

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

Involving Certain Employees of

SHAWANO COUNTY (MAPLE LANE HEALTH
CARE CENTER)

Case 4

No. 53316 ME-812

Decision No. 7197-E

Appearances:

Mr. James E. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO and
Maple Lane Health Care Facility Employees Local 2648, AFSCME, AFL-CIO,
936 Pilgrim Way, #6, Green Bay, Wisconsin 54304, on behalf of the Union.
Godfrey & Kahn, S.C., Attorneys at Law, by Mr. Dennis W. Rader, 333 Main Street,
Suite 600, P. O. Box 13067, Green Bay, Wisconsin 54307-3067, on behalf of Shawano
County.

FINDINGS OF FACT, CONCLUSION OF LAW
AND ORDER CLARIFYING BARGAINING UNIT

On November 8, 1995, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of its
Local 2648, Maple Lane Health Care Facility Employees, filed a petition with the Wisconsin
Employment Relations Commission to include within an existing bargaining unit of Shawano
County employees the position of P.M. Program Supervisor. A hearing was held on March 19, 1996
in Shawano, Wisconsin before Examiner Sharon A. Gallagher, a member of the Commission's
staff. The parties submitted their briefs by May 20, 1996.

The Commission having reviewed the evidence and arguments of the parties, and being fully
advised in the premises, makes and issues the following

FINDINGS OF FACT

1. Wisconsin Council 40, AFSCME, AFL-CIO and its Local 2648, Maple Lane Health Care
Facility Employees, hereafter the Union, is a labor organization with its offices located c/o
Mr. James E. Miller, 936 Pilgrim Way, #6, Green Bay, Wisconsin 54304.

No. 7197-E

2. Shawano County, hereafter the County, is a municipal employer with its offices located at Shawano County Courthouse, 311 North Main Street, Shawano, Wisconsin 54166.

3. The Union is the exclusive collective bargaining representative of certain County employees at the Maple Lane Health Care Center.

On January 30, 1991 the Union petitioned inter alia to include in the Center unit the Program Assistant position. Before a scheduled hearing in the matter could be held, the parties voluntarily agreed to include the Program Assistant into the bargaining unit and on April 12, 1991, the Commission issued an Order of Dismissal in that case (Dec. No. 7197-C).

4. On November 8, 1995, the Union filed the instant petition requesting inclusion of the position of P.M. Program Supervisor (PMPS) (the incumbent of which is Scott Seeger) in the unit. The parties' current collective bargaining agreement describes the bargaining unit as follows:

. . . All regular full-time and regular part-time employees of the Employer employed at the Maple Lane Health Care Facility, except the administrator, assistant administrator, nurse or nurses, clerical employees, psychiatrist, dentist and building maintenance engineer . . .

The County contends that the PMPS is a supervisory position not properly included within the collective bargaining unit. The Union, on the other hand, contends that the PMPS is a bargaining unit position having insufficient supervisory characteristics to warrant continued exclusion from the existing collective bargaining unit.

5. Until approximately April, 1995, there were two Program Assistants at the County's Maple Lane Health Care Center (MLHCC), one working the day shift (7:00 a.m. to 3:00 p.m.) and one working the afternoon shift (12 noon to 8:00 p.m.) Both Program Assistants were in the Union bargaining unit. When the afternoon shift Program Assistant resigned in April 1995, the County decided to change the afternoon shift Program Assistant into a supervisory position to better address program and personnel issues which had arisen, particularly during the 4:00 p.m. - 8:00 p.m. time period when no supervisory personnel were present.

6. The job description for the new P.M. Program Supervisor position states in relevant part as follows:

. . .

REPORTS TO: Program Director

JOB OBJECTIVES: Develop and carry out PM active treatment groups.
Co-direct and run vocational skills workshop. Supervise evening active

treatment programs and staff.

JOB QUALIFICATIONS: Must have an associate or bachelor's degree in a therapy field or related human services area. Must have ability to develop behavior modification programs and classroom management techniques. Previous work with mentally retarded highly desirable. Knowledge of infection control procedures/universal precautions. Ability to supervise and work with direct care staff and DD residents. Must be able to understand and follow state and federal guidelines for ICF's-MR. Must have a valid driver's license. Must be of good moral character and be in good mental and physical condition.

JOB FUNCTIONS: The following duties are normal for this position. They are not construed as exclusive or all-inclusive. Other duties may be required and assigned.

1. Plan, implement, and conduct group and individual activities as deemed by I-team, being aware of and carrying out each resident's individual plan of care and alerting I-team of any changes in resident.
2. Read each plan of care after the initial or review staffing and be aware of the specific long and short term goals, as well as assigned activities.
3. As part of the I-team be aware of staffing schedules and be prepared to attend and provide input for program development.
4. Assist in dining programs for meals and any other special events.
5. Assist and help organize special events.
6. Supervise active treatment program in absence of QMRP and PD.
7. Supervise and discipline direct care staff in absence of QMRP and PD. Participate in training of new employees. Evaluate performances.
8. Motivate and work with direct care staff to effectively carry out each resident's plan of care.
9. Write annual evaluations and recommendations for each individual resident.
10. Run PM staff meetings.
11. Flexible hours depending on need.

ADDITIONAL DUTIES: Maintain files, general work area and supplies in a clean and orderly fashion; attend in-service education and department meetings; report needed supplies and equipment to QMRP and PD; others directed by supervisor.

SAFETY OF RESIDENTS: Is responsible for safety of residents under his/her supervision. Must be on constant alert for possible injuries and report any incidents to supervisor.

MAINTENANCE OF DIGNITY, PRIVACY, AND CONFIDENTIALITY:

Maintain confidentiality of all resident care information and assure resident's rights and privacy are protected at all times.

WORK SETTING/ENVIRONMENT: Works with residents most of the day-may have to handle emotional disturbances; exposed to personality peculiarities of the aged and physical attacks or injury from residents. Works in well lighted, well ventilated building. Occasionally exposed to outside weather, hot and cold temperature extremes, wet and/or humid conditions. Frequently exposed to loud and unpleasant noises. Slight exposure to odors, dust, poor ventilation. Frequent exposure to blood borne pathogens and other infectious agents. Slight exposure to hazards such as mechanical, electrical, chemical, burns, heights, and fast-moving vehicles. May be required to work in physically-confined work space.

PHYSICAL REQUIREMENTS: Frequent standing, walking. Occasionally required to sit, stoop, kneel, crouch, crawl, run, climb, bend/twist, reach. May be required to struggle with/subdue resident. Ability to communicate orally with residents and co-workers. High degree of hearing, near and far vision required. Some lifting of supplies, equipment and moving of furniture and/or residents. Frequently carry 10 pounds or less. Occasionally lift, push/pull 20-100 + pounds. Rarely carry, push/pull 100+ pounds. Able to handle or manipulate objects at low degree of intensity.

MENTAL REQUIREMENTS: Ability to follow directives from his/her supervisor; willingness to cooperate with co-workers. Ability to effectively communicate with supervised personnel. Make independent decisions when needed. Ability to complete accurate assessments and reports. Must have patience, tact, a cheerful disposition, enthusiasm and be able to work with residents based on whatever maturity level they are currently functioning. Ability to deal tactfully with public, visitors, volunteer groups and residents. Participate actively in in-service education programs. Ability to cope with stress of the job.

EQUIPMENT USED: Telephone, automobile, lift van, cooking utensils, ovens, food warmers, mixing equipment, exercise equipment, standing table, mat table, computer.

WORKING HOURS: As assigned

RESPONSIBILITY IN AN EMERGENCY: Expected to respond to

emergency situations involving the safety of residents, other employees and the facility. This includes the ability to assist with a possible evacuation of residents.

...

7. In June, 1995, the County hired Scott Seeger for the PMPS position on the 12 noon to 8:00 p.m. shift. Seeger supervises three Nurse's Assistants. Seeger is supervised by and reports to Program Director Stacy Rudig and Department Head Mary Mayerl. Rudig and Mayerl's normal working hours are between 8:00 a.m. and 4:00 p.m. Monday through Friday. Seeger receives a salary, earning the equivalent of \$10 per hour when hired. He does not receive overtime but earns compensatory time if he works beyond 8:00 p.m. Seeger does not punch a time clock and keeps track of his own hours. The starting hourly wage rates for the day shift Program Assistant and the Nurse's Assistants are \$8.48 and \$6.61, respectively. Employees in these positions punch a time clock and earn overtime.

8. The day shift Program Assistant position (occupied by Neumann) and the PMPS (occupied by Seeger) perform many of the same duties. The incumbents in these positions teach classes to the Center's mentally retarded residents in such areas as music therapy, gardening, range of motion activities, daily living skills, sign language, cooking, outing readiness and sensory stimulation. The incumbents in these positions also direct Nurse's Assistants in how to assist residents during the teaching of these classes. In addition, the Program Assistant and PMPS also provide the same type of hands-on care to residents that Nurse's Assistants perform during the noon meal, as well as at other times. Program Director Rudig and Department Head Mayerl also assist residents with hands-on care when they are in the facility. Seeger and Neumann assist residents at the noon meal by feeding them (as do the Assistants and Rudig and Mayerl). From noon to 3:00 p.m., both Seeger and Neumann are present and working with residents. After the noon meal, Seeger and Neumann are responsible for the token exchange and canteen time and teach one class together. From noon to 3:00 p.m., Seeger is in charge of all program activities and is assisted by Neumann and Nurse's Assistants during this time. Seeger also observes Neumann's work during the class which they team teach from 1:20 p.m. to 2:00 p.m. and Seeger is responsible for the proper operation of this class.

9. The schedule of resident classes and activities is normally determined by Program Director Rudig and Department Head Mayerl. This program schedule is posted outside the Nutrition Center at the MLHCC. If there are questions about the posted schedule, Assistants ask either Neumann or Seeger depending which one is present on the shift at the time. PMPS Seeger is the only supervisor present for the three Nurse's Assistants for the working hours from 4:00 p.m. to 8:00 p.m. Classes and programs are offered during this time. From 7:00 a.m. to 8:00 a.m. Monday, through Friday, Program Assistant Neumann is the only employee present to direct Nurse's Assistants regarding programs. However, normally no programs or classes are offered during this period of time. When Nurse's Assistants have questions regarding programs, they ask Seeger on the afternoon shift (not Rudig or Mayerl) or they ask Rudig or Mayerl during the day shift.

If a problem with a resident arises during any shift, Nurse's Assistants must fill out an incident report sheet. These incident report sheets are passed on to Mayerl and Rudig by Seeger upon their return to work. If a question arises regarding the medical or nursing care of a

resident, and the Nurse's Assistants determine that action must be taken immediately, a Registered Nurse is called to handle the problem. If a question or problem regarding programming arises on the P.M. shift, employees call upon Seeger who is expected to handle the problem or question without contacting Rudig or Mayerl.

10. Rudig and Mayerl conduct weekly staff meetings on the day shift and leave their notes as a guide for Seeger to conduct weekly afternoon shift staff meetings. On rare occasions, Program Assistant Neumann has conducted staff meetings on the day shift in the absence of Rudig and Mayerl, using the notes left by Rudig and Mayerl as a guide. At the staff meetings, Seeger has instructed Assistants regarding break times and procedures thereon, dress codes, the proper method for passing linens, residents' oral hygiene and restructuring program classes. Rudig and Mayerl share a small office at the MLHCC, containing two desks which belong to each of them respectively. Seeger uses one of those desks after Rudig and Mayerl have left work in order to complete necessary paperwork. Neumann has also used Rudig and Mayerl's office for short periods of time while he is at work. Mayerl, Rudig, Seeger and Neumann are members of the MLHCC's I-Team. As such, they meet at least annually in order to review the progress of residents and they make decisions regarding the purchase of supplies and materials for programming.

11. Seeger's performance as PMPS was evaluated by Rudig after two months and after nine months of employment with the County. In his two month evaluation, Rudig wrote in relevant part as follows:

In the first 2 months of his employment at Maple Lane Health Care Center, Scott Seeger has proved himself an asset to our team in the ICF-MR unit. He is often ready with valuable ideas for classes, behavior programs and program scheduling. He has been flexible with his schedule in order to take the residents to various activities and functions and Scott has shown patience and understanding in his relationships with the residents. Although he has only been here a short time, he has been able to learn the basic goals and behavior programs of each resident. When Scott does not know the answer to some problem, he does not hesitate to ask questions rather than doing something incorrectly. Scott also has shown success in supervising his PM staff.

Now that Scott has been trained in the workings of the unit, I would expect him in the next 2 months to do the following:

1)Independently prepare plans for domestic class

. . .

3)Lead weekly staff meetings for PM staff

4)Appraise us of PM problems

5)Make suggestions for evening program changes and assist in their implementation.

...

9)Chart behavior problems on a more regular basis--be a leader to the staff he supervises.

In her written comments regarding Seeger's nine month evaluation, Rudig stated:

...

PART 1 - GOALS ACCOMPLISHED DURING FIRST 9 MONTHS

Goal One: Gain authority with staff.

Results: Seems to have a good working relationship with staff and is a successful supervisor. Also has good control over programming schedule. Staff respect you.

PART 2 - NEEDS - GOALS FOR FUTURE

...

You should continue to watch your verbal approach to residents. You are a very caring (sic) towards the residents, must remember that residents are adults and need to be treated as such. You are the role model for the residents and a supervisor for the staff and they will take their cue from you, therefore you are expected to be all the more careful with your approach that (sic) any other staff.

Make sure that teamwork is the emphasis during the hours of 12-3 when both you and Bill are working. You must communicate with Bill to make sure that all work is done during this time. If you are unable to help with activity, please make sure that Bill is aware and able to handle without you. Also, the 1:20 "fun time": is your responsibility and you must make sure that all residents are involved at all times. Although Bill is also scheduled to run this class, ultimately you are responsible. The direct care staff should be seen as "your" staff and they should be used accordingly. Your responsibility is to take an "observation" role to make sure things are happening as they should. This does not mean you cannot actually participate in the activity . . . but it is essential that you take responsibility to see that all residents are involved. . . . It is also your responsibility to make sure that staff do not do the activity for the residents--remember that the goal is not to decorate the dayroom, but to give the residents

an activity to participate in (decorating is secondary).

PART 3 - STRENGTHS

- 1) Good working relationship with staff. Great supervisory skills. P.M. schedule runs efficiently

...

- 3) Has set up evening program and has it working well (Has encouraged implementation of Sensory Stimulation Program by example)

...

- 5) Has taken initiative in planning evening programs and special activities
- 6) Has done a wonderful job of incorporating money skills and follow through into Canteen program therefore providing a good role-model for his supervised staff to also follow through

...

- 8) Is willing to do whatever asked of him and is flexible with his schedule (which is essential for this PM supervisory position)

...

- 13) Has led staff meetings with PM staff on a consistent basis
- 14) Has effectively relayed concerns of QMRP and PD to supervised PM staff when necessary

12. Seeger independently directs the work of the Nurse's Assistants and can transfer them from one assignment to another. He evaluates the Nurse's Assistants' work performance. Seeger plays no role in hiring or in administering the leave requests of the Nurse's Assistants.

Seeger's independent disciplining authority is limited to verbal reprimands but he can effectively recommend more serious discipline. He has not disciplined any employees or recommended any discipline since his hire.

13. The occupant of the P.M. Program Supervisor position possesses supervisory responsibilities in sufficient combination and degree so as to render the occupant, Scott Seeger, a supervisor.

Based upon the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSION OF LAW

The occupant of the position of P.M. Program Supervisor is a supervisor within the meaning of Sec. 111.70(1)(o)1, Stats., and therefore is not a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

ORDER 1/

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

(Continued on following page)

The position of P.M. Program Supervisor shall continue be excluded from the collective bargaining unit described in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin, this
26th day of November, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

1/ (Continued)

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a

nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

Shawano County (Maple Lane Health Care Center)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER CLARIFYING BARGAINING UNIT

BACKGROUND:

Shawano County created the position of P.M. Program Supervisor in April, 1995 and hired incumbent Scott Seeger in June, 1995. The Union seeks to include this position in the existing collective bargaining unit it represents. The County opposes the inclusion on the basis that the employee occupying the position is a supervisor.

POSITIONS OF THE PARTIES:

Initial Briefs

Union

The Union contended that there is no substantive difference between the duties of the P.M. Program Supervisor position (PMPS) and the day shift Program Assistant position which the parties voluntarily agreed to include in the unit in 1991. The Union observed that the duties of the PMPS which involve giving directions to staff are de minimis and demonstrate supervision of activities not employees. The Union noted that the majority of the PMPS's work time is spent performing unit work -- the same work as Program Assistant Neumann currently performs. In addition, the Union argued that PMPS Seeger has not recommended the discipline of any employee since his hire and that there are three other supervisors to whom the P.M. shift Nurse's Assistants must answer (Mayerl, Rudig and the P.M. shift Charge Nurse). The Union pointed out that Seeger's starting rate of pay was not significantly higher than that of the Certified Occupational Therapy Assistant, (the position listed in the collective bargaining agreement which is the functional equivalent of the Program Assistant). In the Union's view, when instructing employees regarding break time, dress code and giving proper oral care to residents, Seeger was merely reinforcing known policies/contract provisions or passing along information while training employees as a part of his normal programming duties. Regarding PMPS Seeger's conducting regular P.M. staff meetings, the Union noted that the agendas for these meetings were created by Rudig and Mayerl to discuss resident behavior and to assure that activities were properly completed.

The Union urged that PMPS Seeger is really no more than a working foreman or leadman who is expected to supervise the activities of employees and who acts as a link between Nurse's Assistants and their real supervisors. The Union urged that such a conclusion is supported by the position description for the PMPS position as well as Seeger's two month and nine month performance evaluations. In sum, the Union concluded that PMPS Seeger's job duties are not inconsistent with his becoming and remaining a member of the bargaining unit.

The Union contended that the problems on the P.M. shift which occurred prior to Seeger's hire were caused by management's failure to make clear to the previous P.M. Program Assistant the extent of her programming duties and authority.

Since the County changed the PMPS position description and hired Seeger, the actual duties of the disputed position have remained the same as those of the current and prior Program Assistants, all of whom have been members of the bargaining unit. Thus, the Union urged that the PMPS and its incumbent Seeger should be placed in the Union's existing collective bargaining unit.

County

The County contended that Seeger exercises significant independent judgement and authority in his position as PMPS particularly when he is the only supervisor present for four hours of the eight-hour afternoon shift. Although Seeger does not exclusively perform supervisory duties during these four hours, the County noted that the Commission has held that the frequency or infrequency of the exercise of supervisory responsibilities, in and of itself, is insufficient to determine supervisory status, citing Lakeland Union High School District, Dec. No. 17677 (WERC, 4/80).

The County urged that the instant case is similar to and should be controlled by Wood County (Norwood Health Center), Dec. No. 9140-B (WERC, 5/92).

The County also asserted that the pay received by the PMPS (whose position title is not listed in the collective bargaining agreement) is significantly higher than that of bargaining unit employees, supporting a conclusion that the position is supervisory. Furthermore, the County observed, P.M. Nurse's Assistants look to Seeger for direction when problems arise on his shift. This is precisely what Mayerl and Rudig intended when they created the position to alleviate the problems which had arisen due to the lack of supervision on the P.M. shift. Indeed, Rudig stated that since Seeger's hire, she has no longer received phone calls at home regarding difficulties on the P.M. shift.

The County argued that Program Assistant Neumann's job is distinctly different from PMPS Seeger's job responsibilities and that Neumann's perception of Seeger's job duties is not only irrelevant but not based on personal observation. Finally, the County pointed out that Seeger's two and nine month evaluations demonstrate that he is being employed to supervise employees. In the County's opinion, the fact that Seeger had only worked in the PMPS position for approximately ten months at the time of the instant hearing and had had limited opportunity to exercise his total authority, should not necessitate a ruling that he does not actually possess statutory supervisory authority. Therefore, the County sought the continued exclusion of the PMPS and its incumbent, Seeger, from the Union's collective bargaining unit.

Reply Briefs

Union

The Union asserted that the County's reliance upon Wood County (Norwood Health Care Center), supra, is misplaced because the employees therein found to be supervisors had many more of the statutory indicia of supervisory status than does Seeger. The fact that other employees have looked upon Seeger for direction from 4:00 p.m. to 8:00 p.m. and that no other supervisor is present during this time period was also the case with all prior P.M. Program Assistants who, the Union urged, were either leadmen or working foremen. The Union noted that no substantial change in the

actual duties of the position has occurred since that position was occupied by the P.M. Program Assistants Pritchard and Smits.

The Union urged that the actual duties of the PMPS should be measured against the statutory and precedential supervisory criteria and that the County's future intentions regarding the supervisory authority of the position should be disregarded by the Commission.

County

The County argued that the Union mischaracterized Seeger's disciplinary authority in its initial brief. In this regard, the County noted that the exercise of supervisory authority is not a necessary component of a finding of supervisory status. The County pointed out that Program Assistant Neumann and former Program Assistants Pritchard and Smits had no disciplinary authority but that Seeger clearly possesses such authority. In addition, since his hire, Seeger has alleviated the supervisory problems that previously occurred on the P.M. shift. The County observed that the Union wrongly implied that Seeger is not a supervisor due to the fact (in the Union's view) that no problems have arisen on Seeger's shift during his ten month tenure.

The fact that Seeger is (in the Union's view) third in line in the supervisory chain of command does not lessen Seeger's actual supervisory authority on the P.M. shift, in the County's opinion. On this point, the County urged that Seeger is fully in charge regarding all programming issues on the second shift while the Charge Nurse is in charge of all nursing/medical issues during that time. The County contended Seeger's flexible hours (which he sets at his discretion), his sole control and supervision of programming and Assistant activities from 4:00 p.m. to 8:00 p.m., and Seeger's pay rate support a conclusion that Seeger is a supervisory employee. Finally, the County observed, Seeger's job description as well as his two and nine month evaluations demonstrate that Seeger's supervisory responsibilities have already grown and will continue to grow in the future.

DISCUSSION:

Section 111.70(1)(o)1, Stats., defines the term "supervisor" as follows:

. . . any individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

The Commission, in order to determine whether the statutory criteria are present in sufficient combination and degree to warrant the conclusion that a position is supervisory, considers the following factors:

1. The authority to recommend effectively the hiring, promotion, transfer, discipline or discharge of employees;
2. The authority to direct and assign the work force;
3. The number of employees supervised, and the number of other persons exercising greater, similar or lesser authority over the same employees;
4. The level of pay, including an evaluation of whether the supervisor is paid for his skills or for his supervision of employees;
5. Whether the supervisor is primarily supervising an activity or primarily supervising employees;
6. Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employees;
7. The amount of independent judgment and discretion exercised in the supervision of employees. 2/

On balance, we conclude Seeger's position has enough significant supervisory differences from that of the A.M. Program Assistant (or prior P.M. Program Assistants) to warrant a conclusion that Seeger is a supervisor within the meaning of Sec. 111.70(1)(o)1, Stats.

In making this conclusion, we are strongly influenced by the fact that no other person exercises supervisory authority over three Nurse's Assistants on the P.M. shift between 4:00 p.m. and 8:00 p.m. Contrary to the Union's claim, we find the Charge Nurse present during those hours has no supervisory authority. In addition, from 12:00 noon to approximately 3:00 p.m., Seeger directs the work of all Nurse's Assistants and Program Assistant Neumann while programs are given for residents. During this period of time, Seeger directs Neumann and observes his work while the latter teaches a class with Seeger from 1:20 p.m. to 2:00 p.m. Thus, although Mayerl and Rudig are also present at work from noon to 4:00 p.m. and Seeger also performs program teaching duties during this period of time, during his entire day he effectively supervises and directs all employees

2/ Wood County, Dec. No. 8149-B (WERC, 5/92); Portage County, Dec. No. 6478-D (WERC, 1/90); Town of Conover, Dec. No. 24371-A (WERC, 7/87).

who provide program services and is responsible for employee actions as well as for the success of the program during this time. His responsibility is further reflected by his authority to evaluate the work of the Nurse's Assistants and to transfer them from one assignment to another.

Seeger's job description gives him disciplinary authority when his supervisors are not present. From his job description and his testimony at Tr. 39, we are persuaded his independent disciplinary authority is limited to verbal reprimands. However, Seeger testified without contradiction that he could recommend more significant discipline and we are persuaded from the evaluations received from his supervisors that his recommendations would be given significant weight. During his short tenure, Seeger has yet to discipline or recommend same. However, it is his possession of authority which is the critical issue and we are satisfied that he has significant authority in this area.

At the time of his hire in June, 1995, Seeger was offered a starting salary equivalent to \$10 per hour, a rate \$3.39 per hour higher than the contractual starting rate for Nurse's Assistants and \$1.52 per hour higher than the contractual starting rate for the functional equivalent of a Program Assistant. In the circumstances of this case, we are satisfied that Seeger is being paid (at least in part) for his supervision of employees.

We recognize that Seeger has a small number of employees to supervise, has no role in hiring, and has no authority to grant or deny employee leave requests. Nonetheless, his substantial independent authority to direct the work of other employees, and his disciplinary and evaluative responsibilities significantly distinguish him from prior and present Program Assistants and warrant a conclusion that he is a supervisor.

Dated at Madison, Wisconsin, this 26th day of November, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner