BEFORE THE ARBITRATOR

In the Matter of the Petition of

WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

To Initiate Arbitration
Between Said Petitioner
and

Case 9
No. 48172 INT/ARB-6632
Decision No. 27960-A

UNIFIED BOARD OF GRANT AND IOWA COUNTIES

Appearances:

Michael J. Wilson, Representative at Large, appearing on behalf of the Union.

Melli, Walker, Pease & Ruhly, Attorneys at Law, by Thomas R. Crone, appearing on behalf of the Employer.

INTEREST ARBITRATION AWARD

Wisconsin Council 40, AFSCME, AFL-CIO, (herein "Union") having filed a petition to initiate interest arbitration pursuant to Section 111.70(4)(cm), Wis. Stats., with the Wisconsin Employment Relations Commission (herein "WERC"), with respect to an impasse between it and Unified Board of Grant and Iowa Counties (herein "Employer"); and the WERC having appointed the Undersigned as arbitrator to hear and decide the dispute specified below by order dated March 9, 1994; and the Undersigned having held an evidentiary hearing in Dodgeville, Wisconsin, on June 6, 1994; and each party having filed post-hearing briefs, the last of which was received August 27, 1994.

ISSUES

The parties' final offers forms the issues in dispute. They both propose a three year agreement covering the calendar years, 1992, through 1994. I summarize the issues as follows:

1. Subcontracting: The Union proposes: The Employer shall have the right to subcontract work providing that no bargaining unit employee(s) shall be laid off or suffer a reduction in hours as a result of subcontracting. The Employer proposes the management right to: "...determine to what extent any process, service or activities of any nature whatsoever shall be added, modified, eliminated or obtained by contract with any other person or employer."

2. Management Rights: The Employer proposes Article I, Section B. to read as follows:

> "The Employer's exercise of the foregoing function shall be limited only by the express provisions of this Agreement and the Employer has all the rights which it had at common law except those expressly bargained away in this Agreement. This Article shall be liberally construed."

[Emphasis supplied.] The Union proposes as follows:

> "A. Management Rights. It is agreed that the management of the Employer's operations and the direction of its working forces is vested exclusively in the Employer and that this includes but is not limited to the following: [enumeration omitted.]
>
> B. Exercise of Management Rights. Management Rights are prerogatives and functions which encompass those aspects of the Unified Board operations which do not require discussion with or concurrence by the Union, or rights reserved to management which are not subject to collective bargaining. The Employer's exercise of the foregoing functions shall be limited only to the express provisions of this Agreement."

3. Definition of a Grievance: The Employer proposes to define a grievance as follows:

> "A grievance is defined as a complaint by an employee or the Union that an express provision of this Agreement was violated by the Employer. ...."

The Union proposes a definition as follows: "A grievance shall be defined as a dispute regarding the interpretation, application or enforcement of the terms of this Agreement."

4. Informal Grievance Step: The Employer proposes to add to the first step the following: "...it is understood that an employee may discuss a grievance with the employee's immediate supervisor prior to the filing of a grievance, but such discussion shall not be considered a formal step in the grievance procedure..." The Union opposes this.

5. Exclusivity of Remedy: The Employer proposes the following addition to the grievance procedure which addition, the Union opposes: "The grievance procedure set forth herein shall be the exclusive remedy for any complaint of an employee or the Union as to any matter arising during the term of this Agreement and involving the interpretation or application of this Agreement."

6. Promotions and Vacancies: The Union would require that the job

posting contain job description, wage rate, hours of work and office location. The Employer does not specify what must go into the posting.

7. Layoff and Recall: The parties have provided for layoff by reduction in classification. The Employer's proposal specifically states seniority governs and is exercised by classification. The Union's proposal does not clearly state that seniority governs, but does imply that by its other language. Employees can bump junior employees in the same pay range, if qualified to perform the specific job. The Union and Employer both propose recall by strict seniority, provided the employee is qualified to perform the available work.

The relevant part of the Employer's proposal states:

> "The principal of seniority shall be taken into account when the Employer decides to layoff and recall employees. Layoff shall be by job classification. Seniority shall control, in cases of layoff or recall, provided the senior employee currently meets all the qualifications for performance of the work remaining or the work available."

The Union's proposal states in relevant part, underlining on the part not accepted by the Employer:

> "D. Lay-off/Recall. The Employer has the right to lay-off employees in any classification. Those employees so affected by a lay-off shall have the right to bump junior employees in the same pay range or pay ranges below provided they currently meet all qualifications of the junior employee's job. Junior employees bumped may exercise their seniority right in a similar manner. A senior employee may not bump a junior employee if the junior employee performs functions the senior employee is not presently qualified to perform.
>
> Employees shall be recalled in order of seniority provided the employee recalled currently meets all qualifications for performance of the work remaining or the work available."

8. Discipline and Discharge, Work Rules: The parties have agreed to a set of negotiated work rules, except the rule as to drug testing. The Employer further proposes that violations of work rules be subject to stated penalties and that arbitration be limited to review without the arbitrator having the authority to review the reasonableness of the rule or otherwise modify penalties. Discipline for other than violations of the rules would be subject to a "just cause" standard. The Union opposes stated penalties and proposes merely that employees be provide with procedural "due process" and that any form of discipline be only for "just cause". The Union also incorporates a statement of

progressive discipline policy into its proposal. The Union also proposes that the Employer provide a written notice of discharge specifying the reasons for discharge for both regular and probationary employees (who are not subject to the "just cause" standard.)

9. Drug Testing: The Employer proposes a work rule which would subject an employee to discipline for the following reason:

> "Reporting to work under the influence of alcohol or unprescribed narcotics or drugs or using or possessing unprescribed drugs or alcohol while on Employer property after warning. Refusing to be tested if there is a reasonable belief to suspect such influence. All testing shall be conducted by a certified laboratory. The Employer shall pay for the cost of any test it requires the employee to submit to."

The Union opposes the last sentence which is the drug test requirement.

10. Hours of work, overtime, pay periods and report pay

a. work schedule

The Employer proposes:

> "The Employer shall determine the work schedule necessary to conduct operations and said schedules of work may vary between work sites."

The Union proposes:

> "A. Flex-Time. With management approval employees may be scheduled on a straight time flexible schedule.
>
> B. Normal Work Day. Except as provided in Section A above, the normal work day shall be eight (8) consecutive hours.
>
> C. Work Week. The normal work week shall be forth (40) hours, Monday through Friday."

b. Compensatory time: The Union proposes:

> "Any employee who works in excess of forty (40) hours in any one (1) work week shall, at the employee's option, be paid their equivalent hourly rate of pay or given equivalent compensatory time off for such time worked."

The Union also proposes that paid time off count as time worked for overtime/compensatory time off purposes; the Union does not specify a time by which compensatory time off must be used.

The Employer proposes:

> "Any employee who works in excess of forty (40) hours in any one (1) work week shall, at the Employer's option, be paid their equivalent hourly rate of pay or given equivalent compensatory time off for such time worked. Compensatory time shall be taken at time(s) mutually agreed to between the employee and his/her supervisory...
>
> All work in excess of forty (40) hours per week shall be subject to the Employer's approval.'

The Employer proposes that paid time off not be counted as time worked for overtime/compensatory time purposes; the Employer proposes that compensatory time off must be used within 3 months.

c. Break Periods

The Union proposes: "All employees will receive a fifteen (15) minute paid break period during the first half and second half of each shift. Break time off shall be in accordance with current policy and procedure."

The Employer proposes: "All employees will receive a fifteen (15) minute paid break period during the first half and second half of each shift. All breaks must be approved by the employee's supervisor.

11. Benefits for Part-time Employees. The Employer proposes to limit benefits to those part-timers working 20 or more hours per week. The Union wants benefits for all part-time employees regardless of hours.

12. Vacation: The Employer's proposal continues the two-tier vacation system currently in effect. For employees hired before January 1, 1983, the vacation schedule is:

1 year - 10 days
5 years - 15 days
15 years- 20 days
20 years- 25 days

for all other employees it proposes that vacation is earned in the current year for the following year based upon anniversary date of employment and it proposes the following schedule:

Year 0 to 5 earns 3.076 hours vacation [per 80 hours of work]
Year 5 to 8 earns 3.538 hours vacation
Year 8 to 10 earns 4.00 hours vacation
Year 10 to 15 earns 4.615 hours vacation
Year 15 to 20 earns 5.230 hours vacation
Year 20 and beyond earns 6.150 hours vacation

The Union proposes:

Years	Days
1	10
5	15
15	20
20	25

13. Health Insurance. The Employer proposes: "The Employer shall have the right to change carriers provided the level of benefits remain substantially the same." The Union has not proposed any language relating to change in carrier.

14. Wages: The relevant portions of the Union's proposal are attached hereto and marked Appendix A. The relevant portions of the Employer's proposal are attached hereto and marked Appendix B.

15. Call-in Pay: The Union proposes the following:

> "Employees, other than regular on-call employees as provided for in Section G. above, shall receive a minimum of two (2) hours compensatory time at the applicable rate for each call-in to work outside of their normal schedule of hours."

The Employer opposes this proposal.

16. Report-in Pay: The Employer proposes the following:

> "Employees, other than on-call employees as defined in Section 17.06, who report for work without previously being notified not to report, and for whom no work is available, will be compensated for two (2) hours of pay at their applicable hourly rate."

The Union opposes this proposal.

17. Holidays:

a. Saturday and Sunday Holidays:

The parties agree to the following language, except the underlined material which is proposed by the Employer:

> "Holidays falling on a Saturday shall generally be observed on the preceding Friday, Holidays falling on a Sunday shall generally be observed on the following Monday."

b. Tandem Holidays: The Union proposes the following:

> "When Christmas Day falls on Saturday the preceding Thursday shall be observed as the Christmas Eve holiday. When Christmas Day falls on Sunday or Monday the preceding Friday

shall be observed as the Christmas Eve holiday."

18. Medical Examinations. The Employer proposes:

"If employees are required to submit to physical examination as a condition of employment by their Employer, the Employer agrees to pay for all such examinations as required by law. however, in the event the employee prefers a doctor other than the one selected by the Employer, then the employee shall be obligated to pay the difference in fee, if any."

The Union has opposed this proposal.

19. Scope of Agreement. The Employer proposes the following:

> "The Agreement sets forth the entire understanding and agreement of the parties and may not be modified in any respect except by writing subscribed to by the parties. Nothing in this Agreement shall be construed as requiring either party to do or refrain from doing anything not explicitly and expressly set forth in this Agreement; nor shall either party be deemed to have agreed or promised to do or refrain from doing anything unless this Agreement explicitly and expressly sets forth such agreement or promise."

The Union proposes the maintenance of standards provision discussed in 20 below and proposes the following language:

> "Entire Memorandum of Agreement. This Agreement constitutes the entire Agreement between the parties and no verbal statement shall supersede any of its provisions. Any amendment or Agreement supplemental hereto shall not be binding upon either party unless executed in writing by the parties. hereto."

20. Maintenance of Standards: The Union proposes the following provision:

> "The parties agree that all wages, hours and conditions of employment not referred to herein, shall remain in effect during the term of this Agreement unless changed by mutual agreement in writing. It is understood and agreed that this clause is expressly limited to mandatory subjects of bargaining. Either party may repudiate a past practice(s) at the expiration of the Agreement by written notice. Any dispute(s) as to what constitutes a mandatory subject of bargaining shall be determined by the Wisconsin (sic) Relations Commission (WERC)."

The Employer opposes this provision.

21. Bargaining Procedures, Reopener Date: The Employer proposes the following provision:

> "Except as otherwise expressly provided herein, this Agreement shall be in full force and effect for the period from date of execution through December 31, 1994, and shall continue from year to year thereafter, unless written notice of desire to terminate the Agreement is served by either party on the other at least sixty (60) days prior to the date of expiration."

The Union proposes merely that the parties exchange notices of desire to negotiate by September 1, 1994, and that initial proposals shall be exchanged not later than October 1, 1994.

22. Disciplinary actions Occurring after November 8, 1993, and Grievance Arbitration over February, 1993 discharge of L. The Union proposes that all discipline occurring after November 8, 1993, be subject to arbitration under the just cause standard and that the parties agree to submit the discharge of L. to arbitration under the same standard.

DISCUSSION AND POSITIONS OF THE PARTIES

Background

The bargaining unit provides professional services under Sections 51.42 and 51.437, Wis. Stats.. This includes providing community programming for mentally ill, developmentally disabled, and alcohol/drug dependency. For example, the Employer has a crisis intervention program, programs for those with severe and persistent mental illness, and a birth to 3 years program. Services include counseling, case management, intoxicated driver assessment, treatment of children in the birth to 3 program, occupational therapy, speech therapy, residential treatment services and residential living assistance to the disabled.

As of May 29, 1991, there were 23 people in the bargaining unit. Of these, 1 was a Psychotherapist I, 6 were Psychotherapist II's, 2 AODA Counselor II's, 1 was a combined Psychotherapist I/AODA Counselor I, 1 was a combined Psychotherapist II/AODA Counselor II, 4 were DD Specialists (now LTS Case Managers), 4 were in various CSP classifications, and the remainder were individuals in various other classifications. 12 employees left their employment here during the period January 1, 1992, and March 15, 1993. 11 of the 29 employees in the bargaining unit as of March 3, 1993, were in the psychotherapist classifications.

A. Comparisons

1. positions of the parties

The Employer offers comparisons to the following external

group Crawford, Grant, Green, Iowa, Lafayette, Richland and Sauk Counties which are all of the contiguous counties, except Dane County which does not have any 51.42/51.437 employees of its own. The Employer argues that this is the appropriate comparison group because it is in the same labor market as this Employer. It denies the Union's comparison group is appropriate in that the Employer does not hire its professional employees on a state-wide basis as alleged by the Union. Further, it notes that the Union's position is inconsistent with its own position when it has represented other employees of other counties. The Union's position is also inconsistent with arbitral precedent. The Employer also heavily relies upon the agreement it has with its non-professional employees and with provisions in Grant County. It relies upon these heavily, in part, for the purposes of uniformity of administration. [Grant County administers parts of the Employer's wages and benefits, applying related provisions from Grant County's own unilateral personnel policy.

The Union has relied upon comparisons state-wide because there is not enough evidence contained in the comparison group used by the Employer, to determine wages and benefits and because the professional employees in this unit have a state-wide labor market. It believes that it need not be bound by the agreement in the non-professional unit because it was negotiated by a different union and employees in the other unit have different concerns.

2. Discussion

The parties specifically disagree as to the weight the Employer's agreement with the non-professional unit should play in this case. That agreement has been negotiated and renegotiated with a different union over a period of seven years. Many of the proposals which the Employer is making are essentially identical to those in that agreement. This unit is the unit one would expect to be a leader among the two units in establishing wages to the extent the two are comparable. Additionally, this unit consists of professionals who have substantially different concerns. I have given the internal comparison the heaviest weight where uniformity of administration appears to be most important. Otherwise, I have relied more heavily upon the external comparisons.

The Employer has proposed a comparability group which is one of the accepted comparability groups in interest arbitration (contiguous counties). The Union's reliance on state-wide comparisons is generally misplaced. It is unclear whether the employees in this unit do have a state-wide labor market. Not all professional employees do. Even if they did, it is highly unlikely that the difference between this area and the rest of the state with respect to anything other than the wages and major benefits would play any role in recruitment or turnover. The Union's own data indicates that there are not that many significant and consistent differences between the agreements (many of which it

negotiates) elsewhere in the state and those in contiguous counties (many of which it negotiates). However, the Union's position is not entirely wrong. It is conceivable that there could be an "inbreeding" effect of using comparisons in a small group. This Employer is located in a corner of Wisconsin and the available Wisconsin comparisons are limited. In this specific dispute, there is a limited number of comparable positions and, therefore, even this limited number of comparisons is limited more. I have used the Employer's comparability group. I have examined data from an expanded group of counties; Adams, Columbia, Juneau, Rock and Vernon Counties. These counties are nearby. All, but Rock, are primarily rural and Rock County has large rural areas. I have done this to insure that there is a reasonable supply of comparative data. It has not been practical to apply this expanded list because I cannot identify comparable positions in the other counties without job descriptions. In many other situations, the surrounding counties are fairly uniform and there has been no need to use the expanded list. I have also examined the state-wide data offered by the Union primarily with respect to wages for the purpose of determine the potential for a substantial disparity between this area and the rest of the state. I have discussed that unusual application in more detail below. The following is a list of the counties which I have used:

Adams
Columbia
Crawford
Grant
Green
Iowa
Juneau
LaFayette
Richland
Rock
Sauk
Vernon

It is also important to note that, there is no indication in this record that the joint independent agencies similar to Iowa-Grant which exist in the other parts of the state have any functional differences from the counties who perform these services through either independent divisions or divisions of their social service departments. Accordingly, I have not given them special emphasis.

B. Minor Issues

I find that the following issues involve matters which are inconsequential as to the result of this case and do not possess sufficient substance to merit further discussion herein. 6. Layoff and Recall [administratively the same]; 12 change of health insurance carrier [moot]; 17. Bargaining Procedures, Reopener Date [The difference is now moot. Except for the issue of discipline,

the Employer has not contended that the agreement is not retroactive for wages and benefits and, thus, that matter does not appear to be in issue]; medical examinations; informal step in grievance procedure [which is not outlined in the above-stated issues.]; exclusive remedy [which is merely a statement of the existing case law of the WERC. This provision may have an impact on civil rights cases, but that matter was not briefed]; layoff and recall [no substantive difference when provisions are read as a whole.]: meetings and guaranteed work week [which are not listed in the issues, there is no apparent substantive difference.]

C. Subcontracting

1. Positions of the Parties

The Union views management's proposal to include "subcontracting" as a right as essentially requiring the Union to waive its right to bargain over subcontracting during the term of the Agreement. The Union's position authorizes subcontracting, but adequately protects the unit employees as to the effects of subcontracting. The Union argues that the Employer's position may be a reopener prohibited by Section 111.70(4)(cm)8m., Stats. It notes several counties around the state have provisions similar to that proposed by the Union and virtually none have provisions expressly waiving the Union's right to bargain over the decision to subcontract as the Employer has proposed.

The Employer notes that the language it is proposing is identical to that contained in the non-professional agreement. It also that none of the contracts of the counties it deems comparable have restrictions on the employers' rights to subcontract and Grant and Green County contain provisions allowing them control over the processes of work, Iowa County expressly provides for the Employer's right to subcontract work and Crawford County has a provision substantively identical to that proposed by the Employer.

2. Discussion

Both parties propose changes to what would otherwise be the existing statutory and case law governing subcontracting during the term of an agreement. Contracting appears to be common among the comparable counties with respect to the services performed by this unit, but there is no evidence that changes are so rapid that the matter of a subcontract which would affect the integrity of the unit cannot be discussed in negotiations leading to a successor. There is no evidence that the Employer is considering subcontracting at this time. The Employer's proposal would allow complete subcontracting of the entire bargaining unit. Only one external comparable would go that far.

The Union's proposal allows subcontracting, but prohibits the

layoff of unit employees. Among the comparison counties I have relied upon only Adams County has language this restrictive. Thus, neither proposal is supported by comparison or any specific fact in this case.

Under Section 111.70(4)(cm)7 permits consideration of "such other factors ... which are normally or traditionally taken into consideration in the determination of ... conditions of employment through voluntary collective bargaining ...." One of these "other factors" is the fact that collective bargaining is ordinarily a process in which the relationship between management and labor is built over a considerable length of time. Where management and labor work together to build trust and respect for each other's interests, overly restrictive work provisions are often avoided. On the other hand, many unions have fought hard to gain collective bargaining provisions to protect their interests, few of which came at the beginning of the relationship. For these reasons arbitrators have recognized that initial collective bargaining agreements ought not be overly restrictive. While I have found that the Employer's position on this issue is not justified, I do note that the contract is approaching its termination and that position is not likely to have any practical impact.

D. Exercise of Management Rights

1. Positions of the Parties

The Employer takes the position that its proposal is identical to the provision which is contained in the non-represented employees agreement. The Employer argues that the Union's proposal is ambiguous and overly restrictive. It particularly points to the provision which states that "The Employer's exercise of the foregoing functions shall be limited only to the express provisions of this Agreement." [Emphasis supplied.] In its view this is provision would restrict it from supervising its employees. It believes that the Union's proposal is non-sensical.

It is the Union's position that it is not bound to accept the management rights provision negotiated by the clerical union. It notes that no comparable contract in the state has a provision which provides that the management rights provision should be "liberally construed."

2. Discussion

The Union is correct in its position that it should be not bound to accept a provision which is only found in the clerical agreement and no-where else. There is no need for uniform interpretation and there are significant differences between professional and non-professional concerns. However, the unusual language added by the Employer is unlikely to have any substantial impact in most grievance situations.

The Employer is correct that the Union has done the same thing with its proposal. The Union's proposal limits management rights to only those enumerated in the agreement. Section B. of the Union's proposal is ambiguous.
This part of the agreement would be, at best, silent as to the right of management to implement decisions, both major and minor, where it has the obligation to either bargain with the Union about the decision or even merely its effects, but reaches impasse with the Union. When read as a whole with other provisions of the Union's proposal, most particularly its maintenance of standards provisions, the theory of the agreement is essentially a reversal of existing standards by which collective bargaining is conducted and can only lead to a spate of grievances. It is pre-mature in the initial stages of this collective bargaining relationship to go that far. The proposal by the Union could have significant impact on the normal exercise of management functions. The Employer's position is reluctantly preferred.

E. Definition of a Grievance

The difference with respect to this issue is whether this agreement should contain language similar to that among external comparison groups (Union's position herein) or the non-professional agreement (Employer position). The language proposed by the Employer is clearly consistent with its attempt to have a narrowly defined collective bargaining agreement with a broad reservation of management's rights, whereas the Union's is consistent with its attempt at the opposite. Contrary to the position of the Employer, the difference in language between the non-professional and professional agreements is not likely to cause any serious problems in the day to day administration of grievances and the language proposed by the Union is the more commonly accepted.

F. Promotions

The language proposed by the Union is not found among the comparables. The Employer correctly admits that it has no difficulty with the concept, but bases its position upon the fact that it does not want a promotion defeated by a technical error. I don't believe that is a serious risk. Parts of the language proposed by the Union are found in various agreements, but none has the whole provision. The public interest is certainly served by giving public employees the opportunity to be considered for promotions. It provides for better employees in promotional positions and encourages employees to continue in employment by giving them opportunities for advancement. The Union's position is more likely to facilitate these applications and, therefore, it is preferred.

G. Discipline and Discharge

1. Positions of the Parties

The Employer takes the position that discipline and discharge should be as it has proposed for the purposes of uniformity of administration with the non-professional agreement. The Union argues that the Employer's proposal precludes consideration of the following factors; 1. nature of the offense; 2. due process requirements; 3. pre-discharge conduct of the employee; 4. concepts of double jeopardy; 5. employee's past work record; 6. employee's length of service with the Employer; 7. Employer's lax or unequal enforcement of the rules.

2. Discussion

There is no doubt that the position of the Union is the more common among comparison counties. The structure of the Employer's position is comparable to that in the non-professional unit. However, there are substantial differences between the concerns of professional units with respect to discipline and discharge and non-professional units. The latter are more often involved in misconduct and minimum performance issues, but discipline in professional units often involves differences in professional judgment. The administration of the Employer's concept in that type of case is questionable and may lead to results which are not intended such as the dismissal of cases which should be sustained, but only with a reduction in the level of discipline.

There was testimony that about half of the employees in this bargaining unit terminated their employment here in the last year. There was no explanation why. The Union's trial theory was that it was based upon a low wage rate, but it offered no evidence on the subject. There is evidence that one employee was terminated, a rather high proportion in a unit this small. Employees leave employment for a multitude of reasons; however, the level of wage disparity which exists between these jobs and other jobs around the state is not likely to be the sole reason people would have left these jobs and working conditions and relationships must have played some substantial part.

The public has a strong interest in the stability and continuity of public employment for those employees who faithfully and diligently perform their duties over the years. Continuity not only improves services in general, but provides the necessary stability and continuity for the specific services which this unit provides. The Employer's offer goes far in denying those who choose to serve this employer for their career with no opportunity to have an arbitrator consider their length of service in mitigation of a disciplinary penalty in cases where the Employer chooses to disagree with their professional performance. It thereby discourages employees from remaining with the Employer. Indeed, the Employer's proposal leaves in question whether an arbitrator would have the authority to question the judgment of any new set of managers who find fault in the professional judgment of a long term employee. Finally, the Union has made substantial

strides in meeting the concerns of the Employer in negotiating the set of work rules which the parties agreed to. Contrary to the position of the Employer, arbitrators are bound by negotiated work rules.

The Union proposal herein contains many unnecessary ambiguities and adds a number of provisions not found in comparable agreements. While neither proposal is satisfactory, the proposal of the Union is closer to appropriate on this subject.

H. Drug Testing

1. Positions of the Parties

The Employer takes the position that its proposal is identical to the language contained in the non-professional agreement. It believes that it sends the wrong message to the non-professional employees to not subject this unit the same requirement. It notes that there is no evidence that this provision was ever abused with respect to the non-professional unit. It argues that the second and third sentences were added to meet the Union's concerns about the conduct of the tests.

The Union argues that only Green County among the Employer's comparables has a provision concerning drugs in its contract. Grant County has a written policy providing for a drug free work place, but not specifying any drug testing requirement. None of the other similar agencies in the state have drug testing requirements. The Union also argues that the Employer's rule does not provide adequate safeguards for employees in that it does not necessary include a reputable laboratory, for the security of the specimen, and does it specify the nature of the test. [There is no specification for a confirmatory test.] Finally, the Employer has not demonstrated a need for drug testing.

2. Discussion

The controlling consideration with respect to this issue is the interest of the public. Some of these people in this unit are responsible for administering drug rehabilitation services for the Grant-Iowa area. The public has an unquestionable interest in insuring that its employees are not involved in drug activity. This is true not only for those who use the services, but the public in general. Employees in this professional unit share this interest. It is their responsibility to assist those who have been victims of drugs to take responsibility for themselves. They can provide strong leadership in this area only if they are committed to be drug free. It is also in their interest to insure that any fellow employee who does not do so, is removed from responsibility in these services.

The Union has relied upon the fact that the Employer's

proposal is not contained in any collective bargaining agreement of comparable counties. However, it is unclear how many of those counties cover the same issue in their unilateral disciplinary policies not specified in those agreements. I doubt that many of these employers are seriously worried that anyone in this type of unit is using drugs. In any case that is not controlling where unit employees have a high responsibility in curbing drug abuse. The Union has also questioned various aspects of this policy as it pertains to protecting employee rights. I agree with those considerations, but am satisfied that unit employees possess the expertise to negotiate a satisfactory policy. Since this contract is near its end, the matter can be addressed in negotiations.

I. Hours of Work

a. definition

The main issue as to hours is the definition of the work week and normal work day. The Employer's personnel policies now define the normal work week as forty hours and those in the unit who work less than forty hours are regular part-time employees. There is no evidence that anyone in the unit works any other time than Monday through Friday, other than those on-call. The Union's proposal is among the common definitions on this subject and the Employer's arguments raise issues which are outside the ordinary interpretation of these provisions. The Employer's proposal essentially would give it unilateral authority over this issue. This unit is different than the non-professional unit, in that that unit is primarily supporting the work of this unit. The Union's proposal is preferred on this issue.

b. compensatory time

The main issues with respect to compensatory time are whether the Employer or the employee can elect to take compensatory time off and whether the time off must be taken within a time limit. There is no evidence as to the current practice on this subject or whether there has ever been a problem. Thus, there is very little information in this record upon which to make an informed judgment. Three of the counties upon which the Employer relies have the choice between compensatory time or paid overtime fixed by collective bargaining agreement at one or the other. Grant County is one of those counties. Two permit an employee option. One of those counties is Iowa County. One provides for a mutual agreement. Only one has the choice as the choice of the Employer. More importantly, the non-unit agreement upon which the Employer has relied so heavily provides that the employee can select compensatory time (at time and one-half) or payment at his or her option. It is difficult to see why the Employer has an interest in retaining unilateral control and has not asserted it by seeking to fix this selection at either compensatory or paid overtime. Clearly, it has the ability to administer this benefit, as

demonstrated by the existence of a choice option in the non-represented group. On balance, the Union's position is preferred.

J. Benefits for all Part-time Employees

Currently the Employer provides benefits for those working half time or more. Currently, there are seven part-time employees of which 3 are less than half-time working 38%, 25% and 20% time respectively. Other counties have arrangements which restrict benefits for part-time employees. The Employer's offer in this case is comparable to that in the non-professional unit. This is an area in which the Union has not shown any need for change and the Employer has a substantial interest in uniformity of administration between the two units. Accordingly, the Employer's proposal on this issue is preferred.

K. Vacations

1. Positions of the Parties

The Employer argues that it has proposed to continue its two-tier vacation system. It notes that it is the same provision which appears in the non-professional agreement. It is also identical to the vacation provision in the AFSCME agreement with Grant County. Grant County acts as the Employer's payroll agent. The Employer's unrepresented employees receive vacation under the identical provisions of Grant County's personnel system policy. The Employer notes that because of the grandfather provision, the first employee who would receive the 5 week vacation benefit provided under the Union's proposal, but not the Employer's is 2003. Thus, it believes that the Union's proposal could better be left to subsequent bargaining. Finally, it notes none of the surrounding counties have a five week vacation provision.

The Union opposes the two-tier system because none of the comparable counties except Grant have that system. It notes that so few employees stay that length of time, that the impact of the Union position is minimal. Further, among the comparisons the Employer uses this Employer has the longest length of time for employees to earn both the three and four week benefit.

2. Discussion

There are only four people in this unit affected by the difference in the length of the vacation schedule at the three week mark during the term of this agreement. Accordingly, during the term of this agreement, the advantage of uniformity of administration outweighs the increased benefit. Accordingly, the Employer's position on this issue is preferred.

L. Wages

1. Positions of the Parties

The parties strongly disagreed as to the appropriate wage increases for 1992, but mutually agreed upon a general wage increase of 3% across-the-board for 1993 and 4% across-the-board for 1994. The Union's proposed 1992 wage increase is 8.72%, while the Employer's 1992 proposed wage increase is 4.4%. The essence of the Union's argument for its position for the 1992 wage rates is that the almost all of the positions are underpaid. It heavily relies upon the fact that seventeen employees have left the bargaining unit since May, 1991, as evidence that the unit is dramatically underpaid. It notes that six of these are in the psychotherapist classifications and 2 are AODA counselors. As noted above, the Union asserts that since this unit is comprised of professional employees, the market for their services is state-wide and the arbitrator should look at comparisons from around the state rather than just the counties offered by the Employer. The Union offers state-wide comparisons for AODA Counselor positions and Psychotherapist positions which it asserts show that unit employees are grossly underpaid. Since 10 of the 23 employees in the unit as of May 29, 1991 are in the psychotherapist pay classifications and since a large number of employees are in the AODA Counselor classifications, it argues that this demonstrates that its position is the most reasonable. In reply to the Employer's argument during hearing that these comparisons were not "validated" by comparing job descriptions, the Union offered comparisons for the unit Crisis Intervention Worker (which position it claims requires a RN and 1 to 3 years experience preferably in a psychiatric setting.) Based upon its supplementation of the data (Union exhibit 103), it argues that this position is clearly underpaid even in the comparability group offered by the Employer. The Union also notes that the Employer's offer that part-time employees progress to the next step of the schedule based upon the hours worked, rather than on the basis of the number of months worked, is not found among any of the Employer's comparison group. Additionally, it is concerned that the Employer's proposed provision placing employees who are promoted, demoted or transferred to a new pay classification on that pay schedule at the step representing the number of years experience might result in employee receiving a pay decrease when promoted. The Employer has proposed that wage rates be treated as "minimum". The Union argues that under the Employer's proposal, the Employer is free to pay anyone above the salary schedule. It notes that no external comparable has such a provision. The Union supports its proposed wage schedule with probationary and annual increases through the fifth year as a basis for reducing employee turnover. By contrast the Employer's proposal does not contain annual increases at some points. In any event, the Union strenuously objects to the method the Employer uses to convert the existing employees to the new pay schedule. The Employer reduces the maximum pay for 4 classifications by the amounts listed below:

pay reduction/hour

Psychotherapists II	$.01
Emergency Services Coordinator	$.63
AODA Counselor II	$.23
Crisis Intervention Worker	$.55

It notes that Iowa County, by comparison simply used the maximum rate as the maximum of the shortened schedule.

The Employer takes the position that the total dollar difference between the parties' wage offers is $40,662. Except for differences in starting rates for four classifications, the difference in cost is attributable to the Union proposing additional step increases based on the length of service which thus results in higher maximum rates. The Employer heavily relies upon wage comparisons to the surrounding counties in 8 classifications. It notes that these comparisons were made based upon the Employer having compared job descriptions to insure that the jobs were comparable. By contrast, it argues that the Union's state-wide comparisons did not involved a comparison of job descriptions and also was averaged by giving multiple weight to multiple classification in the same employer. Additionally, the fact that there is such a wide disparity of wage rates suggests that these comparisons do not necessarily all involve comparable positions. The Employer argues that its proposed salary schedule places unit employees at or near the top of the comparables in the majority of classifications both for starting and maximum wage rates.

The Employer argues that $3,586 of the difference between wage offers is allocated to the Mental Health Technician which position is vacant. It argues that this position was eliminated during the term of negotiations and that the position was essentially overpaid. It sees no value in awarding $3,586 of back-pay to an employee who no longer is employed. It believes the money is more wisely spent on existing unit employees.

The Employer notes that there are 3 employees in the CSP classification. The Employer's proposal would put the top rate above all but Sauk and Iowa Counties. The Union would put the top rate above all but Iowa County. But Iowa County takes 10 years to reach that rate while the Union would reach it in 5. Similarly, the Employer's proposal for CSP masters places this position above the two identified comparables, while the Union shows no justification for putting that rate even higher.

The parties disagree as to the maximum rate for AODA Counselor II(certified). Among the comparisons used by the Employer, the Employer's position places it near the top. It argues that there is no justification for the Union's position. The Employer concedes that its 1992 proposal represents a 2% decrease in the top rate even though the schedule generally represents an increase. While decreases are not the norm, the change reflects market conditions and has no adverse impact on any current bargaining unit

employee because the affected employee left.

The Employer notes that the Psychotherapist I represents the biggest difference between the parties. The reason for the difference is that the Employer tops its wage progression at 1 year whereas the Union tops its progression at 5 years. The reason the Employer stopped its proposal at one year is that the progression from Psychotherapist I to II require 3,000 service hours and its should therefore normally occur in less than three years. It believes that its offer is generous when compared to the other comparable counties and that the Union's offer is unjustified. In 1992, there were 3 people in this position, but two progressed to II in 1992. Ms. Zolot works only part-time and has not progressed to the II position. The Employer sees no justification in the Union's granting her a 6% increase in 1992, 8.3% in 1993, and 6.7% increase in 1994.

As to the Psychotherapist II (Certified) the Employer argues that the comparable counties have a wide range for the top rate of this position. The Employer notes that its proposal puts this wage rate in the middle of the wide range whereas the Union's would place that rate below the top rate in the group, Sauk County of $18.08. It argues that Sauk County's rate is "unexplainably high". The Employer also notes that the top rate it proposes for 1992 is essentially the same as the 1991 top rate, but also notes that this does not affect anyone as the person who it would affect, left employment in 1992.

The Employer argues that the parties proposals for COP Coordinator involve a modest $.31 per hour, but the main difference is the fact that the Union proposes a 5 year schedule while the Employer requires a 7 year wait. It notes that its proposal is comparable to the schedule in Green County.
It also notes that the LTS Case Manger is in much the same situation.

The Employer finally argues that the Union's heavy reliance on the fact that a number of employees have left during the long period this contract has been in negotiations. There is no evidence of record as to why they left, except for one employee who was terminated. Thus, in its view, the Union is purely speculating to argue that wages are the reason that these employees left. In any event, it argues that its is just as reasonable to assume that the fact that this contract has remained as unsettled as long as it has is the reason. The Employer notes that it has been able to hire 8 employees during this same period. Finally of the $40,662 difference between the parties, over $15,927 represents payment to employees who have left employment.

In its reply brief, the Employer argues that its proposal to progress part-time employees on the pay schedule by the number of hours they

work is more reasonable because it has two employees who work a very few number of hours. The Employer argues that the Union has failed to show that the Employer's proposal to place those who change positions on the salary of the new position based upon the employee's years of service could result in a wage decrease. The Employer also argues that the Union's proposal with respect to granting prior experience is self-contradictory and essentially would prohibit the Employer from granting prior experience credit. The Employer concedes that it reduced the maximum rate for 3 classifications, but it asserts that it took that action based upon the comparable salaries in other counties and those changes did not result in any employee being reduced. In any event, under the Employer's proposal, the maximum rate is achieved in 3 years, not 7 years. The Employer argues that there is no evidence that the primary comparison should be to the three similar combined agencies in the state. It notes that the wage rates among the other three are so varied, that it is clear that none of them are comparable. The Employer responded to the Union's comparison of Crisis Intervention Worker to RN rates because the position does not require a RN. In any event, the rates the Union chose to compare with are not the proper ones and the correct comparison supports the Employer's view.

2. Discussion

One of the major issues between the parties is the establishment of the appropriate initial wage structure for this bargaining unit. It is not uncommon for unions to be seeking large increases in an initial contract because of perceived inequities in existing wage rates. I have chosen to examine the parties' treatment in their respective final offers of the following positions; AODA Counselor I and II, Psychotherapist I and II, CSP, and LTS Case Manager. As of June, 1994, there were 17 employees in the unit of which there were 2 AODA Counselors, 5 Psychotherapists, 4 CSP Professionals, and 4 LTS Case Mangers. I have also discussed the Mental Health Technician, because the back-pay for this position would have a significant impact on the difference between the parties. I would note that over the years, the psychotherapists have been about one-third of the unit.

a. AODA Counselor

The 1991 year-end rate for AODA Counselor II, 3 year rate was $12.25 and the maximum wage rate was $12.48 (seven years of service). The Employer's 1992 proposal reduces the length of the existing schedule from 7 years to 3 years and sets the maximum at for that position to $12.24. The 1991, 1 year rate for AODA Counselor I was $10.26, the maximum rate (after seven years) was $11.32 for 1991. The Employer would set the maximum number of years at 3 years and the maximum rate at $12.25, in 1992.
The Union proposes a 5 year schedule with the following rates:

1 year	3 year	5 year

AODA I	$11.09	$11.65	$12.24
AODA II	$11.83	$12.59	$13.23

The AODA Counselor I normally advances to II within the first three years. There is no difference between the parties' position as to the starting rate for AODA Counselor I or II and accordingly, I have compared the AODA II maximum rate among the comparison counties:

1992 year-end rate comparison
certified

	max.
Adams	no comparable rates for 1992, but 1993 are lower than er. pos.
Columbia	no data
Crawford	no data
Green	11.62
Juneau	13.24
LaFayette	10.75
Richland	12.26
Rock	no data
Sauk	12.26
Vernon	no data
aver.	12.03
Iowa-Grant	
Employer	12.24
Union	13.23

[Longevity excluded.]

These comparisons strongly favor the position of the Employer as to this job.

The Union also offered state-wide comparison and compared itself to the "average" of these comparisons. That figure was misleading in that many counties had multiple classifications of AODA counselor and the Union averaged each of these. Additionally, the Union admitted it made no attempt to compare job descriptions. This method is clearly suspect when these comparisons include AODA counselor III, IV and higher positions as one would suspect that they have additional case management or supervisory responsibilities not present in this unit. The essence of the Union's position in using state-wide comparisons is that the comparison group as a whole is somehow underpaid. If this were true, one would expect that virtually every other unit in the state would pay more. However, what actually occurs is that there is a wide disparity throughout the state. Many employers elsewhere pay approximately the same as the Employer is proposing here. Accordingly, as to these positions, the state-wide comparisons do

not support the position of the Union.

b. Mental Health Technician

The Employer eliminated this position during the last year. It is unclear how, if at all, the duties of this position are now being performed. The Employer has clearly treated this position differently than it has treated the other positions. Accordingly, the Employer has the burden to establish why it should deny an employee the general increase provided to other employees. The testimony offered by the Employer was highly self-serving and is not sufficiently convincing to demonstrate its position that the rate should be red circled. Accordingly, the Union's position is preferred as to this specific position.

The Employer has heavily relied upon the fact that this proposal represents a significant amount of the difference between the parties' wage proposal. Its essential theory is that money should not be wasted on people who are no longer in the bargaining unit. This unit has experienced a substantial turnover rate in the last few years. At least three of these people left when the Employer was effectively proposing wage freezes or cuts for them. It may be that some of these people left employment because of the Employer's approach to bargaining. Under these circumstances, I give no weight to the argument of the Employer on this point. I would also note that while the back-pay for this position is a significant difference in the parties' final offers, it represents a one-time payment, where as the other payments constitute on-going payments.

c. CSP Professional and Masters

There are now three CSP Professionals and one CSP Masters. The Community Support Program Professionals are people with a BS in social work or a related field and 1,000 hours of experience. They work with the chronically mentally ill population in assisting them in living in the community. They teach clients living skills and coordinate mental and other services for them. They also intervene in crisis situations to facilitate needed services. The CSP Masters, requires a masters in social work or related degree and a minimum of 1500 hours experience. Two of the four employees in these classifications have seven or more years, one has three years experience and one has one year. The 1991 5 year rate for the CSP Professional II was $10.22 and the 7 year rate was $10.48. The following is the comparative data available for this position:

CSP Professional II, 1992 Wage Rate Comparison

Grant	$12.21
Green	$10.81
Iowa	$13.05
Richland (BS degree)	$11.63

Sauk	$12.47
Average	$12.03
Employer	$12.31
Union	$12.94

The Employer's offer is more generous than the few available comparisons for the CSP Masters and, therefore, preferred as to that one position. Only Iowa County is higher than the Union's proposal, but I would note that at 8 years of service Iowa County provides for a $12.74 rate. The Employer's position is supported by the available useful data.

d. Psychotherapist I and II

The Employer asserts that the Psychotherapist I and II positions represent related positions and that Psychotherapist I advances to Psychotherapist II after about 3,000 hours of service. The current psychotherapist I works about 800 hours per year. I have chosen to compare the starting rate for Psychotherapist I and the maximum rate for Psychotherapist II

1992 year-end wage rate comparison

	I start	II maximum
Adams	no information	
Columbia	no information	
Crawford	11.37	12.87*
Green	11.77	14.10**
Juneau	12.16***	15.57
LaFayette	13.06***	13.20**
Richland	14.24***	15.22**
Rock	no data	
Sauk	no data	18.08
Vernon	no data	
average	12.52	14.84
Iowa-Grant		
Employer	11.33	14.47
Union	12.01	15.33

* The parties have different figures for this information which appears to be based upon using different classifications for comparison. The Employer compared job descriptions before making its comparisons whereas the Union did not. Accordingly, I have used the Employer's figures.
** mid-year collective bargaining agreement.
*** beginning of single range for psychotherapist

While averages suggest that the Employer's position is low for the beginning Psychotherapist I rate among the selected comparisons, and the Employer's maximum Psychotherapist II rate

position is slightly favored by the selected comparison counties, the data is skewed in favor of the Union by the factors noted above.

The Union also offered state-wide comparisons to virtually every county in Wisconsin as to this position. Virtually every county listed outside the comparable group selected here pays more than the maximum the Union is proposing here for the Psychotherapist II. These comparisons leave a serious question as to whether the Psychotherapist II is underpaid.

Five of the employees who left employment with the Employer in the 16 months following January 1, 1992, were in psychotherapist positions. This is an incredibly high number of employees to leave in this period given the size of this unit. While there was no direct testimony as to why they left, I can't believe that wages were not a factor. Thus, the preponderance of evidence supports the Union's position that the local comparisons are not reliable and that these positions are underpaid. Overall, I believe that the Union's position is closer to being correct on these positions.

e. LTS Case Manager

The only available reliable evidence on these positions is the comparisons offered by the Employer. There is no question that these comparisons heavily favor the position of the Employer.

f. Schedule

The following is a comparison of the counties the Employer used as comparable as to the length of the salary schedule.

Crawford start, 6 mos., 12, 24
Grant cba same as Crawford
Green start, 6 mos., 1 yr, 3 yr., 5 yr., 7 yr.
Iowa schedule for most relevant employees
start, 6 mos., 18 mos., 30 mos.
Community Health Nurse, start, 6 mos., 2 year, 5, 8, 10 yr.
LaFayette probation, 6 mos., 7 years
Richland start, 6 mos., 18 mos., 24 mos., 30 mos.
Sauk start, 6 mos., 18 mos., 30 mos.

The Employer is proposing a shorter schedule in most cases and, therefore is closer to comparable. The Employer's method of implementing this schedule leaves serious questions, but does not have determinative weight in determining appropriate wage level in this case.

g. Placement on Schedule Provisions

The provision requiring the Employer to provide proof to the Union when it grants new hires experience credit and preserving the

Union's right to bargain on the subject is not likely to be given the interpretation feared by the Employer. This issue is given no weight in this proceeding.

h. Minimum Rates Provision

The Employer has proposed retaining unilateral authority to pay employees above the "minimum rates" specified in the agreement. Both parties have agreed to a provision which permits the Employer to give credit for prior relevant experience. No comparable employer has a similar collective bargaining agreement provision. The Employer has moved to reduce the length of the existing schedule and reduce maximum rates for certain positions. The Employer's offer is largely inconsistent with its wage proposal. Accordingly, the Union's position on this issue is preferred.

i. Summary

The available evidence supports the Employer with respect to the appropriate wage level as to all, but the psychotherapists. No weight is given to the issue involving the mental health technician. Thus, it appears that the Employer's position is closer to appropriate with respect to the majority of the unit employees. The Employer's position on wages is preferred.

M. Scope of the Agreement and Maintenance of Standards

a. Positions of the Parties

The Union takes the position that it needs the maintenance of standards position because the Employer might make changes during the term of the agreement affecting mandatory subjects of bargaining. Under its proposal the Union would have to agree to any such change. It notes that the Employer's final offers essentially excludes the enforcement of past practices. Under the Employer's proposal, the Employer could implement any such change after reaching impasse with the Union. The Union believes that this is an unfair advantage to the Employer. The Union notes that there are a number of collective bargaining agreements around the state with similar or related provisions. The Union opposes the Employer's entire memorandum of agreement clause because it contains the unusual and ambiguous restriction that the agreement does not restrict the Employer unless a provision "explicitly and expressly" does so. It argues that this might be misconstrued in a later arbitration decision.

The Employer takes the position that only Green County among its external comparison counties has this type of provision. It argues that this contract is a first agreement and that the Union has already obtained contract provisions at least as strong as the non-professional unit which has bargained over seven years to

obtain those benefits. It argues the parties have reached extensive agreements which are very detailed and, thus, no further restriction is needed.

b. Discussion

The Employer's proposal as to the scope of the agreement essentially waives the Union's right to bargain during the term of the agreement as to matters not raised in negotiations whereas the Union's proposal for maintenance of standards and scope of the agreement requires the Employer to either preserve any change in the status quo in a mandatory subject of bargaining until the end of the agreement, or to successfully negotiate any change with the Union. The language proposed by the Union is a broad maintenance of standards rather than a maintenance of benefits provision. Among the twelve counties which I have used for comparison, only Green County has similar language. Sauk County has a provision maintaining "authorized benefits". The Employer's contract with the non-professional unit does not contain a similar provision.

A party who proposes to add a provision to a collective bargaining agreement must establish that there is a need for the proposal and that its offer is necessary and appropriate to meet that need. The existing unit is very small. There is no evidence that the conditions of employment here are highly varied, unduly complex or otherwise difficult to ascertain. Further, the parties have negotiated for a long period of time with respect to a widespread number of issues and reached an extensive agreement on many of those issues. The Union has failed to show that the cost of negotiations outweighs the benefit of specific negotiations on whatever issues are of concern to the Union.

The Union has addressed itself to the possibility that the Employer might make some change during the term of the agreement. The Union proposal substantially restricts the Employer's ability to make changes during the term of an agreement and may add to the cost of making any of those changes. The unit itself operates in an area of direct state mandate in the currently volatile health care service sector. The Employer has made some revisions during the term of negotiations for this agreement. The interest of the public is in having the services mandated by law in the most effective form consistent with maintaining as much stability and continuity in the professional staff and services as possible. Thus, the Union is correct that some change might be necessary in this unit. However, the Union has not demonstrated that the Employer has ever acted in poor judgment or improperly in making any of its changes to date. Since this is an initial contract, the Union cannot show that the Employer has ever acted inappropriately during the term of the agreement. The Union has, thus, failed to show the need for this type of restriction as of this time.

N. Disciplinary Actions

a. Positions of the Parties

The Union takes the position that the only disciplinary action which it intends to appeal under these provisions is the discharge of L. It object to consideration of any other discipline and asks that the arbitrator keep that issue confidential. It believes that with the certification for bargaining comes the right to bargain over discipline.

The Employer strenuously opposes this provision. It notes that there was only one significant disciplinary action during this period, a disciplinary action of an employee for alleged cause which will not be elaborated here and the discharge of employee L. It argues that the Union's position is highly impractical since the discipline was imposed under a different standard of review than that imposed by a just cause standard and the Employer is not now prepared to meet that level of proof. With respect to the L. discharge, the Employer notes that under the proposal of both sides there is a six month probationary period which could be extended by mutual agreement of the employee and the Employer. L. was employed less than a year when she was discharged and had the agreement been in place, the Employer might well have exercised the extended probationary period option.

2. discussion

The Employer's objection to arbitrating the discharge of L. has little merit. The Employer discharged L because of poor performance and incompetence. At the time the discharge occurred, the Union objected to it and the Employer should have been prepared to bargain with respect thereto (including providing relevant information supporting the discharge). The Employer's offered exhibits (tab 11) demonstrate that the Employer has well documented the problems it experienced with this employee. The very strong public policy of Wisconsin is to discourage work stoppages and this can only be accomplished if disputes between the parties can be resolved without resort to concerted action. Further, at the time the discharge occurred, it was subject to review before equal rights agencies, and the WERC on their respective anti-discrimination standards. The evidence submitted by the Employer indicates that it did investigate and document L's. disciplinary situations. Finally, the parties have selected a panel of arbitrators who have experience hearing cases under Section 111.70(3)(a)3, Stats., and, thus, are familiar with dealing with situation in which employers did not contemplate that their actions would be reviewed. The parties here have negotiated specific work rules, including rule 11, which were essentially the same rules which were in effect at the time the discharge occurred and, thus, it appears likely that the parties' arbitration panel could render a fair decision with respect to that matter. The Union's position is preferred on this issue.

N. Summary and Selection of Final Offer

The main issue in this dispute is the initial wage rates. The Employer's offer is closer on this issue, although the evidence strongly suggests that the psychotherapist wage rates need to be re-examined. The Employer's offer is preferred with respect to the major benefit issue as well, vacations.

The purpose of having final offer interest arbitration is to encourage the parties to come as close to reasonable as possible. This did not occur with respect to the language of this agreement. The parties have chosen to remain in extreme positions.

The main issues with respect to the other provisions of this agreement, are the overall management rights/maintenance of standards (scope) provisions, and discipline and discharge. There has been at least one discharge in this bargaining unit during the term of negotiations. In this small of a bargaining unit this is a high amount. A large number of employees have left, at least several while the Employer was proposing wage cuts or freezes for them. Job security. The public interest in professional positions particularly is in hiring good employees and encouraging them to remain with the public employer. Guarantees of fair and impartial discipline are often an inducement for good employees to stay with a public employer even when their are opportunities at much higher pay outside. The offer of the Union clearly is closer to that which is appropriate than that of the Employer which limits employees' right to argue their full defense in disciplinary matters.

As noted in the discussion above on specific issue, the parties positions are extreme on the scope of the agreement type issues, and the Employer's issue is "closer" to appropriate on the major issues. That is not to suggest that it is desirable, merely that it is closer. Taken together with the wage and benefit issues, the Employer's overall position is closer to appropriate. Accordingly, the Employer's offer is adopted.

AWARD

That the parties' agreement contain the final offer of the Employer.

Dated at Milwaukee, Wisconsin, this 27th day of October, 1994.

Stanley H. Michelstetter II
Arbitrator