

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petitions of :

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LOCAL 1258, AFSCME, AFL-CIO :

:

and :

:

ROCK COUNTY :

:

Involving Certain Employes of :

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ROCK COUNTY (HEALTH CARE CENTER) :

:

Case 4
No. 48620 ME-625
Decision No. 8243-M

Appearances:

Mr. Thomas Larsen, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 173
Mr. Robert D. Heidel, Assistant Corporation Counsel, Rock County,
51 South Main Street, Janesville, Wisconsin 53548, on behalf of Rock
County.

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

On January 15, 1993, Rock County filed a petition requesting the Wisconsin Employment Relations Commission to determine whether the position of Administrative Assistant for Support and Technical Services should be included or excluded from the bargaining unit represented by Local 1258, AFSCME, AFL-CIO. On July 28, 1993, Local 1258, AFSCME, AFL-CIO filed a petition requesting the Commission determine whether the position of Active Treatment Leader should be included in its bargaining unit. Hearing into the consolidated petitions was held on January 20, 1994, in Janesville, Wisconsin, before Mary Jo Schiavoni, a member of the Commission's staff, at which time the parties stipulated to the exclusion of the Administrative Assistant for Support and Technical Services position from the collective bargaining unit. The parties further stipulated that, in the event the Commission determined the position of Active Treatment Leader to be professional, Local 1258 is not an appropriate bargaining unit for their inclusion therein. A stenographic transcript of the hearing was prepared and received on February 11, 1994, and the parties completed their briefing schedule by March 31, 1994. The Commission, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. Rock County, hereinafter referred to as the County or the Health Care Center, is a municipal employer and has its offices at Rock County Courthouse, 51 South Main Street, Janesville, Wisconsin, 53545; among its functions it maintains and operates the Rock County Health Care Center, an Intermediate Care Facility for the Mentally Retarded (ICF/MR).

2. Rock County Employees, Local 1258, AFSCME, hereinafter referred to as the Union, is a labor organization with offices at 1734 Arrowhead Drive, Beloit, Wisconsin 53511-3808. The Union is the exclusive collective bargaining representative for a bargaining unit described in the parties' 1992-1993 collective bargaining agreement as:

all regular full-time and regular part-time employees of the Rock County Health Care Center, and 51.42 Program, the Developmental Disabilities Board, Rock County Farm, and the Rock County Health Department, but excluding administrators, supervisory, confidential, craft, professional and temporary employees.

3. The 31 clients at the County's ICF/MR are all mentally retarded, most of them severely or profoundly so; some have developmental disabilities. There are currently approximately seven to eleven Certified Nursing Assistants (CNAs) assigned to each of three shifts, accounting for about 57 CNAs in the workforce, which personnel are included in the bargaining unit identified in Finding of Fact 2.

4. The County created the Active Treatment Leader position around January 1, 1993. It hired the four individuals who occupy this position in February, March, and April of 1993. Prior to their being hired, the CNAs at the Center were supervised by the nursing staff; in particular, the Registered Nurses (RNs) and Licensed Practical Nurses (LPNs) who functioned as shift supervisors.

5. The job description for the Active Treatment Leader position is as follows:

JOB RELATIONSHIP

Position: Active Treatment Leader

Department/Location: ICF/MR Unit/Rock Co. Health Care Center

Supervisor: ICF/MR Unit Manager

Workers Supervised: Nursing Assistants, ATA, COTA

JOB DUTIES

Summary: Under the direction of the ICF/MR Unit Manager provides day-to-day supervision and direction to the ICF/MR Unit staff.

Tasks:

1. Supervises and ensures implementation of program habilitative efforts.
2. Supervises and assures client data collection efforts.
3. Participates in scheduling work shifts of unit staff as directed by ICF/MR Manager.
4. Trains staff through provision of direct service to clients.
5. Schedules work assignments.
6. Participates in and performs quality improvement reviews/training observations with and for unit staff.
7. Prepares and presents employee performance evaluations under direction of ICF/MR Manager.
8. Ensures data collection forms are available as needed. Routes completed forms to appropriate staff.
9. Ensures other habilitation supplies are kept stocked and available for use.
10. Participates in the development and revision of the program's habilitative systems.
11. Participates in the development and revision of clients' individual program plans.
12. Functions as an advocate for clients and unit staff.
13. Other related duties as assigned by ICF/MR Unit Manager.
14. Participates as member of Crisis Intervention Team.
15. Participates in fire drills/disaster evacuations as directed.

WORKING CONDITIONS

Lifting light to heavy object/including clients with ambulation problems. Potential exposure to body fluids. Exposure to loud noise. Extended periods of standing, bending, walking.

MATERIALS, TOOLS, EQUIPMENT, WORK AIDS

Training manuals, patient charts, ICF/MR regulations, data collection materials, computer UVT, typewriter.

REQUIREMENTS OF WORK

Bachelor's degree in a human service field. Previous experience working with developmentally disabled adults who exhibit severe adaptive difficulties strongly preferred. Previous supervisory experience required. Or any equivalent combination of training and

experience which provide the following knowledge, abilities and skills:

1. Knowledge of habilitative needs presented by developmentally disabled adults.
2. Knowledge of the application of skill acquisition techniques.
3. Knowledge of the application of maladaptive behavior elimination techniques.
4. Ability to communicate concisely both verbally and in writing.
5. Ability to direct the activities of staff.
6. Ability to develop working relationships with community agencies, families, guardians, etc.

6. The primary responsibility for the Active Treatment Leaders is to insure that the CNAs follow the individual program plans for the residents. The primary method for Active Treatment Leaders to supervise and monitor the performance of the CNAs is to model interactions with the clients in accomplishment of various aspects of the client individual program plans, to observe the direct care given by the CNAs and to provide feedback on performance. They are responsible for insuring that the interactions between the CNAs and the clients are appropriate. They are direct supervisors of the CNAs on their shift. They are responsible for directing and assigning the CNAs in the routine performance of their average daily duties. Each Active Treatment Leader will have approximately seven to eleven CNAs under him or her at any given time. The Active Treatment Leaders are responsible for periodically evaluating the employees under their supervision in writing. These evaluations are used to determine whether a CNA can pass probation and to assess work performance. At the present time, because they are new to their positions, these evaluations by the Leaders are also being reviewed by Intermediate Care Facility/Mental Retardation Manager who is also their supervisor.

While the Active Treatment Leaders have the primary responsibility for supervising the CNAs, the nursing supervisor, a RN or LPN might direct them in situations of medical emergency. A nursing supervisor also directs those CNAs who are working on the night shift when the residents are primarily engaged in sleeping and not awake and active.

The County requires the Active Treatment Leaders to be college graduates in an area such as social work or another human services field. They are paid a beginning salary of \$22,089.60 per year and a maximum of \$26,811.20. The CNAs whom they direct are by and large high school graduates with a CNA certification who earn approximately \$12,000.00 per year.

The Active Treatment leaders are involved in the first step of the grievance procedure along with the Facility Manager. The authority to authorize overtime is shared by the Active Treatment Leaders, the Manager and the nursing supervisors. The Active Treatment Leaders will be doing more of the scheduling of necessary overtime from the night shift to the day shift and from the day shift to p.m. shift, however, the selection who is to be required to work the overtime is governed by the collective bargaining agreement. The Active Treatment Leaders have the authority to issue informal and formal verbal warnings. They are also authorized to conduct formal counseling sessions and to issue written warnings but it is with consultation of the manager. Any discipline above issuing written warnings is referred to higher management personnel such as an associate administrator.

The incumbent Active Treatment Leaders possess supervisory authority in

sufficient combination and degree to be deemed supervisory employes.

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

CONCLUSION OF LAW

The occupants of the position of Active Treatment Leader are supervisory employes within the meaning of Sec. 111.70(1)(o)1, Stats., and therefore not municipal employes 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 CLARIFYING BARGAINING UNIT 1/

The positions referenced in the Conclusion of Law shall continue to be excluded from the bargaining unit described in Finding of Fact 2.

Given under our hands and seal at the City of
Madison, Wisconsin this 9th day of June, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

(Footnote 1/ appears on the next page.)

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.

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.

(Footnote 1/ continues on the next page.)

(Footnote 1/ continues from the previous page.)

(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.

ROCK COUNTY (HEALTH CARE CENTER)

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

POSITIONS OF THE PARTIES

In support of its position that the position of Active Treatment Leader (ATL) is a municipal, non-professional employe, the Union asserts that the ATL's are untrained and unqualified to direct the CNAs in the performance of their duties or evaluate that performance; that the ATLs lack the authority to adjust grievances without consulting the ICF/MR Manager; that they only have authority to require overtime in accordance with established facility procedures; and that it is the nursing supervisor, not the ATL, who is the CNAs true supervisor.

In support of its position that the position of ATL is a supervisory position, the County asserts that the ATLs do have the authority to effectively recommend discipline, can issue verbal warnings (both formal and informal) on their own authority, and written warnings upon consultation with the ICF/MR Manager; that they do have the authority to direct and assign the work of the CNAs; that their level of pay reflects their supervisory responsibilities; that the posted position description, and the interview process, focus on prior supervisory experience as an essential qualification; that they supervise CNAs, and not any particular activity; that they spend approximately 85% to 90% of their time on supervisory duties; and that they exercise a substantial amount of independent judgment and discretion in the exercise of their supervisory duties.

DISCUSSION

When considering a claim of supervisory status, the WERC considers the following factors:

1. The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employes;

2. The authority to direct and assign the work force;
3. The number of employes supervised, and the number of persons exercising greater, similar or lesser authority over the same employes;
4. The level of pay, including an evaluation of whether the supervisor is paid for his/her skills or for his/her supervision of employes;
5. Whether the supervisor is supervising an activity or is primarily supervising employes;
6. Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employes; and
7. The amount of independent judgement exercised in the supervision of employes. 2/

As stated above in Finding of Fact 6, the Active Treatment Leaders are the direct supervisors of the Certified Nursing Assistants, responsible for their daily direction and assignment. They directly monitor the CNA's work and can change work assignments as needed. The Leaders are responsible for periodic written evaluation of the CNAs under their supervision, including the evaluations which determine whether a CNA will pass probation. The Leaders have independent authority to issue verbal warnings and have the authority to issue written reprimands following consultation with the Manager. While discipline above a written warning is referred to higher level management, the Leaders are involved as management representatives at the first step of the grievance procedure. As they are largely uninvolved in direct patient care, they clearly are not lead workers. The wage disparity between them and the CNAs can be attributed, in heavy measure, to their supervisory duties.

Accordingly, we have found the position of Active Treatment Leader to be supervisory, 3/ and have ordered its continued exclusion from the bargaining unit.

Dated at Madison, Wisconsin this 9th day of June, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

2/ City of Milwaukee, Dec. No. 6960-J (WERC, 5/89)

3/ We found similar positions supervisory in Columbia County, Dec. No. 12038-D (WERC, 10/92) and Walworth County, Dec. No. 9041-C (WERC, 3/92).