JANINE P. GESKE

1012 East Ogden Avenue
Milwaukee, Wisconsin 53202

Tel. (414) 288-7877
Fax: (414) 390-0299
E-mail: jpg@execpc.com

Fellow of the American College of
Civil Trial Mediators

November 17, 2006

Honorable Rudolph T. Randa
U.S. District Court Eastern District
517 East Wisconsin Avenue #362
Milwaukee. Wisconsin 53202-4511

Re: Jeanine B. et al. v. James Doyle et al.
Case Number 93-C-57

Dear Judge Randa,

Please find enclosed my arbitration decision in the Jeanine B. et al. v. James Doyle et al. case. As part of the consent decree in this matter, you ordered, pursuant to the parties' request, that I serve as an arbitrator on any disputes between the parties. They did submit an issue to me that they could not resolve. That issue was briefed and I have enclosed a copy of my decision. The parties have received a copy of this decision as well.

You will not have to address any issue relative to my fees in this matter as I decided to handle this case on a pro bono basis. If you need me to do anything else relative to this case, please have your clerk contact me. Thank you for your consideration.

Sincerely,

Janine P. Geske

cc. Attorney Eric Thompson
Attorney Diane Welsh

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

JEANINE B., et al., **Case No. 93-C-547**

Plaintiffs,

v. **DECISION AND ORDER**

JAMES DOYLE, et al.,

Defendants.

This matter is before me for arbitration pursuant to the settlement agreement and the consent decree ("the Agreement") entered by Judge Rudolph Randa, District Court Judge for the Eastern District of Wisconsin on December 3, 2003 (and modified on November 14, 2003.) The Agreement provided for three annual periods during which the defendants ("the State") must meet certain child welfare outcomes for Plaintiff Class children ("plaintiffs") and performance outcomes of child welfare practice improvements in Milwaukee County.

During the second period of the Agreement (Period 2 Corrective Action Plan known as "CAP"), there were six areas of substantial noncompliance with six enforceable measures. In light of the high caseworker turnover the State made a commitment to initiate staff retention programs. This action was included in the CAP because Bureau of Milwaukee Child Welfare ("BMCW") was out of compliance with the caseload requirement of the Agreement. BMCW came into compliance with the caseload requirement and have been released from that provision. Plaintiffs also sought this corrective action in light of noncompliance on other enforceable measures affected by turnover. These programs included salary increases and a stepped salary system for ongoing case managers, as well as educational advancement and caseworker recruitment initiatives ("recruitment and retention initiatives"). The Governor funded these initiatives for the biennium 2005-2007 by executive action after the Legislature rejected a request to appropriate the funds.

As BMCW continues to remain out of compliance with a number of enforceable measures affected by high caseworker turnover, the plaintiffs requested that the State agree to continue these recruitment and retention initiatives as part of an attempt to negotiate an agreement pursuant to the Consent Decree during a Period 3 CAP. The State is willing to include the specific language regarding continuation of recruitment and retention initiatives requested by the plaintiffs as long as the State can add the qualifier: "Maintenance of this initiative beyond the current biennium is contingent upon

appropriation of necessary funds." The State indicates that it remains "committed to maintaining the caseworker retention initiatives. . .and will make their best efforts to maintain the initiatives..."

The plaintiffs believe that the proposed language by the State gives itself an escape provision that does not adequately protect the children with a legally enforceable provision. Since the parties were unable to reach an agreement on this point, the plaintiffs filed for arbitration on this issue pursuant to Sec. IV of the Agreement.

The State accurately asserts that the level and quality of services provided to children and families by the BMCW is much higher than it was when the services were previously provided by Milwaukee County. There continues to be steady progress in serving children and families, improving day-to-day practice and strengthening accountability. There are 40% fewer children in out of home care, children are reaching permanency more quickly, children in out of home care receive regular visits by their caseworkers and the incidence of maltreatment in out of home care has significantly decreased. The State points out that of the twenty enforceable provisions under Article 1, only eight remain enforceable at this time.

The plaintiffs do not disagree that BMCW has made substantial strides towards compliance with enforceable provisions of the Agreement. However the State also cannot contest that it is out of compliance with multiple enforceable provisions of the Agreement, two of them for the past three annual compliance periods. (Secs. I.B.7: adoptions within twenty-four months; and I.D.9: placement stability.) After extensive negotiations, the plaintiffs and the State have worked out all the substantive terms of a necessary CAP, except for the staff retention initiative issues involved in this arbitration.

In 2003, the BMCW lost 98 of 218 caseworkers (45%) and in 2004 it lost 129 of 233 workers (55%). According to a study commissioned by the State, the caseworker turnover ranged between 41% and 90% in 2004. In 2005, BMCW lost 113 of 210 caseworkers (54%). The State also does not dispute that the high caseworker turnover contributes to poor casework practice and worse outcomes for children, including on the enforceable measures (such as timely permanency and multiple placement moves) with which the State has been the most chronically non-compliant. (The State, however, does argue that turnover problems do not impact all areas where the BMCW has not yet reached compliance.) One of the State's experts opined that a foster child's chances of achieving permanency during an eighteen-month period in care immediately drops from a high of 74.5% for those with only one caseworker to just 17.5% for those with two caseworkers during the period. There is a direct correlation between turnover numbers of caseworkers assigned to a child and the likelihood that the child will achieve permanency. In fact in June, 2005, the Secretary of the Department of Health and Family Services wrote in a letter to the Joint Committee on Finance asking it to reconsider its vote against additional funding for caseworker retention:

> The correlation between turnover and the detrimental effect on children and families is well documented. High case manager turnover forces families

> to start over with new workers, often resulting in a lack of trust between the case manager and the family and delays implementing service plan activities to achieve permanency. . . I cannot stress enough how detrimental high turnover rates are in Milwaukee County, and how vital funding salary increases are to our ability to make improvements.

In October, 2005, Burnie Bridge, Administrator of the Division of Child and Family Services, wrote a letter describing the problem:

> In 2004, the plaintiffs, knowing that child welfare staff members are the backbone of this system, saw a soaring caseworker turnover rate. It is undisputed that consistency and continuity of case managers are important factors in achieving positive outcomes for children and families. Because turnover interferes with the continuity of professional involvement between case managers and the children and families they serve, the quality of service they provide is diminished. As a result, the plaintiffs negotiated a commitment from the State that it would initiate staff retention programs. The salary increases were a critical step.

The State clearly admits the continuing need for caseworker recruitment and retention initiatives and that the initiatives in the past have led to "decreased staff turnover." The plaintiffs have demonstrated that these recruitment and retention initiatives are critical in addressing the serious caseworker turnover issue. The plaintiffs maintain that there is no issue that the continuation of these initiatives is necessary as corrective actions to correct past and ongoing non-compliance of Sec. IV. B of the Agreement. According to two reports commissioned by the State, the average difference in salary between private ongoing caseworkers and state social work staff was over $8500.00 or 26%. Both of these reports recommended that increased compensation was essential to improving the turnover problem. The State has not offered any evidence to the contrary. In fact, since the State included the recruitment and retention initiatives in September, 2005, turnover has declined. However the turnover problems continue to be a serious problem as the plaintiffs demonstrate that at the current reported rate of 14+% for the first six months of 2006, the turnover will still be nearly 30% for the year.

The State takes the position that it cannot unequivocally commit to continue these essential initiatives beyond the end of the biennium in June 2007 when the currently allocated funding ends. Although the State has admitted that these initiatives are critical to achieving quality services and positive outcomes for children, it cites its lack of legal authority to agree that it will continue to fund these corrective actions after July, 2007.

The State specifically asserts the following arguments to oppose the plaintiffs' motion to require the State to a continuation of staff recruitment and retention initiatives included in the Period 2 CAP (although the State does indicate that it supports continuation of the caseworker recruitment and retention initiatives):

1.) Neither the defendants nor the arbitrator, through the development of a Corrective Action Plan, have the legal authority to bind a future legislature to provide funding for a specific appropriation.

2.) What corrective actions may be needed in mid-2007 is an issue to decide at that time, and not now.

The Agreement between the plaintiffs and the State provided that, when the State was not in compliance with the Agreement, the parties could allow the State to agree to "necessary corrective actions." When caseworker turnover continued to be chronically high, rising as high as 55% annually, no one can dispute that the children in the plaintiffs' class were being seriously impacted. In fact, failure to continue the recruitment and retention initiatives to reduce that number seriously jeopardizes any chance to remedy the ongoing record of noncompliance with the Agreement. The State has reached compliance on most of the required provisions and continues to make substantial improvement on most of the remaining provisions. I would also note that even during times of high turnover, BMCW made significant progress in improving services to children. BMCW is well on its way to meeting the remaining requirements

The State accurately argues that "the Settlement Agreement did not [specifically] require the State to implement caseworker retention," But then the State takes the position that its previously negotiated corrective actions do not become part of the consent agreement. I disagree. The State may not continue to be out of compliance with a number of enforceable provisions impacted by the high turnover rate and then argue that it cannot commit to taking essential actions because of a potential lack of funding. Despite the State's argument to the contrary, once the parties enter into a corrective action agreement, it becomes part of the enforceable settlement terms of the Agreement. until compliance is reached on the requirement for which the corrective action was being taken or until a subsequent corrective action plan has been negotiated.

Although the State argues that it cannot be bound to future based corrective actions, the negotiated corrective plan necessarily involves prospective remedies. This year although the Legislature refused to appropriate funds to continue these recruitment and retention initiatives, Governor Doyle authorized some unexpended funds to be used for those purposes. The State argues that I, acting for the federal court, cannot bind the Legislature to appropriating similar funding for next year.

Specifically, based upon a theory of separation of powers, the State argues that I cannot order the State to continue these initiatives because a federal court does not have the legal authority to bind a future legislature to provide funding for a specific appropriation. The State's initial brief argues at length about the constitutional authority to appropriate funds. The plaintiffs do not disagree that it is the Legislature that has the authority for appropriation of monies. However the plaintiffs maintain that they are not requesting that I order the Legislature to make any appropriations. They clearly admit that there are costs associated with maintaining the existing initiatives. The plaintiffs are not requesting that those initiatives be funded from any particular source. The State

concedes that should the Legislature again refuse to appropriate funds for the recruitment and retention initiatives that they "would have the authority to reallocate available funds" to maintain the initiatives. They also pointed out that such reallocation is only available if there are in fact surplus funds.

The plaintiffs request is for an order compelling the State to continue the recruitment and retention initiatives. They are asking to hold the State to the Agreement it previously entered into for the benefit of the children in Milwaukee County. It agreed to come into compliance with all the standards outlined in that Agreement and to utilize all corrective actions it has agreed to. The State cannot agree to a corrective action to address turnover, not reach full compliance on measures substantially impacted by the large number of turnovers, and then decide it will not fund necessary actions to continue to move toward compliance.

The State's argument about its inability to commit the Legislature to make future appropriations misses the point. The State cannot agree to a settlement in federal court which requires either compliance with a number of provisions for the benefit of Milwaukee County children or negotiated corrective actions and then now argue that it only has to follow through on the necessary corrective actions if the Legislature decides to appropriate funding next year. The State must live up to its previously negotiated commitments which include the recruitment and retention initiatives until it achieves compliance with the standards.

The plaintiffs are not urging me to order a specific "appropriation" but that the State continue to engage in the necessary corrective actions that have ancillary costs, appropriate to secure belated compliance with the district court's order. The State cannot meet the requirements of the Agreement by conditionally committing to the caseworker recruitment and retention depending on what the Legislature decides to do. The U.S. Supreme Court points out in Frew v. Hawkins, 540 U.S. 431, 438 (2004) that "federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced." Id. At 440.

The plaintiffs correctly assert that since the caseworker initiatives are a "necessary corrective action" required by the Settlement Agreement—a federal court consent decree—state law prohibitions "cannot survive the command of the Supremacy Clause of the United Stares Constitution.' A federal court remedy to secure prospective relief can be enforced "notwithstanding a direct and substantial impact on the state treasury." Milliken v. Bradley, 433 U.S. 267, 293 (1977). Although the State correctly argues that Milliken is factually very different than this case because it involved a school desegregation order in which the State of Michigan had been ordered to pay unappropriated funds to the Detroit School System after having been found to have been a participant in constitutional violations. However, the case does stand for the general proposition that (at least under some circumstances) a federal court may order a state legislature to expend unappropriated funds.

A federal court order issued by consent in settlement of the case is no less enforceable. Frew, Id., In Frew, the State of Texas had entered a consent decree which required state officials to implement specific proposals. Two years later, the petitioners filed a motion to enforce the provisions of the decree. The state officials argued that the federal court could not enforce federal consent decrees involving state officials. The U.S. Supreme Court held for the petitioners on that issue.

The plaintiffs also cite to a federal district court case which is relatively similar to the situation here. Juan F. 2004 WL 288894 In this child welfare case, the defendants challenged the court monitor's Exit Plan which would have required "funding and resources necessary to implement the Exit Plan," on the grounds that it required the expenditure of unappropirated state funds. The court held for the plaintiffs in deciding that it did in fact have the authority to require the State to provide the necessary funding for the implementation of the consent decrees. In fact, the court in Juan F. wrote that "rather, if a state agency refuses to adhere to a consent decree, the court may impose such prospective ancillary relief, including financial sanctions, that is necessary to insure compliance." Id. at 1.

The State argues that all the cases cited by the plaintiffs are distinguishable, in part, because here "the defendants agreed to a set of actions and performance standards. The Settlement Agreement makes no commitment to appropriate state funds." (p. 5 of Defendant's Rebuttal to Plaintiffs' Reply Brief.) The problem with that argument is that agreeing to take those actions and to meet those standards, there are obviously costs involved, just like the cost of recruitment and retention initiatives. The second problem with the State's argument is that in that same Agreement, it also agreed to negotiate "corrective actions" when it failed to meet the requirements of the Agreement. The plaintiffs are simply asking that the State live up to those actions.

There is no question that the recruitment and retention initiatives are essential corrective actions to reverse the continuing problems experienced by the State in retention of caseworkers. This record is replete with evidence that clearly demonstrates that the more turnover in caseworkers assigned to a child, the less likely the child will achieve permanency. As previously discussed, the State cites to many authorities that hold that the authority to appropriate funds rests solely with the Legislature. However to carry the State's argument to an extreme, if the Legislature decides it does not want to fund anything that the State needs to do to become compliant with the federal court consent decree, there would be no way to enforce the agreements previously reached by the parties to avert an arbitration for noncompliance.

The State also argues that Section IV. B. of the Agreement provides that corrective actions will be identified *after* notice of noncompliance with any of the provisions. But here, the plaintiffs have demonstrated that the State will not be in compliance at the end of 2006 despite its steady and consistent progress toward achieving the requirements of the Agreement. It is also undisputed in this case that the State has

been out of compliance since the 2003 Agreement and will continue to be out of compliance at the end of this year on issues substantially impacted by the retention of caseworkers.

Although the State maintains that I cannot proceed at this point because it is premature to decide what corrective action may be needed in mid-2007, I am convinced by the plaintiffs' argument that deferring this issue until then could easily jeopardize retention of caseworkers causing harm to the children in the Class. Since the State must acknowledge that it will continue to be out of compliance with the Settlement Agreement for the 2006 annual compliance period, this matter is appropriately before me now.

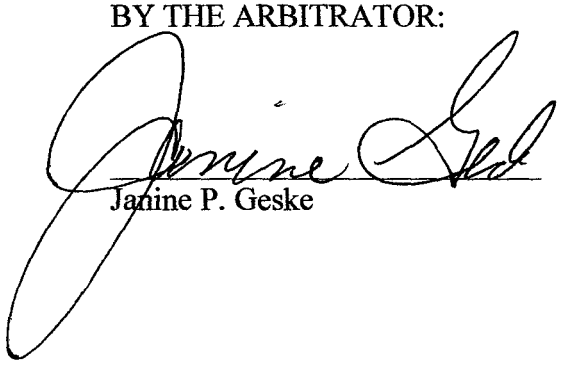
Contrary to the position of the State, I am not ordering that the Legislature appropriate funding. The State is bound by the Settlement Agreement it signed which required "necessary corrective actions" when it continued to be out of compliance of the standards and outcomes of the federal court order. The parties could either agree to corrective actions, or if they could not reach an agreement, then an arbitrator would make the determination. I am mindful that this order will have a significant fiscal impact. The State, however, is bound to the previously agreed upon corrective actions until compliance is reached on the requirement(s) for which the corrective action was being taken or until a subsequent corrective action plan has been negotiated. I am ordering that, as previously agreed, the State continue its recruitment and retention programs for caseworkers for the Period 3 CAP.

THEREFORE, based upon this record,

IT IS HEREBY ORDERED that the pursuant to Sec. IV.C. of the Agreement that the Period 3 CAP include a commitment by defendants to the continuation of their recruitment and retention initiatives for caseworkers as previously initiated pursuant to the Period 2 CAP.

Dated at Milwaukee, Wisconsin this 17th day of November, 2006

BY THE ARBITRATOR:



Janine P. Geske