

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

:

In the Matter of the Petition of :

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NORWOOD HEALTH CENTER EMPLOYEES, :

LOCAL 1751, AFSCME, AFL-CIO : Case 7

: No. 46053 ME-510

Involving Certain Employes of : Decision No. 9140-B

:

WOOD COUNTY :

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Appearances:

Mr. Michael J. Wilson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719-1169, representing Norwood Health Center Employees, Local 1751.
Mr. Douglass F. Maurer, Personnel Director, Wood County, Wood County Courthouse, 400 Market Street, P.O. Box 8095, Wisconsin Rapids, Wisconsin 54495-8095, representing Wood County.

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

Norwood Health Center Employees, Local 1751, AFSCME, AFL-CIO, filed a petition with the Wisconsin Employment Relations Commission (hereinafter Commission) on May 13, 1991, to clarify a bargaining unit of municipal employes of Wood County composed of all regular full-time and regular part-time employes and North Wood County Day Services employes, except the administrator, physician, registered nurse, supervisors, confidential office personnel and seasonal employes, by including in said unit the position of Developmental Disability Services Supervisor. Hearing was held before Examiner James W. Engmann, a member of the Commission's staff, on October 24 and December 11, 1991. Said hearing was transcribed, copy of which was received on January 13, 1992. The parties filed briefs, the last of which was received on February 6, 1992, and they waived the filing of reply briefs. The Commission, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. Norwood Health Center Employees, Local 1751, AFSCME, AFL-CIO (hereinafter Union) is a labor organization with offices at 5 Odana Court, Madison, Wisconsin 53719-1169.
2. Wood County (hereinafter Employer or County) is a municipal employer with offices at 400 Market Street, P.O. Box 8095, Wisconsin Rapids, Wisconsin 54495-8095.
3. The most recent collective bargaining agreement between the parties contains the following article:

Article 2 - Recognition

2.01 The Employer recognizes the Union as the exclusive bargaining agent for all regular full-time and regular part-time employees and North Wood County Day Services Employees except the administrator, physician, registered nurse, supervisors, office personnel who are in charge of employees' confidential records, and

seasonal employees, as to wages, hours, and all other conditions of employment.

4. On May 13, 1991, the Union filed with the Commission a petition to clarify a bargaining unit of municipal employes of Wood County by including in said unit the position of Developmental Disability Services (DDS) Supervisor, alleging that said position is not supervisory in nature and that the incumbents are municipal employes who share a community of interest with the unit represented by the Union. In a letter dated May 20, 1991, the County asserted that the employes in question are supervisors as defined in MERA and thus are excluded by the contractual Recognition clause quoted above in Finding of Fact 3.

5. Norwood Health Center is a health care facility owned and operated by Wood County and is located in Marshfield, Wisconsin. It is a facility which operates three distinct licensed units totaling 79 beds. One of said units cares for residents who have developmental disabilities and/or mental retardation and who require regular and constant care and attention. This unit has 15 beds in each of two sections and usually 14-15 residents in each section. The Administrator of the Center is Randy Bestula (hereinafter Administrator).

6. The position of Developmental Disabilities Services (DDS) Supervisor was created on January 1, 1988. The position's job description reads in relevant part as follows:

DEVELOPMENTAL DISABILITIES SERVICES SUPERVISOR

. . .

II. POSITION DESCRIPTION:

Under the direction of the Program Manager provides direction and supervision to staff and program of ICF/MR unit(s), insuring adequate, appropriate, and consistent resident services as outlined in IPP's, policies and procedures of the facility and all applicable codes.

III. TYPICAL DUTIES:

A. Personal Responsibilities:

1. Assists in selection, training and evaluation of D.D. technicians and other direct service staff.
2. Distributes and monitors D.D. technician responsibilities to insure good resident care, consistency with IPP's, and equitability of work loads.
3. Schedules breaks, approves schedule changes for D.D. technicians.

4.Reviews D.D. technician recording/reporting to insure compliance with program policy/procedure and continuity of programming.

. . .

III.(sic) PERFORMANCE REQUIREMENTS:

A.Responsibilities:

1.Supervisory:

a.Supervises the performance of all direct care personnel on the unit for assigned shift(s) and provides performance evaluations on persons supervised.

b.Assigns work responsibilities as necessary to carry out IPP's and to insure good resident care.

c.Works with nurses to insure appropriate delivery of medical care as required by residents and directed by physician.

d.Assures safety and security within assigned unit and participates in assuring safety and security within the facility as a whole.

e.Communicates with the Program Manager or administrative on-call person on problems or questions within area of responsibility that require immediate answers.

f.Works closely with QMRP in instances requiring restraint use or use of mechanical devices as part of an approved behavior modification program.

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7. Crystal Garbisch has been employed at Norwood Health Center since 1978 and has been a DDS Supervisor for three years. For the seven years immediately preceding her appointment as a DDS Supervisor, she was a Developmental Disability Technician (DD Tech). She is the DDS Supervisor on the AM shift, working from 6:30 a.m. to 3:00 p.m., including a 1/2 hour lunch. She has every Monday off and every other weekend. Wanda Bluhm is the DDS Supervisor on the PM shift. Dale Schultz is the permanent DDS Supervisor on the Night shift. Schultz has been on medical leave since July 24, 1991. Doug Krokstrom is currently filling this position. Schultz works from 10:45 p.m. to 6:45 a.m. with every Tuesday and every other weekend off. Schultz has been a DDS Supervisor since the position was created on January 1, 1988. Prior to then, Schultz was a DD Tech for two and one half years.

8. DDS Supervisors are involved in the hiring process. Depending on the shift or shifts on which the vacancy exists, the appropriate DDS Supervisor(s) interviews candidates with Ken Hastreiter, Program Manager (hereinafter Program Manager). In some instances, the interview team agrees as to whom to recommend for hiring. In others, the DDS Supervisor makes a recommendation to the Program Manager as to who to hire. The DDS Supervisors do not have authority to hire on their own, nor do they have veto power over who is hired. Either the Program Manager or the DDS Supervisor informs the candidates as to who was selected.

9. The DDS Supervisors have the authority to issue some discipline and to effectively recommend other discipline. Garbisch has given eight or nine oral warnings or written reprimands. Written reprimands are signed by Garbisch and placed in the employee's personnel file. While she takes the majority of such disciplinary action by herself, Garbisch sometimes informs the Program Manager before taking such action, and sometimes she seeks advice from the Program Manager and other DDS Supervisors prior to taking action. One time when Garbisch was new on the job, the Program Manager disciplined an employee supervised by Garbisch. Schultz has been involved in issuing three warnings: two verbal and one written. The Program Manager and he decided the discipline in two cases; the Program Manager decided in the other case. DDS Supervisors have the authority to send employes home in certain situations, such as when an employe engages in patient abuse or is intoxicated. DDS Supervisors do not have the authority to suspend employes for any extended period of time or to discharge employes. Effective recommendations for discipline more severe than a written reprimand are made to the Center Administrator by the appropriate DDS Supervisor(s) and the Program Manager. DDS Supervisors sign suspension letters which are placed in the employe's personnel file. A very small part of their time is spent on disciplining employes.

10. Garbisch spends approximately 25 percent of her time in direct patient care; the other 75 percent is spent in organizing the work force, observing and training staff, setting up and attending staff in-services, training sessions and meetings, and facilitating patient plans, including developing goals and objectives for the residents. She also determines and implements changes in duties or work procedures for the employes. Schultz spends approximately 25 percent of his time in direct patient care; the other 75 percent is spent doing paper work, such as Individual Patient Plans (IPP), handling patient money and checking of DD Techs. In addition to her other duties, Bluhm does scheduling for the three shifts. Inside each shift, each DDS Supervisor approves schedule changes. Employes submit vacation request to each DDS Supervisor who initially approves or disproves said requests. DDS Supervisors disapprove requests if staffing is not available. Approved requests are sent to Bluhm for scheduling. Final approval for vacations comes from the Program Manager. The DDS Supervisors have the authority to assign overtime.

11. Garbisch supervises five regular full-time DD Techs, three to four part-time and some casual employes on the AM shift. When the Nursing Supervisor is gone, she also supervises the Health Nurse. Schultz supervises two full-time DD Techs and several part-time and casual employes on the Night shift. These two DDS Supervisors and DDS Supervisor Bluhm are supervised by the Program Manager. DDS Supervisors are paid \$10.50 per hour. DD Technicians are paid between \$7.31 and \$8.62 per hour, effective July 1, 1991, depending on

seniority. DDS Supervisors are compensated for overtime.

12. The DDS Supervisors attend supervisory meetings with the Program Manager and other supervisors. Garbisch and Bluhm have also attended supervisor training programs on employe discipline and on supervisory actions and techniques. DDS Supervisors evaluate all employes whom they supervise a majority of the time. Garbisch evaluates between 10 and 15 employes yearly, six of whom are full-time employes, three to six of whom are part-time and the rest of whom are casual employes. Schultz evaluates the two full-time employes on the Night shift and other employes who work on that shift. Evaluations are usually done yearly on the employe's anniversary date but, if special circumstances warrant it, evaluations can be done as often as every 30 days. The evaluation, done on a County form, rates an employe from "1 No basis for evaluation" to "5 Outstanding" in 22 factors grouped in the areas of knowledge of field or specialty, application of knowledge, skill in accomplishing assigned tasks, communication skills, and inter-personal relations. In addition, the form allows for recommendations for improvements, additional comments by the evaluator, and employe comments. The DDS Supervisor shares the evaluation with the employe who can ask questions and add comments as the employe wishes. The evaluation is then signed and dated by both the DDS Supervisor and the employe. It is forwarded to the Program Manager who places the evaluation in the employe's personnel file. The DDS Supervisors are the only ones to evaluate the DD Technicians; although the Program Manager is supervisor of and evaluates the DDS Supervisors, he does not evaluate the DD Technicians. DDS Supervisor evaluations of the DD Techs do not generate merit pay but may be utilized when vacancies are filled.

13. By contractual agreement, the first step on the grievance procedure does not go to the DDS Supervisors but to the Administrator. If a grievance does come to the DDS Supervisors, they have been told to forward the grievance to the Program Manager. Because of other contractual limitations, the DDS Supervisors do not have authority to layoff or recall employes or to permanently transfer or promote employes.

14. The occupants of the position of DDS Supervisor possess and exercise supervisory responsibilities in sufficient combination and degree so as to make them supervisory employes.

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

CONCLUSION OF LAW

The occupants of the position of Developmental Disabilities Services Supervisor are supervisory employes within the meaning of Sec. 111.70(1)(o)1, Stats., and therefore are not municipal employes within the meaning of Sec. 111.70(1)(i), Stats.

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

ORDER CLARIFYING BARGAINING UNIT 2/

The position of Developmental Disabilities Services Supervisor hereby continues to be excluded from the bargaining unit set forth in Finding of Fact 3 above.

Given under our hands and seal at the City of
Madison, Wisconsin this 5th day of May, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairperson

Herman Torosian, Commissioner

William K. Strycker, Commissioner

2/ 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

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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.

WOOD COUNTY

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

BACKGROUND

Wood County created the position of Developmental Disabilities Services Supervisor effective January 1, 1988. The Union seeks to include said position in the collective bargaining unit represented by the Union. The County opposes the inclusion on the basis that the employes occupying the position are supervisory employes.

POSITIONS OF THE PARTIES

The Union argues that the Developmental Disabilities Services (DDS) Supervisors have no role or authority whatsoever in employe grievances; that discipline above verbal counsel or discipline is decided by a higher authority; that very little of DDS Supervisor's time is devoted to employe discipline; that administrators above the DDS Supervisors review the situation and circumstances and make an independent decision regarding discipline; that DDS Supervisors are primarily supervising the care of patients; that while DDS Supervisors are involved in employe evaluations and participate in hiring interviews, said activities have no consequence since there is no merit pay plan and advancement in the bargaining unit is pursuant to the bargaining agreement; that while the recommendations of DDS Supervisor for hiring are seriously considered as part of the team process, a higher authority also participates who makes independent judgments regarding the qualifications of applicants; that, on balance, the exposure to and participation in "team" interviews is not sufficient to exclude these municipal employes as supervisor; that the daily work routine of the DDS Supervisors reveals the major thrust of the position is to work in the develop-mental disability program for the patients; that any supervisory authority is limited; and that higher levels of management have reserved authority to make personnel decisions. The Union requests the Commission order the accretion of the DDS Supervisors to the bargaining unit represented by Local 1751.

The County argues that the incumbents in this case do hold supervisory positions, that through testimony and exhibits, it is evident that the incumbents have been and are involved in the employment and management process; that they are involved in the hiring process when vacancies occur; that they evaluate performance, approve time records, and approve and schedule workers; that they answer employee questions and provide professional guidance as required; that they discipline subordinates when necessary; that they generally manage the professional positions to which they are assigned; that it is abundantly clear that these individuals and positions fall well within the MERA definition of supervisor; that no evidence was presented to show that there was any direct supervision by higher authority of the subordinates to the DDS Supervisor position; and that, on the contrary, that issue was refuted. The County requests that the Commission sustain the County's position and retain the positions of DDS Supervisor at Norwood Health Center as supervisory.

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, or lay off, recall, promote, discharge, assign, reward or discipline other employes, 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 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 less authority over the same employes;

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 employes;

5. Whether the supervisor is primarily supervising an activity or is primarily supervising employes;

6. Whether the supervisor is a working supervisor or whether he or she spends a substantial majority of his or her time supervising employes; and

7. The amount of independent judgment exercised in the supervision of employes. 3/

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 employe occupying the position is supervisory. 4/

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

4/ Somerset School District, Dec. No. 24968-A (WERC, 3/88); Kewaunee County, Dec. No. 11096-C (WERC, 2/86).

Applying these factors here, we find that the duties and responsibilities of the DDS Supervisors warrant the conclusion that the position is supervisory.

The DDS Supervisors are involved in the process of hiring the employees that they supervise. Candidates for positions are interviewed by a team consisting of the appropriate DDS Supervisor or Supervisors and the Program Manager. In some instances, the interview team agrees as to whom to recommend for hiring. In others, the DDS Supervisor makes a recommendation to the Program Manager as to whom to hire. The record does not contain an example where such a recommendation was not followed. Either the Program Manager or the DDS Supervisor informs the candidates as to who was selected. While the DDS Supervisors do not have authority to hire on their own and they do not have veto power over who is hired, the record is clear they have the authority to effectively recommend hiring.

While the record shows that only a small part of the DDS Supervisor's time is spent on disciplining employees, the record also shows that the DDS Supervisor is involved in the discipline or effectively recommending the discipline of the employees they supervise. The DDS Supervisors can and do issue oral warnings and written reprimands. Garbisch has issued eight or nine such warnings or reprimands, a written copy of which is signed by Garbisch and placed in the employee's personnel file. Such actions can and have been taken independently of higher level management, specifically the Program Manager. On two occasions, the Program Manager did issue discipline involving employees under the DDS Supervisor. The record shows, however, that this occurred early on when the position of DDS Supervisor was new and these two incidents are a small minority. While DDS Supervisors have the authority to send an employee home if the situation calls for such action, they do not have the authority to unilaterally impose a suspension or to discharge an employee. When such discipline is contemplated, the DDS Supervisor and the Program Manager act as a team in determining a recommendation for discipline to be made to the Center Administrator. When a suspension does occur, it is the DDS Supervisor's signature which appears on the suspension notice that is placed in the employee's personnel file. Based upon the foregoing, we conclude that the DDS Supervisors have the authority to issue or to effectively recommend discipline.

The record also shows that the assignment of all work done by the DD Techs and the direction as to how that work should be done comes from the DDS Supervisors. They not only determine employee duties and work procedures but they also oversee that the work is performed. Bluhm, DDS Supervisor on the PM shift, does the overall scheduling for the three shifts. Scheduling is done independently, without approval from higher level administration. The DDS Supervisors can approve schedule changes inside each shift. The DDS Supervisors also approve and disapprove vacation requests and, while approved requests are also reviewed by the Program Manager, the record does not show that these requests were ever modified or reversed. In addition, the DDS Supervisors have authority to assign overtime. The DDS Supervisors initial time cards which vary from the original schedule due to the assignment of overtime or the taking of time off. Therefore we conclude that the DDS Supervisors have the authority to direct and assign the work force.

While the Program Manager supervises the DDS Supervisors, the DDS Supervisors independently supervise the employees under them. Schultz, DDS Supervisor on the Night shift, supervises the least number of employees since the residents are asleep through most of his shift. Yet he supervises two full-time DD Techs and several part-time and on-call employees. Garbisch, DDS Supervisor on the AM shift, supervises five full-time DD Techs, three to four part-time employees and several on-call employees. If the Nursing Supervisor is gone, she also supervises the Health Nurse. DDS Supervisors are paid \$10.50

per hour. DD Techs are paid between \$7.31 and \$8.62 per hour, depending on seniority. Both Garbisch and Schultz were DD Techs before they were promoted to DDS Supervisors. They are compensated for overtime.

The DDS Supervisors attend supervisory meetings with the Program Manager and other supervisors. Garbisch and Bluhm have also attended supervisor training programs on employe discipline and on supervisory actions and techniques. While 25 percent of their time is spent in direct patient care, the DDS Supervisors spend the remaining time on such activities as training and observing employes. The DDS Supervisors are also solely responsible for evaluating the employes under them. Schultz evaluates at least three employes each year and Garbisch evaluates between 10 and 15 employes each year. It is the DDS Supervisor who prepares the evaluation, presents it to the employe and signs the evaluation with the employe before it is placed in the employe's personnel file. The Union argues that since evaluations do not provide for merit pay or advancement, the DDS Supervisors' evaluation of employes have no consequence. However, while these evaluations do not directly impact wages, they are meaningful as they can serve as an early stage of a progressive discipline program and can be utilized when the County is deciding who will fill a vacancy.

While it is correct that the DDS Supervisors do not have the authority to transfer, lay off, promote or recall employes or to adjust their grievances, such authority has been limited by the parties themselves through the collective bargaining agreement. Thus, layoffs are controlled by Article 4 - Seniority and transfers and promotions are determined by Article 5 - Vacancies and Job Posting. Under Article 9 - Grievance Procedure, the parties have agreed that the first step of the grievance procedure begins with the Administrator. But even though the DDS Supervisors do not exhibit all the factors considered in determining supervisory status, we find that the position exhibits a sufficient combination of these factors for us to find the position supervisory. For these reasons, we concluded that the occupants of the position of DDS Supervisor are supervisors and excluded from the bargaining unit.

Dated at Madison, Wisconsin this 5th day of May, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

A. Henry Hempe, Chairperson

Herman Torosian, Commissioner

William K. Strycker, Commissioner