

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**WINNEBAGO COUNTY**

and

**WINNEBAGO COUNTY DEPARTMENT OF HUMAN SERVICES  
EMPLOYEES, LOCAL 2228, AFSCME, AFL-CIO**

Case 357  
No. 62094  
MA-12153

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**Appearances:**

**Mr. Richard C. Badger**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, P.O. Box 2825, Madison, WI 53717-1903, on behalf of Local 2228.

**Mr. John A. Bodnar**, Corporation Counsel, Winnebago County, 448 Algoma Blvd., P.O. Box 2808, Oshkosh, WI 54903-2808, on behalf of the County.

**ARBITRATION AWARD**

Pursuant to the terms of the 2001-03 labor agreement between Winnebago County (County) and Winnebago County Department of Human Services Employees, Local 2228, AFSCME, AFL-CIO (Union) the parties jointly selected Sharon A. Gallagher, a member of the Wisconsin Employment Relations Commission's staff, to hear and resolve a dispute between them regarding the selection of Jason Baer to fill a job opening in the Long-Term Support Division—Supported Living Team, over Grievant Barbara Robertson. Hearing was held in the matter on March 20, 2003, at Oshkosh, Wisconsin. No stenographic transcript of the proceedings was made. The parties agreed at the hearing that they would send their initial briefs directly to each other with a copy to the Arbitrator postmarked May 5, 2003, and that they would reserve the right to file reply briefs. The Arbitrator received all briefs in the case by May 27, 2003, 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 Arbitrator should determine the following issues herein:

Did the County violate the collective bargaining agreement when it failed to award the Grievant, Barbara Robertson, the position of Service Coordinator/Social Worker in the Long-Term Support Division—Supported Living Team in the Human Services department? If so, what is the appropriate remedy?

## RELEVANT CONTRACT PROVISIONS

### ARTICLE 1 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, lay off, suspend, transfer, 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.

In no event shall the exercise of the above rights and responsibilities of the Employer violate the terms and conditions of this Agreement.

### ARTICLE 11 JOB POSTING

A job vacancy shall be defined as a position not previously existing in the job classification plan attached to and made a part of this Agreement or a vacancy in a position in the said job classification plan due to termination of employment, promotion or transfer, death or disability of existing personnel, and, in the judgment of the Employer, the need to fill such job vacancy continues to exist. In the event the Employer determines not to fill any job vacancy in the job classification plan, the Employer agrees to post a notice of job discontinuance for a period of five (5) working days. Any such aforementioned vacancy shall be posted for five (5) working days on the Union bulletin boards in the Human Services Department. The Union President shall be provided with a copy of said posting.

The job requirements, qualifications and salary range shall be a part of the posting. Regular employees who have passed their probationary period and who desire to apply for such vacant position are to make application in writing through the Department of Human Resources.

The Employer shall determine the qualifications of the applicants. If, in the opinion of the Employer, two (2) or more applicants for a single vacancy are in all respects equally qualified to fill such vacancy, it shall be filled by the employee among such equally qualified applicants having the longest continuous service within the Human Services Department. If, in the opinion of the Employer, one (1) of such applicants is better qualified to fill such vacancy than any other applicant, it maybe filled by such better qualified applicant. . . .

QUALIFICATIONS DISPUTES. If there is any difference of opinion as to the qualifications of an employee, the Employer or the Union may take the matter up for adjustment through the grievance procedure.

. . .

### **BACKGROUND**

It is undisputed that the Grievant, Barbara Robertson, who has been employed by the County as a Social Worker for the past 19 years has had either above average or superior overall evaluations during her County employment. Robertson stated herein that she has been employed in the area of child welfare for her entire tenure with the County. Robertson submitted a summary of her work for the County (Union Exhibit 1), which read in relevant part as follows:

. . .

#### **July 1993 to present - Child Protective Services - Winnebago County DHS:**

Complete family assessments and develop case plans of the family's strengths and needs, case management, contact with collaterals, prepare court reports and represent Department in numerous court appearances including sworn testimony (28 appearances in 2001 alone), case monitoring, case evaluations, crisis intervention, referrals to community resources and services, individual/family/couples counseling, emergency placements, initiate guardianships and attend hearings, provide teaching, coaching, and role modeling to clients. Issues addressed with families include neglect, physical and sexual abuse, incest, domestic abuse, mental illness, physical disabilities, developmental disabilities, and alcoholism.

**July 1989 to July 1993 - Delinquency Unit - Winnebago County DHS:**

Completed child and family assessments to determine comprehensive needs for services, developed written treatment plans, case management and monitoring, referrals to community resources and services, contact with collaterals, prepared court reports and represented Department in court appearances, crisis intervention, individual, family, and group counseling, and emergency placements. Issues addressed included incest, sexual abuse, juvenile delinquency, alcohol and drug abuse, school truancy, and runaways.

**July 30, 1984 to July 1989 - Substitute/Foster Care Unit- Winnebago County DHS:**

Liaison to foster homes, group homes, residential treatment centers and corrections facility, attended staffings, provided individual, group, and family counseling, crisis intervention, referrals and collateral contacts to community resources and services, prepared court reports and represented Department in court appearances. Work cooperatively with other agency staff as well as community resources to develop a plan for treatment, which appears most appropriate for individual children and their families. Special concentration in the area of alcoholism and chemical dependency.

. . .

Robertson has a B.S. degree in Social Work and Criminal Justice and 23 graduate credits toward a Masters degree, 9 of which are in areas related to older adult issues (Long-Term Care, Gerontology Concepts and Aging Policy). Robertson also took a 3-credit graduate level class in "Social Welfare-Developmental Disabilities." Robertson's employment on the County's Child Protective Services team involves the following duties, as she stated on her application for the Supported Living Team position:

Family assessments, crisis intervention, course reports, case record maintenance, provide counseling to children and adults as needed, referrals to outside agencies, teaching and training, work cooperatively with outside agencies.

Robertson stated herein that in her current position, her duties are generally to confer with clients, to do assessments of family needs and skills of the family and to get referrals from outside sources to meet the needs of her clients. Robertson stated that the welfare of the children in the family is her primary concern but that a secondary concern is to try to return children to their parental home if that is possible after they have been removed due to parental neglect. If return to the parental home is not possible, Robertson's job is to try to find foster parents for the children and to assist in the termination of parental rights if that is required or necessary. Thus, court mandated or court approved services are the rule in her cases and Robertson frequently testifies in court.

Robertson stated that in her position, from time to time she has worked with developmentally disabled and physically disabled clients but she has never had a position with the County where the primary focus was to provide services to developmentally disabled, physically disabled or cognitively disabled adults. Robertson stated herein that she has had at least 15 clients who have been physically or developmentally disabled and she stated that some of these cases have remained open for between one and three years. These developmentally/physically disabled children have ranged in age between 3 and 17 and there have been three developmentally/physically disabled adults involved in her cases. At the time that Robertson applied for the Supported Living Team position, her wage rate was \$23.07 per hour.

The job posting of the disputed position, Service Coordinator/Social Worker in the Long-Term Support Division—Supported Living Team, reads in relevant part as follows:

...

**SALARY:** \$15.11-\$22.50/HR.

**POSITION PURPOSE:** TO ASSIST INDIVIDUALS WITH A DEVELOPMENTAL AND/OR PHYSICAL DISABILITY AGE 23 TO 65 IDENTIFY NEEDS, PLAN, COORDINATE THE PROVISION OF SUPPORTS SERVICES WITHIN AN INDIVIDUAL'S FUNDING ACCOUNT, AND MONITOR OUTCOMES.

**POSITION IN ORGANIZATION:** REPORTS TO THE SUPPORTED LIVING TEAM SUPERVISOR

**MAJOR DUTIES:**

THE MAJOR DUTIES OF THIS POSITION REFLECT THE "BEST PRACTICE CORE VALUES" (SEE ATTACHED) FOR PROVIDING SERVICES AND SUPPORTS. BEST PRACTICES SHOULD ALWAYS BE USED AS A FILTER FOR PLANNING AND IMPLEMENTING SERVICES AND SUPPORTS.

1. To assess the needs, strengths, wants, preferences, future goals, and desired outcomes of individuals collaboratively with the individual and relevant others.
2. To coordinate and facilitate the development of a plan that is based on a self-directed [sic]. The focus should reflect the person's specific needs, desires, and outcomes. Progress towards meeting outcomes, consumer satisfaction, and cost-efficiencies, are part of the ongoing monitoring of a person's individualized plan.

3. To evaluate and respond to emergencies and crisis situations. This includes, but is not limited to the provision of or arrangement for APS such as: emergency protective placements, guardianships, elder abuse, and abuse to vulnerable adults.
4. To assist persons in accessing community resources and natural supports to ensure that desired outcomes are achieved.
5. To document all case management activities and to complete all paperwork required as mandated within the Supported Living Team.
6. To actively participate in meetings and training opportunities that will enhance skills and practice, including, but not limited to: supervisory, team, and division meetings as well as supervisor recommended training(s).
7. To provide the individual/family with information, support, and experience (practice opportunities) needed to make informed decisions and understand the service delivery system, natural supports, budgets, funding, costs, and choices.
8. Assist and/or arrange for individuals to have and operationalize individual funding accounts as well as personal budgets; inform supervisor of changes in support needs that may impact on budgets and/or contracts.
9. Assist communities, its' [sic] citizens and organizations, make their services and resources accessible and available to individuals supported within the Long Term Support Division.

**PRINCIPAL ACCOUNTABILITIES:**

1. To ensure that the Long Term Support Division's "Best Practices Core Values" as well as the Supported Living Team's goals and procedures are implemented and practiced for persons regardless of the severity of their developmental and/or physical disability.
2. Participates in division and/or team decision-making process to effect change reflective of the philosophy, core values, and goals.
3. To ensure that funding source regulations are adhered to and that non-county dollars are utilized before county funding. Ensures that guidelines are adhered to as required by funding sources and established programmatic procedures.
4. To mobilize appropriate resources that are effective, efficient, and of value to the users of funding and/or services.
5. To ensure compliance with federal, state, county, and department rules, regulations, policies and procedures.
6. To provide accurate and complete assessment/profiles, waiver applications, case notes, and other written information as required and in accordance with state, federal, and department standards and schedules.
7. To meet ongoing training requirements of the Department of Human Services and/or Winnebago County, Long Term Support Division, and

- funding sources. Maintain the knowledge and skills necessary to assess, plan, and monitor supports and to keep current with changes in rules, regulations, and community resources.
8. To ensure that each person's legal rights, safeguards and confidentiality are upheld.
  9. To respond to individuals, families, service providers, and co-workers in a timely and courteous manner.
  10. To demonstrate professional conduct and a commitment to seek solutions utilizing problem solving and creativity.
  11. To meet or exceed the minimum loggable case management standards, individual goals, and team goals.

**KNOWLEDGE, SKILLS AND ABILITIES:**

1. Person must possess a Bachelor's Degree in health or human services field and two years of experience in working with people with developmental and/or physical disabilities. The person shall be knowledgeable concerning the service delivery system and the resources available to the individual with a developmental and/or physical disability.
2. Compatibility with, and the commitment to embrace, the service philosophies of the Department of Human Services - Long Term Support Division (see Best Practice Core Values).
3. A demonstrated ability to listen to individuals, identify needs, and creatively address them.
4. The ability to adjust and contend with a constant caseload demand, efficiently prioritizing caseload, service needs, and daily tasks to ensure priority services are delivered as well as other needed work is completed.
5. The ability to utilize conflict resolution and problem solving techniques.
6. A demonstrated ability to be a project-oriented, self-starting, and self-directing; uses independent judgement and discretion in setting daily priorities.
7. The ability to effectively facilitate a meeting with a variety of persons in an array of settings.
8. Must be able to meet consumers and guardians at times that are outside the typical hours of work.
9. The demonstrated ability to skillfully/creatively plan and organize to achieve the most effective and efficient service delivery.
10. The ability to communicate effectively and professionally both verbally and in writing.
11. The ability to use a personal computer with basic typing, competence using Outlook and Word for Windows.
12. General math knowledge to monitor service logs, monthly expense forms, individualized funding accounts, and authorizations.

13. Demonstrates sensitivity to cultural, social, economic, race, and individual differences. 1/

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*1/ The parties stipulated that Baer and Robertson were equally qualified on items 10 through 13 of "Knowledge, Skills and Abilities," and that these factors were not determinative in deciding Baer should get the position.*

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On September 10, 2002, both the Grievant and employee Jason Baer filed applications with the County to apply for the position in dispute in this case. Baer described his duties with the County in the job he had at the time of application as follows:

Case manage young adults aging out of child welfare. Assist with transition into adulthood via support information assistance.

Baer was hired by the County in January, 1999; he held the Independent Living Specialist position with the County from July, 2001 through the date of his application (September 10, 2002) for the disputed position. His pay rate at the time of application was \$13.95 per hour. From January, 1999, through the date of application, Baer also performed duties as a Lead Mental Health Technician for the County (at the same hourly rate) which he described in his application as follows:

Schedule outreach services for CSP, DD, Oshkosh Team and therapist work with individuals (mental health and DD) in the community, CSP day management duties.

By way of elaboration and explanation, Baer also attached the following description of his prior work which was related to the position applied for:

...

Schedule for, and work with, individuals from the third floor of Winnebago County DHS. These include providing respite to individuals living in group homes in the community, helping individuals access appointments, doing some individual work on coping skills, delivering and observing medications, and working with service coordinators in setting up MHT services.

Have done case management work for the Independent Living Program for the last year working with young adults aging out of child welfare. Through this position I have worked with various groups [sic] homes, foster parents, social



workers, families of the service recipients, social security, section 8 housing, etc... I have researched available community resources for service recipients to utilize. I have case management experience on TCM (intake/referral, enrollments, documentation, closing cases, etc...) in working with these young adults.

Worked from 1995 through 2000 (with one break for internship) for Lutheran Social Services with people with developmental disabilities living in the community and group homes. Work included helping people access appointments, sitting in on treatment meetings, assisting with/teaching ADLS, assisting with accessing community recreational activities.

Worked at Norristown State Hospital in Pennsylvania with adults with developmental disabilities. Work included leading various groups (music, recreational, exercise, skills building), attended and contributed to treatment team meetings. Assisted individuals with accessing special events such as dances, picnics, holiday celebrations, etc... Did individual work with some people on specific goals (e.g. moving towards a lesser restrictive environment, coping skills).

Worked with children with developmental disabilities in grade school (Perry Tippler) and High School (North High) leading music groups focussed [sic] on different goals including educational, movement, behavioral. Worked individually with a person with brain injury, in groups with adults with developmental disabilities at long term care facilities, and group homes.

Various side projects within my county position including; work with Amy Hartman and the CSC program, assistance to and coordination with the Hope and Care Inn, co-facilitating recovery model training at different areas of the state for CSP, volunteering to participate as Day Manager on a biweekly basis for the CSP. 2/

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2/ *CSP means Community Support Program. The Community Support Program is like the Long-Term Support Team but it is for adults who have chronic mental illness.*

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Baer stated herein that as a Mental Health Technician and Lead Mental Health Technician for the County from January, 1999, through October, 2002, he spent 70-80% of his time working with developmentally and physically disabled adults. Baer also explained that

during his tenure with Lutheran Social Services, he worked with developmentally disabled and physically disabled, cognitively delayed, autistic and mentally ill clients who were adults under the age of 65 for his entire tenure there. During his six-month internship at Norristown Hospital in Pennsylvania, Baer stated that he worked with a combination of developmentally disabled and physically disabled adults, as well as with mentally ill patients. In his positions with Lutheran Social Services and the County, Baer stated that his goal was to respect disabled adults' right to make their own decisions and to help them make sound decisions that they are comfortable with based upon their goals and societal expectations. None of Baer's clients were subject to court orders. During his employment in the past, Baer has provided direct services as well as case management. 3/

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*3/ Jason Baer has a B.A. in Music Therapy and a Masters degree in Counseling. Baer has received excellent evaluations from the time of his hire in January, 1999, through the date of his hearing.*

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Mary Krueger has been the Division Manager of the Long-Term Support Program since approximately February, 2002. Krueger stated herein that approximately four years ago the County's community programs were merged together to form a Department of Human Services. Krueger stated that as Division Manager of Long-Term Support, she is in-charge of one of five divisions in the Department of Human Services, which provide service and coordinate care and funding given to physically and developmentally disabled individuals (some of whom are elderly as well) who also may have cognitive difficulties such as cerebral palsy or epilepsy.

In the Long-Term Support Division, employees do all of the intake work for cases and provide adult protective services for the developmentally disabled and physically disabled population. 4/ Krueger stated that the philosophy of her Division is that all persons from the ages of 23 to 65 have the right to live freely in the community and it is the Long-Term Support Division employees' job to help developmentally, physically and mentally disabled individuals assess their needs and coordinate services for them so that they can be successful participants in community life.

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*4/ The other four divisions in the Department of Human Services are Family Support, Supported Living, Older Adults and Elderly Services.*

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Krueger stated that she was part of the interview team for the disputed position, which interviewed both Baer and Robertson. Krueger stated that the interview team's decision was unanimous that Baer was the best candidate for the position, after the team looked at the

applications (and the attachments thereto) of the two candidates and interviewed both candidates and checked their qualifications. The interview team asked the following questions to both candidates at interviews conducted on September 18, 2002:

. . .

1. Experience with physical/dev disabilities [sic]?
2. What is your understanding of coordination of services and \$?
3. How would you get to know a person and their needs?
4. What do you think a SC/SW needs to have/be?
5. What is your courtroom experience?
6. What is your experience with assessments?
7. What are you feelings about paperwork?
9. What is your feeling about the importance of team aspect?
9. With [sic] is your comfort level with change of policies, procedures, etc?
10. (Explain Best Practices)..how do you advocate when there are discrepancies between what the client and guardianship want?
11. What do you do with difficult cases/how do you handle?
12. What is your budgeting experience with cases?
13. Why do you want to change positions?

Krueger stated that more than 90% of the clients served by the disputed position are in what is known as the MA Waiver program, a State program which is covered by State regulations and a manual setting forth specific requirements for those who fill case manager positions serving developmentally and physically disabled clients whose services will be paid either by Medical Assistance or paid under the MA Waiver program. The case management services portion of the MA Waivers manual reads in relevant part as follows, concerning allowable services:

. . .

Case management services include responsibility for locating, managing, coordinating and monitoring all proposed waiver services, other services and informal community supports needed by eligible persons and their families. The intent of case management services is to enable waiver participants to receive a full range of appropriate services in a planned coordinated, efficient and effective manner.

Case management services consist of the following activities: information and referral, arranging for provision of services completion of level of care documents, monitoring and review of waiver eligibles' services, service coordination, crisis intervention, case counseling, case planning, assessment, diagnosis and referral assistance to participant to locate safe and appropriate housing, follow-along to ensure quality of care and case reviews which focus on client progress in meeting goals and objectives established through the case plan. Services that are typical for this program may be an integral, but subordinate, part of other programs when the client is receiving services in only one other program.

#### SERVICE REQUIREMENTS/LIMITATIONS/EXCLUSIONS

...

2. Case management is a required service. The agency responsible for providing or purchasing waiver services will be responsible for ensuring the provision of case management for every individual served by the waiver.

3. The waiver agency must ensure that case management is provided by a qualified case manager.

...

#### STANDARDS

HSS 61.32 Follow-along services. Follow-along services establish and maintain a relationship with a person with a developmental disability and the family for the purpose of assuring that the needs of a person with a developmental disability are identified and met. Follow-along services shall establish a catchment area system of case management which shall coordinate services to a person with a developmental disability whether that person receives services from one or many agencies.

(1) **REQUIRED PERSONNEL.** There shall be a case manager who has the skills and knowledge that would be typically acquired through a course of study leading to a degree in a human services related field, and at least 2 years

experience in developmental disabilities. This person shall be knowledgeable concerning the service delivery system and the resources available to the individual with a developmental disability. The case manager shall be responsible to the director of the board, or if contracted, to the director of the contracted agency.

. . .

Krueger stated that the State of Wisconsin requires that any case manager filling the disputed position must have a Bachelor's degree in a Human Services area plus at least two years of work with developmentally disabled clients. Indeed, the job description lists these requirements specifically. Krueger stated that Robertson's work with the developmentally disabled, reportedly 15 clients with such disabilities, was merely incidental. Krueger stated that this fact was clear during the interview of Robertson. As Robertson's social work did not meet the State requirements of two years of experience with developmentally disabled clients in the age 23 to 65 years of age category, Baer was the overwhelming favorite and unanimous choice of the interview committee for the position because Baer had worked for more than two years with developmentally and physically disabled clients in various settings.

In addition, Krueger stated that even if the State of Wisconsin did not have the MA Waiver program, the Department of Human Services at the County would still require two years' experience with developmentally and physically disabled clients for the disputed position because it is important to have experience and knowledge of the targeted population (the clients with whom the position is to work) in order to understand and assist these clients with their goals. Krueger also stated that Baer had more extensive knowledge of the service delivery system for the developmentally and physically disabled target group than did Robertson, who has not dealt with this group or service delivery model on a regular basis. Krueger stated that Robertson has worked under a "court directed" model in the Child Protection Services Division, which differs from the "best practice core values," a self-directed model, required for the disputed position. Krueger stated that Baer has consistently worked under a self-directed model both at Lutheran Social Services and in his previous County positions.

Krueger stated that courtroom experience is a very small percentage of the work of the disputed position. Krueger stated that she distinguished between the two applicants based on the first and second paragraphs of the Knowledge, Skills and Abilities section of the job posting; that regarding paragraphs 3 through 13 of that section, there was no real difference between the qualifications of Baer and Robertson for the job. Krueger admitted that although she was concerned about Robertson's lack of contact with the targeted disabled group with which the position was to work, she (Krueger) did not contact Robertson's supervisor to ask her what Robertson's background was in working with developmentally and physically disabled people. Krueger stated it is the amount of time with the targeted group and the approach (the self-directed model) which is used with developmentally and physically disabled

people that was most important to Krueger and the interview team in deciding that Baer was more qualified than Robertson for the position. Krueger stated that the successful candidate for the job would have to meet the MA Waiver requirements immediately before stepping into the position and that the State's two-year experience requirement includes case management and direct care work with the target population.

### **POSITIONS OF THE PARTIES 5/**

#### **The Union**

The Union argued that the Grievant met all of the minimum qualifications for the disputed position, that she has been a professional employee at the County for the past 20 years and that the position in dispute is extremely similar to her current position at the County. In addition, the Union listed Robertson's experience with the target population of the position and stated that she had more than 2 years' experience with that population. The Union's brief described Robertson's experience as follows:

...

Ms. Robertson testified that she works primarily with children in her current position. However, as she testified at hearing, over the course of twenty plus years with the County, she has had certain individuals with developmental and/or physical disabilities [sic] have been a part of her case management. She testified that [sic] was responsible for an individual with Down's Syndrome (as a minor and as an adult) from 1979 to 1980; from 1991 to 1993 she worked with a child with multiple sclerosis [sic]; from 1993 to 1994 she worked with a child with multiple birth defects; from 1993 to 1996 she was involved with an individual with mental retardation/cognitively delayed; from 1996 to 1998 she handled another case involving an individual with mental retardation/cognitively delayed (as a minor and as a young adult); from 1997 to 1998 she was involved with an adult with brain injuries from a motorcycle accident; from 1997 to 1998 she case-managed another child with mental retardation/cognitively delayed; from 1996 to 1999 she worked with an autistic child who was also mentally retarded/cognitively delayed; more recently she has worked with individuals (primarily children) who suffered from brain injuries and from multiple birth defects. In fact, since 1993 she has had one or more open cases concerning individuals with disabilities that would be considered part of the targeted group for the position in dispute.

...

Thus, the Union contended that if the Arbitrator looks at Robertson's graduate course credits and her 20 years' professional experience, the Arbitrator will conclude that the position in dispute should have been given to Robertson.

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*5/ The parties submitted as Joint Exhibit #3 prior cases decided by WERC Arbitrators, as follows:*

*AFSCME LOCAL 2228 AND WINNEBAGO COUNTY, CASE 286, No. 55215, MA-9931 (KNUDSON, 1/98); WINNEBAGO COUNTY (DEPARTMENT OF SOCIAL SERVICES), CASE 188, No. 44449, MA-6305 (HOULIHAN, 12/91); WINNEBAGO COUNTY (SOCIAL SERVICES), CASE 318, No. 58021, MA-10815 (LEVITAN, 3/00).*

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Indeed, the Union argued that Robertson was better qualified for the disputed position than Jason Baer. In this regard, the Union noted that Robertson has proven experience in the courtroom, in handling a full caseload and in identifying and addressing the needs of clients. In contrast, Baer has had mostly direct care experience with the targeted group, not case management work while employed by the County. In addition, Baer's prior work experience did not give him case management experience either. The Union urged that the job application process at the County should not be a "popularity contest" in which Baer is favored over the Grievant.

Furthermore, the Union argued that prior arbitration awards submitted by the parties, particularly the LUCARELI case, shows that Robertson should have received the position she applied for. On this point, the Union noted that in LUCARELI, the Arbitrator made clear that non-professional work for the County should not count toward the experience requirements of a professional position. Therefore, the Union contended that the County's actions in selecting Baer for the disputed position were arbitrary and capricious because the County chose a less qualified, less senior employee who had only paraprofessional experience for this professional position. In these circumstances, the Union argued that the Robertson should be given the position of Supported Living Team Service Coordinator/Social Worker and that she should be made whole.

### **The County**

The County argued that Articles 1 and 11 of the labor agreement demonstrate that it has the right to determine the qualifications of applicants and that seniority only comes into play when two applicants are "in all respects" equally qualified. In addition, prior arbitration awards show that the County has broad discretion to determine qualifications. These awards require a narrow inquiry in this case, whether the County acted arbitrarily or capriciously in determining that the Grievant was not qualified for the position.

In this case, the County urged that Baer has had substantial direct experience over the past eight years working with developmentally/physically disabled individuals. At best, Robertson's experience with the target population has been peripheral, minimal or incidental to her Child Protective Services position. Therefore, the County urged that it did not act arbitrarily or capriciously or in bad faith in determining that Baer was the most qualified individual for the disputed position.

The County also noted that the State of Wisconsin requires the County to have certain qualifications for the position in dispute before the County can receive Medical Assistance funds to reimburse it for services rendered to the developmentally disabled population. Therefore, the County job requirement that successful applicants have two years' experience working with developmentally/physically disabled individuals is neither arbitrary nor capricious. As the Grievant did not have the two years' experience with the target population required for the position and as Baer had in excess of two years' experience with that population, the County urged that the grievance be denied and dismissed in its entirety.

## **Reply Briefs**

### **The Union**

The Union repeated many of the arguments it made in its initial brief in its reply brief. In addition, the Union noted that County interviewers for the disputed position never bothered to investigate the amount of much time the Grievant had spent with the developmentally or physically disabled population and that therefore the County's actions toward the Grievant were arbitrary and capricious. In addition, the Union noted that the excerpt from the Medical Assistant Waivers Manual submitted by the County (County Exhibit 1) refers to case management, not to direct care, in referring to the experience requirement for the position involved in this case.

The Union urged that an unbiased third party outside the County should have determined whether the Grievant was qualified for the position. On this point, the Union noted that Department Chair Kreuger failed to look at the Grievant's case files, to talk to her supervisor or to determine what, if any, contact the Grievant had had with the target population. Therefore, the Union inquired how Kreuger could have fairly found that the Grievant was unqualified for the position. In these circumstances, the Union urged that the County's reliance on Kreuger's analysis showed that the County had been arbitrary and had not acted in good faith.

Finally, the Union urged that Jason Baer admitted that he had a social relationship with several long-term support team members and this should require a conclusion that Baer was the "favorite candidate" which would also support an allegation that the County acted arbitrarily and capriciously in selecting Baer for the position. Therefore, the Union urged the Arbitrator to sustain the grievance, make Robertson whole and place her in the disputed position.



## The County

In reply, the County urged that the Grievant did not have two years of consistent work with developmentally and/or physically disabled individuals and did not have the knowledge of the service delivery system required for the position. The County noted that Baer had more than two years' experience with the target population and was knowledgeable regarding the service delivery system. The County urged that Baer and Robertson were not equally qualified and Robertson's seniority never came into play under Article 11 of the labor agreement. The County argued that a reasonable person could have found Baer more qualified, arriving at the same conclusion that the County did based on the facts the County had before it at the time of its decision. Therefore, the County's action in selecting Baer for the position was neither arbitrary nor capricious and the Arbitrator should not substitute her judgment for the County's.

The County also argued that hiring the Grievant for the disputed position when she did not have the qualifications for the position, could have seriously jeopardized the County's financial and programmatic relationship with the State of Wisconsin under the Medical Assistance Program. Therefore, whether or not the State of Wisconsin had actually set a standard that would have barred the Grievant from the position, it was neither arbitrary, capricious nor discriminatory for the County to conclude that the State had such a standard according to the MA Waivers Manual and to deny the Grievant the position based on State requirements.

## DISCUSSION

Article 1 of the labor agreement provides that the County has the right to hire employees. Article 11 states that the County "shall determine the qualifications of the applicants" and that only when two or more applicants for a single vacancy are "in the opinion of the Employer" "in all respects equally qualified" to fill the vacancy does departmental seniority become the deciding factor as to who should receive the open position. Article 11 also states that if "in the opinion of the Employer" one applicant "is better qualified . . . than any other applicant" the County may fill the position with the better qualified applicant. This language grants the County broad discretion to judge and determine the qualifications of applicants.

The parties submitted several prior arbitration awards between them that they argued were on point for this case. I have reviewed these awards, two of which (Knudson and Houlihan awards) concerned the application of the same Article 11 language that is before me. The third decision (Levitan award) concerned Article 7, Bumping Rights. It is significant that all three arbitrators indicated in their awards that the County had retained broad discretion to determine and judge the qualifications of applicants for positions.

In regard to the Knudson award, I note that that case involved only one unit employee, Lehl, who applied for an open Home Consultant position. The County selected an outside applicant as being more qualified than Lehl. The arbitrator found that because Lehl had only a high school diploma, had not taken any post-secondary courses for credit but had non-credit

courses in parenting and personal finances and had raised five children, she was not qualified for the position of Home Consultant. The outside applicant had a BA degree in Vocational Home Economics as well as teaching experience in the subject area at the elementary and high school levels and she had worked as a case worker, in a County Family and Children Department in Indiana. Although the position description for the Home Consultant position did not require a college degree, Arbitrator Knudson found that that position description clearly required some post-secondary education. The arbitrator also found that the County's requirements of some post-secondary education for the position was neither unreasonable, arbitrary nor capricious.

Arbitrator Houlihan in the Lucareli grievance found that Grievant Lucareli did not possess the social work degree required for the open position nor did she have one-year of experience which the County required in order to be considered minimally qualified for the open Social Worker position. Houlihan held that the County's educational and experience requirements were not irrational or unreasonable and that Lucareli had been advised of these requirements when she previously applied for a Social Worker position in 1983. Houlihan noted that in 1983, Lucareli failed to meet the same educational and experience requirements or to object to their application to herself.

Arbitrator Levitan in the Van Groll Palma grievance had a different issue before him that involved Article 7, Bumping Rights. However, Arbitrator Levitan found that Articles 7 and 11 contained similar language regarding the broad extent of the County's discretion to determine and judge qualifications of applicants (as found by arbitrators Houlihan and Knudson) which also applied to those who wished to bump. Arbitrator Levitan then applied the same arbitrary and capricious standard to the case before him as had Arbitrators Houlihan and Knudson in their cases under Article 11.

Given the above analysis, I see no reason to depart from the consistent standard applied by these prior arbitrators. I note that the language of Article 11 has not changed since these prior awards issued.

The job posting for the disputed position states that the successful applicant must assist developmentally and/or physically disabled individuals age 23 to 65 and have two years experience working with this population, and that the major duties of the position include being knowledgeable of and able to use the "best-core values service delivery system." There is no issue in this case that both applicants meet the educational requirements for the position — at least a BA degree in a Health or Human Services field. The record shows that Robertson has earned a college degree in Social Work and has 23 graduate level credits toward a Masters degree, 9 of which were relevant to the open position. The record also shows that Baer has BA degree in Music Therapy and a Masters in Counseling.

Thus, the remaining issue for determination in this case is whether the County's decision that Robertson was less qualified than Baer was arbitrary, capricious or arrived at in bad faith. Following its analysis of the applicants' paperwork and their interview, the County

interview team unanimously decided that Robertson did not possess two years' experience serving the developmentally and/or physically disabled population ages 23 to 65. The record evidence clearly supports such a conclusion. Counting every case to which she testified, Robertson did not have two years' experience with developmentally and/or physically disabled adults. Indeed, virtually all of Robertson's experience with the target population has been with children under 18. In addition, Robertson admitted herein that she was unfamiliar with and had not used the delivery service method, "best-core values," used on the Supported Living Team.

The County pointed out that the State of Wisconsin's MA Waivers Manual requires that personnel administering the MA Waivers must be ". . . a case manager who has the skills and knowledge . . . typically acquired through a course of study leading to a degree in a Human Services field and at least two years experience in developmental disabilities. This person shall be knowledgeable concerning the service delivery system and resources available . . ." to the developmentally disabled population. Although it is clear that Robertson has extensive experience as a case manager under the court directed model, she has had no experience with the service delivery system required for the developmentally disabled population, and she has had very little need to access resources available to the developmentally disabled population. 6/ Thus, I cannot find that the County's decision that Robertson lacked the required experience with the target population as well as the knowledge with service delivery system and resources available to the population was arbitrary or capricious. In addition, the record herein also supported the County's work experience and knowledge requirements for the position.

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*6/ I note that Robertson's experience in the courtroom is not something that is required or desirable for the Supported Living position.*

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In addition, I note that Baer had extensive experience with the targeted population not only during his employment with the County but also during his prior employment with other employers and during his internship. Thus, Baer's experience spanned over the past 8 years working with developmentally and physically disabled individuals almost exclusively while Robertson's experience over the past 20 years with the County has been exclusively.

The fact that the County failed to check with Robertson's supervisors, to look over her case files, to determine exactly how much time Robertson spent with the target population cannot form the basis for a ruling that the County was thereby arbitrary or capricious *vis a vis* Robertson. In this regard, I note that the interview team was fully aware of the operation of the Child Protective Services division and of Robertson's work therewith. Furthermore, the interview team asked the same 13 questions to both applicants, designed to elicit their prior experience with the physically and developmentally disabled as well as their understanding of how services are delivered and coordinated on the Supported Living Team. Division Manager

Krueger stated herein her impressions, as a member of the interview team, of the two applicants, clearly stating that after analyzing the applications and the results of the interviews, the interview team unanimously concluded that Baer was more qualified for the position than Robertson. This evidence supports a conclusion that the County acted in a rational and reasonable manner in determining that the Jason Baer was the better qualified applicant for the open position.

The Union argued that Baer was the “favorite candidate” of the County. There was no evidence to support this claim placed in the record of this case. In addition, the Union urged herein that an unbiased outside third party should have determined whether Grievant Robertson, was qualified for the position. I note in this regard that there is absolutely no basis in the contract for such an approach. Therefore, the County would not have been required contractually to employ an unbiased third party to determine qualifications for the open position.

Article 11 is clear. The only time seniority becomes a tie-breaking factor is when two candidates for a position are “in all respects equally qualified” in the opinion of the County. The County has found that Jason Baer was more qualified for the specific open position involved in this case.

My conclusions herein do not mean that Ms. Robertson is not an outstanding Social Worker with a fine educational background and in-depth experience in Child Protective Services. Rather, they mean that in the County’s opinion, which the County is undeniably entitled to based on the clear language of Article 11, Robertson did not have the work experience with the target population nor did she have the knowledge concerning the service delivery system and available resources for the target population prior to her hire, as required by the County’s position description. In the circumstances of this case, therefore, I issue the following

### **AWARD**

The County did not violate the collective bargaining agreement when it failed to award the Grievant, Barbara Robertson, the position of Service Coordinator/Social Worker in the Long-Term Support Division — Supported Living Team in the Human Services Department. The grievance is therefore denied and dismissed in its entirety.

Dated in Oshkosh, Wisconsin, this 25<sup>th</sup> day of June, 2003.

Sharon A. Gallagher /s/

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Sharon A. Gallagher, Arbitrator