing, and pulling, and operating controls.

Occasional bending twisting, squatting, climbing, reaching, and grappling.

Communicating orally in a clear manner.

Distinguishing sounds at various frequencies and volumes.

Distinguishing people or objects at varied distances under a variety of light conditions.

This position description should not be interpreted as all-inclusive. It is intended to identify the major responsibilities of this job. The incumbents may be requested to perform job-related responsibilities and tasks other than those stated in this description.

On Thursday, April 20, 2000, Fazer reported to the Shelter Care facility to begin his work there. On that day, he met with Shelter Care Director Jim Hermans and Department Director Bill Jones and received an orientation document from Hermans as well as a tour of the facility. Hermans showed him the room in which he would be officed. That room, the first room along the girls' wing, had previously been used as a girl's bedroom and at other times as an office for the social work intern assigned to work at Shelter Care during his/her internship from UW-Green Bay. The room was equipped with a telephone and couch as well as a side table which could be used as a desk. Hermans also gave Fazer a copy of the master key to all of the rooms in the facility. 2/

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*2/ Although Fazer claimed that the key he was given only opened the doors to the girls wing, there was no evidence that Fazer's key was not a full master key which operated every door in the facility except the front door.*

---

Fazer basically spent the remainder of the day working on the orientation materials that Hermans had given him. The following day, April 21, 2000, was Good Friday and a half-day holiday in the County. Fazer reported to work as expected on the morning of April 21<sup>st</sup> and had a brief conversation with Hermans in which he indicated he felt uncomfortable in the office provided him because it was in the girls' wing of the facility and close to the girls' bathroom. Fazer stated that there had been some allegations made against him of a sexual nature and while these allegations were untrue, Fazer was particularly sensitive to the issue of sexual allegations. Fazer stated that the office space itself was adequate—it was just the proximity to the girls rooms that made him uncomfortable. Fazer stated that he noted one of the girls looking at him “funny” when she was on her way down the hall and saw him in that area. Hermans responded that it could be that the young woman was wondering who Fazer was and that this was a frequent occurrence for new staff members at the Shelter Care. Fazer said he did not need an office at all and could work at any spot, even moving from place as needed throughout the day.

Hermans volunteered to set Fazer up in the conference room of the facility, as had been done in the past on occasion with other people who needed office space. Fazer agreed that he had thought of this also and that that could work well. Hermans then moved Fazer to the conference room, got a telephone and set it up in that room for Fazer and indicated that he (Hermans) would request a locked file cabinet for Fazer to use. Hermans said that he was happy that Fazer had been upfront about his concerns and was comfortable bringing them directly to Hermans. Hermans assured Fazer that relocating him was easy.

Fazer spent the balance of the morning in the conference room reading and talking with the residents in the facility. At one point, two boys got into an argument and a brief fight broke out while Fazer was in the room. A staff member broke up the fight and sent the boys

to their rooms to cool off. At the end of the work day, Fazer told Hermans that he had had a good morning and did not mind having the kids nearby in the conference room as it gave him a chance to talk with them and meet them. Before leaving for the day (between 11:30 a.m. and 12 p.m.), Fazer spoke briefly to Hermans about his plans for the weekend and wished Hermans a good holiday. Hermans indicated that Fazer should continue to work out of the conference room.

On Monday, April 24, 2000, Fazer called Hermans early in the morning and left a voicemail message. Hermans called Fazer back and Fazer stated that he had thought things over during the weekend and had come to the conclusion that he would not return to the Shelter Care. Fazer said this was due to his “concerns and fears” regarding possible client allegations since he would be officed in the girls wing and a lot of other things that he could not go into. Fazer stated that he did not blame Hermans for any of this, as the situation was much bigger than the Shelter Care position. Fazer indicated he was in the process of writing to Jim Kalny to explain his actions. Fazer indicated that the situation should be put back in the County’s lap where it belonged; that the County would not like his actions and that he was sure that the County would do whatever they had to and that Fazer would have to decide what was best for him to get on with this life. Fazer indicated that he had spoke with this lawyer and had had a long talk with his wife over the weekend. Hermans asked if Fazer wished to discuss any further accommodations with him. Fazer responded in the negative. Hermans essentially wished Fazer well and the conversation concluded. 3/

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*3/ Regarding the content of the above conversation, I have credited Jim Hermans concerning his version of that conversation. I found him to be an entirely credible witness and he made contemporaneous notes (placed in the record herein) which fully supported his testimony.*

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The staff orientation document which Fazer reviewed on his first and second day of employment at the Shelter Care reads in relevant part as follows:

. . .

Week One

Day One and Two

- Introduction to staff and tour of facility.
- Location of office and other work space; phone and office equipment; supplies.

- Meeting with supervisor to review job description and its function with Shelter Care.
- Begin reading Shelter Care policies and procedures. Review with supervisor to include questions, answers and clarifications as needed.
- Begin initial contact/familiarization with clients groups.
- Review of administrative rules for Shelter Care and Wis. Stats. 48 and 938 relating to Shelter Care.
- Referrals with staff the intake procedures and process of admission to Shelter Care.
- Rules and expectation for residents.
- Questions, clarification as needed with supervisor.

## Week Two

- Continuation as needed from days 1 and 2.
- Overview of confidentiality and client grievance procedure.
- Daily routine and activities for residents.
- School (Community Schools and Bayview).
- The roles of student interns and volunteers.
- Review with staff and supervisor the role of the Human Services Department case managers assigned to residents.
- Review of resident records to identify case plans and involvement with community resources.
- Further contact and becoming familiar with client group.
- Discussion with various case managers who visit the facility and/or who have clients placed at Shelter Care to explore ways of working together on case service plans.



-Leaving about community resources frequently used by Shelter Care residents; visit location and meet providers.

-Review Shelter Care resource material to aid in developing ideas for group work with residents (i.e. social skills; daily living skills; sound decision making etc.).

### Week Three

-Based on information gained in the first two weeks, begin development of assessment, social history and service plan documents for use with residents. Collaborate with staff and other case managers for ideas. Contact service providers to compare formats.

-Share recommendations with supervisor and finalize.

-Discuss reporting requirements with supervisor.

-Develop group program ideas. Coordinate ideas with staff and unit supervisor. Review with supervisor final plans.

### Week Four

-Discuss with supervisor the approach to client work and prioritizing client needs.

-Begin direct service client work. Discuss and review with supervisor assessment and service plans as developed. Gradually build caseload.

-Conduct group work with residents per the plan developed earlier. Review outcomes with supervisor.

### Month Two

-Identify and schedule training in the areas of:

- a. Juvenile Court and procedures.
- b. AODA and mental health screening.
- c. Other training necessary for social work certification and Human Services Department requirements for pay step.

d. Affirmative action and client grievance procedures training at May 2000 staff meeting.

On April 24, 2000, Fazer wrote the following letter to Human Resources Director Kalny:

. . .

I am writing to inform you that the current situation that has been fabricated to return me to work is unacceptable. I have reported as commanded to the Shelter Care position and the Shelter Care Facility. I am writing to follow up and to inform you that I will not allow myself to be placed back into that position for a number of reasons and personal risk factors.

I have been positioned in the female resident's wing in a female resident's bathroom for my office space. This is unacceptable and entirely inappropriate. This leaves myself open to great liability. I refuse to accept the liability and chance for any type of allegations to arise. I have voiced these concerns to Jim Hermans and staff at the shelter. Direct care staff also felt that my office being down the female wing was inappropriate.

Jim Hermans gave another option which was using the conference room and the wall phone in that room. This is also unacceptable as this room is used frequently by staff, residents, family, agencies, etc. In fact, Friday a fight broke out in the conference room between residents while I was attempting to complete my first week orientation. This is definitely not conducive to having a successful return or to my personal safety.

I am definitely being treated in a separate and retaliatory manner by being placed in such a position of personal risk. No other male member of the PEA Union is placed in a situation where their office is in a female resident's bedroom in the female residents wing of the Shelter Care Facility. No other member of the PEA Union is placed in a facility without definite job duties and definite office space. This situation is completely inappropriate and unacceptable.

Brown County has separated me from my union coworkers and placed me in a position against my will. Brown County has also failed to provide me a position that is even remotely similar to the position that I currently possess in the Community Integration Program. The fabricated position at Shelter Care is not comparable to the position in the CIP unit.

In light of Brown County using anonymous allegations in my situation in the recent past, I have great fear that Brown County will continue to utilize this means of retaliating against me. Thus, I will not consent to being placed in a situation where the county can use such allegations to place me at risk of being accused and charged with possible crimes.

. . .

After his conversation with Fazer on the morning of April 24, 2000, Hermans called County officials to notify them that Fazer did not intend to return to work at Shelter Care. As a result, Kalny wrote the following letter to Fazer dated April 26, 2000, and had a Sheriff's Department plain clothes police officer deliver it to Fazer at his home on April 26. That letter read in relevant part as follows:

. . .

I am in receipt of the above-referenced correspondence in which you inform me that you will not return to the temporary Shelter Care position. I am also informed that you failed to report to work on April 24<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup> and that you have returned your key.

I have reviewed your letter and cannot agree with the assertions you make. Being officed in the female wing at the Shelter Care facility does not expose you to liability, unless you misbehave. We have placed other people in that same office on a temporary basis. Other Social Workers have used that office for client interviews as well.

I also cannot agree that placement in the conference room at Shelter Care is inappropriate. Again, we have placed others in that room on a short-term or occasional basis and this room has also been used for interviews.

You continue to insist that the placement is retaliatory. As you are aware, the placement is consistent with the restriction put on your return to work by the worker's compensation health care professional.

In regard to your insistence that we are using anonymous allegations in your situation, I again deny that allegation. Moreover, I have no understanding of why this is important in regard to your return to work through the Shelter Care transition position.

Seeing as you have elected to discontinue coming to work without authorization, you are absent from your job without approval. In addition to your absence

being evidence of job abandonment, unauthorized leave is grounds for discipline up to and including discharge. The County specifically reserves its rights in that regard.

We have provided a reasonably similar position for you to transition back to work in a manner consistent with the advice from a health care professional. At each step you have insisted that our actions are retaliatory, rather than work with us to try to minimize what adverse impact you may believe could occur.

If you choose not to return to the Shelter Care position, we will treat your action as job abandonment, voluntarily discontinuing your employment with the County. Your continued absence through Friday, April 28, 2000 will be taken as your answer that you did not wish to work this situation out and have determined to leave employment with Brown County.

...

Fazer responded to the County's letter in detail by letter dated April 26<sup>th</sup>. The relevant portion of that letter reads as follows:

...

I am "not" voluntarily relinquishing my employment with Brown County. I am not allowing myself to be placed in a situation of great risk. I am not allowing myself to accept separate and disparate treatment by my employer.

...

On May 4, 2000, Kalny responded to Fazer's April 26 letter in relevant part as follows:

...

Finally, On April 26, 2000, the County gave you the opportunity to return to work by April 28, 2000. Your actions in not coming back to work constitute job abandonment and you are no longer considered a Brown County employee.

You will be receiving the appropriate documents for an individual who has voluntarily discontinued their employment with the County effective April 24, 2000.

...

On May 25, 2000, Fazer wrote the following letter to Kalny:

...

This is to create a clear record of my stand on my position of CIP social worker with Brown County Human Services. I am not, have not, and will not voluntarily resign from my position. I fully expect the opportunity to discuss and work out solutions to the current issues pertaining to my employment with Brown County.

...

On cross-examination, Fazer asserted that he was not qualified for the social work position at the Shelter Care. However, he admitted that he could perform all of the duties listed on the job description except that he was unfamiliar with juvenile delinquency laws and had had no training or certifications in the AODA area or in initial screening for mental health disorders. Fazer's social work degree from UW-Green Bay is a generalist degree, which briefly covered these topics. Only after he became an employee at CIP did Fazer gain a QMRP certification.

The County submitted several city ordinances which it urged were pertinent to this case:

...

**4.04 COLLECTIVE BARGAINING AGREEMENTS.** This chapter applies to employees not covered by collective bargaining agreements and to employees so covered when specific labor contract provisions do not apply to the contrary.

...

**4.77 LEAVE OF ABSENCE.** (1) Policy. The Personnel Director may grant a regular employee leave without pay for a period not to exceed one year subject to the following conditions:

...

(2) Unauthorized Absence. It is recognized that there may be extenuating circumstances for unauthorized absence, and due consideration shall be given each case. However, an employee who is absent from duty without approval may be considered as having abandoned his/her position, depending on the circumstance.

...

## POSITIONS OF THE PARTIES

### The Union

The Union argued that Article 27 of the labor agreement requires the County to post any new positions and that the Union refused to waive the posting procedure regarding the Shelter Care job given to Fazer. Thus, the County placed Fazer in Shelter Care job in direct violation of Article 27, although his prior position at the CIP unit was vacant and available. In the Union's view, therefore, the County abused its discretion under Article 19 by creating a position, failing to post it and placing Fazer in that position. Indeed, if the Employer had followed Article 27 and placed Fazer in the Shelter Care position, Fazer could have returned to his CIP unit within ten working days of taking the Shelter Care position if he had chosen to do so.

Although the language of Article 19 grants the County discretion following a long-term disability leave, that discretion is limited by Article 27. Pursuant to Article 19, the County must return an employee to a position for which he/she is qualified. The Union noted that the County has always utilized testing to determine qualifications. As Fazer's prior work at the Shelter Care was as a non-degreed caregiver, Fazer was not qualified for the Shelter Care position in the Union's view. In this regard, the Union observed that Fazer had no training in State and Federal laws pertaining to Shelter Care and had no training in AODA or mental health screening, which was required at the Shelter Care. Thus, the Union urged that the only position that Fazer was qualified for was his former CIP position.

The County did not rely on professional advice in placing Fazer in the Shelter Care. In this regard, the Union noted that Fazer was not placed in Shelter Care on Dr. Grunert's advice, as Grunert's addendum was sent to the County Workers Compensation Attorney and County did not receive it before April 17, 2000. In addition, Fazer's placement at Shelter Care was not an attempt to accommodate Fazer, but rather an attempt to force him to resign. In any event, the Union urged that the Grunert opinion was invalid. On this point, the Union pointed out that Dr. Grunert saw Fazer on two occasions for brief periods and restricted Fazer's return to work while his own doctor, who he had been seeing for two years, released him without restriction. In addition, Dr. Grunert's addendum was based on a radio talk show transcript, Internet communications and past medical records. Fazer denied authoring the Internet communications copies of these and the talk show transcript were never placed in the record in this case and the past medical records had been available to Dr. Grunert before he issued his addendum. Thus, in the Union's view, Grunert's addendum opinion is without merit and apparently based on the County's wish to treat Fazer unfairly.

In these circumstances, the Union urged that the placement of Fazer in the Shelter Care position was discriminatory, based upon his handicap or illness. The Union noted that Fazer's psychiatrist believed he was fit to return to the CIP unit; that his former supervisor John Cornette was no longer a supervisor in the CIP unit in 2000; and that the placement of Fazer in

CIP would have afforded him a level of comfort not available in the Shelter Care job. In this regard, the Union noted that Fazer was qualified to work in CIP, that he knew the routine, regulations and statutes that were applicable thereto and that he would have the support of his colleagues at CIP. In contrast, at Shelter Care Fazer was unfamiliar with State and Federal laws and regulations applicable thereto and unfamiliar with the expectations of his supervisor. At Shelter Care, Fazer would have to create a new program, which never existed before, and that the job could expire by the end of the year. In these circumstances, the Union urged that the grievance should be sustained and Fazer should be returned to his CIP position.

### The County

The County argued that the Grievant failed to demonstrate that he was not qualified for the Shelter Care position. The County argued that on April 20, 2000, Fazer was not returning from a long-term disability — that Fazer's LTD ran out on August 8, 1999, more than eight months before his return to work. Although Fazer was employed by the County after August 8, 1999, he received no salary or benefits and was not entitled to use Article 19, Section 3, upon his active return to County employment. Thus, in the County's view, Article 19, Section 3, is inapplicable and the County had complete discretion to place Fazer in any position that it chose.

Even if Article 19, Section 3, applies to the Fazer case, the record showed that the County believed and Fazer admitted he was qualified for the Shelter Care position. In this regard, the County noted that at the instant hearing Fazer admitted that he had the education and experience to perform all but three of the itemized qualifications for the position. Those three items included knowledge of applicable laws and regulations, familiarity with community resources and the ability to diagnose and provide treatment. As the County planned to fully train Fazer, these three items would not have been a problem for Fazer in the Shelter Care position. The County further noted that Fazer did not introduce any evidence, other than his own opinion, that he was not qualified for the Shelter Care job. As the Shelter Care job description was specific and not generic and as Article 3 of the contract allows the Employer to waive the testing requirement, the County did not exceed its authority in placing Fazer in the Shelter Care job.

The County argued that the Grievant failed to prove a violation of Article 19, Section 3. The County contended that it has discretion to make determinations as to classifications on a case-by-case basis and that the language of Article 19, Section 3, is mandatory. The County performed a case-specific job analysis prior to Fazer's return to work, considering nine factors before it placed Fazer in the Shelter Care position as the best place for him to resume his employment. These nine factors included Dr. Thomas's medical release, Dr. Grunert's medical release, the County's conversations with CIP employees regarding Fazer's possible return to work there, Fazer's two unsuccessful attempts to return to CIP, Fazer's qualifications for the Shelter Care job and the fact that he had previously worked there,

the County's hope that the Shelter Care job would become permanent and that Fazer's filling of the Shelter Care job on a temporary basis would be acceptable to the Union and the County, the County's intent to provide Fazer with training in any areas he needed and the good relationship between Fazer and Shelter Care Director Hermans in the past. All of these factors, the County urged, supported the County's conclusion that Fazer was appropriately placed in the Shelter Care position.

Fazer failed to show that his placement at Shelter Care supported his claim of constructive discharge. For constructive discharge to have occurred, an employer must intentionally make working conditions so intolerable to a reasonable person that the person is forced to involuntarily resign. In the County's view, there is nothing in the record, which describes a workplace so permeated with hostility as to satisfy the constructive discharge criteria in this case. In this regard, the County noted that Fazer complained about his office being in the girls' wing, but that Hermans cured this complaint immediately, making it unreasonable for Fazer to raise that as a difficulty thereafter. In addition, on or before April 21<sup>st</sup>, Fazer never objected that he was unqualified for the Shelter Care position, that he could not learn the job at Shelter Care, and Fazer did not object to not being tested for the job or to the temporary nature of the job. Rather, he worked for a day and one-half and abandoned his position, and Fazer was fully aware that the County would consider him terminated if he failed to report to work on or before April 28, 2000, when he chose not to return to Shelter Care. Therefore in these circumstances, the County urged that the grievance be denied and dismissed in its entirety.

## REPLY BRIEFS

### The Union

The Union argued that the County should not place the burden on the Grievant to prove he was not qualified for the Shelter Care position. The Union noted that Fazer has no special training to deal with the Shelter Care population and was not aware of applicable State and Federal laws and regulations, making him unqualified for the position. As the County has never waived testing even for lateral transfers, and the Shelter Care and CIP are very different jobs, the burden of proof should be on the County to explain why it by-passed testing and placed Fazer in the Shelter Care job.

The Union observed that the County argued that Fazer was not returning from a long-term disability leave and that Article 19, Section 3, should not apply. The Union contended that such an assertion is contrary to the evidence. In this regard, the Union noted that Fazer received a limited release from Dr. Thomas between June 23 and August 9, 1999, and that Thomas only issued Fazer a full release to return to work in August, 1999, whereupon Fazer requested to return to County employment. As the County wanted an independent medical exam for Fazer and this could not be scheduled until September, it was not Fazer's fault that he



did not return immediately to County employment. Indeed, Fazer had a relapse in the fall of 1999 so that independent medical exam could not be scheduled until late February, 2000. Although the County argued that Fazer qualified for the Shelter Care position based on the job description, the Union noted that the job description does not measure specific job duties. In addition, although the County argued that Article 3 (Management Rights) allowed it to waive testing and assign Fazer to the Shelter Care position, the Union urged that one should not read Article 3 in a vacuum. In this regard, the Union noted that Article 2 states that the County cannot discriminate against any employee due to handicap and that Article 3 itself states that the Employer cannot exercise its management rights in violation of the agreement.

The Union urged that the County is not privileged to place Fazer in any job and that the contract does not allow the County to by-pass the normal qualifications procedure (testing) to determine Fazer's qualifications for the Shelter Care position. The nine factors the County reportedly used to place Fazer in the Shelter Care position do not hold up to close scrutiny, in the Union's view, leading to a conclusion that the reasons were created in order to justify the County's violations of the labor agreement and posting requirements.

The Union contended that the County constructively discharged Fazer by placing him in the Shelter Care position. For constructive discharge to occur, working conditions must be so intolerable that a reasonable person would be compelled to resign. In this regard, the Union noted that the added responsibilities of learning new laws and regulations, isolation from his co-workers, discrimination because of Fazer's handicap and the fact that the Shelter Care job was temporary, all show that the County treated Fazer differently than it treated any other employees. In addition, the Union noted that the County cannot refuse to return Fazer to the CIP unit because it would have harmed him. Rather, the law would allow the County to refuse to return an employee to a work area only if it would harm others. As the County failed to prove any harm to other employees in CIP by Fazer's return thereto, this reason for refusing to return Fazer to the CIP unit was inapplicable. In these circumstances, Fazer was justified in removing himself from the Shelter Care position and insisting on his contract rights to return to the CIP unit.

### **The County**

The County argued that the violation of Article 19 is the central issue in this case. The County noted that the "work now, grieve later" principle should apply to this case, as no unusual or abnormal safety or health hazards existed for Fazer if he remained at the Shelter Care. In this regard, the County noted that by his March 30, 2000 letter, Fazer effectively admitted that he realized he should have lived up to the "work now, grieve later" axiom and Fazer's abandonment of his Shelter Care job should defeat his claim of constructive discharge. In addition, Fazer's alleged fear of remaining at Shelter Care was fanciful, unsubstantiated and unworthy of belief, in the County's view. In this regard, the County noted that Fazer's first office at Shelter Care had been used as an office for several years; that Shelter Care workers

must physically check on all residents every ten minutes; that the office door on Fazer's office was locked from the outside; that male staff regularly patrol the girls' wing; that Fazer indicated that he did not need an office and that the conference room was adequate; that alternate office space was not available; that there was no evidence that the scuffle which occurred on April 21 in Fazer's conference room office endangered Fazer; and that Fazer did not mention the scuffle when he left work that afternoon.

Thus, the credible evidence supported a conclusion that Fazer resigned and voluntarily quit his Shelter Care position. In this regard, the County noted that Fazer had plenty of notice that he would be placed at Shelter Care before it occurred and that no evidence was proffered to support the Union's claim that the Shelter Care constituted a hostile environment sufficient to sustain a claim of constructive discharge. Finally, Fazer was warned that he would be considered to have quit his employment if he failed to report to work as ordered (by April 28<sup>th</sup>) and Fazer specifically refused to report to work under those conditions. As the contract does not allow the employee to dictate job placement, the County has the final say on the assignment of employees pursuant to Article 19. Article 19 would be rendered meaningless if this were not the case.

The County observed that the Union only raised the anti-discrimination section of Article 2 at the hearing and that this was never raised during the processing of the grievance. There was no evidence that Fazer was in fact handicapped when he was placed in the Shelter Care position and there was insufficient evidence to show that Fazer was handicapped under any other legal analysis. Finally, there was no proof that Fazer was covered by the Wisconsin Fair Employment Act as a disabled person.

The County argued that posting and/or testing for the Shelter Care position is irrelevant to this case. In this regard, the County noted that the Union acquiesced in Fazer's temporary placement in the Shelter Care job, filing no grievance thereon, and that the County never refused to post the Shelter Care job, but merely suspended the posting thereof. Finally, the County contended that it had the right to waive testing and that at this late date the Union's challenge of Dr. Grunert's credentials, being based upon no factual evidence and no testimony from experts or from Grunert, should be disregarded.

### **DISCUSSION**

A central question in this case, on which the parties strongly differ, is whether Article 19, Section 3, should apply to Fazer's situation. The facts of this case clearly demonstrate that Article 19, Section 3, is applicable. In this regard, I note that in March, 2000, Fazer's doctor's found that he was "able to return to work." In addition, the facts showed that Fazer had been on "LTD" prior to his return to work in April, 2000. As nothing in Article 19 requires an employee to have been on LTD immediately prior to the employee's return to work and no language of the contract conflicts with the applicability of Article 19 to Fazer's situation, it is reasonable to apply Article 19, Section 3, to Fazer's situation.

The remaining language of Article 19, Section 3, states that an employee returning after being on LTD “will be reinstated to an available position for which s/he is qualified.” It is significant that this language does not require the County to return the employee to the position he/she previously held before going on LTD. Rather, Section 3 goes on to state that “such determination will be made by the Employer on a case-by-case basis.” The use of the word “determination” appears to refer back to both “available position” and to the qualifications of the employee. Thus, the judgment regarding employee qualifications and what position is available are clearly left to the employer under Article 19, Section 3. In short, Fazer did not have the right to return to his CIP position under the language of Article 19, Section 3. Rather, he had the right to return to an available position for which he was qualified.

The question then arises whether the Shelter Care position was “available” at the time Fazer was placed in it. I believe the position was “available.” In this regard, I note that the County had created a job description and orientation program for the Shelter Care position prior to Fazer’s placement therein. Fazer’s placement in the position supports a conclusion that it was “available.” Whether or not the position remained “available” later is not relevant to this case. It is significant that Article 19, Section 3, does not state that the available position must be a permanent one.

Furthermore, although the Union argued that Article 27 should have been applied to the Shelter Care social work position prior to Fazer’s placement therein, such an approach was not required, as the County was following Article 19, Section 3, placing Fazer in the position. In my view, the Shelter Care social work position was not a “vacancy” which the County needed to fill within the meaning of Article 27, but it was an available position pursuant to Article 19, Section 3.

But even if one were to find the Shelter Care position to constitute an Article 27 “vacancy,” it is clear that that Article allows the County to make “immediate temporary assignments to fill any vacancy” before applying Article 27 procedures to fill the vacancy permanently. Thus, the County had the right to place Fazer in the Shelter Care position without first posting (and testing for) the position.

The next question which must be determined in this case is whether the County acted arbitrarily, capriciously or discriminatorily in determining that Fazer was qualified for the Shelter Care position. 4/ In this regard, I note that Human Resources Director Kalny stated that he considered a number of factors in deciding to place Fazer in the Shelter Care social work position. Those factors included the following:

1. Dr. Mead’s return to work slip without restrictions dated February 24, 2000.
2. Dr. Thomas’ return to work slips dated June 23, 1999 and August 9, 1999, as well as Dr. Thomas’ August 26, 1999 letter of explanation and certain medical records dated in October concerning Fazer’s refusal to take his medication, a medical record

- dated November 8, 1999 and January 5, 2000, by Dr. Thomas, which indicated that a return to Brown County might exacerbate Fazer's medical condition.
3. The September, 2000 commitment proceedings of Fazer.
  4. Kalny's concern about four or five CIP employees who were interviewed regarding their belief that tension, publicity and resentment in the CIP unit might be the result of placing Fazer in that unit upon his return.
  5. The two failed attempts to return Fazer to the CIP unit.
  6. The fact that the Shelter Care job appeared to be a way of removing Fazer from a stressful environment and easing him into the County workforce as both Dr. Thomas and Dr. Grunert had recommended work on a trial basis or phase-in.
  7. Fazer's positive relationship in the past with Jim Hermans, the Shelter Care director and the type person Hermans is (low-key).
  8. Dr. Grunert's re-evaluation of Fazer dated April 13, 2000, in which Grunert finds the Shelter Care position would be the best position to place Fazer for his return to work.

It should be noted that Kalny stated without contradiction that it was his belief that the return to work slips from Drs. Mead, Thomas and Grunert were conflicting and that Dr. Thomas' August 26, 1999 explanation conflicted with his own return to work slip issued on behalf of Fazer. Given the correspondence between Fazer and Kalny as well as the extensive medical records which have become a part of this record, I cannot find that the County's decision to place Fazer in the social worker position at Shelter Care was either arbitrary, capricious or discriminatory.

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*4/ For the reasons stated above, I believe that the Shelter Care position was "available" and that the County could place Fazer in that position. The contract does not require that the County place returning employees in a permanent position.*

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An additional question arises whether Fazer was in fact qualified for the Shelter Care position. In this regard, I note that Fazer admitted that he could perform all of the job duties listed on the Shelter Care job description with the exception of mental health screening and AODA assessment and counseling. Fazer also stated he was not aware of the laws and regulations surrounding juvenile delinquency. However, these exceptions do not mean that Fazer was unqualified for the Shelter Care position. In fact, the County had promised, as listed in his orientation documents and as the County witnesses stated in this case, that Fazer would be fully trained in any areas in which he needed training or education so that he could fully perform his Shelter Care position. Furthermore, I note that the Shelter Care position calls for a social work degree, which Fazer possesses and at the time of this placement at Shelter Care, Fazer was properly certified by the State of Wisconsin as a social worker. Fazer's social work degree is a generalist degree from UW-Green Bay and a more specific

degree was not required for the Shelter Care position. Although Fazer's prior work at the Shelter Care was not in a professional position, it was sufficient to give at least an idea of how the Shelter Care facility operated from a caregiver point of view. Finally, it is clear from the record that Fazer failed to argue that he was unqualified for the Shelter Care position at any time before or during his appointment to the Shelter Care position. In these circumstances, the facts demonstrate that Fazer was qualified for the Shelter Care position at the time he was placed in it.

The Union argued that Fazer was constructively discharged when the County failed to return him to his CIP position but instead placed him in the Shelter Care position. As Fazer had no right under the contract language (Article 19) to return to his CIP position, he could not be constructively discharged by being placed at Shelter Care. 5/

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*5/ The Union argued that the County placed Fazer in the Shelter Care position in order to retaliate against Fazer for whistle blowing regarding the misconduct of another County employee. The Union failed to submit evidence to support this argument. The Union also claimed (without offering supporting evidence) that the County retaliated against Fazer for his public criticism of County policy and management. Therefore, these arguments were unpersuasive.*

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The Union argued that the County made Fazer's working conditions so intolerable he was forced to quit on April 24, 2000. In his April 24<sup>th</sup> letter to the County, Fazer listed the following items as making his work life intolerable:

1. His first Shelter Care office in a girl's bedroom was inappropriate and could subject him to liability;
2. His second office in a conference room was unacceptable;
3. He had no definite job duties or office space as Shelter Care;
4. At Shelter Care, he was treated differently and was separated from his union co-workers.

In my view, none of these circumstances is sufficient (taken separately or together) to prove the intolerable circumstances necessary to justify Fazer's refusal to return to work at Shelter Care. It should be noted that Hermans accommodated Fazer's concerns about his office being in the female bedroom immediately and moved Fazer to the conference room office; that the girls' bedroom office had been used as an office for several years by student interns at the Shelter Care; that physical checks every ten minutes by care giving staff provide a safe guard against any resident being unobserved and unaccounted for; that male staff members are regularly seen on the girls' wing; and that the conference room was really the only remaining area of the Shelter Care available for office space other than the vacant girls' bedroom Fazer was initially offered. In addition, the record facts show that based upon his

position description, Fazer was assigned definite job duties at Shelter Care. The Union also failed to prove herein that Fazer was disparately treated. The simple fact is that as the social worker at the Shelter Care, Fazer would necessarily be the only social worker present at the facility and isolation from his co-workers could not be avoided.

In its brief, the Union also argued that Article 2 should guarantee that Fazer should not be discriminated against because of his handicap. In this regard, I note that none of the doctors involved in Fazer's case found him to be either disabled or handicapped in any way at the time that they released him to return to work. The fact that Fazer is the only employee who has not been returned to his former position after having taken LTD, I do not find remarkable or the basis for the Union's claim of disparate treatment. In this regard, I note that the record clearly shows that no employee has ever been on LTD and off work for the extensive period Fazer has. Thus, a claim of disparate treatment is very difficult to make where, as here, the Union has failed to show that any other employees have been in a similar position to Fazer in the past.

The final question in this case is whether Fazer abandoned his position with the County by failing and refusing to return to the position at the Shelter Care on and after April 28, 2000. In this regard, I note that Article 8 (Discipline) states that no employee shall be reprimanded, suspended or discharged except for just cause. One of the causes for disciplinary action is listed as habitual tardiness, unauthorized or excessive absence or abuse of sick leave. Article 8, Section B, also requires that the Employer notify the employee being dismissed in writing of the reasons for the action with a copy being sent to the Union. In this case, the County notified Fazer that it would consider him to have voluntarily relinquished his employment if he failed to report to work on April 24, 25 and 26 and through April 28, stating that if Fazer chose not to return to his Shelter Care position, the County would treat Fazer's action as "job abandonment, voluntarily discontinuing your employment with the County." Although Fazer wrote back to the County indicating he was not voluntarily relinquishing his employment with the County, he also refused to return to the Shelter Care position as he believed it constituted "separate and disparate treatment by my employer" and placed him (Fazer) "in a situation of great risk."

Although the language of Article 8 is sparse, it does allow the County to consider an employee terminated for unauthorized absence. It is clear based on this record that Fazer was given sufficient notice that his continued absence from work at the Shelter Care would constitute an unauthorized absence which would subject him to involuntary termination. Fazer's letter in response to the County's April 26, 2000 letter demonstrates that Fazer was well aware of the risks he was taking by refusing to return the Shelter Care. Indeed, Fazer's correspondence with the County demonstrates that he was aware of the axiom that an employee should "work now and grieve later." In these circumstances, it was reasonable for the County to conclude that Fazer had abandoned his employment and that it could rightly consider him to have voluntarily quit his employment.

Based on the evidence and argument in this case, as well as the above analysis, I therefore issue the following

**AWARD**

The County did not violate Article 19, Long-Term Disability, by refusing to return the Grievant to his former position in the Community Integration Program. The grievance is, therefore, denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin, this 23<sup>rd</sup> day of March, 2001.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator