BEFORE THE ARBITRATOR

In the Matter of the
Interest Arbitration between

DANE COUNTY

Case 204 No. 56471
And Int/Arb-8476
Decision No. 2984v

DANE COUNTY PROFESSIONAL SOCIAL
WORKERS UNION, LOCAL 2634, AFSCME, AFL-CIO

INTEREST ARBITRATION AWARD

Appearances:

Mr. Jon Anderson, Godfrey & Kahn, S.C., on behalf of the County.

Mr. Jack Bernfeld, Staff Representative AFSCME Council 40, on behalf of Local 2634.

The above-captioned parties, hereinafter referred to as the County and the Union respectively, have been parties to a series of collective bargaining agreement throughout the years. The parties were able to resolve most issues for the 1997-1999 successor agreement including wages and fringe benefits except for workload issues, including overtime compensation of the professional social workers. As a part of the collective bargaining agreement, they established a Labor/Management Committee to review workload issues and under the authority of Section 111.70, Wis. Stats., agreed to a Voluntary Impasse Procedure as a means of resolving the dispute. The parties selected the undersigned to serve as arbitrator pursuant to Voluntary Impasse Resolution Procedure from a panel provided by the Wisconsin Employment Relations Commission. Hearing was held in Madison, Wisconsin on October 8, 1999. No stenographic transcript of the proceedings was made. All parties were given the opportunity to appear, to present testimony and evidence, and to examine and cross-examine witnesses. The parties completed their post-hearing briefing schedule on January 27, 2000. The record was closed upon receipt of the last reply brief. Now, having considered the evidence adduced at the hearing, the arguments of the parties, the contract language, and the record as a whole, the undersigned issues the following Award.

ISSUE AND FINAL OFFERS:

The Arbitrator is charged with selecting a final offer for incorporation into the parties' collective bargaining agreement.

The Union's final offer contains the following revision to the 1997-1999 contract:

1. Create 9.02 as follows:

Commencing on the first day of the pay period following the date that the arbitration decision is rendered, the application of "Current Practice" and usage of "comp time" as referred to in Section 9.01 above shall be as follows:

a. The employee, with supervisory approval, may adjust their starting and ending time by one hour.

b. Overtime work shall require supervisory approval. Compensatory time off shall accrue at the rate of one and one-half (1-1/2) hours for each overtime hour worked up to a maximum of twenty-four hours in a payroll year, payable as thirty-six (36) hours of compensatory time. Any comp time earned will be used as soon as possible following its incurrence. Additional overtime worked beyond the 24 hours (payable as 36 hours) shall be paid at the rate of one and one-half times the hourly rate of pay (including longevity pay), except that additional compensatory time may be accrued by the mutual agreement of the employee and supervisor. On the last pay period of the payroll year all compensatory leave accrued during that payroll year which was not taken as compensatory leave shall be paid out in cash.

c. A record must be kept by the supervisor of compensatory time earned and taken off.

d. For Human Services Department personnel, an exception is made for compensatory time earned as provided for in the Emergency Protective Services Policy Addendum to the labor agreement.

2. Terminate the Memorandum of Understanding appearing on the bottom of page 38 and continuing on the top of page 39 which is dated 15 June 1982 and relates to "…the application of "Current Practice and usage of "comp time" as referred to in Section 9.01…", on the first day of the pay period following the date that the arbitration decision is rendered in this case.

The County's final offer is no change to the parties' labor agreement.

STATUTORY CRITERIA:

The criteria to be utilized by the Arbitrator in rendering the award are set forth in Section 111.70(4)(cm), Wis. Stats., as follows:

7. 'Factor given greatest weight.' In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall consider and shall give the greatest weight to any state law or directive lawfully issued by a state legislative or administrative officer, body or agency which places limitations on expenditures that may be made or revenues that may be collected by a municipal employer.

7g. 'Factor given greater weight.' In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall consider and shall give greater weight to economic conditions in the jurisdiction of the municipal employer than to any of the factors specified under subd. 7r.

7r. 'Other factors considered.' In making any decision under the arbitration procedures authorized in this paragraph, the arbitrator or arbitration panel shall also give weight to the following factors:

a. The lawful authority of the municipal employer.
b. Stipulations of the parties.
c. The interests and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement.
d. Comparison of wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of employees performing similar services.
e. Comparison of the wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees generally in public employment in the same community and in comparable communities.
f. Comparison of the wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees in private employment in the same community and in comparable communities.
g. The average consumer prices for goods and services, commonly known as the cost of living.
h. The overall compensation presently received by the municipal employees, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
i. Changes in any of the foregoing circumstances during the pendency of the arbitration.
j. Such other factors, not confined to the foregoing, which are normally or traditionally taken in consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

POSITION OF THE PARTIES:

County

The County points out that the Union's final offer modifies the *status quo* compensatory time language in two areas. It seeks to expand the level of overtime compensation from the current hour-for-hour threshold to that of time and one-half. It adds a provision for paid overtime after an employee has accumulated 24 hours of overtime.

The County alleges that the total cost impact of the Union's final offer is unknown. Because under the Union's offer the maximum accrual for compensatory time will continue to be 24 hours, albeit payable as 36 hours, the Union's offer also provides that employees will be paid for any additional overtime hours at time and one-half.

The County, utilizing the 24-hour overtime threshold currently set forth in the parties' agreement, but averaging the pay-out at time and one half plus longevity pay, estimates the cost impact of that portion of the proposal alone to be over $44,000.

When the possibility of incurring additional overtime is calculated into the equation the County suggests that the payout could easily be double the $132,410.63 estimation if every bargaining unit member attempted to work one hour of overtime each week, thereby resulting in over 40 hours of overtime on an annual basis. This, it asserts, is a significant costly final offer and reflects a major change in how the County and its professional employees do business. Acceptance of the Union's final offer could potentially require the expenditure of significant amounts of County funds and will negatively impact the Human Services Department's operating budget for many years in the future.

The County believes that its offer reflects the professional nature of the employees and adequately compensates them from having to occasionally work overtime. It believes that its offer of the status quo is more reasonable and should be selected because (1) the Union's offer is a significant departure from the *status quo*; (2) the Union's offer presents the potential for serious fiscal impact on the County's budget and will, undeniably, increase the County's cost of providing the same level of service; (3) the County will likely be forced to implement reductions in its level of service in order to fund the Union's final offer; (4) the Union has not presented the County with *quid pro quo* in exchange for this major change in the compensatory time language; (5) the bargaining unit members enjoy extremely competitive wages in comparison with other counties around the state; (6) the County's final offer is more sensitive to the interest and welfare of the public and the need for high levels of service within Dane County; (7) the County's final offer recognizes the obvious need for the parties to freely bargain the overtime/compensatory time issue; and (8) the Union's final offer poses a significant economic issue and adds new language that clearly should not be awarded by an interest arbitrator.

The County asserts that the Union seeks to gain much more than any party should be able to achieve through the interest arbitration process. It maintains that significant policy changes should not be imposed through interest arbitration, noting that arbitrators are want to do so, absent a convincing demonstration of the need for such a change. Pointing to a recent City of Madison decision by Arbitrator Richard U. Miller, (Dec. No 29452-A; 6/99), the County argues that acceptance of the Union's offer has far reaching implications and would seriously change the way the Human Services Department conducts its business. It would be unconscionable for a neutral to impose the substantial and negative change that the Union seeks with its offer.

The Union, in the County's view, has offered neither a justified need for the change nor has it provided a *quid pro quo* to the County and it must do both in order to justify the adoption of its offer. The County argues that based upon the evidence and testimony presented at the hearing, the Union has clearly failed to demonstrate that there is a persuasive need to alter the economic package to the degree mandated by its final offer. Defending a final offer that provides for overtime at such a significantly higher level than what is currently enjoyed is a heavy burden. Given this fact, the County alleges that the Union's defense of its final offer must be established by clear and convincing evidence.

The County maintains that bargaining unit member concerns with their workloads and specific case management issues will not be addressed by the implementation of the proposed overtime provision. To the contrary, acceptance of the Union's offer might exacerbate the problem if the County is forced to make accommodations within its budget with potential overtime costs reaching into the hundreds of thousands of dollars.

Having a heavy workload is not however reason to change the way the parties have historically done business in the County's opinion. Social work is a calling. To do the work effectively, within the time allotted, is undoubtedly a challenge. The County does not believe that the perception of a select few bargaining unit members that they need to work overtime hours provides a sufficient justification for its proposal with the potential to present financial overload. It notes that no grievances have been filed alleging that employees have routinely worked more than the expected amount.

The County also argues that the Union's final offer, if implemented, would be unduly burdensome on the County creating undue hardship. It relies upon the testimony presented with respect to the Family Counseling Department and the CYF Division. In the Family Counseling Department imposition of additional overtime and related compensation would be disastrous in the opinion of its administrator, might require alternative delivery models including consideration of privatization, and would greatly impact on department workloads. Acceptance of the Union's offer would force the Administrator to be a watchdog of the department and strain a collegial relationship with her employees. Greater record keeping would also be necessary with the time expenditures to perform that function.

In the CYF Division, that Administrator's testimony mirrored many of the same concerns. Given the County Executive's fiscal budget mandates, the CYF Administrator felt that there would be no available funds to pay for additional overtime and there would be a likelihood that other areas within the overall CYF budget will be cut including bargaining unit positions. Several divisions of CYF are not under direct supervision geographically and this would create a potential for problems in monitoring overtime.

The County argues that implementation of the Union's final offer creates serious administrative issues for the managers of the Human Services' Department and for the Family Court Counseling Service resulting in a domino effect on all department employees. The issue raised by the Union's offer must be resolved in voluntary collective bargaining, not arbitration because in bargaining, the parties can anticipate and eliminate the many administrative side issues. An award in favor of the Union's offer would raise serious issues that simply are not addressed within the Union's proposed language.

The County also points out that the Union has commenced a class action lawsuit in Dane County Circuit Court challenging the contention that these employees are professionals and not eligible for overtime pay at the time and one-half rate required for nonprofessionals. The exempt status of these same bargaining unit employees will be resolved through the class action in court pursuant to the Fair Labor Standards Act. The lawsuit, in the view of the County, clearly undermines the need, in this proceeding, to make the enormous change in the *status quo* that the Union is seeking. There is no need for the change whatsoever because if the Union is successful, employees will receive overtime at time and one half. The lawsuit should run its course and resolve the issue. If it does not, then the parties can revisit this issue in bargaining.

The County also notes that the parties' bargaining history does not reflect an ongoing attempt by the Union to secure this benefit through contract negotiations. Its attempt to change the compensatory time language has been sporadic and unpredictable. On occasion it has proposed the change and dropped it in bargaining while in other years it has not even proposed a change. It also points out that the most recent proposals have all been linked to workload or caseload problems.

The County stresses that the parties' bargaining history reveals that a *quid pro quo* is often provided as a trade-off for significant contract enhancements. Its insistence that the Union prove a *quid pro quo* for its offer is consistent with it past bargaining history. For the most part, the County did achieve a *quid pro quo* as a trade-off for specific enhancements. It is not unreasonable for the County to continue to expect some concession from the Union for the implementation of such a significant improvement.

Both parties presented external comparable data. Utilizing an arbitration award from 1985, the County concedes that the first tier of external comparables are Columbia, Dodge, Green, Iowa, Jefferson, Rock and Sauk Counties, the City of Madison, State of Wisconsin and other Dane County Public Employers. Because Dane County is the second largest in the state, the County maintains that the second tier of comparables

should consist of the 10 most populous counties including, Brown, Kenosha, Marathon, Outagamie, Racine, Rock, Sheboygan, Waukesha, and Winnebago Counties. In addition to a competitive salary schedule, bargaining unit members enjoy an incomparable longevity benefit wherein after approximately 4 years of service an employee is eligible for minimum longevity of 3%, with the maximum longevity threshold of 12%.

With respect to the Tier 1 wage comparisons, Social Worker and Senior Social Worker classifications, Dane County hourly wages surpass the comparable average by over $2.54 per hour. With the addition of the longevity benefit, the County argues that the Dane County wages are at or near $4.50 above the comparable average. Looking at Tier 2 wage comparisons, with the addition of the longevity benefit the Dane County wages are nearly $3.00 per hour above the comparable average. Without the longevity benefit the Dane County social workers earn hourly wage rates that are slightly more than the comparable average. With addition of the longevity benefit, the hourly earnings advance more substantially, leveling out at $2.59 above average. For Senior Social Workers with the longevity benefit, the hourly rate is nearly $2.00 above average. This data demonstrates that the County's social workers are extremely well paid without receiving overtime.

The County avers that the Union's reliance on the overtime provisions of collective bargaining agreements in other internal bargaining units is misplaced. The County insists that there are only three other internal units wherein a comparison with social workers is appropriate, nurses, attorneys, and unrepresented managerial/professional employees. Aside from these units, the traditional "blue collar" versus "white collar" analysis is controlling. Of the professional bargaining units, only the nurses' contract provides for time and one-half. The attorneys and unrepresented professionals do not receive this benefit. While conceding that time and one-half overtime is admittedly more prevalent within the County once non-professional units are considered, the critical difference is that these other units contain employees who are non-exempt from FLSA requirements. Citing at least one arbitrator who concluded that because of the disparity of skill and training required of the employees in the internal units, less weight should be given to those comparables. The County urges the undersigned to accept this line of reasoning in the instant dispute. Overtime at time and one half has a historical, as well as legal basis, in these other internal units.

The County also alleges that the local labor market does not justify the significant change that the Union is seeking. Social workers who work in Dane County school districts, with two exceptions, earn no over-time and the two exceptions earn overtime or compensatory time on a straight hour-for-hour basis. Social workers employed by the State of Wisconsin earn overtime on an hour-for-hour basis. Very few of the agencies who employ social workers from whom Dane County purchases services provide for any type of overtime compensation for their employees. Based on these external comparables, the County maintains that local support for the Union's offer does not exist.

The County points out that the Union openly admits that the nature of the dispute is related to workload issues within the CYF division and not overtime, conceding that

the workload focus has spanned several bargains. It contends that the Union's commitment to caseload limitations was addressed in the recent bargain with the formulation of the *ad-hoc* study committee. The County stresses that this is not an issue which can be resolved overnight and the fact that the *ad hoc* workload committee continues to meet today invalidates such a statement.

The County distinguishes arbitral precedent cited by the Union wherein Arbitrator Kerkman held that the employer's final offer maintaining the *status quo* would not be accepted where the intent of the re-opener was to specifically address the issue of union security. It claims that the facts of that case are dramatically different from the instant dispute. Here, progress within the committee context has occurred so much so as to warrant continuation of the committee. The County's belief that the current overtime language is appropriate should not prejudice its right to maintain the *status quo*. The committee is the statutorily preferred method of problem solving.

The County stresses that individual employees who make a conscious decision to forego the record keeping of overtime hours are only hurting themselves. The ultimate responsibility under either proposal will rest with each individual employee. Furthermore implementation of the Union's final offer would create serious administrative and operational issues. The operational issues resulting from the offer will result in unintended consequences. In this vein, it points out that Union proposals making its offer operational in the pay period after the arbitration award gives the County two weeks to make the administrative change. Acceptance and implementation of the Union final offer will likely turn the CYF Division and other administrative departments upside down.

The Union openly admits to the likelihood of significant cost exposure relating to its own final offer. The County insists that it does not have the personnel or resources to authorize and monitor under the Union's proposal. The County believes that the social workers will get the work done without running to their supervisors and managers. Supervisors will then be in the untenable position of having to deny legitimate overtime hours because prior supervisory approval was not received and the cost implications of unguarded overtime hours may break the budget.

Members of the social worker bargaining unit are professionals and thus, are treated differently than other hourly county employees, more like attorneys and manager/professionals and less like hourly employees and those in the health care industry. The County insists that the FLSA lawsuit and exempt or non-exempt FLSA status has very real and direct implications upon the overtime/compensatory time contractual language. The ultimate determination in the lawsuit, in the County's view will either validate the County's position or solve the problem for the Union.

Noting that the differences in the external comparable pool are slight, the County cites the Briggs interest arbitration award of 1985 as suggestive of the first tier with the top ten counties in the State, excluding Milwaukee County as the second tier. The Union's exclusion of Dane County school districts, the City of Madison and the state of Wisconsin comparables is predicated upon the fact that they do not support the Union's

position. Similarly, its inclusion of Milwaukee County is also not valid, in the County's view.

The County notes that this has been an extremely emotional bargain, culminating in an interest arbitration with the potential of creating financial distress within the County's Health and Human Services Department. The County believes that it has demonstrated that the maintenance of the *status quo* would not be detrimental to these bargaining unit members because they will continue to be recognized for the occasional need to work extra hours with the opportunity to accrue compensatory time and to receive exceptional compensation in terms of base rate earnings and longevity payouts. They will also continue to be the recipients of positive changes and process improvements that are surely to follow from the work of the *ad hoc* workload committee. The FLSA determination should come first, especially in light of the potential to significantly disrupt County operations. The County requests that its final offer be selected in this dispute.

Union

The Union stresses that this dispute has its roots in a longstanding and growing concern about increasing work expectations and the disparity between unit employees and other public employees regarding overtime pay. The parties' contract has long provided that the work week of unit employees would "average on an annual basis forty (40) hours per week…" According to the Union and the witnesses that it presented at the hearing, it has become increasingly apparent that the work assigned to many unit employees cannot be completed during a forty (40)-hour week. Witnesses Tom Reed, Bob Syring, Diane Leigh, and Anthony Keshena established that social workers were simply unable to do the job required of them by the County in a forty (40) hour week for a variety of reasons, including, but not limited to the fact that the work has become more complicated; the social workers have increasingly been assigned clerical tasks; the court has required their appearance during vacation periods and non-work hours; and no back-up is provided during these times. Despite these changes, the County has not employed additional social workers, has not filled vacant positions, and is scheduling some positions for elimination in 2000.

Many bargaining unit employees, particularly those employed in the CYF division, typically work significantly more than forty (40) hours each week and the County has been aware of this situation without providing any relief. Currently, the parties' contract has provided for limited compensation when an employee works more than forty (40) hours in a week with employees being permitted to accumulate up to 24 hours of compensatory time. Compensatory time beyond the twenty-four hours, while permitted by contract, is routinely denied. Furthermore, employees are only entitled to future time off for overtime worked rather than payment in the form of wages. Despite these modest entitlement provisions in the current agreement, employees regular forfeit even claiming compensatory time because there is simply too much work and the caseload of an absent employee is not covered by others so that taking time off results in the social worker falling farther behind in his or her work. Many employees have simply

stopped counting overtime hours. Thus, the current provisions have proven wholly inadequate to alleviate the overburdened workload faced by many employees.

The Union claims that it has attempted to negotiate relief for the increasing burden that the unit employees have shouldered since at least 1993, stressing that Union proposals have been made in each round of negotiations since at least 1993. No other issue is subject to this restricted reopening of the contract and the options in the voluntary impasse resolution process are rather limited because the workload and staffing level determinations are permissive subjects of bargaining. Only the impact of those management determinations is left for negotiation. The traditional union responses to employer efforts to force employees to work more than forty (40) hours per week are proposals dealing with overtime compensation.

Pointing to the national standard of forty (40) hours as constituting the normal workweek, the Union suggests that its proposal is a fair and equitable solution to the impact of the undisputed problem and a more modest proposal than the entitlements applied to virtually all other represented County employees. It refers to its limitation that overtime work can only be performed with supervisory approval as allowing the County to authorize and monitor overtime work and to determine when work in excess of forty hours in a week is warranted. The Union maintains that its proposal is fair, workable and just.

In the Union's view, the County's failure to propose a solution to a problem that it acknowledges exists should weigh heavily against the merits of its offer. The parties' agreement to reopen the contract on this sole issue anticipates that both parties would offer solutions to the issue. This failure to proffer solutions must not be rewarded.

With the exception of the Attorneys Association, all other represented County employees enjoy overtime pay for work in excess of normal hours. The Attorneys may accrue unlimited compensatory time at straight time. The Union's offer is modeled after overtime provisions contained in other County collective bargaining agreements. Addressing the County's argument that bargaining unit employees are professional and therefore do not deserve a premium overtime rate for their labors, the Union looks to the nurses and professional law enforcement employees who receive an overtime premium. It alleges that the County pays overtime to other employees who might otherwise be exempt under the provisions of the Fair Labor Standards Act. It relies on similar reasoning advanced by Arbitrator Joseph Kerkman in Pierce County (Sheriff's Department) Case 70, No. 41573, MIA-1380, Decision No. 26029 (1989). Here the County pays overtime premiums to virtually all represented employees – professional and nonprofessional alike; far in excess of FLSA requirements, yet denies social workers the same benefit.

According to the Union, the Fair Labor Standards Act lawsuit is not relevant to the instant proceeding and should not be a factor considered in selecting a final offer. The Union refutes County arguments that the unit employees work "professional" hours, insisting that they must account for their time and are expected to work established times

Monday through Friday with the contract only permitting deviation from the normal work day by one hour.

In answer to the County contention that the Union should offer a *quid pro quo* for the overtime pay, the Union claims that this type of analysis is not relevant to this dispute because the parties have agreed to re-open the contract on one issue – overtime compensation. No other matter could have been presented to the arbitrator and no other issue could have been traded. The County retains total discretion to authorize overtime. If none is approved there is no cost. Furthermore, the County has not offered any evidence that any other represented group provided a quid pro quo for overtime compensation that exceeds the Fair Labor Standards Act. To make this argument that the other unions have provided consideration for the benefit, the County must show that in fact this occurred.

Comparisons to unrepresented employees groups are wholly inappropriate in the Union's opinion. This is the case because the terms and conditions of employment are unilaterally established rather than bargained.

The Union insists that there is overwhelming support for the Union's proposal when comparing it to overtime compensation provided to social workers in other communities, acknowledging that there is some debate as to which employers constitute appropriate external comparables. For comparables, the Union points to the largest seven (7) counties, by population in Wisconsin and the seven (7) contiguous to Dane County. It notes that the County has argued in the most recent arbitrations involving professional employees that the ten (10) largest counties constitute the most appropriate comparable pool. Of the nine largest counties, it points out that only one county, Outagamie, does not provide overtime compensation to its social workers. Even expanding the comparable pool to include Marathon and Sheboygan Counties does not support the County's contention. All of the contiguous counties also enjoy overtime compensation. In the Union's view, the practices of all of the comparables, both external and internal, are compelling. The Union does not view the school district as a comparable and notes that it should be given little weight. In looking to the City of Madison as a comparable, the Union notes that it does not employ social workers and that most of its other professional employees, with the exception of the Attorneys employed by the City, do receive overtime compensation.

The Union believes that its offer best meets the statutory criteria. It points out that virtually every other comparable county provides time and one-half overtime compensation to its social workers and there is no reason why Dane County cannot do so also. The Union submits that the County has given the bargaining unit employees no other choice.

The Union claims that the County does not raise any significant concerns about the mechanics of the Union's offer because the offer is structurally sound. The fact that overtime work shall require supervisory approval undermines County concerns that it cannot control the amount of overtime worked. The County cannot have it both ways.

The Union points out that for costing purposes, the County wants the arbitrator to assume that all employees work endless amounts of overtime, yet in defending its offer the County describes its offer as continuing to recognize and reward those bargaining unit members who may, on occasion, need to work additional hours.

The case is not about employees who may occasionally work an extra hour, but rather about a chronic and progressively worsening problem causing many hours of work beyond the workweek. The Union notes that the County has sole discretion to assign overtime work and may deem that no employee will work beyond forty (40) hours in a week. Even assuming that the County's projections are true, the cost in relation to the wage compensation alone is insignificant. In the Union's view, what the County costing demonstrates is the significant lost compensation that employees in this bargaining unit face in comparison to virtually every other County employee. Every one hundred (100) hours of overtime work donated or not compensated cuts the effective hourly wage rate of unit employees by nearly one dollar.

Tracking one's time is already required of the professional social workers. The Union avers that the nursing staff is no less professional because they record their time and are paid overtime at time and one-half.

In addressing the County's *quid pro quo* argument, the Union suggests that no significant policy change is involved because this is not the first group of County employees to be paid time and one-half for overtime work. It is virtually the last represented group without such a basic benefit. In the Union's view, the County reference to the City of Madison (Library Unit) is also misplaced because that case involved a significant policy change. In that case, part-time library employees would have been the only City workers to have that benefit. Here the social workers are the only groups of County employees who are denied overtime compensation.

The Union believes that the County's analysis regarding the *status quo* is also mistaken. The Union believes that it has established convincingly that a problem exists. The parties have established the 40-hour workweek as the standard and anticipated that employees might work extra hours "on occasion". That is not the current system where witness after witness has testified that the workweek routinely exceeds forty hours and everyone knows it.

The County understands the connection between workload and compensation. They agreed to the Memorandum of Understanding providing that they proceed to arbitration on the issue of comp time/overtime for unit members. The Union stresses that it is not permitted under the agreement to directly make workload proposals but is left to bargain the mandatory impact of the decisions made and implemented by the County.

There is no evidence that the *ad hoc* Committee on workload made great strides or that anything has come out of the committee and the County knows this. The arbitrator cannot and must not draw any conclusion about the work of the Committee other than that it was not satisfactory. While acknowledging that there is a workload

problem, the Union insists that the County blames the employees by insisting that members learn to better manage their time and work to accomplish the tasks within the time allotted. The employees are not employed to do charity work. They perform a highly skilled service.

In addressing the argument that it has failed to offer an adequate *quid pro quo*, the Union avers that the issue before the arbitrator does not lend itself to that type of exchange. It emphasizes that the County can simply limit employees to forty hours per week and no unit employee will derive a benefit from the new language. Its proposal forces the County to care how many extra hours are worked by employees. The Union offer will not cost the County one cent if it wisely uses its authority to control workloads and workflow. It could result in a reduction of overtime. Therefore, it does contain a trade-off.

A *quid pro quo* is unnecessary in this setting because the parties themselves agreed that if an acceptable method of containing workloads were not implemented, they would address the impact of that failure by overtime compensation. For the County to assert that the Union has failed to offer something, when the agreement specifically prohibits it is disingenuous. The County continues to have full control of the purse strings. The party that opposed change, the face of a clear need for change and which carries that resistance to change to arbitration takes an enormous risk that the other side will identify the solution for the problem.

There is no evidence that the Union offer will present an undue hardship on the County. It has an overtime system in place for hundreds of other employees and virtually every other comparable county has an overtime system in place for its social workers. The burdens the County cites in its brief do not warrant rejection of the Union offer. The Union alleges that its offer does not in any way change the manner in which employees are scheduled and that there has been no reason to increase staffing levels if more work can be attained from current staff at no cost. The arbitrator cannot find justification for denying the union offer simply because the managers have been unable to obtain more funds. The issue for the County is all about the priorities which it has been unwilling to make. No other departments with employees who receive overtime have evolved into an "us vs. they" work environment. The County is precluded from arguing that the interest arbitration proceeding is untimely or improper based upon a private lawsuit when it agreed to proceed to arbitration on this issue.

With respect to the Union's seriousness about the issue in past bargaining history, the Union alleges that it has been serious about the issue for many years without resolution. It notes that promises by the County in the past have proven hollow. Similarly, the County has offered only tiny examples of bargaining history from other units to establish that they have provided a *quid pro quo* for their benefits. In this dispute, the County did not ask for nor does it seek a *quid pro quo*. Only if the committee process failed could the Union proceed to arbitration. The delay results in delayed implementation of the Union's offer such that it will not be effective during 1998 and 1999. The offer is prospective only. The County offers no evidence that any other

bargaining unit provided a quid pro quo for overtime compensation. Such a pattern, the Union concedes, would be relevant. All but one of the so-called *quid pro quo* agreements cited by the County involves the addition of a new pay step – hardly a tradeoff. The County "reaches" in trying to tie a law enforcement unit hours reduction for a pay freeze example to the instant issue. There the employees were already working less than forty hours but receiving compensation for every hour worked. The County was already paying overtime in excess of what the Union is seeking.

Pointing out that the County has acknowledged that the dispute is not a "classic" wage dispute, the County attempts to make it one by the presentation of wage data from comparable counties. Its logic is flawed. The Union submits that this is not a dispute about longevity pay, the salary schedule or the fact that employees are paid well relative to the comparables. The fact that wages are relatively high in Dane County is no surprise because it is the second largest and one of the wealthiest counties in Wisconsin. Only one of the external comparables does not provide its social workers with overtime compensation, just one. The argument that unit employees should be denied overtime pay because they are "adequately" compensated is undercut, if the same methodology is used in comparing other County classifications to similar jobs used in comparable counties. The wages for county employees in other bargaining units which enjoy overtime also exceed the comparable averages with the nonprofessional rates in Dane County exceeding the average of other counties even more than the social worker rates.

The County would have the arbitrator ignore the fact that virtually every represented County employee receives overtime compensation at a level higher than proposed by the Union. Irrespective of the FLSA, the County has provided overtime compensation in excess of that required by the FLSA.

The Union complains that the current system is unfair because the harder one works, the less pay one receives. Using the County's calculation, the Union estimates that an employee who works forty (40) hours per week earns $20.107 per hour while the employee who works 45 hours per week earns nearly two dollars per hour less. According to the Union, its offer is compelling, the County has chosen not to play, and has offered no alternative. The Union offer meets the statutory criteria and it should be selected.

DISCUSSION:

Any evaluation of the offers submitted by the parties must begin within the statutory framework set forth above. Section 111.70(4)(cm) 7. is inapplicable because no state law or directive exists which places limitations on expenditures made by a municipal employer with respect to this bargaining unit. Because the County is under no such statutory limitation, this factor does not clearly favor one party over another and the case will be determined by evaluation of the lesser factors.

Likewise, Section 111.70(4)(cm)7g. is not determinative. The County makes no argument that it is unable to pay or that economic conditions in the County are such that the County's offer should be favored. This conclusion may appear a bit disingenuous, given the potential economic impact of the Union's offer should the County authorize all social workers to work significant overtime. Nevertheless, the Union's offer vests total control of authorized overtime with the County and its supervisors. This leads to the conclusion that the County can, to a significant degree, control the economic impact of any overtime authorized. The County's loss of substantial funding from the State in the health and human services area obviously impacts on the merits of the two offers. It should, however, be noted that all of the external comparables are just as adversely affected as Dane County is by the State's funding decisions in this arena. Accordingly, this factor is considered with the traditional factors and does not stand alone and is not the determining factor given the safeguards which the Union has included which require supervisory approval of all overtime worked. The parties' arguments about the economic impact of the proposal are addressed below in consideration with the other subsection 7r factors.

The 'other factors considered' in Section 111.70(4)(cm) 7r. determine the outcome of the instant dispute, in particular, subsections b., c., d., e., f., and j. It should be noted that no evidence was presented by either party with respect to subsections a. g., and i. Some evidence was presented with respect to h.

Because the County's offer is the *status quo*, the Union has the burden of establishing the need for the requested change in the language. The undersigned concludes that the Union has met its burden in this respect, at least with respect to the significant number of social workers in the CPS, CYF, and JFF units. The testimony of Union witnesses, especially Leigh and Reed, convinces the undersigned that the workload of the social workers in many of these units has increased substantially over the past ten years and that the social workers have brought those concerns to the bargaining table unsuccessfully in many past bargains.

Having concluded that the Union has established the necessity for a change, the question still remains as to whether the Union has established the necessity for this particular change proposed in its final offer. As the Union has quite correctly pointed out, workload concerns are permissive subjects of bargaining falling within the legitimate authority of the County. The Union is limited to bargaining the impact of the County's decisions in this area. The substantial increase in the duties over the past ten years of a significant number of social workers resulting in their inability to accomplish all of the requisite tasks within the normal 40-hour work week has established the need for a change in the parties' overtime language. Underlying and driving this conclusion is the premise that bargaining unit employees are entitled to be paid for <u>required</u> work. The evidence adduced at the hearing does not support the County's representations that occasionally employees are required to work overtime and that the current *status quo* language addresses those occasional instances.

Similarly, the County's attempts, through the *ad hoc* Workload Committee, to make some changes in the assignment of work and delegation of responsibilities to address the workload issue are acknowledged. However, the County's arguments that the Union's offer is premature given the FLSA lawsuit brought by certain employees and the continuous work of the Workload Committee are rejected because the County has failed to present tangible evidence of progress or proposals to solve the underlying issue facing a significant portion of the bargaining unit.

The County's allegations that the Union's offer presents the potential for serious fiscal impact on the County's budget and will, undeniably, increase the County's cost of providing the same level of service needs to be addressed along with the County's corollary argument that the County will be forced to implement reductions in its level of service in order to fund the Union's final offer. First, both sides ask the undersigned to adopt and accept the other sides' worst-case representations. The County cites the fact that the payout for additional overtime could be $264,820.00 if each bargaining unit employee worked just one hour of overtime a weeks as if it has no control over authorizing overtime. Similarly, the Union has represented that the County can simply limit employees to forty hours per week and no employee will derive a dollar from the new language. Obviously the true impact of the proposed language will fall somewhere in the middle. Supervisors will scrutinize the real need for overtime hours and employees will occasionally have to earn overtime to appear before judges out of their scheduled work hours and to work on those rare occasions wherein their supervisors deem that a true emergency exists. In the opinion of the undersigned neither side estimated the true fiscal impact of its proposal. Accordingly, the arguments as to the fiscal impact of the proposal, vis-à-vis the representations of both sides, only slightly support the County's offer over that of the Union. This stems from the few occasions where a true emergency does exist and an employee will work overtime at the time and one-half rate where it now the employee to take hour-for-hour compensatory time up to twenty-four hours or does not receive any compensation for the emergency time worked.

The real fiscal impact on Dane County of the Union's proposal, as stated above, should not be any greater than the fiscal impact presented to those comparable counties which already offer unlimited overtime at the rate of time and one half. Accordingly, looking to the external comparables is necessary to evaluate the reasonableness of the parties' offers. The parties agree on the comparable first tier counties as the counties contiguous to Dane County. The County would also include the City of Madison, the State of Wisconsin, and other Dane County public employers, in this case the Madison Metropolitan School District and other school districts in Dane County. They agree on Brown, Kenosha, Outagamie, Racine, Sheboygan, Waukesha and Winnebago as other populous counties in the state who are comparable. The County also cites Sheboygan and Marathon Counties as falling into this second tier of comparables.

Examining all of the external comparables leads to the inescapable conclusion that they highly favor the Union's offer. With the exception of the school districts, who work a nine-month schedule and whose wages and benefits may or may not be substantially different from those offered by the counties, all but one of the comparables

cited provide for some form of overtime. Only Outagamie County does not provide for overtime at time and one-half. The City of Madison does not employ social workers so it cannot be found to be a comparable for these comparison purposes. The State of Wisconsin does not pay time and one-half for overtime but it does pay overtime to its social workers at a straight-time wage. Other than the school districts, for whom no evidence has been presented as to whether they actually work outside of their scheduled work week or what that work week might be, the evidence indicates that all other comparable public employers pay for time worked beyond 24 hours by social workers. It may well be that Dane County social workers receive higher wages, but these wages are bargained for on the basis of the normal forty-hour work week. All wage comparisons are premised upon an hourly wage. The County has not established that the wages provided to the social workers compensate them for an unlimited number of hours spent working outside of their workday. Accordingly, it is concluded that the external comparables highly favor the Union's offer.

The parties have also pointed to the internal comparables. It is inappropriate to consider the wages and benefits of unrepresented managers and professionals within the County. All of the represented blue-collar units receive overtime as does the nurses' bargaining unit, while the attorneys do not. Because the nurses and the blue-collar units receive overtime, it can be concluded that the internal comparables favor the Union's offer. This is the case because the working conditions under which the County's nurses operate are probably quite similar to those experienced by the social workers who may on some occasions work out of the very same locations.

The fact that certain private agencies who employ social workers may not offer overtime and that these employees may work along side bargaining unit employees slightly favors the County's position. Once again, the scheduled work day and work week for these employees is not known nor has evidence been received as to their work loads. While this evidence slightly favors the County, it is not considered determinative.

The County's contention that acceptance of the Union's offer will change the relationship between management and bargaining unit employees has been considered as well as the evidence presented regarding administrative difficulties in implementing the Union's offer. While it may very well be true that the Union's offer will affect its relationship with management, the bargaining unit has made its choice in this respect and based upon the experiences with other counties who must service similar populations, this factor will not have a great impact. In the same vein, the County has administrative systems in place to address overtime concerns and policies in its other units, so the effect upon the system in the long run will be negligible.

The fact that the Union has not offered a *quid pro quo* might, under different bargaining circumstances, be reason for rejecting its offer notwithstanding the need which it has demonstrated. However, here, the issue arises as a limited re-opener on this one issue and the County has not made substantive proposals to address the compelling problem described. Simply put, the undersigned is not persuaded, as the County argues, that the *status quo* language addresses the ever-growing, substantially increased workload

required of the bargaining unit employees. Accordingly, a *quid pro quo* under the circumstances is not warranted.

One final persuasive factor in accepting the Union's offer is the fact that employees are entitled to compensation for the hours that they are actually required to work. The supervisors can insure that they do not work overtime when they are not required to do so. However, when they are required to do so, they are entitled to enjoy overtime for those hours required in excess of the normal workweek. The external comparables highly favor the Union's offer, while the internal comparables also favor the offer. The Union has provided safeguards so that determinations as to when overtime is necessary remain with the County's management.

CONCLUSION:

Evaluation of the 'other factors' criteria set forth in Section 111.70(4)(cm)7r., in particular, the external and internal comparables among the other represented public employees, results in this

AWARD

That the Union's final offer is adopted as the award in this proceeding and incorporated into the parties' 1997-1999 collective bargaining agreement.

Dated this 18th day of February, 2000, in Madison, Wisconsin.

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Mary Jo Schiavoni, Arbitrator