

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of :
WALWORTH COUNTY :
Involving Certain Employees of : Case 6
WALWORTH COUNTY (LAKELAND : No. 44249 ME-429
NURSING HOME) : Decision No. 9041-C
- - - - -

Appearances:

Whyte & Hirschboeck, S.C., Attorneys at Law, 111 East Wisconsin Avenue, Suite 2100, Milwaukee, Wisconsin 53202, by Mr. Alfred Heon, appearing on behalf of Walworth County.
Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719-1169, by Mr. Jack Bernfeld, Staff Representative, appearing on behalf of Local 1925-A, AFSCME.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On June 22, 1990, Walworth County filed a petition requesting that the Wisconsin Employment Relations Commission clarify a bargaining unit at the Lakeland Nursing Home represented by Local 1925-A, Wisconsin Council 40, AFSCME, AFL-CIO by excluding Licensed Practical Nurses because of their alleged supervisory status. Hearings on the petition were conducted on November 8, December 17, 1990 and January 4, 1991 before Daniel J. Nielsen, an Examiner on the Commission's staff. Transcripts of the hearings, post-hearing briefs and reply briefs were received by the Examiner by April 8, 1991.

The Commission having considered the evidence, the arguments of the parties, and the record as a whole, and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. Walworth County, hereinafter referred to as either the County or the Employer, is a municipal employer and has its offices at the Walworth County Courthouse, P.O. Box 1001, Elkhorn, Wisconsin 53121.

2. Lakeland Nursing Home Employees, Local 1925-A, Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter referred to as either the Union or AFSCME, is a labor organization and has its offices c/o Mr. John Maglio, Staff Representative, P.O. Box 624, Racine, Wisconsin 53401-0624.

3. On June 20, 1969, the Union was certified by the Wisconsin Employment Relations Commission, hereinafter referred to as the Commission, as the exclusive collective bargaining representative of

all regular full-time and regular part-time employees (regular defined as averaging twenty (20) hours per week or more) of Walworth County Hospital and Home, excluding supervisors, clerical, professionals, casual employees and all other employees of Walworth County. (Dec. No. 9041)

On February 17, 1975, the Commission clarified the bargaining unit to include the new position of Licensed Practical Nurse in the unit (Dec.

No. 9041-B). The collective bargaining agreement between the County and AFSCME for the years 1989-1991 contains a recognition clause as follows:

ARTICLE I - RECOGNITION

1.01 Recognition. The County recognizes the Union as the exclusive bargaining representative for purposes of conferences and negotiations concerning wages, hours and other conditions of employment for all regular full-time and all regular part-time employees of Walworth County employed at the Lakeland Nursing Home of Walworth County excluding supervisors, clericals, professionals, casual employees and all other employees of Walworth County, as certified by the Wisconsin Employment Relations Commission.

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The County, by the instant petition, seeks to remove the Licensed Practical Nurses (hereinafter LPNs) from the bargaining unit, asserting that they are now functioning as supervisors of Nursing Attendants and Certified Medication Assistants (hereinafter CMAs) working at the Lakeland Nursing Home.

4. The County operates a nursing home, the Lakeland Nursing Home, providing skilled care to 328 elderly and disabled patients. The facility is a 24 hour per day, seven day per week operation, which is staffed by more than 400 employees working three shifts. Lakeland is overseen by a Board of Trustees comprised of County Supervisors and representatives of the community, which reports to the Walworth County Board. The day-to-day operations of the facility are directed by Administrator Marilyn Rantz. Nursing services are directed by Lora Johnas, the Assistant Administrator/Director of Nursing. Nursing services on the AM shift are delivered under the general direction of two 24 Hour Coordinators who function much like head nurses in a traditional hospital setting. Two PM Coordinators function on the PM shifts and one Night Coordinator functions on the night shift. The Coordinators are also referred to as Nurse Managers. Unit Nurses are either LPNs or Registered Nurses (hereinafter RNs) and report to Nurse Managers. Nurse Managers have minimal professional contacts with Nursing Attendants. Nursing Attendants are each members of teams which vary in size from three to six, and may include a ward clerk. Each team is led by a Unit Nurse. All Unit Nurses are required to wear white uniforms; Nursing Attendants are required to wear pink uniforms. During the course of a shift, Nurse Managers have infrequent contacts with their respective Unit Nurses.

5. In the past ten years there have evolved significant changes in the care procedures followed at Lakeland Nursing Home in that more Nursing Attendants are involved in direct care of residents and there is more supervision by licensed nurses (RNs and LPNs).

6. Lakeland is organized into two buildings and ten nursing units. On the AM and PM shifts: 1 East, 2 East, 3 East, 1 West, 2 West, 3 West, 1 North and 2 North. On the Night shift, each wing is a separate unit. Each unit is staffed by a Unit Nurse and Nursing Attendants. The Unit Nurse provides direct care, as well as coordinates and supervises the delivery of care by the Nursing Attendants.

7. Twenty-three percent of Lakeland's personnel are licensed health care personnel, as compared to a norm of 30-35% for most Medicaid licensed facilities. Thirty-nine Unit Nurses function as team leaders for the Home's

nursing units, supervising Nursing Attendants and CMAs. Of these, 18 are LPNs and 21 are RNs. Lakeland attempts to maintain an approximate 50:50 ratio of LPN Unit Nurses to RN Unit Nurses. There is no difference in the team leader responsibilities of an RN functioning as a Unit Nurse and an LPN functioning as a Unit Nurse. The RNs are not members of the bargaining unit.

8. Unit Nurses spend between 30 and 40% of their time distributing and administering medications, between 10 and 20% of their time providing hands-on treatment such as wound management and tracheotomy care, between 20 and 30% of their time reporting activities with staff (either formally or informally), giving direction, and making sure that the care is being delivered (to the residents), and between 10 and 20% of their time in charting activities.

9. The 1990 job description for LPN Unit Nurse states, inter alia:

JOB SUMMARY:

The LPN Unit Nurse under the general supervision of the 24 Hour Manager of Resident Care, PM Coordinator, or Night Coordinator performs basic nursing activities in the care of residents. Job duties are governed by Wisconsin's Nurse Practice Act, Chapter HSS132 of the Wisconsin Administrative Code, professional standards for nursing practice and the corresponding policies and procedures of the Nursing Department.

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DUTIES AND RESPONSIBILITIES:

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12. Assumes leadership during fire drills or emergency situations. Administers simple emergency care.

13. Is knowledgeable of Resident's Bill of Rights; insures that resident rights are maintained.

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16. Assigns duties and resident assignments to nursing staff each day. Responsible for following up to assure the work has been completed satisfactorily and complies with LNH policies/procedures. Supervises direct care staff:

a. In the provision of care designed to meet resident's personal hygiene needs.

b. In the application of principles of restorative nursing to prevent deformities, correct body alignment, maintain range of motion.

c. In the use of safe body mechanics in

lifting and transfer.

d. In caring for resident's personal effects.
Assures compliance with LNH
policies/procedures.

e. To insure that physical environment is
orderly, attractive and safe for residents,
staff, volunteers, and visitors.

f. To insure that care is delivered properly
and complies with Lakeland Nursing Home
policies/ procedures.

17. Evaluates employee performance. Responsible for
follow up performance evaluation, documentation and
appropriate counseling of nursing attendants. Consults
with responsible Manager/Coordinator for assistance
with employee counseling and disciplinary action.
Conduct yearly formal job evaluations with
Manager/Coordinator.

18. Provides an assignment and specific directions
to Certified Medication Assistant on areas assigned.
Supervises Certified Medication Assistant:

a. To insure that medications are delivered
properly in accordance with Lakeland Nursing
Home policies and procedures.

b. To evaluate employee performance.
Responsible for follow-up performance
evaluation, documentation and appropriate
counseling of Certified Medication Assistants.
Consults with responsible manager/coordinator
for assistance with employee counseling and
evaluations. Conducts annual formal job
evaluations with Manager/Coordinator.

19. Participates in orientation of licensed staff
and attendant staff. Responsible for evaluation of new
attendant performance.

20. Directs staff to attend required inservice
programs. Seeks opportunities for continuing
education.

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22. Participates on committees. May participate in
the development and review of departmental policies and
procedures.

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10. Approximately 200 Nursing Attendants are required by Lakeland to
fill 98 full-time equivalent positions in a seven day, 24 hour per day, work
week. Forty-two Nursing Attendants work on the AM shift, 38 on the PM shift
and 18 on the Night shift. The Nursing Attendants spend 50% of their time in

providing direct care to residents, assisting them in dressing, eating, toileting themselves, and the like. Approximately 30% of their time is devoted to cleaning, bedmaking and other custodial functions. Five to 10% of their time is spent charting and the remainder is occupied by breaks. Nursing Attendants report to the Unit Nurse, and any special work order or specific instructions on patient care are given to the Nursing Attendants by the Unit Nurse. The Unit Nurse oversees the work performance of the Nursing Attendants.

11. A CMA is authorized to administer certain medications to residents. The position of CMA pays more than the position of Nursing Attendant and is considered to be less physically demanding work. Nursing Attendants may become CMAs by successfully completing course work offered through the local technical college. Nursing Attendants must secure the recommendations of two Unit Nurses, the Director of Nursing and the Administrator in order to enroll in the CMA course. On two occasions, Unit Nurses had recommended Nursing Attendants for CMA training and then approached superiors who refused recommendations. In both cases, the Nursing Attendant was denied admission to the CMA program. On one occasion, a Unit Nurse directly refused a recommendation, and the Nursing Attendant was denied admission to the CMA program. The CMA rotates among units, and is given work assignments by the Unit Nurse. The Unit Nurse is authorized and obligated to remove a CMA from the unit if the CMA is performing her job improperly. As of the dates of hearing in this matter, no CMA had ever been removed from a unit for cause by a Unit Nurse.

12. The collective bargaining agreement between the County and AFSCME contains a grievance procedure, providing, inter alia:

ARTICLE IV - GRIEVANCE PROCEDURE

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4.02 Procedure. All such grievances shall be processed as follows:

Step 1: If an employee has a grievance, he shall first present the grievance orally to the Supervisor in charge of the work being carried on by the aggrieved employee. Said grievance may be presented by the employee either alone or accompanied by one (1) Union Representative within thirty (30) calendar days from the date of the event or knowledge thereof which gave rise to the complaint or grievance will be barred.

Step 2: If the grievance is not settled at Step 1 within five (5) working days after being presented to the Supervisor in charge of the work being carried on by the aggrieved employee, it shall be reduced to writing and presented to the Administrator . . .

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4.07 Written Reprimands. When an employee is given a written reprimand, a copy of the reprimand shall be given to the local Union President, and the County Personnel Director.

Unit Nurses do not process grievances from employees, nor do they typically participate in grievance meetings, other than as witnesses.

13. Article XXVI of the collective bargaining agreement provides, inter alia:

26.06 Work Rules - Discipline. Employees shall comply with all provisions of the Agreement and all reasonable work rules. Employees may be disciplined for violation thereof under the terms of this Agreement, but only for just cause and in a fair and impartial manner. When any employee is being disciplined or discharged there shall be a Union Representative present. However, written notice of the discipline may be sent by certified mail (return receipt requested) to an employee's home, provided two (2) copies are sent at the same time to the Local Union President.

The great majority (60% - 70%) of the disciplinary actions taken at Lakeland are for reasons of poor attendance. They are governed by an objective point system, with the points noted by the receptionist who receives call-ins from employees who are going to be either late or absent. Grievances over attendance related disciplines are handled through a meeting between the Nurse Manager and the Union. Discipline for poor attendance, however, is automatic, based on point accumulation.

14. Allegations of gross patient abuse will result in the immediate removal of a Nursing Attendant from patient contact duties. The Unit Nurse will order the removal if she is the one to whom the allegation is made. If an allegation of patient abuse is made to a Unit Nurse, the Unit Nurse investigates such allegation, and has the authority to make effective recommendations as to the discipline to be imposed. The standard procedure for a patient abuse case is to notify the Nurse Manager, or the Director of Nursing of the situation, who then commences an investigation. In cases involving gross patient abuse, e.g., flagrant physical mistreatment, the Administrator becomes directly involved in the investigation. The decision whether to suspend a Nursing Attendant without pay, or to terminate her, is made by the Director of Nursing, the Director of Finance and the Administrator.

15. Discipline cases involving injury to a resident or other resident care issues are, as a matter of policy, automatically referred to the Administrator's level. Grievances over resident care issues are filed at the second step of the grievance procedure.

16. Acts of discipline, (not including "counseling" or verbal reprimands) are recorded on discipline forms, signed by the employee, a Union representative, and the employee's supervisor or department head. The Union receives copies of these disciplinary forms, but does not receive copies of "counseling notes." No Unit Nurse has filled out a discipline form except for "counseling notes." While Unit Nurses sometimes attend grievance meetings over discipline there is no standard practice in place as to their attendance. "Counseling notes" refer to memoranda of verbal reprimands issued by Unit Nurses to Nursing Attendants regarding performance-related issues. Many Unit Nurses record those "counseling notes" in a "counseling book." The counseling book is kept at the Unit Nurse's station, and is referred to by Unit Nurses in order to determine whether an employee has shown a pattern of inappropriate conduct. The Union does not receive copies of these "counseling notes," although they are commonly cited as justification for the level of discipline imposed in a given case during formal disciplinary meetings. Unit Nurses have the authority to suspend Nursing Attendants or CMAs for violation of the dress code. Unit Nurses can also effectively recommend written reprimands be issued,

have the authority to suspend Nursing Attendants or CMAs for violation of the dress code, and are authorized and obligated to take action (including suspension from patient contact) in cases of alleged patient abuse.

17. Upon their hire, new Nursing Attendants are placed in a training class run by Lakeland. Those who successfully complete the training class then go through a five day orientation period during which they work with an experienced Nursing Attendant who serves as their preceptor. The preceptor may recommend an extension of the orientation period. The orientation period is followed by a ten day tracking period. During the tracking period, new Nursing Attendants are graded on a daily basis by Unit Nurses. Those who successfully complete their tracking period then receive a permanent assignment and serve a six month probationary period. If there are concerns about a new employee's performance during the tracking period, the Unit Nurse may recommend extending the tracking period or releasing the employee. These recommendations are followed by Lakeland management.

18. When a former Nursing Attendant seeks re-employment, Lakeland will, as a matter of course, ask for a recommendation from the Unit Nurse(s) who worked with the former employee. These recommendations are followed by Lakeland management.

19. The collective bargaining agreement provides, inter alia, at Article VIII - Job Posting:

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8.03 Filling of Vacancy. In filling a vacancy, the employee signing with the greatest seniority shall be given first consideration. Skill, ability and efficiency shall be taken into consideration only when they substantially outweigh considerations of length of service.

Nursing Attendants annually receive a formal evaluation of their respective skills, abilities and efficiencies. Employees at Lakeland self-report on their performance under a Hay Evaluation System. A supervisory evaluation is also prepared. Some Unit Nurses prepare the supervisory evaluations for the Nurse Managers, some provide information to the Nurse Manager who then prepares the evaluation, and other Unit Nurses merely answer questions posed by the Nurse Manager. Some Nurse Managers allow employees to fill out the evaluation forms themselves. The variety in methods of evaluation and the identity of the evaluator is a matter of personal preference of the Manager and the Unit Nurse. The Nurse Manager possesses the ultimate authority to perform annual performance evaluations, but relies on input (in whatever form) from the Unit Nurse. Positive evaluations may form the basis for mitigation of penalty in discipline cases.

20. Employees are centrally assigned to units, and rotate between set job assignments within the unit on the basis of a rotation system designed by a committee of Unit Nurses. A typical rotation would include working one side of the hall for a week, working the other side of the hall the next week, and giving baths for the third week. In cases where an unanticipated change is required in the rotation or employees must be removed from a unit to work on an understaffed unit, the Unit Nurse will float an employee to the different assignment. The decision as to whom to float is based on the predetermined rotation, originally developed by a committee of Unit Nurses. The Nurse Manager is informed of changes in assignment.

21. Unit Nurses may recommend the involuntary transfer of a Nursing Attendant. These recommendations are made to the Nurse Manager, who retains ultimate authority to make the transfer. The Nurse Manager's decision to approve or not approve the transfer depends upon the reason for the recommendation. Approximately half of such recommendations are approved. Recommendations for transfer based on inter-personal difficulty between a Nursing Attendant and a resident are normally approved. Recommendations for transfer based on inter-personal difficulty between team members may be refused and the Unit Nurse directed to assist the disputants in working the issue out.

22. The collective bargaining agreement for the years 1989-91 sets forth the following pay schedules for Nursing Attendants and LPNs:

		Start	Prob	2080 Hours	4160 Hours	6240 Hours	8320 Hours	5 Years
1989	NA	5.91	6.13	6.34	6.56	6.78	6.97	7.84
	LPN	7.19	7.52	7.86	8.19	8.52	8.87	9.25
1990	NA	6.09	6.31	6.53	6.76	6.98	7.18	8.08
	LPN	7.41	7.75	8.10	8.44	8.78	9.14	9.53
1991	NA	6.27	6.50	6.73	6.96	7.19	7.40	8.32
	LPN	7.63	7.98	8.34	8.69	9.04	9.41	9.82

The contract does not contain any pay rate for CMAs, RNs or Unit Nurses. In negotiations over the collective bargaining agreement, the parties have never discussed supervisory responsibilities as being a reason for the higher rate of pay for LPNs.

23. Unit Nurses possess the authority, in the interest of Walworth County, to effectively recommend transfer (where premised on resident-nursing attendant conflict), suspension, re-employment, promotion or discipline of other employees.

24. Unit Nurses possess the authority, in the interest of Walworth County, to make work assignments to Nursing Attendants and CMAs.

25. Unit Nurses possess the authority, in the interest of Walworth County, to evaluate the performance of newly hired Nursing Attendants, and to effectively recommend the extension of tracking periods and the release of newly hired Nursing Attendants during their tracking period.

26. Unit Nurses exercise supervisory responsibilities in sufficient combination and degree so as to make them supervisors.

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

CONCLUSION OF LAW

The Licensed Practical Nurses functioning as Unit Nurses are supervisors within the meaning of Sec. 111.70(1)(o), Stats.

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

ORDER 1/

The instant petition for clarification of the bargaining unit is granted, and the Licensed Practical Nurses functioning as Unit Nurses are excluded from the bargaining unit set forth in Finding of Fact 3.

Given under our hands and seal at the City of
Madison, Wisconsin this 16th day of March,
1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

A. Henry Hempe, Chairperson

Herman Torosian, Commissioner

William K. Strycker, Commissioner

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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.

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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.

WALWORTH COUNTY
(LAKELAND NURSING HOME)

MEMORANDUM ACCOMPANYING FINDINGS OF
FACT, CONCLUSION OF LAW AND ORDER

Arguments of the Parties

The Position of the County:

The County takes the position that the LPN Unit Nurses have evolved into supervisors, and should be excluded from the bargaining unit. With the Trustees wanting to maintain a 23% licensed staffing ratio in the face of a population needing far more medical care, it is necessary that the licensed staff perform in the role of supervisors rather than direct care providers. This necessitated the adoption of a team approach to patient care, with the LPN Unit Nurse moving away from patient care and into the role of a supervisor. This evolution is evident from the gradual change in job descriptions for LPN Unit Nurse from 1978 through 1990. The 1978 job description includes no supervisory functions, and specifies that the LPN works under the direction of an RN. In 1979, a few supervisory functions were introduced, but the LPN continued to work under the direction of an RN. By 1983, the job title was changed to "LPN Unit Nurse," additional supervisory functions were incorporated into the job description, and the lines of reporting were changed from "Under the Direction of a Registered Nurse" to "under the general supervision of the 24 Hour Manager of Resident Care, PM Coordinator, or Night Coordinator"

By 1990, the supervisory role of the LPN Unit Nurse became clear, with the LPN Unit Nurse responsible for a host of supervisory functions, the most significant of which are assigning work to Nursing Attendants and CMAs, evaluating their job performance and imposing discipline.

A review of the record shows that the actual job duties of the LPN Unit Nurse amply satisfy the statutory criteria for supervisory status:

Hire: The LPN Unit Nurse makes the final hiring decision on new attendants by evaluating their performance. The record shows that LPN Unit Nurse recommendations for dismissing new attendants or extending their tracking periods are routinely accepted by the upper levels of management. Furthermore, the LPN Unit Nurse may effectively recommend whether a former Nursing Attendant should be rehired.

Transfer: While central staffing handles most transfers, the LPN Unit Nurse may transfer employees in instances where personality conflicts or difficulties between the Nursing Attendant and a resident dictate a change in work assignment. Similarly, the LPN Unit Nurse may decide who is rotated out of a unit to cover another unit in cases of absenteeism.

Suspend: LPN Unit Nurses may suspend employees in two instances. The first is where an allegation of patient abuse is made, and second is where the CMA is failing to do her job properly.

Promote: LPN Unit Nurses may influence a promotion decision in three ways. Most directly, a Nursing Attendant wishing to become a CMA must obtain the recommendation of his or her LPN Unit Nurse. Further, a Nursing Attendant wishing to become an Orientation Preceptor for new Nursing Attendants must also have the LPN Unit Nurse's recommendation. Finally, the contractual posting procedure weighs skill and ability along with seniority in determining who receives a job posting. Since the LPN

Unit Nurse evaluates Nursing Attendant performance, the LPN Unit Nurse has significant input in the promotion decision.

Discharge: As noted, the LPN Unit Nurse may effectively recommend the discharge of a probationary Nursing Attendant. The record shows that LPN Unit Nurses have recommended discharge for Nursing Attendants who have passed their tracking period. In cases of patient abuse, LPN Unit Nurses must make the initial determination of whether abuse has taken place, thus triggering the discipline process. The higher level administrators who make the actual decision to discharge in abuse cases will solicit the opinion of the LPN Unit Nurse as to the appropriate course of action. Thus LPN Unit Nurses play a significant role in discharge decisions.

Assign: The LPN Unit Nurse begins each shift by assigning tasks to Nursing Attendants. During the course of a shift they may reassign Nursing Attendant's and will dictate when the Nursing Attendants take their breaks. While there is a rotation system followed for assignment, the system was designed by the LPN Unit Nurses themselves, and is proof of the discretion LPN Unit Nurses exercise.

Reward: The LPN Unit Nurse rewards Nursing Attendants by way of evaluating their performance. These evaluations may affect discipline, the opportunity for promotion to CMA and the skill and ability level an Nursing Attendant is credited with when posting for a promotion. Nursing Attendants are evaluated annually after their first year of employment, and while the Nurse Manager may vary the means by which the actual evaluation form is filled out, the LPN Unit Nurse always provides the critical information on Nursing Attendant performance. LPN Unit Nurses conduct the formal evaluation conference about half of the time, but the interview simply reviews the evaluation prepared by the LPN Unit Nurse.

Discipline: LPN Unit Nurses issue verbal reprimands and warnings and may effectively recommend more serious levels of discipline. The record shows that upper levels of management invariably agree to LPN Unit Nurse recommendations for written reprimands. Further the LPN Unit Nurses often sit in on formal discipline meetings.

Adjustment of Grievances: The LPN Unit Nurse plays no role in the grievance procedure, but this is attributable to the Union's failure to follow the procedure. Instead of presenting their grievances "orally to the Supervisor in charge of the work carried on the by the aggrieved employee" as dictated by Article IV, the Union has bypassed the LPN Unit Nurse and proceeded to the Director of Nursing, Director of Finance or the Administrator. Despite the Union's failure to follow the contract, the LPN Unit Nurse is regularly presented with employee complaints and concerns and does address these problems.

Other Indicia of Supervisory Status: In addition to the above cited factors, several other points in the record support the supervisory status of the LPN Unit Nurses:

The Nurse Manager ordinarily has contact with the LPN Unit Nurse twice a shift, for only five minutes or so. The Nurse Manager almost never has contact with the Nursing Attendants.

The LPN Unit Nurse enforces the dress code.

LPN Unit Nurses make policy for Lakeland by sitting on various policy making committees.

LPN Unit Nurses participate in quarterly professional staff meetings and participate in the decision making process. Policy decisions are made at these meetings, as well as the monthly LPN Unit Nurse meetings.

LPN Unit Nurses must give permission for staff to leave work early.

LPN Unit Nurses are responsible for enforcing the Patients Bill of Rights, which Nursing Attendants need only comply with it. LPN Unit Nurses are also responsible for the whereabouts of patients.

LPN Unit Nurses make decisions regarding in-service requirements for Nursing Attendants.

LPN Unit Nurses wear different uniforms than Nursing Attendants.

The record evidence demonstrates the strong supervisory component of the LPN Unit Nurse's jobs, and in light of this, Commission precedent demands that they be excluded from the bargaining unit. In Sauk County (Health Care Center), Dec. No. 17882-A (WERC, 3/81) and Dodge County (Clearview Home), Dec. No. 11469-A (WERC, 3/83), the Commission determined that LPN Unit Nurses performing similar functions could be excluded as supervisors. While there are minor differences between the two precedents and this case, all three have in common a team concept of care delivery, central staffing decisions, LPN Unit Nurses spending the majority of their time delivering direct care to patients, and LPN Unit Nurses playing an important role in evaluating and disciplining employees. Significantly, the employees excluded from the bargaining units in Dodge and Sauk Counties did not perform all of the supervisory functions performed by the LPN Unit Nurses in Walworth County.

The County urges that the practicalities of nursing home management must lead to the conclusion that LPN Unit Nurses are first line supervisors. The Nurse Managers have almost no contact with Nursing Attendants, and could not possibly supervise all of the LPN Unit Nurses and Nursing Attendants. The situation, the County argues, is very like a factory where a general supervisor may have authority over line supervisors. The presence of the general supervisor does not make the line supervisors any the less supervisors.

The Position of AFSCME:

AFSCME takes the position that the LPN Unit Nurses occupy a low level in the hierarchy of authority at Lakeland Nursing Home, and that their positions are organizationally insignificant in terms of supervising Nursing Attendants and CMAs. If the LPN Unit Nurses have any supervisory-type duties, they flow from their role as lead workers.

The LPN Unit Nurse allegedly supervise a maximum of six employees, with five Nurse Managers, five Assistant Nurse Managers, the Assistant Administrator, Director of Finance and the Administrator all holding greater authority over those employees. The evidence, the Union argues, is undisputed that the LPN Unit Nurses spend their time in delivering patient care. Between 30 and 40% of their time is spent administering medications. Ten to 20% of the work day is spent providing treatments, such as wound management and tracheotomy care. Another 10 to 20% of the day is spent charting patient care.

Finally, 20 to 30% is devoted to reporting on residents' conditions and making reports to Nursing Attendants at the beginning of the shift and, at the end of

the shift, to the members of the on-coming shift. If any supervising is done, it comprises a small portion of this last component of the work day.

It is clear that the LPN Unit Nurse is principally responsible for supervising resident care activities, supervising the work of Nursing Attendants but having little input on personnel matters. The difference in the role of the LPN and the Nursing Attendant is a function of greater knowledge and patient care experience, rather than any supervisory responsibility. The difference in pay between LPNs and Nursing Attendants is a function of market conditions as reflected in collective bargaining. The County has not raised any argument of supervisory responsibility in attempting to bargain higher wages for LPNs.

LPN Unit Nurses play no role in scheduling, since the specific work schedules are assigned by central staffing, and changes are made via a predetermined rotation. LPN Unit Nurses have no authority to call-in employees to replace absent workers, nor may they schedule or require the working of overtime. Sick leave and vacation requests may not be approved by LPN Unit Nurses, and they have no authority to release employees from work early. Similarly, shift assignments, promotions, work schedules, and unit assignments are all determined by managers above the LPN Unit Nurse. Formal hiring processes are controlled by the Assistant Administrator. The grievance procedure, which by contract must begin with the immediate supervisor, looks to the Nurse Manager as the first step. None of those traditional factors in determining supervisory status support the County's attempt to remove these workers from the bargaining unit.

The County places great importance on the alleged role of LPN Unit Nurses in administering discipline. In fact, the Union argues, the LPN Unit Nurse plays no role whatsoever in the vast majority of disciplines, which spring from an attendance policy administered centrally by Lakeland. Sixty to 80% of the discipline is related to attendance. The LPN Unit Nurse's role in the remaining discipline cases is limited, at best. The claim that counseling plays some part in the discipline procedure is refuted by the contract, which calls for notice to the Union of any discipline and the presence of a Union representative. Neither copies of counseling notes, nor notice of any counseling, have been provided to the Union. The policy regarding counseling is haphazard, in that some LPN Unit Nurses do not make counseling notes, some make them and keep them rather than placing them in the counseling book, and other put them in the book, but never refer to the book for information. The formal discipline notices issued by the Home are not signed by LPN Unit Nurses, and LPN Unit Nurses rarely attend formal discipline meetings. Discipline at less than the discharge level is handled by Nurse Managers. In cases where discharge is considered, or if there are allegations of abuse, the Administrator or Assistant Administrator handles the discipline. Thus there is no proof of LPN Unit Nurse authority to effectively recommend the discipline or discharge of unit employees.

The County asserts that the LPN Unit Nurses have input in rehiring Nursing Attendants, but the evidence supporting this shows that there is no formal policy of seeking LPN Unit Nurse input, and their role is actually limited to occasional and anecdotal observations. As for the claim that LPN Unit Nurses have substantial supervisory authority during a new employee's probationary period, the Union notes that newly hired Nursing Attendants serve an apprenticeship and are evaluated by the Nursing Attendant preceptor as well as the LPN Unit Nurse.

Turning to the County's claim that LPN Unit Nurses evaluate Nursing

Attendants, the Union suggests that a more reasonable reading of the record is that there is no uniform policy for evaluations. While LPN Unit Nurses provide information to managers for evaluations, some managers have the Nursing Attendant fill out the evaluation form, some have the LPN Unit Nurse prepare the form, and others do the evaluations themselves. The Union notes that the annual evaluations are rather unimportant in any event, since they have no impact on pay, promotion, transfers or other working conditions.

The County's attempt to portray the LPN Unit Nurses as playing a role in reassigning Nursing Attendants is not supported by the record. The LPN Unit Nurses may request that an Nursing Attendant be reassigned, but that request must be made to a Nurse Manager, and the requests are not always granted. Changes in work assignments are, as noted, governed by a rotation system.

Contrary to the County's claims, the LPN Unit Nurses do not supervise CMAs. The fact that a LPN Unit Nurse must recommend an Nursing Attendant for admission to the CMA course does not suffice to render the LPN Unit Nurse a supervisor. The LPN Unit Nurse's responsibility to remove a CMA from the unit if the CMA is performing her duties incorrectly results from a strict policy, which the LPN Unit Nurse abides by in ministerial fashion. There is no discretion involved in the removal decision.

Finally, the Union dismisses as unimportant the participation of LPN Unit Nurses on various committees, and their role in enforcing the dress code. On this latter point, the Union notes that no employee has been disciplined or sent home for violating the dress code for Nursing Attendants. For all of the foregoing reasons, the Union asks that the petition be dismissed.

DISCUSSION

The facts underlying the dispute are detailed in the Findings of Fact. Briefly restated, Walworth County operates the Lakeland Nursing Home. The Union is the certified exclusive bargaining representative for non-professional, non-clerical employees of Lakeland Nursing Home. Among the employees in the bargaining unit are Licensed Practical Nurses, who function as Unit Nurses under a team approach to care delivery adopted in the early 1980's.

The reason for adopting the team approach was an increase in the proportion of residents needing skilled care (from 40% in 1980 to 80% in 1990) combined with a policy decision by the County Board to maintain a 23% ratio of licensed personnel in the work force. The lower ratio of licensed personnel requires greater delegation of responsibility for unskilled care to unlicensed personnel in order to accommodate the greater demands for skilled care on licensed personnel.

Unit Nurses may be either RNs or LPNs, and there is no distinction between the two in how they function in the role of Unit Nurse. The Unit Nurses serve as team leaders, assigning and overseeing the work of from three to six Nursing Attendants, who provide direct services to residents, as well as cleaning, housekeeping, and charting patient information. The Unit Nurse devotes 30 to 40% of her time distributing medications, and divides the remainder of her time between providing direct treatment to residents, preparing reports, charting patient care, and supervising Nursing Attendants. Unit Nurses report to Nurse Managers, who in turn report to the Director of Nursing and the Nursing Home Administrator.

The County seeks to remove the LPN Unit Nurses from the bargaining unit, asserting that their team leader role carries with it sufficient indicia of supervisory responsibility to render them supervisors under the statute.

AFSCME objects, arguing that they are, at best, lead workers.

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

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

. . .

The Commission considers the following factors in determining whether a position is supervisory in nature:

1. The authority to effectively recommend 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 persons exercising greater, similar or less authority over the same employees;
4. The level of pay, including an evaluation of whether the supervisor is paid for his or her skills or for his or her supervision of employees;
5. Whether the supervisor is primarily supervising an activity or is primarily supervising employees;
6. Whether the supervisor is a working supervisor or whether he or she spends a substantial majority of his or her time supervising employees; and
7. The amount of independent judgment exercised in the supervision of employees. 2/

Not all of the above factors need to be present for a position to be found supervisory. Rather, in each case, the inquiry is whether the factors are present in sufficient combination and degree to warrant the conclusion that the employee occupying the position is supervisory. 3/

Applying these factors here, we find that the duties and responsibilities

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

3/ Dodge County (Clearview Home), Dec. No. 11469-A (WERC, 3/83).

of the Unit Nurses warrant the conclusion that the positions are supervisory. The Unit Nurses supervise from three to six Nursing Attendants depending upon the shift. Unit Nurses make work assignments and direct the efforts of the Nursing Attendants. While some of the work performed by the Nursing Attendants is routine, the needs of residents change. Changes in the residents' treatments, activities and general care are communicated to the Nursing Attendants by the Unit Nurses. During the shift the Unit Nurse observes/evaluates the quality of the care provided to the residents by the Nursing Attendants. Over the last ten years the ratio of licensed staff to non-licensed staff has decreased. Earlier, when more licensed staff was involved in providing direct care, less supervision was needed. Now, with only 23% of the staff being licensed, the majority of the care is being provided by Nursing Attendants who need to be monitored regularly.

Unit Nurses exercise a high degree of independent judgment. Nurse Managers spend very little time in each of the units interacting with the Unit Nurses. Testimony indicates that Unit Nurses and the Nurse Manager may only interact briefly on only one to three occasions each shift. Many times these discussions will deal with acute care that a resident either needs to receive or is receiving. These minimal contacts between the Unit Nurses and the Nurse Managers require the Unit Nurses to operate independently and rely heavily on their own judgment.

Nursing Attendants receive annual evaluations. These evaluations are based upon the direct observation and documentation developed by the Unit Nurses. Although the material for evaluations is developed by the Unit Nurses in all cases, the process through which the evaluation takes place is mixed. Some Nursing Attendants complete a self evaluation before the supervisor's evaluation takes place. Some Unit Nurses complete the evaluation and discuss it with the Nursing Attendant independently. Some Unit Nurses provide evaluation material to the Nurse Manager and then participate in a meeting with the Nurse Manager, Unit Nurse and Nursing Attendant to review the evaluation. Some Unit Nurses provide evaluation material to the Nurse Manager who then independently discusses the evaluation with the Nursing Attendant. While this mixed practice is of some concern to us, it is evident that the basis for each evaluation is the assessment of the Unit Nurse. Further, the record substantiates the conclusion that the normal operational routine of the facility would not provide the Nurse Manager with the opportunity to evaluate Nursing Attendants on a meaningful or accurate basis. We also note that during the Nursing Attendant's probationary period, the Unit Nurse performs evaluations at the three month and six month points. From all this, we conclude that the evaluation responsibility of the Unit Nurses is meaningful, significant and an indication of supervisory status.

Unit Nurses counsel Nursing Attendants about performance deficiencies and job related problems. This counseling, if not successful, can result in a verbal warning. If the problem is not resolved by the verbal warning, the matter is reduced to writing and submitted to the appropriate Nurse Manager. The Nurse Manager will then address the problem with a Nursing Attendant. In many instances the Unit Nurse is present; however, on some occasions the Unit Nurse is not present during the discussion. However, the notes and documentation provided by the Unit Nurse are used regularly by the Nurse Manager. The recommendations of the Unit Nurse are sought and usually followed in disciplinary matters.

The Unit Nurse has the authority to remove employes from their responsibilities in two instances and to suspend employes in a third instance. A Unit Nurse is empowered to relieve any CMA of medication responsibilities if such employe is not performing satisfactorily. This will be done immediately with

an investigation to follow. In cases of suspected resident abuse, the Unit Nurse has the authority to relieve Nursing Attendants of their respective duties immediately pending an investigation of the matter. Usually the employee remains at the Nursing Home in these two instances. If Nursing Attendants are violating the dress code and not responding to counseling, the Unit Nurse has the authority to send the employee home without pay to change into clothing which conforms with the dress code. These actions can take place without consultation with high level management. Based upon the foregoing, we conclude that the Unit Nurses have the authority to effectively recommend discipline in some circumstances and to independently impose discipline in others.

Periodically Unit Nurses have recommended that Nursing Attendants be transferred from one unit to another. These recommendations have been made either because of difficulties with residents in a particular unit or difficulties with co-workers. Normally, transfer recommendations are approved when the reason for transfer involves a problem with a resident in the unit. Transfer recommendations have been disapproved when the recommendation was made because a Nursing Attendant was experiencing inter-personal problems with co-workers. Based upon the record we conclude that Unit Nurses have the authority to recommend transfers when problems with residents is the basis for such recommendation.

Nursing Attendants can become CMAs. (This is the only promotional opportunity within the general job classification.) CMAs dispense medications to residents. In order to qualify for this position, a Nursing Attendant must complete a specialized training program. Nursing Attendants must obtain the recommendations of two Unit Nurses in order to participate in the necessary training. Evidence on the record supports that Unit Nurses have withheld recommendations when they have felt that a Nursing Attendant was not suitable to move into the CMA position.

At Lakeland, the hiring of Nursing Attendants is a very thorough process. Initially Nursing Attendant candidates are recruited by central staffing. The candidates then undergo a comprehensive training program to learn the components of the Nursing Attendant job. After candidates have successfully completed the training, they are assigned to an experienced Nursing Attendant who acts as preceptor for a five-day orientation period. During this time, the candidate observes the experienced Nursing Attendant and performs Nursing Attendant duties under the preceptor's immediate direction.

Upon completion of the five-day orientation period, the Nursing Attendant candidate begins a ten-day tracking period. During this time, the Nursing Attendant candidate is placed under the supervision of a Unit Nurse and performs the normal duties of a Nursing Attendant. The Unit Nurse evaluates the candidate's performance on a daily basis. Counseling is provided and questions are answered when needed. Directions regarding proper procedures are provided by the Unit Nurse.

Following this ten-day tracking period, the Unit Nurse is required to make a recommendation as to whether the candidate is to be employed on a regular basis. If the candidate's performance has not been satisfactory, the tracking period may be extended or, in some instances, the candidate could be released. The tracking period is the final stage of the employment process during which the candidate's fitness is evaluated in the actual work environment. Recommendations of the Unit Nurse in these matters are

consistently followed.

This tracking period should not be confused with a probationary period. The tracking period must be successfully completed before the Nursing Attendant begins the traditional probationary period which consists of a three month and six month evaluation. The involvement of the Unit Nurses in this process whether deemed to constitute effective hiring recommendations or effective evaluation authority is extremely significant and indicative of supervisory status.

Periodically individuals, who were previously employed as Nursing Attendants, re-apply for employment. When this occurs, the Unit Nurses, who had supervised the former employe, are asked to provide an employment recommendation. On several occasions, Unit Nurses have recommended against the re-employment of an individual because of prior performance problems. On other occasions re-employment was recommended. The re-employment recommendations provided by the Unit Nurses have been consistently followed.

We reach the same conclusion herein as we have previously as to team leaders. In Dodge County (Clearview Home), supra and in Sauk County (Health Care Center), supra, aff'd Case No. 81 CV 1992, (CirCt Dane, 3/82), the positions in question:

1. Directed the day to day activities and had significant authority over the employes under their supervision, even though the team leaders/unit supervisors also had significant patient care responsibilities.
2. Issued oral discipline and had the authority to recommend or take more severe disciplinary action.
3. Had the authority to recommend employes for promotion.
4. Performed annual employe evaluations.

We find the factual similarities between those two cases and the instant matter instructive.

While the Unit Nurse positions do not exhibit all of the factors we consider in determining supervisory status, they exhibit a sufficient combination of these factors for us to find them to be supervisory. For the reasons stated, we conclude that the position of LPN Unit Nurse at Lakeland Nursing Home is supervisory and excluded from the bargaining unit.

Dated at Madison, Wisconsin this 16th day of March, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairperson

Herman Torosian, Commissioner

William K. Strycker, Commissioner