BEFORE THE ARBITRATOR

In The Matter of the Petition of

DANE COUNTY PROFESSIONAL EMPLOYEES UNION, AFSCME, AFL-CIO

To Initiate Arbitration Between Said Petitioner and

DANE COUNTY (PROFESSIONAL EMPLOYEES)

Case 181
No. 64003 INT/ARB-10270
Decision No. 31578-A

Appearances:
Mr. Jack Bernfeld, Staff Representative, Wisconsin Council 40, on behalf of the Union.
LaFollette, Godfrey & Kahn, by Mr. Jon E. Anderson, and Ms. Kim M. Gasser, on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "County," selected the undersigned to issue a final and binding award pursuant to Section 111.70(4)(cm)6 of the Municipal Employment Relations Act, herein "MERA." A hearing was held in Madison, Wisconsin, on May 3, 2006. The hearing was transcribed and the parties subsequently filed briefs and reply briefs that were received by July 20, 2006.

Based upon the entire record and the arguments of the parties, I issue the following Award.

BACKGROUND

The Union represents for collective bargaining purposes a unit of about 122 professional employees employed by the County consisting of "all regular full-time and regular part-time professional employees of Dane County, excluding supervisors, managerial, confidential and executive employees and all employees in existing bargaining units. . . ." These bargaining unit

employees work in a number of different agencies and departments including the Departments of Administration, Human Services, County Extension Office, Land Conservation, Land Information, Parks, Planning, Public Works, and the Sheriff's Office (City Exhibit 10), and include about 50 separate job classifications.

The parties engaged in negotiations for a 2004-2006 initial collective bargaining agreement and they agreed on all issues except for overtime pay, call out pay, working at home, paying earned overtime at the time of termination, and flex time. The Union then filed an interest arbitration petition on September 17, 2004, with the Wisconsin Employment Relations Commission, herein "WERC." The WERC appointed William C. Houlihan to serve as an investigator and to conduct an investigation pursuant to Section 111.70(4)(cm)6 of MERA. The investigation was closed on January 10, 2006, and the WERC on January 26, 2006, issued an Order appointing the undersigned to serve as the arbitrator.

FINAL OFFERS

The Union's Final Offer states:

> The following provisions shall be incorporated into the 2004-2006 collective bargaining agreement between Dane County and the Dane County Professional Employees Union, AFSCME, AFL-CIO.
>
> 1. Article 9 Hours of Work (Sections 9.01) continued, 9.02 and 9.03 shall become effective at the beginning of the pay period following the issuance of the Interest Arbitrator's decision.)
>
> > 9.01 (a) (continued): Deputy Coroners who are assigned to work in excess of three (3) twenty-four (24) hour shifts in the above nine (9) day cycle shall receive overtime compensation pursuant to Section 9.02, except that no employee shall receive more than sixteen (16) hours of overtime compensation for any consecutive twenty-four (24) hours so assigned. Deputy Coroners called in to work outside of their normal twenty-four (24) hours shift shall receive compensation pursuant to Section 9.03.

9.02 Overtime: Overtime work shall require supervisory approval. Employees who work in excess of forty (40) hours in a payroll week shall receive overtime compensation, except as provided below. For the purpose of computing overtime, any time for which an employee receives pay shall be counted as time worked. 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 (24) hours in a payroll year, payable as thirty-six (36) hours of compensatory time. Such accrued compensatory leave time shall be taken at a mutually agreeable time. Any additional overtime worked beyond the twenty-four (24) hours (payable at thirty-six (36) hours) shall be paid at the rate of one and one-half (1-1/2) times the hourly rate of 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.

A. Employees with the mutual agreement of their supervisors, may elect to participate in a flextime arrangement on a regular or intermittent basis. The flextime arrangement will be based on established County pay periods. This means that an employee may work more than forty (40) hours in a week and less than forty (40) hours in the next week of the payroll period, (with supervisory approval), so that the total hours worked in the payroll period does not exceed eighty (80) hours. Where such mutual agreement exists employees will have their contractual overtime based on work over eighty (80) hours in a pay period. Employees who, with supervisory approval, work over eighty (80) hours in a pay period shall receive overtime compensation as provided in Section 9.02. The supervisor or employee may withdraw agreement to a flextime arrangement at any time upon ten (10) workdays notice.

9.03 Call-out Employees who are called to work outside of their regular schedule of hours by their department head or others designated by the department head, either by being called back to work or to perform work from home shall be compensated for such time. A minimum of two (2) hours shall be granted to any employee who is so called back to work; a minimum of one (1) hour shall be granted to any employee who is called to perform work from home. No employee shall be sent home or denied his/her regular work schedule of hours to avoid the payment of overtime.

3. Article 16 Separation from County Service

16.01 Separation from County Service Benefits. On the regular payday after the effective date of the discharge, layoff, resignation, retirement, or

death, an employee shall be paid the regular salary, vacation, holiday and overtime accumulated through such date of discharge, layoff, resignation, retirement or death.

4. The Tentative Agreements of the parties.

The County's Final Offer states:

. . .

Dane County, as and for its revised final offer for an initial collective bargaining agreement with Dane County Professional Employees, AFSCME, AFL-CIO, covering the 2004-2006 term, proposes that all signed tentative agreements of the parties be incorporated into the initial collective bargaining agreement along with the attached proposals. This offer consists of two (2) pages including this page.

. . .

ARTICLE XVI – SEPARATION FROM COUNTY SERVICE

1. 16.01 Separation from County Service Benefits. On the next regular payday after the effective date of the discharge, layoff, resignation, retirement, or death, an employee shall be paid the regular salary, vacation and holiday accumulated through such date of discharge, layoff, resignation, retirement or death.

2. **This offer includes all items tentatively agreed to and initialed by the parties.**

STATUTORY CRITERIA

. . .

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. The arbitrator or arbitration panel shall give an accounting of the consideration of this factor in the arbitrator's or panel's decision.

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.
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 other employees performing similar services.
e. Comparison of the wages, hours and conditions of employment 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 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 proceedings.

j. Such other factors, not confined to the foregoing, which are normally or traditionally taken into 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.

POSITIONS OF THE PARTIES

The Union maintains that its Final Offer should be selected because it is needed to overcome the current inequality of where some bargaining unit employees receive comp time and others do not; because it is wrong to require employees to work overtime in their offices and/or in their homes and to be called out from home without receiving a minimum amount of compensation; because it is wrong to not pay employees their accrued overtime when they terminate their employment; because its flex time proposal is fair and must be agreed to by supervisors before it can take place; and because the County's projected overtime costs are greatly exaggerated. The Union also states that non-unionized comparables should be disregarded and that it is not required to offer a quid pro quo for its proposals because this is an initial collective bargaining agreement where the status quo doctrine is not applicable.

The Union adds that its Final Offer does not represent a significant policy change because "This unit is virtually the last represented group without. . ." such basic premium pay benefits; that the County's reliance on prior interest arbitration cases addressing the status quo is misplaced; that the parties here have used other unionized labor agreements as their "primary reference source. . ." in determining what should be in this agreement and not the County Board's past resolutions involving unrepresented employees; and that the Union demonstrated in negotiations that it "was seriously concerned about overtime compensation." The Union also asserts that "we are long past the era when 'professional' employees were made to feel that it was beneath their profession to seek just compensation for their work"; that there is no evidence to support the County's claim that past enhancements in its other labor contracts were reached as a result of quid pro quos; and that the employees here "should be entitled to overtime compensation consistent with virtually all internal and external comparables"

The County claims that "Significant policy changes should not be imposed through interest arbitration"; that selecting the Union's Final Offer "would result in a substantial change in the status quo" which is unwarranted; that the status quo/quid pro quo doctrine for initial contracts has played a "significant role" in the development of this agreement; that the Union has failed to establish the need for change or to offer a quid pro quo; and that, "A quid pro quo is an established component within the historical Dane County bargains." It also contends that the Union's claim of need for its proposal is without support in the record, and the Union's demand "for more" seriously departs from the internal way of changing the economic status quo only when there has been some "meaningful quid pro quo."

The County also claims that the Union's Final Offer "mandates overtime payments for employees who clearly are exempt under FLSA regulations"; that the Union's "attempt to discount the FLSA implications should be ignored"; that the external comparables present "a mixed bag of comparisons"; and that the County's recent financial history "suggests continued budgetary restraint. . ." rather than the increased labor costs associated with the Union's overtime proposals. The County also maintains that there is no merit to the Union's attempts to include Milwaukee County as a comparable and to discount non-union comparable counties; that the professional employees herein receive higher straight time compensation than other internal bargaining units; and that the Union's reliance on what happened with the County's Social Workers' bargaining unit is misplaced because the parties here "spent very little time bargaining over the Union's desire for overtime compensation."

DISCUSSION

The issues here center on: (1), whether employees should receive time and a half pay and/or comp time for working over 40 hours a week; [1] (2), whether employees called out from home and ordered to report to work are entitled to a minimum of two hours call-out pay at time and a half regardless of the amount of work performed; (3), whether employees required to work at home are entitled to a minimum of one hours pay at time and a half for any work which takes more than a few minutes and which involves something more than simply answering a telephone call; [2] (4), whether employees who terminate their employment are entitled to be paid for their accumulated overtime; and (5), whether employees can work under flex time arrangements with their supervisor's permission.

All of these proposals would kick in on the first full pay period following the issuance of the Award, thereby eliminating any back pay liability and thus enable the County to determine whether it wants to authorize any overtime from that time forward. In addition, the overtime proposal provides for accumulating up to 24 hours of comp time in a payroll year to be paid at the overtime rate, to be followed by payment of any overtime over 24 hours unless both the employee and his/her supervisor agree that such excess should be paid out in the form of comp time. The Union's Final Offer also contains the same language found in the Social Workers' contract (Union Exhibit 6-8).

[1] The standard work week is 40 hours, Monday-Friday, with different employees having different starting and quitting times.

[2] Union representative Jack Bernfeld stated at the hearing that no payment would be required if employees merely answered routine telephone questions at home "that may occur from time to time" and that is how I am interpreting this proposal. Transcript of May 3, 2006, hearing, p. 14, herein "Transcript."

The following witnesses testified about the County's current overtime and flex time practices.

Carol Johnson-Hohol, a Public Health Nutritionist, works in the Public Health Department. She regularly works 7:45 a.m. to 4:30 p.m., Mondays through Fridays and sometimes on Saturdays, and she three times a month works to either 6:30 p.m. to 6:45 p.m. She testified that she "almost always" works more than 40 hours a week, and that she does not receive any extra pay or compensatory time off when she does so; that she has unsuccessfully requested a flex time schedule; that her work load over the last five years has "definitely" increased because there are about another 1600 WIC participants in her program; and that she sometimes has taken time off to see a doctor without taking sick leave.

Marvin Klang, a Senior Systems Administrator, works in Information Management where he mainly backs up software and erects computer firewalls to prevent intruders from accessing the County's computer files. He regularly works 40 hours a week from 6:00 a.m. – 2:30 p.m., Mondays-Fridays. His workload has increased over the last few years because the County has not filled vacant positions and because there have been growing demands for more computer services. He said that he regularly works more than 40 hours a week, including working at home; that he since 1997 has received comp time off at straight time for working over 40 hours pursuant to an agreement with his supervisor and manager; and that there is no formal system in his department for keeping track of an employee's time.

Klang carries over his unused comp time to the new calendar year and said that his supervisor occasionally asks for documentation before granting comp time off; that he does not keep track of telephone calls to his home if they take less than 15-20 minutes, but that he records them for comp time purposes if they take longer than that; and that he sometimes does the same

thing when he is called into his office. He also said that his wage rate is near the top of the pay scale; that his supervisor must approve whenever he, Klang, wants to use comp time and that it is sometimes denied; that he normally does not tell his supervisor when he works more than 40 hours because he just goes ahead and does it "if it has to be done"; and that his fellow Senior Systems Administrators keep track of their comp time the same way he does.

Steven Jones, a Network Systems Programmer, also is employed in Information Management. He normally works between 7:00 a.m. – 8:00 a.m. to between 4:00 p.m. – 5:00 p.m., Monday through Friday. His workload has recently increased because of emerging technology and because vacant positions have not been filled. He said that he seldom works more than 40 hours a week; that he now gets one hour comp time for every hour worked over 40 hours and that he once received 1½ hours comp time for each extra hour worked; that he has informally taken time off when he worked more than 40 hours; and that while he keeps track of his own comp time, his department does not have a formal system for tracking it.

Craig McCallum, a Conservation Engineer in the Water Resources Department, works 8 hours a day from 8:00 a.m. to 4:30 p.m., Monday-Friday. He regularly works more than 40 hours a week during construction season and receives one hour of comp time for every hour worked over 40 which he informally keeps track of himself. His work has increased in recent years and about half of his counterparts in his department have flextime schedules which allow them to have every other Friday or Monday off.

Ann Webbles, a Community Development Block Grant Specialist in the Department of Planning and Development, has overall oversight over three grant programs. Her flextime schedule enables her to work 9:00 a.m. – 5:00 p.m. without lunch Mondays – Friday. She testified that her workload over the last several years has "increased dramatically", and that an

internal study revealed her office is "essentially about a person and a half understaffed at this point." She now regularly works about 50 hours a week and added that "I'm not getting all my work done"; that she does not receive any added compensation for working extra hours; and that she does not "have the time to take the comp time." There is no formal system for keeping track of her overtime hours and she only recently has started to keep track of her overtime.

Majid Allan, a Senior Planner in Planning and Development, testified that he "generally, perhaps more often than not, perhaps 50 percent of the time" works more than 40 hours a week. He informally keeps track of his comp time when he works more than 40 hours a week and needs his supervisor's permission to take comp time. None of his requests have ever been denied. He also said that he only has been able to use about 30% - 40% of his comp time because he is too busy to use the rest of it up, and that he lost about 40-60 hours of comp time in 2005 because of his heavy workload.

Social Worker Bob Syring works for Dane County Human Services and is in the separate Social Workers' bargaining unit. He testified that the County in the prior interest arbitration proceeding before Arbitrator Mary Jo Schiavoni claimed that his union's demand for time and a half overtime pay would cause great financial damage if it were awarded and that one supervisor in that proceeding testified that there would be a "bloody chain of events" if the union's offer were selected. [3]

Syring added that his department only has incurred about $6,000 - $7,000 in yearly overtime costs since that award was issued, and that the payment of overtime which Arbitrator Schiavoni ordered has had a "beneficial effect" because:

[3] Dane County and Dane County Professional Social Workers Union, Local 2634, AFSCME, AFL-CIO, Case 204, No. 56471, INT/ARB-8476, Dec. No. 2984v (Schiavoni, 2000).

> Typically, what we struggled with in the past prior to this was an inability to bring matters to the attention of management at all.
>
> And what's happened since the time and a half overtime award is we now have a tool, where when folks are being given work or are expected to work in excess of 40 hours routinely, our social workers have the ability to go to their supervisors and say the expectation you have for me for this week is excessive or I've already put in so many hours and I can't accomplish the other tasks that you expect me to accomplish within 40 hours, so if you expect me to do this work, you need to provide me time and a half overtime.
>
> So I think it's given social workers a tool to be able to draw the attention of the work demands to the supervisors and there has been some overtime paid. . . . [4]

Travis Myren, the Assistant Director of the County's Department of Administration, was involved with the WERC election leading to the Union's 2004 certification and then in the negotiations for the parties' initial agreement. She testified that non-unionized professional employees, supervisors and managers are part of the Management Advisory Council, herein "Council", which advocates for "management pay, benefits, training needs"; that the Council serves "as an advisory role" to the County executive; and that the Council never discussed overtime "in any significant way." She said non-unionized professionals and the bargaining unit employees herein do not receive any longevity pay because the County several years ago took that money and rolled it into higher salaries; that the employees herein now receive all of the fringe benefits they previously received when they were unrepresented; and that they are on their prior pay scale.

Asked about the status quo regarding taking time off after having worked 40 hours, Myren replied:

> A Well, there are informal arrangements for what we've referred to today as comp time, I would call it discretionary time, just because it gets

[4] Transcript, p. 89.

> confusing when you call it comp time and it's earned at time and a half. I would call it discretionary time off arrangements now, where employees may, some on an hour for hour basis, some not on an hour for hour basis, get some credit for time worked in advance of 40 hours per week on an informal basis, again.
>
> Q Do the employees in this bargaining unit with the exception of Steve Jones ever receive time and a half compensatory time?
>
> A That was I think clearly an error. [5]

Myren added that the County considers the professional employees herein to be exempt under the Fair Labor Standards Act, herein "FLSA," and that they therefore are not entitled to overtime under the FLSA. She also stated that division managers filled out a survey showing whether employees routinely work more than 40 hours a week and whether they get comp time (County Exhibit 27); that two managers responded they never have overtime; and that the remaining eleven managers responded that they infrequently have it. She added that there have been staff reductions because of the County's financial condition, and that the Union in negotiations never offered anything to the County in exchange for the premium pay benefits it seeks here.

Asked what changes would happen if the Union's Final Offer is selected, Myren replied:

> Well, I think certainly, you know, I think managers will be watching time taken more closely. Right now, I think there are relatively loose arrangements with respect to breaks in some cases, discretionary time off, lunch periods. Nobody is really watching on an hour for hour basis making sure that people are at their desks and being productive.
>
> I think if this – if an overtime provision were there, I think managers would certainly be more aware of hour for hour productivity and the amount of time actually spent doing work.[6]

[5] Id., p. 162.

[6] Id., p. 168.

She added that the Council does not have an agreement with the County; that the Council does not have any bargaining rights; and that she does not have any personal knowledge as a result of the above survey to refute the prior witnesses' testimony about the overtime they are working. Asked what would be preserved if the County's Final Offer is selected, she replied "The status quo" even if that varies from person to person.

It is within this testimonial background and the documentary evidence submitted that the above statutory criteria must be applied.

I find that the "greatest weight" and "greater weight" factors are not applicable, a point acknowledged by both parties; that there is no question relating to the County's lawful authority; that the stipulations of the parties do not favor either party; that factor h. relating to overall compensation does not favor either party; that factor f. relating to private employment cannot be given any weight based upon the evidence produced in this proceeding; that the CPI does not favor either party; that there have not been any changes during the pendency of this proceeding affecting either Final Offer; and that there are no "other factors" other than the ones listed that must be considered.

The interests and welfare of the public do not favor either party because the public will be served by adopting either Final Offer.

As for the County's financial ability to meet the costs of the Union's Final Offer, the County asserts that "continued budgetary restraint" is needed rather than "increased labor costs associated with the imposition of time and one-half overtime" because the County in recent years has faced decreasing state aids, stagnant sales tax revenues, dropping interest income, and increased debt service (County Exhibits 26-30). The County adds that its financial difficulties have forced it to not fill many vacant positions; that it has engaged in "a myriad of budget cutting

mechanisms"; that the County Executive has ordered all County departments to tighten their financial belts in part through hiring freezes (County Exhibit 29); and that its unions have recognized this financial problem by agreeing to a 2004 wage freeze and to split wage increases in 2005 and 2006.

The County cites City of Princeton Electrical Utility, Dec. No. 30700-A (2004), where Arbitrator June Weisberger ruled that a $50,000 reduction in State revenue sharing funds "must be considered as part of the greater weight factor of 111.70(4)(cm)(7g) relating to "economic conditions of the municipal employer" in part because the employer "has already begun the difficult process of making significant cuts in various City department budgets to meet this financial challenge" and because "local conditions" revealed unemployment; a recent population decline; lower County annual wages and per capita income than Wisconsin averages; and an older population on limited incomes.

This record differs from City of Princeton because there has been no recent population decline in Dane County; or higher unemployment; or lower county-wide annual wages; or lower per capita income; or an extensive older population on limited income. In addition, the County's per capita income ranks third in the state; the per capita value of its property ranks in the top quarter of the state; and its 2004 levy rate was ranked 68th in the state (Union Exhibits 4-4, 4-5), thereby showing that the County's financial condition is much better than the one faced by the City of Princeton.

The County also relies on the following cases in support of its contention that an ability to pay argument deserves most weight when an employer has engaged in the kind of budget cutting found here: Sheboygan Water Utility, Dec. No. 21723-A (Vernon, 1985); City of Beloit

Bus Drivers, Dec. No. 22374-A (Malamud, 1985). Since this record establishes that the County in recent years has taken numerous steps to deal with its financial difficulties, I agree that the County's Final Offer must be considered within a background showing that the County is not as flush as the Union claims.

The County claims that the adoption of the Union's Final Offer can lead to higher overtime costs of up to about $492,255 (County Exhibit 32); that the Union's proposal relating to working at home can cost up to about $134,103 annually (County Exhibit 33); and that it simply cannot afford such costs.

These claims are similar to the ones made by the County to Arbitrator Schiavoni when it asserted that the union's overtime proposal in that proceeding, which was similar to the one made here, could cost up to about $264,820.[7] In fact, Social Worker Syring testified without contradiction that the overtime costs in the Social Workers' unit amounted only to about $6,000 - $8,000 a year.[8] Given the huge disparity between the County's claims there and subsequent reality, I find that the County's projected claims here are too speculative and thus cannot be accepted as fact.

The County's claims of excessive premium time payments also are undermined by its own survey of managers who reported that overtime is never needed for two divisions, i.e., in the Clerk of Court's office and in the Department of Human Services, and that it is infrequent in all of the eleven remaining departments (County Exhibit 27).

[7] Schiavoni Award, at 16.

[8] Transcript, p. 89.

Furthermore, the County has absolute control over its overtime costs because the Union's proposal does not become effective until after this award issues and because the proposal provides that supervisors must approve all such overtime. Hence, the County can turn off the overtime pay spigot whenever it wants, and for whatever reasons it wants.

Adopting the Union's proposal also may bring about needed efficiencies and priorities, a made point by Syring who testified that paying overtime in the Social Workers' bargaining unit has had a "beneficial effect" because it has "caused management to look a little bit more closely at what's expected of us. . . ." Assistant Director Myren also acknowledged that overtime would cause managers to be "more aware of hour for hour productivity and the amount of time actually spent doing work." [9]

The County adds that selection of the Union's offer "would be divisive" and insensitive to the accepted financial conditions existing in the County because "significant efforts for employee response to financial pressures will be lost."

It is hard to see how the Union's offer would be "divisive" when the Union is simply asking for the overtime that all of the County's other bargaining units already enjoy. Moreover, the County certainly has more equitable ways to make its employees feel the County's financial pressures other than asking them to work for free when they work more than 40 hours a week, which is what the County is asking here for only one of its bargaining units.

I therefore find that the County has the financial ability to meet the costs of the Union's Final Offer and that this factor supports selection of the Union's Final Offer.

[9] This of course also means that the County can insist employees actually work 40 hours before they are paid overtime and that they document all their requests for overtime and comp time usage. It therefore probably will be necessary to change the County's time-keeping practices.

Turning now to the comparables, both parties have agreed upon the following eight internal Dane County comparables:

> AFSCME Local 65, (Highway, Zoo and Expo); AFSCME Joint Council, Local 705/720 (Badger Prairie, Courthouse and Non-Professional Human Services); AFSCME Local 2634, Professional Social Workers'; Attorney's Association; Building and Construction Trades Council of South Central Wis.; Deputy Sheriffs, WPPA; Supervisory Law Enforcement, WPPA; and United Professionals for Quality Health Care, 1199W, SEIU (Union Exhibit 3-1; County Exhibit 42).

All of these bargaining units receive overtime for working more than eight hours a day and/or 40 hours a week and all except for the Attorney's bargaining unit, where employees receive comp time on a straight time basis, receive either time and a half or double time for overtime (Union Exhibit 3-6). In addition, seven of these internal comparables provide for call-out pay (the Attorney's unit apparently does not); six comparables provide for a minimum of two hours for each call out; and employees are paid for working at home in all of the five or six units which sometimes require employees to work at home (Union Exhibit 3-7; County Exhibit 43).

The Union's proposal here is more modest than most of these internal comparables because it provides for overtime pay only when employees work more than 40 hours a week or more than 80 hours in a two-week period under a flex time agreement, as opposed to five of the internal comparables who pay overtime whenever employees work more than 8 hours a day (Union Exhibit 3-6).

As for the County's unrepresented professional employees, I find that they cannot be given much weight because their wages and conditions of employment are significantly different from represented employees. See Washburn School District, Dec. No. 24278-A (Kerkman, 1987), where Arbitrator Joseph Kerkman ruled:

> The undersigned has considered the arguments of the parties, as well as the cases which they cited, and concludes that the weight of the authority is persuasive that only organized districts should be considered in making the comparison of the comparables. In arriving at the foregoing conclusion, the undersigned not only considered the number of arbitrators, but the quality of the rationale in support of the proposition that unorganized districts fail to establish comparability.

Arbitrator Schiavoni reached the same conclusion in the prior arbitration proceeding involving the County and its Social Workers' bargaining unit when she ruled: "It is inappropriate to consider the wages and benefits of unrepresented managers and professionals within the County." [10]

I therefore find that the internal comparables support the Union's Final Offer.

As for the external comparables, the parties have agreed to two tiers of external comparables.

Tier 1 consists of the following agreed upon counties which are contiguous to Dane County: Columbia, Dodge, Green, Iowa, Jefferson, Rock, and Sauk (Union Exhibit 4-2; County Exhibit 34).

All twelve bargaining units in these comparables receive either comp time or time and a half for overtime, with five of them receiving overtime for working 8 hours a day (Union Exhibit 4-6; County Exhibit 36). All of them also receive call-out pay, with nine of them receiving minimum payment of an hour and a half to two hours (Union Exhibit 4-6). Furthermore, seven of the bargaining units whose members sometimes work at home receive payment ranging from actual time worked at the straight time rate to time and a half or comp time, with only two of them requiring a minimum payment (Union Exhibit 4-7).

[10] Schiavoni Award, p. 17.

Tier 2 of the external comparables consists of the City of Madison and the following agreed upon Wisconsin counties: Brown, Kenosha, Outagamie, Racine, Rock (which is included in Tier 1), Waukesha, and Winnebago (Union Exhibit 5-1; County Exhibit 38). The parties disagree over whether Marathon, Milwaukee, and Sheboygan counties should be included within this second tier.

Recognizing that choosing the appropriate pool of comparables "presents some challenges," the Union proposes that Milwaukee County be included within these comparables because Dane County and Milwaukee County "are fast being linked by the ever expanding megalopolis between Chicago and Milwaukee." The Union opposes the City's inclusion of Sheboygan County and Marathon County because the population differences between them and Dane County is greater than the difference between Dane County and Kenosha County which has the smallest population among the Union's proposed comparables (Union Exhibit 5-3). The Union also maintains that unrepresented groups of employees within the external comparables should not be considered because "The preponderance of arbitral thought is that comparisons to non-represented employee groups carries little or no weight because the terms and conditions of employment are unilaterally established rather than bargained." The Union thus cites Washburn School District, Dec. No. 24278-A (Kerkman, 1987), and Webster School District, Dec. No. 23333-A (Kessler, 1986), where unrepresented comparables were not considered.

The County opposes the Union's proposed inclusion of Milwaukee County because of its much larger size and because it "has been historically discounted as a comparable to Dane County," citing Arbitrator Jay Grenig's decision in Dane County Attorneys, Dec. No. 22840-A

(1986). The County also maintains that Marathon and Sheboygan counties were part of the second tier of comparables "validated by Arbitrator Schiavoni" and that they should be included here.

The County adds that groups of non-represented professional employees should be included because "What has been consolidated into a single unit in Dane County does truly span over non-union and various unionized environments in each of the comparable counties"; because a blended union/non-union comparable pool is "necessary as the parties move into future contract negotiations and subsequent discussions on wage structures and other unique benefits for professional employees"; and because non-represented employees are part of the local labor market and thus represent one of "the relevant factors used in many other Dane County proceedings." It thus points out that the bargaining units in Jefferson, Rock and Sauk counties "do not include clusters of positions similar to those reflected in the Dane County unit" (County Exhibit 35).

The Union counters: "A mixed unit is not any less valuable as a comparable than a unit only of professionals."

I agree, as the overwhelming weight of arbitral authority does not consider non-represented employees when looking at comparability and because the County has failed to prove that it in fact will face any serious difficulties when the parties engage in future negotiations. Moreover, even though the employees herein are clustered into one bargaining unit, there is no reason why the parties cannot look at and consider the represented professional employees in non-clustered units for the purpose of comparability. Hence, the parties will be able to determine how the local labor market compensates similar employees.

However, the Union has not provided a sufficient basis for including Milwaukee County as an external comparable and Arbitrator Grenig did not include Milwaukee County within his set of external comparables in Dane County Attorneys, supra. I am very reluctant to disturb comparables established in prior interest arbitration proceedings absent any significantly changed circumstances which have not occurred here. Accordingly, I find that Milwaukee County should not be included within the external comparables.

Since Arbitrator Schiavoni ruled that Sheboygan and Marathon counties should be included as external comparables, I find for the same reason that they should be included here.

The County claims that an assessment can be made only "marginally" as to what the external public sector comparables provide in the form of overtime benefits because "there is a mixed bag" within "the unionized environment." It thus points out that the professionals in Columbia County receive comp time on a straight time basis; that the professionals in Marathon County receive comp time only when they finish a project at the end of the work day; and that some of the overtime provisions sought by the Union here are more generous than some of the provisions found in these comparables. The County also asserts that the external data should not control because: "Development and ultimate refinement of an issue that significantly alters the status quo must be addressed locally without undue reliance on the surrounding comparables."

The County adds that most external counties "do not offer the benefit of call out pay for professionals," and that this "comparison data must be tempered to recognize that Dane County's professionals are bargaining an initial contract, a contract that has plenty of opportunities for continued discussions on this issue." The County thus quotes Arbitrator George Fleischli's

decision in Washington County Social Services Department, Dec. No. 22732-A (1986), wherein he stated that "the circumstances under which the premium may be earned can be quite important."

I agree that the circumstances involving external comparables "can be quite important." Nevertheless, there is an almost universal practice of paying some overtime since all of these comparables except one [11] pay overtime and/or comp time at either straight time or time and a half rates for working outside the normal work day (Union Exhibit 5-5; County Exhibit 39). All of them also pay call-out pay ranging from actual time worked to a minimum of three hours at either straight time or time and a half rates, and the seven bargaining units where employees sometimes work at home receive either prescribed rates or minimums ranging up to three hours pay (County Exhibit 41; Union Exhibit 5-6).

Closer to home, the City of Madison has four bargaining units consisting of either all professional employees (i.e., the nurses' unit and the attorneys' unit), or a combination of professional and non-professional employees (i.e., a librarian's unit and a general unit). All of these employees receive either overtime or comp time at a rate of time and a half for all overtime worked except the Attorney's unit which receives comp time at the straight time rate (Union Exhibit 5-7). Three of these units also receive a minimum of two hours call-out pay (the Attorneys' unit does not because it has flex schedules) (Union Exhibit 5-8). Two of them, the general unit and the Attorneys' unit sometimes have members working at home for which they receive either straight time, or time and a half, or double time for Sunday work (Union Exhibit 5-8).

The external comparables thus support the Union's Final Offer.

[11] Brown County's Medical Examiners do not receive overtime (Union Exhibit 5-5).

Turning now to whether the Union was required to offer a quid pro quo in exchange for its premium pay proposals, the Union maintains that the Schiavoni Award controls because Arbitrator Schiavoni rejected the County's similar claim there that the union was required to offer a quid pro quo and because she found that the County had not made substantive proposals to address the compelling problem described." [12] She also found that the union's offer should be adopted because employees:

> are entitled to enjoy overtime for those hours required in excess of the normal work week. 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 City's management. [13]

The Union replies to the County's acknowledgment that "it would be difficult to determine what, exactly, would be an appropriate quid pro quo" [14] by stating:

> No kidding! A *quid pro quo* means that there will be an exchange of some sort. Even if this were a case where *status quo* and *quid pro quo* considerations were appropriate, the issue before us does not lend itself to that exchange. The County can simply determine that no employee will work more than forty (40) hours and unit employees will derive no benefit. However, the Union offer does recognize that compensation for work over forty (40) hours requires guidelines. While currently employees can work countless unrecorded and uncompensated hours beyond the normal work week, the Union offer provides a clear mechanism for the County to control the work in the future. The Union offer demands that *"[o]vertime work shall require supervisory approval"*. The Union offer provides the County with sole control over the work. The Union offer will not cost the

[12] Schiavoni Award, p. 17.

[13] Id., p. 18.

[14] County's Main Brief, p. 25.

> County one (1) cent, if it wisely uses its authority to control workloads and flow. The Union offer, indeed, could result in a reduction of compensatory time, in the instances where it has heretofore been applied. [15]

The Union also cites several prior interest arbitration awards which held that the status quo doctrine does not apply to initial contracts including Crivitz School District, Dec. No. 2417-A (Chatman, 1987); Benton School District, Dec. No. 24812-A (Barron, 1988); and Town of Lisbon, Dec. No. 30123-B (Engmann, 2002).

Arbitrator James Engmann explained in the latter that a quid pro quo is not needed in an initial collective bargaining agreement because:

> . . .
>
> In most cases, it would put a labor organization at a severe disadvantage, for one reason employees organize it that their wages, hours and conditions of employment are not as good as those of their unionized neighbor. Because it is an initial collective bargaining agreement, the union is not attempting to change something previous agreed to by the parties. Prior to their being certified as a collective bargaining unit, the Town of Lisbon determined the wages, hours and conditions of employment of these Town of Lisbon employees. So, in this case, as in all cases involving an initial collective bargaining agreement, the Association is trying to change something unilaterally implemented by the Town. To require a union to bear such a burden to change so many things in an initial agreement would thwart the intent of collective bargaining.
>
> So instead of having a status quo, the parties start with a clean slate, and the criteria for determining the content of that initial collective bargaining agreement is much more influenced by what other unionized employees have in the internal comparables and external comparables than by what the Town Board has decided in the past should be the employees' wages, hours and conditions of employment.
>
> . . .
>
> In sum, the Arbitrator determined that as this is an initial collective bargaining agreement and as there is no previous agreement which the parties are trying to change, that the labor relations concept of status quo with its accompanying

[15] Union's Reply Brief, p. 15.

> burden of proof will not apply, that the Association's arguments regarding status quo will be rejected, and that the analysis will focus on the stipulations of the parties and the comparison of wages, hours and conditions of employment of municipal employees in the same community and in comparable communities to determine the selection of the Final Offer. [16]

The County argues that the Schiavoni Award "placed a great deal of emphasis on the fact that the parties had spent a significant amount of time dealing with the overtime issue," unlike here where "the parties have had but one opportunity to address the issue of overtime." The County thus argues that Arbitrator Schiavoni "would certainly have been hard pressed to select the Union's final offer . . . if the facts were as they are here."

Myren testified that the overtime issue here came up in negotiations "several times . . ." even though the parties did not spend "a lot of cumulative time discussing it." [17] She also acknowledged that the Union then told the County the overtime issue would block a contract settlement unless there was an agreement and that the County itself never made any written overtime proposals. [18]

Regardless of what Arbitrator Schiavoni would or would not do here, which is something we will never know, I find that the parties properly discussed this matter and that the Union demonstrated how serious it was by telling the County there would be no agreement unless the County agreed to its overtime proposal. Since the County never made any written counter proposal, it, too, demonstrated that there would be no agreement unless the Union dropped its

[16] Id., at 23-24.

[17] Transcript, p. 176.

[18] Transcript, pp. 176-177.

overtime proposal. Given the fixed positions of the parties on a matter that does not need any further study, I find that the issue here is ripe for resolution on the merits and that there is no point in pushing off its resolution for several more years as urged by the County.

The County goes on to cite Arbitrator Schiavoni's decision in Columbia County, Dec. No. 28983-A (1997), wherein she stated: "A change in the status quo is not to be taken lightly. Moreover, arbitrators are reluctant to grant a party in interest arbitration what it could not gain through bargaining." The County also relies on Arbitrator Sherwood Malamud's discussion of the status quo doctrine in City of Verona, Police Department, Dec. No. 28066-A (1994), wherein he quoted from his prior decision in D.C. Everest Area School District, Dec. No. 24678-A (1988), and stated:

. . .

> The party proposing change must establish the need for change and convince the Arbitrator of that need. The imposition of this burden accords to the status quo its important role in maintaining stability in the bargaining relationship between the parties. On the other hand, once a need for change is established, the imposition of a quid pro quo provides the opponent of change with something in exchange for changing the status quo. In addition, the party that opposes change, in the face of a clear need for change and which carries that resistance to change to arbitration, incurs an enormous risk. The opponent of change that chooses to stonewall and act as if there is no need for a change leaves to the other side the ability to identify the solution for the problem giving rise to the need for change.

. . .

The County thus claims that a quid pro quo must be offered whenever parties are negotiating an initial agreement, citing Arbitrator Herman Torosian's decision in Oconto Unified School District, Dec. No. 30295-A (2002). The County adds that it has maintained the status quo by giving these bargaining unit employees the prior benefits, wage scale, and existing practices covering comp time and flex time which previously existed when they were unrepresented and

that "the historical relationship" between the County and the Council has enabled the status quo to play a "significant role in the development of this initial collective bargaining agreement." The County also claims that the Union has failed to prove that "there is a persuasive need to alter the economic relationship to the degree mandated by its final offer."

What went on between the Council and the County in their prior dealings has little bearing here because these employees are now represented by a union which has the effective power to say "no" to any County proposal, and to then proceed to interest arbitration which considers external comparability which may not have come into play when these employees were unrepresented. See School District of Waukesha, Dec. No. 18391-A (Zeidler, 1981).

I also find, in accord with the reasoning set forth by Arbitrator Engmann in Town of Lisbon, supra, that the Union was not required to offer a quid pro quo because this is an initial agreement. Arbitrator Malamud has agreed with this view because he ruled in another case that no quid pro quo is needed when negotiating an initial contract because "it is inappropriate to burden either party with . . ." that requirement. See Village of East Troy, Dec. No. 27176-A, p. 26 (1992).

The County also claims that "a quid pro quo is an established component within the historic Dane County bargains" as shown in County Exhibit 45 which details quid pro quos in other bargaining units, and that the "most telling quid pro quo occurred within the current 2004-2006 bargaining cycle" when the County provided a no-layoff pledge in exchange for a wage freeze.

The Union answers that "There is not one shred of evidence in the record to support this contention because" County Exhibit 45 "does not demonstrate or prove that any of the conditions described were linked or were an exchange"; because most of the examples cited involved the

WPPA and centered on new pay steps or pay adjustments; and because the County "did not identify quid pro quo's involving AFSCME's more than fifty (50) years of representation for most County workers."

Since the quid pro quo doctrine is such an integral part of public sector bargaining in Wisconsin, it would be surprising if some of the benefits set forth in County Exhibit 45 did not come about as part of some sort of an exchange. However, that exhibit is not complete because it does not refer to any AFSCME units even though AFSCME has been on the County scene for about 50 years. and it does not detail what specific quid pro quos, if any, were exchanged for any of the overtime provisions now found in the County's other eight bargaining units. In addition, it does not appear that the examples cited by the County involved first contracts which, for the reasons stated above, do not require quid pro quos.

The County asserts that the employees herein receive higher straight-time compensation than other internal salary schedules and that "Comparison of and expectation for similar overtime benefits is neither reasonable nor appropriate."

The minimum and maximum hourly rates herein for the highest pay classification are higher than any of the internal comparables except for the Attorneys' unit which does receive comp time for working over 40 hours. However, the minimum hourly rate herein for the lowest classification is lower than the Sheriff's Supervisors' unit, the nurses' unit, the Sheriff's non-supervisory unit, and the Social Workers' unit, and the maximum rate for that classification is lower than these same four units (County Exhibit 44). Hence, the record is mixed on this issue.

In addition, there is no basis for finding that the compensation herein was originally established to capture a reasonable amount of overtime. To the contrary, since the Attorneys' unit does receive comp time for working over 40 hours even though it is the highest paid unit,

the County has recognized in the past that the question of straight-time wages is a separate question of whether overtime should be awarded when employees work outside their normal work week. Moreover, given the unanimity among the County's other represented internal units and the near unanimity among almost all of the external represented units in awarding overtime, I find that it is reasonable and appropriate for these employees to be treated in the same fashion.

The County also asserts that its offer "maintains the status quo and allows for recognition at the department level consistent with the professional nature of the jobs"; that the Union has failed to prove "there is a persuasive need to alter the economic relationship to the degree mandated by its final offer"; and that, "The critical question is whether the calculation should be premised on a time and one-half basis and whether accumulation and cash payout should be provided."

The problem with these claims is that the Union has demonstrated the need for a consistent, uniform policy regarding overtime so that all bargaining unit members are treated the same which does not happen now, and the Union also has demonstrated the need to let employees take off all of the comp time they now earn under the current system but cannot always use because of their heavy workloads.

Maintaining the status quo means that some employees will go on being compensated in the form of comp time while others are not, and that some will continue their flex time schedules while others are not allowed to have flex schedules, thereby perpetuating the inequities which have arisen over the years with these employees. In addition, maintenance of the status quo can leave new hires at the mercy of their supervisors as to whether they will or will not receive overtime. That can constitute individual bargaining which is the very antithesis of collective bargaining.

I thus find that the Union has proven the need for overtime and comp time because: (1), some employees like Hohol do not receive any comp time or overtime; (2), some employees like Allan cannot use up all of their comp time because of their heavy work loads which make it very difficult to take off all of the comp time they have earned; (3), past management decisions regarding which employees receive comp time and which do not apparently were based on historical accident and/or the individual personalities and bargaining skills of those involved, as opposed to any reasoned, consistent policy which treats similarly situated employees equally; and (4), there is no valid policy reason as to why certain professionals today should receive comp time while other professionals standing next to them or working down the hall from them do not.

The Union also has established the need for call-out pay because equity requires employees be paid when they leave home and report for work, as opposed to providing their services for free. Indeed, the County itself recognizes this equitable claim because six out of its eight internal bargaining units provide for a minimum of two hours call-out pay and a seventh receives call-out pay for actual hours worked.

In addition, since accrued comp time and accrued overtime represent earned benefits which are awarded for time already worked, equity requires payment for that time when employees leave their employment, just as they now receive their back salary and accrued vacation and holiday pay upon their terminations pursuant to Section 16.01 of the agreement. Indeed, if employees do not receive their accrued comp time and/or accrued overtime, the County will receive a windfall by receiving services without paying for them. The Union's proposal is supported by 7 out of the 8 internal County comparables, thereby showing that the County already grants this very benefit to almost all of its other unionized employees.

The Union's flex time proposal also is reasonable because it contains the same flex time language found in the Social Workers' contract, (Union Exhibit 3-5), and it allows for the kind of flex time arrangement now found in the Land and Water Resource Department where employees like McCallum, with their supervisor's approval, sometimes work 9 hours days in order to get every other Friday off.

The County claims that the Union's Final Offer "attacks the County's conviction that these bargaining unit members are, indeed true professionals," and that selecting the Union's offer "would result in a major policy shift within the County," one that "should not be imposed through the interest arbitration process," but rather, "through voluntary collective bargaining." The County cites several interest arbitration awards where arbitrators stated they were reluctant to order the implementation of significant policy changes,[19] including Washington County Social Services Department, supra, wherein Arbitrator Fleischli stated:

> The imposition of a one and one-half time premium incentive requirement for overtime worked by professional employees constitutes a major change in working conditions which will undoubtedly have a significant impact upon the way in which such work is performed in the department in the future. Unlike a wage proposal, which can be adjusted in the next round of negotiations, if it is found to be a little on the high side or a little on the low side, such a change will also have a prospective impact on labor costs which will continue for the foreseeable future. For these reasons as well, the undersigned is reluctant to sanction its imposition through arbitration, without clear evidence that the proposal in question contains significant flexibility with regard to daily overtime and significant limitations and regulations with regard to its daily application, comparable to that found in other agreements.

[19] City of Madison (Library Unit), Dec. No. 29452-A (Miller, 1999); Columbia County, Dec. No. 28960-A (Kessler, 1997); Benton School District, Dec. No. 24812-A (Baron, 1988); and Webster School District, Dec. No. 23333-A (Kessler, 1986).

I agree with the Union that Washington County is distinguishable because it did not involve an initial contract; because the contract there already provided for comp time and overtime at the straight time rate; because the union's proposal asked for time and a half payment after the normal work day and work week; because the unused accumulated comp time was paid out at the end of the year; and because the benefits granted there in 1986 were superior to what the County has presented here.

Furthermore, Arbitrator Fleischli's ruling was predicated over his conclusion that the union's proposal did not provide "significant flexibility with, regard to daily overtime and significant limitations and regulations with regard to its daily application, comparable to that found in other agreements." [20] Here, on the other hand, the Union does not ask for daily overtime and all overtime must be expressly approved by a supervisor, thereby obviating the problems noted by Arbitrator Fleischli.

The Union adds that the County has not offered any proposal to either codify the existing practices relating to comp time or to make those practices uniform in the parties' agreement, and it quotes Arbitrator Byron Yaffe's decision in City of Madison (Public Library), [21] wherein he stated:

. . .

> While the City's position is consistent with the status quo and generally is supported by the transfer policies which appear to be in effect in the majority of the cited comparable library systems, it fails to adequately or effectively address legitimate employee concerns regarding their conditions of employment, particularly in light of the organizational changes which appear to be on the horizon in the City's library system. The City's failure to address these concerns in its final offer and its resulting failure to offer any degree of predictability as to

[20] Id., p. 12.

[21] Case XCIV, No. 31254, MED/ARB-2195, Decision No. 20807-A, p. 5 (1983).

> how transfers will be handed in the future, unquestionably raises serious doubts in the employees' minds as to whether any legitimate interests they might have with respect to this issue will be given consideration by the Employer in the implementation of its transfer policy. While there is no evidence that there has been widespread Employer disregard of such employee interests in the past, the concerns which have been expressed herein do merit a constructive Employer response setting forth predictable standards and procedures for dealing with this problem, even though comparable Wisconsin library systems do not appear to date to have addressed this issue in any detailed manner.
>
> In this regard, while comparability often is given significant weight in proceedings such as this, where, as here, legitimate employee concerns affecting their conditions of employment exist, in the undersigned opinion, an employer has some responsibility to address those concerns in a reasonable fashion. The Employer's failure to do so here in its final offer seriously jeopardizes the reasonableness of its position.

That same situation exists here because the County has not offered any proposal to treat all of its professional employees in the same manner, and because the County also does not address the inequities which arise when employees must perform extra work at no extra pay and/or when their work loads prevent them from using up all of their comp time.

The County nevertheless claims that City of Madison is distinguishable because the parties there spent two years of bargaining whereas here there was only a "partial day of discussion," and that the problems caused by the selection of the union's offer there led to a subsequent interest arbitration proceeding before Arbitrator Gil Vernon who ruled that the most reasonable approach was to give the "basic thrust" of the disputed language "time to operate and give the parties a chance to address whatever problems might develop.[22] The County thus asserts: "a reasonable approach in this instant dispute is to allow the parties greater time outside the parameters of negotiating an initial contract to address the various issues associated with the

[22] City of Madison (Library Unit), Dec. No. 22001 (1985).

Union's final offer," citing Green Bay Area School District Noon Hour Supervisors, Dec. No. 31255-C (2006), where Arbitrator William Eich ruled that the union's request for 3½ paid holidays for an initial contract was unreasonable.

I have stated above why there is no point in pushing off the resolution of this overtime issue. In addition, the issue addressed by Arbitrator Gil Vernon centered on how already existing contract language was to be applied, which is certainly understandable. Here, there is no existing language and such language is needed so that its "basic thrust," too, can be understood and applied sooner rather than later.

The County also argues that the Union's overtime proposal "crosses into the regulatory threshold of what an employer is required to provide pursuant to the mandates of "the FLSA," and that the Union's proposal should be rejected because overtime exemptions have been available for parties classified as professional or who hold computer-related occupations (County Exhibit 13), and because that "means that the employer is not required to pay the employees at time and one-half. . ." for working over 40 hours in a work week (County Exhibit 14). The County also claims that the Union's overtime proposal "undercuts the purpose of. . ." the FLSA and "ignores the diverse job classifications recognized in this unit," and that it would "undermine the valid, flexible and ultimately professional relationship that has existed for years among the various tiers of the County's professional staff."

The County under the FLSA certainly is not "required" to grant overtime to professionals. That, though, is not controlling because the FLSA provides for a floor of rights under federal law, whereas this case centers on what overtime, if any, is to be provided above

that floor under the state's statutory scheme set forth in MERA.[23] Hence, MERA recognizes that professional employees – independently of what rights they do and do not have under federal law - have the same rights as non-professional rank and file employees to bargain for themselves and that a professional's wages, hours, and conditions of employment are to be resolved in an interest arbitration proceeding when parties cannot reach a voluntary agreement.[24]

Indeed, the County itself has recognized that important principle because it has agreed with its eight other bargaining units that professionals are entitled to various kinds of overtime. In addition, almost every other external unionized comparable does the same, thereby showing that the FLSA does not serve as a bar to such compensation in such bargaining units and that other municipal employers recognize that the professional employees in those units are to be paid for all work they perform.

In addition, the County overstates the dire consequences that may follow if the Union's Final Offer is selected, as it is hardly likely that bargaining unit employees will stop acting like true professionals or that the County will stop treating them as such. Hence, there is not one iota of evidence in this record - nay, not even a scintilla nor an iota - showing that any adverse consequences have been caused by granting overtime to the other professionals in the County's other bargaining units.

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[23] See Pierce County (Sheriff's Department), Dec. No. 26029-A (1989) where Arbitrator Joseph Kerkman rejected a similar employer argument. See, too, City of Madison (Library Unit), note 16, supra, where Arbitrator Miller ruled: "The FLSA is not relevant to the case at hand."

[24] The Union points out: "There has been no official determination that some or all of the employees in the instant bargaining unit are exempted from the FLSA." While that is true, I have assumed for the limited purpose of this proceeding that all of the professional employees may be excluded from the FLSA's coverage.

The County also claims that the employees herein "are managerial types of employees, not social workers" who "clearly exercise significant discretion and control"; that "Application of provisions more restrictive than that required within the FLSA regulations is unfair"; and that accepting the Union's Final Offer effectively waives "the County's right to assess the FLSA mandates for these professional positions" (Emphasis in original).

The WERC on January 20, 2004, certified that this unit consists of "all regular full-time and regular part-time professional employees" and that it thus excluded supervisory, managerial, and all other employees. As a result, there is no merit to the County's claim that the employees herein are "managerial types of employees." They, in fact, are professional employees who have the same right to bargain over their overall compensation as all other employees covered by MERA.

There also is no merit to the County's claim of unfairness since the County today is paying overtime in excess of what is required under the FLSA to its professional social workers, nurses and attorneys. In addition, and as related above, it is difficult to see what is so unfair about paying employees when they are required to work outside their normal 40 hour work week.

The County's claim that it will be unable to assess the FLSA's mandates fares no better because the County does not specify just what other mandates it is concerned about; because the County already has had two and a half years to study this issue; and because there is no evidence in this record that the County has experienced any such problems in its other three professional bargaining units, all of which receive overtime in spite of the FLSA.

Based upon all of the above, I conclude that the Union's Final Offer should be adopted because it is supported, to one degree or another, by almost all of the internal and external unionized comparables and because the Union has made a compelling case as to why its offer is more equitable than the County's offer.

It therefore is my

AWARD

That the Union's Final Offer and all of the parties' tentative agreements are to be incorporated into the parties' 2004-2006 agreement.

Dated at Madison, Wisconsin, this 12th day of August, 2006.

Amedeo Greco /s/
Amedeo Greco, Arbitrator