

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

---

In the Matter of the Petition of  
**DISTRICT 1199W/UNITED PROFESSIONALS FOR QUALITY HEALTH CARE,  
SEIU, AFL-CIO, CLC**

Involving Certain Employees of  
**SAUK COUNTY**

Case 20  
No. 47677  
ME (u/c)-3243

**Decision No. 17343-C**

---

Appearances:

**Attorney Todd J. Liebman**, Corporation Counsel, Sauk County, 505 Broadway, Baraboo, Wisconsin 53913, appearing on behalf of Sauk County.

**Attorney Debra Wojtowski**, with briefing by **Ms. Lenore Wilson**, Executive Director, 2001 West Beltline Highway, Madison, Wisconsin 53713-2366, appearing on behalf of United Professionals for Quality Health Care.

**FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND ORDER CLARIFYING BARGAINING UNIT**

District 1199W/United Professionals for Quality Health Care, SEIU, AFL-CIO, CLC filed a petition on July 2, 2001, with the Wisconsin Employment Relations Commission seeking to clarify an existing bargaining unit of Sauk County employees which United Professionals represents by including the two Jail and Occupational Health Nurses (one full-time and one part-time). The County contends the Nurses should continue to be excluded from the bargaining unit because: (1) the recognition clause in the 2001-2003 United Professionals contract excludes them from the existing unit; (2) they are supervisors and managerial employees; and (3) they do not have a community of interest with the employees in the existing United Professionals bargaining unit.

Dec. No. 17343-C

Two days of hearing in the matter were held in Baraboo, Wisconsin, on December 19, 2001, and February 7, 2002, before Examiner Lauri A. Millot, a member of the Commission's staff.

The Commission received written briefs by April 25, 2002.

Pursuant to Sec. 227.45(3), Stats., by letter dated October 18, 2002, the Commission advised the parties of its intention to take official notice of certain documents. No objection was made by either party and the Commission hereby confirms that it has taken official notice of those documents.

**To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.**

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

### **FINDINGS OF FACT**

1. District 1199W/United Professionals for Quality Health Care, SEIU, AFL-CIO, CLC, hereinafter United Professionals, is a labor organization with its offices located at 2001 West Beltline Highway, Suite 201, Madison, Wisconsin.

2. Sauk County, hereinafter County, is a municipal employer with its offices located at 505 Broadway, Room 126, Baraboo, Wisconsin. The County provides governmental services to the citizens of Sauk County.

3. In SAUK COUNTY, ME-1732, DEC. NO. 17343 (WERC, 11/79), following an election, the Wisconsin Employment Relations Commission certified United Professionals as the exclusive bargaining representative of a bargaining unit defined as:

All regular full-time and part-time professional employees, including registered nurse and social worker employed by the Department of Social Services and Public Health Service of Sauk County, but excluding supervisors, craft employees, managerial employees and confidential employees, . . . .

4. On June 30, 1992, the Labor Association of Wisconsin, Inc. filed a petition for election with the Wisconsin Employment Relations Commission seeking to represent employees in a bargaining described in the petition as:

All regular full-time and part-time professional employees employed by the Department of Human Services and Public Health Nursing Service of Sauk County, but excluding supervisors, craft employees, managerial and confidential employees, in accordance with WERC Decision 25107ME-1732.

On July 28, 1992, the Commission received a Stipulation for Election which confirmed that Labor Association of Wisconsin, Inc., the County and United Professionals had agreed that the Commission should conduct an election in the following bargaining unit to determine whether the employee wished to be represented by Labor Association of Wisconsin or United Professionals or by neither of said organizations for the purposes of collective bargaining:

All regular full-time and regular part-time professional employees employed by the Department of Human Services and Public Health Nursing Service of Sauk County, excluding supervisory, craft employees, managerial and confidential employees.

On August 18, 1992, pursuant to the Stipulation, the Commission directed that an election be held in a bargaining unit described in the same manner as in the Stipulation.

United Professionals won the election and on October 9, 1992, the Commission issued a Certification of Representative indicating that United Professionals was the collective bargaining representative of a bargaining unit described in the same manner as in the Stipulation.

The 2001-2003 bargaining agreement between United Professionals and the County provides as follows in ARTICLE 2-UNION RECOGNITION:

- 2.01 RECOGNITION: The County of Sauk hereby recognizes its legal obligation to bargain with District 1199 W / United Professionals for Quality Health Care as the exclusive representative for the purposes of collective bargaining with the County, or its authorized representative(s), on all questions of wages, hours, and/or other conditions of employment for all regular, full-time and part-time professional employees employed by the Department of Human Service [sic] and Public Health Department of Sauk County, but excluding supervisors, craft employees, managerial and confidential employees, in accordance with WERC Decision 25107ME-1732.
- 2.02 PURPOSE OF RECOGNITION CLAUSE: This recognition clause is set forth merely to describe the bargaining representative and the bargaining unit covered by the terms of this Agreement, and is not to be interpreted for any other purpose.

5. The County employs approximately 642 employees and has five bargaining units: (1) the United Professionals unit; (2) a unit comprised of the clerical employees assigned to work stations in the Courthouse and the West Square Building represented by the Teamsters; (3) a unit comprised of the Certified Nursing Assistants and some clerical employees in the County Health Care Center represented by American Federation of State, County and Municipal Employees (AFSCME); (4) a unit comprised of the Highway Department laborer/operator employees represented by AFSCME; and (5) a unit comprised of the Jail Officers, Clerk Matrons and Patrol Deputies in the Sheriff's Department represented by the Wisconsin Professional Police Association, Law Enforcement Employee Relations Division.

6. The elected Sheriff is at the top of the organizational hierarchy for the County Sheriff's Department. Reporting directly to the Sheriff is the Chief Deputy. Reporting to the Chief Deputy are the Captain of Field Services and the Captain of Security (herein known as Jail Administrator). The Jail/Huber Sergeants and the two disputed Jail and Occupational Health Nurses (herein Jail Nurses) report to the Jail Administrator.

7. The job description for the Jail Nurses, as revised June, 1996, reads as follows:

**Purpose of Position**

The purpose of this position is to provide jail inmate nursing services and occupational health nursing to Sheriff's department employees.

**Essential Duties and Responsibilities**

**The following duties are normal for this position. These are not to be construed as exclusive or all-inclusive. Other duties may be required and assigned.**

- Screens, examines and evaluates current and new inmates for illnesses/injuries. Examines inmates following prior treatment.
- Assesses illness and injury to determine treatment and/or referral for additional medical treatment. Coordinates inmate medical referrals with providers.
- Reviews medical records and reports.
- Provides treatment, advice and issue medication according to license authorization or physicians' protocols.
- Responds to emergency and non-emergency calls, including weekends and evening hours, for medical screening and treatment.

- Records provided nursing services and updates records.
- Provides medical education to inmates, jailers and other Sheriff's Department staff.
- Reviews all reported employee injuries and illnesses. Meets with injured/ill employees within 24 hours of reported occurrence. Coordinates treatment and restricted duty assignments with treatment providers, employees and supervisory staff.
- Establishes job injury reporting policies and procedures. Trains staff regarding injury reporting process.
- Prepares job injury/illness reports. Investigates worker's compensation claims questioned by insurance carrier or Department Supervisors. Testifies regarding disputed injury/illness claims.
- Develops and implements employee and department applicant medical screening program.
- Maintains Department medical records.
- Acts as Department blood-borne pathogen exposure control officer.
- Coordinates Department nursing services with County Nurse's office.

. . .

Jail Nurse Busser completed a Job Description Questionnaire on or about August 18, 2000. One section of the form requested that she identify her job duties/essential accountabilities. Her responses along with the percentage of time allocated to the task are as follows

. . .

<b>% of Time Spent</b>	<b>Essential Accountabilities</b>
65	Sick call & triage of inmate medical needs, provide medical treatment & education according to license authorization or physician's orders, respond to emergency and non-emergency calls @ both facilities, coordination of referrals, obtain & review medical records in order to very necessary continued care, also to verify inmate's need for prescription meds.
10	Review and respond to e-mail, voice mail, and incoming basket correspondence.
5	Monitor chronic diseases i.e., diabetes, heart disorders.
5	Mental Health needs for inmates.
5	Monitor medications for inmates for SE and adverse reactions.
2	Manage inmate/employee health records.
5	Develop and/or update policies and procedures. Prepare yearly reports for supervisors & medical director.
3	Develop and teach inservice to Jail staff.
5	Occupational Health issues re: department employees such as OSHA Standards on Bloodborne Pathogens/Respiratory PE/Employee PE/Immunization updates.
4	Attend seminars and inservice training course, Jail Health Conferences, Jail Nurses Group meetings. Work on planning committee for yearly Jail Health Conference. Review professional journals. Develop & implement necessary Occ Health programs for employee health & safety.
1	Act as blood borne & air borne pathogen exposure control officer.

...

8. The incumbent in the full-time Jail Nurse position is Margo Busser. Busser was the first Jail Nurse hired by the Sheriff's Department when she accepted a half time position in April, 1995. On July 1, 1996, Busser's position was increased to full-time. Busser previously was an independent contractor with the County servicing the maternal-child health grant through the County Public Health Department. Busser is a certified correctional health care provider. Busser does not have the power of arrest.

Busser works a 40-plus hour workweek (8:00 a.m. to 4:00 p.m. Monday through Friday) and is compensated within the Grade 11 level of the 2001 Non Rep Salary Matrix (\$19.82 per hour). The 2001 Non Rep Salary Matrix has ten steps ranging in pay from \$17.09 per hour to \$21.05 per hour. Busser receives the same fringe benefits as other non-bargaining unit employees of the County. Busser does not receive overtime nor compensatory time, but may take time off during the same pay period or the following pay period for any hours worked in excess of 40 provided she obtains permission from the Jail Administrator or the Sheriff.

Busser has an office in the Annex. The Annex building is located between the County Courthouse and an addition to the Courthouse. The County Sheriff's Department and Jail is located across the street from the Annex.

9. Busser performs medical triage to inmates to assess their level of wellness or sickness and determines which inmates are in need of referral for outside care. Busser conducts medical evaluations of new inmates, determines inmate special nursing needs, determines whether an inmate should be evaluated by a physician, and monitors inmate medical progress and/or change in medical condition. She spends eighty percent (80%) of her time performing these duties.

Busser prepares and provides training to Sheriff's Department staff on medical issues relevant to the Jail including medication delivery, communicable diseases, medical conditions and blood-borne pathogens. Busser provides direction to Jail staff regarding medication time, medication handling, and treatment. Busser informs the Jail Administrator or Jail Sergeants of any violations of policy and procedure committed by Jail Officers with regard to the medical and health needs of inmates. Busser does not have the authority to discipline or effectively recommend discipline of Jail Officers but may, on occasion, be asked her opinion as to the appropriate level of discipline that should be imposed.

10. Busser participated in the hiring of the half-time Jail Nurse, Kathryn Whalen. Busser reviewed applications, assisted in the determination of which candidates would be interviewed, prepared questions for the interviews and participated in the interview along with the Sheriff, the Chief Deputy, the Jail Administrator, a Lieutenant and a Sergeant. Each interview participant recommended to the Sheriff that Whalen should be hired.

Busser did not complete a six-month probationary evaluation of Whalen because she was on leave at the time the evaluation was due. The Jail Administrator and Busser prepared and discussed with Whalen a one-year evaluation. When Jail Officers are evaluated by Jail Sergeants, Busser provides input to Jail Sergeants as to Jail Officers performance regarding the provision of medical services to the inmates.

Busser and Whalen generally distribute the daily workload on a consensual basis. Busser provides Whalen verbal feedback on performance and medical issues. Busser reviews

charts and orders to apprise herself of the patient's condition and to determine whether Whalen is accurately performing her responsibilities. Busser schedules Whalen's work hours and has the authority to order and authorize additional hours of work for Whalen.

The Jail Administrator approves leave requests for both Busser and Whalen.

Busser does not participate in the hiring process of Jail Officers. Busser reviews medical and mental testing results and, based on her medical training, makes recommendations to the Sheriff regarding continued employment of new Sheriff's Department staff. Busser assesses employee light duty requests and coordinates light duty work assignments. Busser monitors light duty compliance with medical restrictions.

Busser advises the Department as to whether Department employees are medically able to perform the duties of special law enforcement units such as the dive team, emergency response team or critical incident team.

Busser does not possess supervisory duties and responsibilities in sufficient combination and degree to be a supervisor.

11. Using resources from both the public and private sector, Busser drafts Department policy and procedure as to medical issues. Busser receives guidance and direction from the State of Wisconsin Department of Corrections and the State Jail Inspector for policy and procedure development consistent with administrative codes that address jail health issues. Busser has drafted medical policies including the Respiratory Protection Policy, TB Skin Testing Policy, Blood-borne Pathogen Policy, and Pre-employment Random Drug Testing Policy. Busser submits new or revised policies and procedures to an advisory board composed of the Public Health Director, the contracted physician Medical Director, the Huber Facility Supervisor, the Jail Administrator, and the Sheriff for suggestions. All medical policies must be approved by the physician Medical Director. The Sheriff has ultimate authority to approve policy and procedure in the Sheriff's Department.

Busser is responsible for the day-to-day operation of the nursing programs and services. Busser attends regional Jail Nurse meetings four times per year.

Busser has independent authority to request legal opinions from County Corporation Counsel on medical and health issues for the Sheriff's Department.

Busser has made recommendations regarding health and medical needs, staff wellness and staff physical fitness to the Jail Building Project Committee.

Busser attends Sheriff's Department weekly management meetings when there is an item on the agenda that pertains to a new policy, procedure or order. Busser is not expected to attend all weekly management meetings. The other employees that attend the management meeting are the Sheriff, Chief Deputy, Jail Administrator, and Lieutenants. Sergeants attend when there is an item on the agenda of specific interest to them.



Busser negotiated the contract with the physician Medical Director on behalf of the Sheriff's Department. Busser sought physician applicants, recommended the amount of compensation, prepared the contract, submitted the contract to Corporation Counsel for legal review, and recommended its approval to the Sheriff.

Busser provides recommendations to the Jail Administrator for the medical and health portion of the Jail budget. Busser advocates for the purchase of equipment she and Jail Nurse Whalen believe would be useful when performing their responsibility. Busser has authority and negotiates to make expenditures of less than one thousand dollars for items in the line item of the Jail budget for purchases of items such as syringes, medical supplies, dressings and over-the-counter medications.

Busser does not sufficiently participate in the formulation, determination and implementation of County policy or have sufficient authority to allocate County resources to be a managerial employee.

12. The incumbent in the half-time Jail Nurse position is Kathleen Whalen who was hired on July 26, 2000. Immediately prior to her employment with the Sheriff's Department, Whalen worked 20 years as a surgery nurse for the Reedsburg Area Medical Center.

Whalen does not have the power of arrest. Whalen regularly works 20 hours per week (Mondays and Thursdays 8:00 a.m. to 4:00 p.m. and Tuesdays 8:00 a.m. to 12:00 p.m.) and will work additional hours as a back up to Busser on Busser's days off or while Busser is away from the Jail. Whalen is on-call when not at the worksite. Like Busser, Whalen is compensated within Grade 11 of the Non Represented Salary Matrix (\$18.46 per hour).

Whalen shares the job description of Busser as identified in Finding of Fact 7. Whalen reviews medical intake forms for inmates, supervises the distribution of medication, performs triage, refers inmates to a physician for medical care or treatment, responds to questions from Jail Officers, and assists in the training of Jail staff. Whalen follows the standard nursing process of assessment, planning, implementation and evaluation in performing her responsibilities. Whalen takes blood pressure readings; checks ears, lungs; changes dressings; removes sutures; performs ear irrigations; and administers IM injections to jail and Huber inmates. The majority of Whalen's time is spent performing these responsibilities.

Whalen is responsible for Jail medical issues in the absence of Busser.

Whalen assists Busser in Department policy and procedure development. Whalen developed a medical log form. Whalen does not interact with the Jail advisory board.

Whalen assisted Busser in the investigation and purchase of a medical cart system and put in a request to the Jail Administrator for the purchase of a pulse oximeter. Whalen has access to Sheriff Department staff occupational health charts.

Whalen does not sufficiently participate in the formulation, determination and implementation of County policy or have sufficient authority to allocate County resources to be a managerial employee.

13. Whalen's supervisory duties and responsibilities are limited to direction of the work of Jail Officers as to medical care of inmates and providing input when Jail Officers are evaluated.

Whalen does not possess supervisory duties and responsibilities in sufficient combination and degree to be a supervisor.

14. The Sauk County Public Health Department provides nursing and health education services to the citizens of the County. Programs administered by the Department include immunization, childrens' special health care needs, community options, home assessments, birth to three assessments, pregnancy testing, prenatal care, rural safety, home visits to elderly clients, paternity testing, dental and health education and home care services.

The Public Health Director is compensated at Grade 18 of the 2001 Non Rep Salary Matrix and Grade 20 on the 2002 Matrix and the Home Care Nursing Supervisor is compensated at Grade 14 of the Matrix.

The Department employs four Home Care Nurses and four Public Health Nurses who are members of the bargaining unit represented by United Professionals. In 2001, the wage rates for the Home Care Nurses extended from a hiring rate of \$16.74 per hour to a maximum 60-month rate at \$19.46 per hour. In 2001, the wage rates for the Public Health Nurses extended from a hiring rate of \$16.91 per hour to a maximum 60-month rate of \$19.77 per hour.

Home Care Nurses perform assessments and provide skilled nursing care to clients recently released from a hospital or nursing home. Home Care Nurses work independently in the client's home. They take care of IVs, change dressing and/or provide diabetic care. Home Care Nurses generally service an elderly population. Home Care Nurses recommend occupational therapy, speech and/or physical therapy services for their clients. Home Care Nurses supervise personal care services provided to their clients by Home Health Aides. The non-bargaining unit member Home Care Supervisor, who is a registered nurse, supervises Home Care Nurses. Formal experience in a nursing home or hospital and being a registered nurse are requirements for a Home Care Nurse. A bachelors' degree is not required. Home Care Nurses have varied work hours dependent on the client and receive on-call compensation. Home Care Nurses carry a beeper and are compensated at the overtime rate for work performed outside their regular work hours and/or on the weekend.

Public Health Nurses make nursing diagnosis and assessments. Public Health Nurses make referrals to social services, housing authority, and physicians. Public Health Nurses hold bachelors' degrees. Public Health Nurses work from 8:00 a.m. to 4:30 p.m., Monday through Friday.

From 1989 through 1995, the County Public Health Department provided nursing services to the County Jail and Huber facility. Public Health Department Director Beverly Muhlenbeck and the Public Health Nurses provided nursing service in response to telephone inquiries and questions from Sheriff's Department staff.

Infrequently, Busser and Whalen inform the County Health Department when they are unavailable so that Health Department personnel can act as a back-up to the Sheriff Department staff. This occurred on two occasions during 2001. In the absence of Busser and Whalen, Jail Officers occasionally telephone the County Health Department for medical back up to Busser and Whalen.

15. The County operates the Sauk County Health Care Center, which is a one-facility unit that is located approximately 15 miles from the Sauk County Annex that provides nursing home services. The Center is staffed, in part, by a non-represented Director of Nursing, a non-represented Assistant Director of Nursing, non-represented Licensed Practical Nurses (LPN's) and non-represented Registered Nurses. The Center also employs Certified Nursing Assistants, and clerical staff who are in an AFSCME bargaining unit. The LPN's and Registered Nurses are afforded benefits consistent with the non-represented employees' benefit structure including overtime.

The LPN-Health Services Supervisor and Registered Nurses at the Health Care Center are compensated at Grade 11 on the 2001 Non Rep Salary Matrix. The Assistant Director of Nursing is compensated at Grade 15 and the Director of Nursing is compensated at Grade 17.

The LPN's were determined by the Wisconsin Employment Relations Commission to be supervisors in SAUK COUNTY, DEC. NO. 17882-A, (WERC, 3/81).

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

### **CONCLUSIONS OF LAW**

1. The incumbents in the position of Jail and Occupational Health Nurse are not managerial employees within the meaning of Sec. 111.70(1)(i), Stats., or supervisors within the meaning of Sec. 111.70(1)(o)1, Stats., and therefore are municipal employees within the meaning of Sec. 111.70(1)(i)., Stats.

2. Because Article 2 of the 2001-2003 collective bargaining agreement between United Professionals and Sauk County is ambiguous, the 2001-2003 agreement does not bar inclusion of the Jail and Occupational Health Nurses in the bargaining unit covered by that agreement.

3. The Jail and Occupational Health Nurses have a sufficient community of interest with employees in the bargaining unit described in Finding of Fact 4 to be included in that unit and inclusion therein is consistent with the statutory directive in Sec. 111.70(4)(d)2.a., Stats., that the Commission should “avoid fragmentation by maintaining as few bargaining units as practicable . . .”

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

**ORDER CLARIFYING BARGAINING UNIT**

Jail and Occupational Health Nurses Margo Busser and Kathryn Whalen are included in the bargaining unit described in Finding of Fact 4.

Given under our hands and seal at the City of Madison, Wisconsin, this 25<sup>th</sup> day of November, 2002.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

Steven R. Sorenson /s/

Steven R. Sorenson, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

SAUK COUNTY

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

**POSITIONS OF THE PARTIES**

**Initial Briefs**

**United Professionals**

United Professionals argue that the Jail Nurses are not supervisors or managerial employees and should become members of the only professional employee County bargaining unit.

United Professionals argue that the Jail Nurses are not supervisors because neither the organizational chart for the Sheriff's Department nor the position description indicate that they supervise any employees. United Professionals dispute the Sheriff's testimony that the Nurses supervise the Jailers. Rather, United Professionals assert that the evidence substantiates that the Nurses neither hire, fire, nor have the authority to discipline. With specific regard to Busser, United Professionals assert that she is not Whalen's supervisor. It supports this assertion with the testimony of Jail Administrator Hafemann and Whalen herself who both indicated that Hafemann was Whalen's supervisor.

United Professionals argue that neither Busser nor Whalen meet the definition of a managerial employees as stated in KEWAUNEE COUNTY, DEC. NO. 13185-G (WERC, 10/97). United Professionals point out that neither employee has any influence on the jail budget beyond offering a "need" or "wish" list. Further, neither Busser nor Whalen have a "high level of decision-making [authority] related to policy and procedure." United Professionals note that the policies developed are the direct result of jail health services regulations and/or OSHA and more notably, all policies are subject to the approval of an advisory board and the Medical Director.

As to the appropriateness of adding the Jail Nurses to the bargaining unit, United Professionals assert that the only logical bargaining unit for the Jail Nurses is the existing professional nurse and social worker unit because all other units consist of either non-professional employees or employees with the power of arrest. United Professionals point out that because the Commission will not combine employees with and without the power of arrest in the same unit, it is not appropriate to include the Jail Nurses in the Sheriff's Department bargaining unit. Moreover, the historical involvement of the Public Health Department and its nursing staff in the Jail health program and the current Public Health Director's mentoring of Busser support the existence of a community of interest between the Jail Nurses and the Public Health Nurses in the existing United Professionals unit.

## The County

The County argues that the Jail Nurses are supervisors and thus appropriately excluded from the petitioning bargaining unit. The County asserts that the positions are similar to the non-represented supervisory nursing positions in the Sauk County Health Care Center and thus argues it would be "anomalous" to include them in this bargaining unit. The County further relies on the decision of the United States Supreme Court in *NLRB v. KENTUCKY RIVER COMMUNITY CARE, INC.* 532 U.S. 706 (2001) wherein the Court clarified the definition of "supervisor" in a manner supportive of the Jail Nurse's supervisory status.

In addressing the supervisory criteria established by Sec. 111.70(1)(o)1, Stats., the County asserts that Busser played the primary role in the hire of Whalen; that both Busser and Whalen provide input into Jailer performance appraisals; that both Busser and Whalen recommend discipline; and that Busser has been involved in the direct discipline of staff. The County contends that the Jail Nurses assign work to the extent that they direct the distribution of medication and determine which personnel will participate in special teams of the Sheriff's Department. The Jail Nurses are equivalent to Sergeants in the Jail organizational structure and are compensated at the same pay grade as other supervisory employees. The County cites Commission decisions that find the constant supervision of a care team meets the "supervision of employee" criterion. Finally, the County asserts that the Jail Nurses directly supervise Jailers and exercise an extremely high degree of independent judgment and discretion thereby meeting the statutory criteria for a supervisor.

The County argues that the Jail Nurses have more in common with the supervisory non-represented nurses in the Sauk County Health Care Center than the non-supervisory nurses in the Public Health Department and, as a result, are not appropriately added to the United Professionals unit. The County relies on our decisions in *SAUK COUNTY, DEC. NO. 17882-A (WERC, 3/81)* and *WALWORTH COUNTY, DEC. NO. 9041-C (WERC, 3/92)*. The County asserts that there is not a community of interest between the Jail Nurses and the Nurses in the United Professional bargaining unit since the Public Health Nurses do not direct patient care, do not supervise any other County employees, do not perform management functions like drafting policies and the Home Care Nurses do not provide care to individuals in an institutional setting and do not supervise County employees. Further, there is no similarity in wages, hours, working conditions, work locations or supervision or bargaining history. Lastly, the County asserts that anti-fragmentation is not at issue because the nurses with whom the Jail Nurses share a community of interest are the non-represented Health Care Center nurses.

The County next asserts that Busser is a managerial employee, and further, that in Busser's absence, Whalen is a managerial employee. The County contends the testimony supports the conclusion that Busser has established all policies and procedures for inmate health care and occupational health issues in the Sheriff's Department; that she consults with legal counsel; that she has established an advisory board; that she contracted for the Medical

Director; and that she established and has "unfettered" authority to expend funds from the Jail budget. The County asserts Busser and the County Public Health Director are comparable management positions.

Finally, the County argues that the contractual recognition clause does not allow for the inclusion of professional employees outside the Departments of Public Health and Human Services. The County finds support in SAUK COUNTY, DEC. NO. 6762-A (WERC, 11/98) for this proposition. Further, the County asserts that the appropriate unit for the Jail Nurses, if they are going to be represented by any union, is the Sheriff's Department unit.

### **Reply Briefs**

#### **United Professionals**

In response to the County's assertions, United Professionals refer the Commission to its decision in VERNON COUNTY DEC, NO. 13805-I (WERC, 2/00) wherein it found that to be a supervisor, the individual must supervise employees rather than jail activities. Further, the Commission's decision in VERNON COUNTY, SUPRA, reinforces United Professionals' argument that preparation of draft policies and procedures, subject to approval, and budget preparation input with limited expenditure authority, do not constitute sufficient grounds for exclusion from the bargaining unit as a managerial employee.

In response to the County argument that the parties have agreed to limit the scope of the unit to the departments identified in the 2001-2003 contract, United Professionals point out that at the time this bargaining unit was certified, these positions did not exist. Thus, United Professionals argue that the 2001-2003 contract does not preclude including the Jail Nurses in the unit.

Finally, United Professionals disagree with the County's interpretation of NLRB v. KENTUCKY RIVER COMMUNITY CARE, INC., SUPRA. United Professionals concur with the Supreme Court's analysis that the professional exercise of independent judgment does not categorically exclude a position from a bargaining unit as a supervisor.

For all of the above reasons, United Professionals assert that the Jail Nurses should be included in the existing bargaining unit.

#### **The County**

In response to United Professionals' argument that the Jail Nurses are not supervisors, the County reminds the Commission that the Sheriff is the sole determiner of what authority the Jail Nurses possess and that the Sheriff testified that the Jail Nurses possess the "same supervisory authority as any other supervisor."

In response to United Professionals challenge to the managerial status of Busser, the County reiterates that Busser was responsible for the contract with the Medical Director, has made numerous requests for legal opinions on major policy issues and that Busser had considerable authority regarding the Jail portion of the Sheriff's Department budget.

For the above reasons, the County asserts the Jail Nurses should continue to be excluded from the bargaining unit.

### **DISCUSSION**

#### **Does the 2001-2003 contract bar the Jail Nurses from inclusion in the United Professionals unit?**

Citing our earlier decision in SAUK COUNTY, DEC. NO. 6762-A (WERC, 11/98), the County argues that the Jail Nurses cannot become part of the United Professional bargaining unit through this unit clarification proceeding because the Nurses are not employed by the "Department of Human Service [sic] and Public Health Department of Sauk County" as specified in Article 2 of the 2001-2003 bargaining agreement. The County asserts that by virtue of this contractual recognition clause, the County and United Professionals have agreed to a "departmental unit" and necessarily have also agreed that all non-departmental employees (such as the Jail Nurses) should be excluded.

United Professionals respond by asserting the contractual recognition clause does not bar the addition of the Jail Nurses to the existing unit because: (1) when this unit was created, it included all professional employees of the County who were eligible for representation; (2) the Jail Nurse positions did not exist when this unit was created; (3) employees of the Public Health Department performed the duties in question before the Jail Nurse positions were created; (4) the contractual recognition clause itself specifies that it "is not to be interpreted for any other purpose" beyond describing the bargaining representative and unit; and (5) there is no other unit into which the Jail Nurses can be placed and creation of an additional unit would constitute undue fragmentation.

As reflected in the SAUK COUNTY case cited by the County, where appropriate, we will not allow parties to use a unit clarification proceeding to obtain representational rights to positions the parties have agreed to exclude from a bargaining unit. However, we have held that where the parties' agreement on the scope of their unit is less than clear, we will proceed to the merits of the unit clarification petition. WISCONSIN DELLS SCHOOL DISTRICT, DEC. NO. 24604-C (WERC, 10/92); DEPERE SCHOOL DISTRICT, DEC. NO. 25712-A (WERC, 10/90). Here, the unit to which these parties agreed was originally described in our 1979 Certification of Representative as:



. . . all regular full-time and regular part-time professional employees, including registered nurse and social worker employed by the Department of Social Services and Public Health Service of Sauk Count, but excluding . . .

This description of the unit includes but is not limited to those employees in the identified departments. As argued by United Professionals, it includes all eligible professional employees.

As reflected in Finding of Fact 4, when Labor Association of Wisconsin, Inc. filed an election petition in 1992, it proposed a unit description that referenced the Commission's 1979 decision but used language that differed from that found in the 1979 decision. Aside from insertion of the word "professional," the Stipulation for Election signed by the parties used this different unit description language and as did our 1992 Certification of Representative.

Article 2 of the parties' 2001-2003 contract describes the unit as:

. . . all regular full-time and part-time professional employees employed by the Department of Human Service and Public Health Department of Sauk County, but excluding supervisors, craft employees, managerial and confidential employees in accordance with WERC Decision 25107ME-1732.

Thus, the parties' 2001-2003 contract contains language which on the one hand limits the scope of the unit to the identified departments and on the other hand references our 1979 Certification of Representative which did not so limit the scope of the unit.

As indicated earlier herein, unless we are satisfied that the agreement on the scope of the bargaining unit is clear, we proceed to decide the merits of the petition. Here, the ongoing contractual reference to our 1979 Certification (which created an "all professionals" unit) creates ambiguity as to whether these parties have agreed to a departmentally defined bargaining unit. Therefore, we proceed to decide the merits of the petition.

### **Are Busser and Whalen Supervisors?**

When determining whether an employee is a supervisor, we apply Sec. 111.70(1)(o)1, Stats., which defines a supervisor as an 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 to 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.

When interpreting this statutory language, we consider the following:

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 other persons exercising greater, similar or lesser authority over the same employees;
4. The level of pay, including an evaluation of whether the supervisor is paid for his/her skill or for his/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 spends a substantial majority of his/her time supervising employees; and
7. The amount of independent judgment exercised in the supervision of employees.

TAYLOR COUNTY, DEC. NO. 24261-F (WERC, 5/98).

Not all of the above-quoted factors need to reflect supervisory status for us to find an individual to be a supervisor. Our task is to determine whether the factors appear in sufficient combination and degree to warrant finding an employee to be a supervisor. RICE LAKE HOUSING AUTHORITY, DEC. NO. 30066 (WERC, 2/01).

### **Busser**

Looking first at Factor 1, we conclude that Busser does not effectively recommend the hiring, promotion, transfer, discipline or discharge of employees.

As to hiring, Busser served on the six person committee (which included the Sheriff) that interviewed Nurse Whalen and recommended that she be hired. However, as the testimony of both Busser and Sheriff indicates, if Busser had recommended that Whalen be hired and others on the interview team had disagreed, the Sheriff would have proceeded to make an independent hiring decision. Therefore, we conclude that Busser does not effectively recommend hiring.

Busser plays no significant role in transfers and promotions.

As to discipline and discharge, the record clearly establishes that it is the Sheriff who imposes discipline. Although Busser testified that she imposed discipline on a Jail Officer who had improperly administered medication, we are persuaded from the record as a whole that Busser's role was limited to completing a form that documented the performance issue in question and then discussing disciplinary options with the Jail Officer's supervisor. On balance, we are persuaded that Busser does not impose or effectively recommend discipline but rather is to report performance problems to others who then proceed to investigate the matter and make a recommendation to the Sheriff.

Busser does review and evaluate the results of routine physical and mental tests taken by newly hired Department employees and then makes a recommendation to the Sheriff regarding whether the employee is fit for duty, needs further testing or should be terminated. Although Busser's exercise of her professional judgment can lead to termination, we are satisfied that Busser does not exercise sufficient discretion when making this judgment so as to make her role significant in the assessment of her supervisory status.

As to Factor 2, Busser does have the authority to assign work to Whalen although it is clear that they generally divide the workload on a collegial basis. Busser directs the work of Jail Officers as to the medical care of inmates. She also plays a role in determining the assignments of law enforcement employees when she medically assesses their fitness to be members of special Department groups such as the dive team.

As to Factor 3, part-time employee Whalen is the only individual over whom Busser has regular authority. Whalen and Busser both report to the Jail Administrator who, among other matters, approves their requests for leave use. To the extent Busser directs the work of Jail Officers, she shares that role with Whalen and with the Jail Sergeants who directly supervise those employees.

Looking at Factor 4, within Grade 11 of the 2001 Salary Matrix, Busser is paid \$19.82 per hour while Whalen receives \$18.46 per hour. This relatively small pay differential is reflective of Busser's greater years of service rather than any supervision of Whalen.

Turning to Factor 5, we conclude that Busser is primarily supervising work activity—the medical responsibilities of Whalen and the Jail Officers—than supervising employees. Busser's role in the evaluation of Whalen and the Jail Officers is indicative of her limited supervisory role. While Busser plays a role in Whalen's evaluation, both the Jail Administrator and Sheriff credibly testified that they play a significant role in the evaluation process. Similarly, while Busser reports on the job performance of Jail Officers as to the medical treatment of inmates, she does not have independent evaluative authority. Our conclusion in this regard is consistent with Whalen's testimony that she views the Jail Administrator as her supervisor.

As to Factor 6, it is clear that Busser spends the majority of her time performing her nursing responsibilities.

Regarding Factor 7, Busser exercises independent judgment when performing her limited supervisory duties and responsibilities.

Given all of the foregoing, we conclude that Busser is not a supervisor. Her role in the critical areas of hiring and discipline is limited, she spends the majority of her time performing her nursing responsibilities, and even lacks the authority to approve Whalen's leave requests.

Although she exercises independent judgment when exercising her limited supervisory authority, the extent of that authority is insufficient to make her a supervisor. 1/

---

*1/ The County cites the United States Supreme Court's decision in NLRB v. KENTUCKY RIVER COMMUNITY CARE, INC. 532 U.S. 706 (2001) in support of its position. Our result is not inconsistent with that of the Court. We acknowledge Busser's exercise of independent judgment. As noted above, it is the limited extent of her supervisory authority that produced our conclusion that she is not a supervisor.*

---

Contrary to the County's argument, our conclusion is not at odds with the Sheriff's constitutional authority. We have done no more than measure the duties and responsibilities the Sheriff has given the Jail Nurses against the statutory definition of a "supervisor" which we have the jurisdiction and obligation to apply. We are in no position to assess the accuracy of the Sheriff's testimony that the Jail Nurses have the "same supervisory authority as any other supervisor." The duties and responsibilities of other Department personnel were not at issue in this proceeding.

Nor is our conclusion contrary to that reached in SAUK COUNTY, DEC. NO. 17882-A (WERC, 3/81). The employees therein found to be supervisors had far greater disciplinary and evaluative authority than does Busser.

### **Whalen**

Whalen's supervisory authority is limited to circumstances where she fills in for Busser during absences and to the direction of the work of Jail Officers when they provide medically related services to inmates. Given our conclusion as to Busser's status, it is apparent that Whalen is not a supervisor.

### **Are Busser and Whalen Managerial Employees?**

A "managerial" employee is specifically excluded from the definition of "municipal employee" found in Sec. 111.70(1)(i), Stats. However, because there is no statutory definition of a "managerial" employee, that term has been defined by the Commission through case law. With judicial approval, the Commission has defined a "managerial" employee by considering the extent to which the employee participates in the formulation, determination and implementation of management policy or possesses the authority to commit the employer's resources. CITY OF MILWAUKEE V. WERC, 71 WIS. 2D 709 (1976); VILLAGE OF WHITEFISH BAY, 103 WIS.2D 443 (CT. APP. 1981); KEWAUNEE COUNTY V. WERC, 141 WIS.2D 347 (CT. APP. 1987); MANITOWOC COUNTY V. LOCAL 986A, 170 WIS.2D 692

(Ct. App. 1992); COUNTY OF EAU CLAIRE V. AFSCME LOCAL 2223, 190 WIS.2D 298 (Ct. App. 1994). To confer managerial status, the employee's policy role must involve all three elements (formulation, determination and implementation) "at a relatively high level" MARINETTE COUNTY, DEC. NO. 26154-B (WERC, 3/92) or the employee's authority to commit resources must involve allocation of resources in a manner which significantly affects the nature and direction of the municipal employer's operations. VILLAGE OF JACKSON, DEC. NO. 25098 (WERC, 1/88)

### **Busser**

Busser's responsibilities include drafting policy and procedures related to the health of inmates and Department employees. When meeting these responsibilities, she may consult with the Corporation Counsel's office to obtain legal advice. Her work is subject to the review of an advisory committee and the approval of a contracted Medical Director and the Sheriff. Given these review and approval restrictions, we conclude that her policy/procedure role is not sufficient to establish managerial status. Contrary to the County, the fact that Busser played a significant role in the selection of the Medical Director and creation of the advisory committee does not diminish their respective roles in the review and approval of policy/procedures.

Busser plays a role in the allocation of Department resources when she makes budget recommendations to the Jail Administrator regarding the medical needs of the Department. She also advocates for equipment purchases and for design features when new facilities are built. However, this limited role in the allocation of resources does not "significantly affect the nature and direction" of the Department and thus falls far short of establishing managerial status.

The County makes much of the important role Busser played when establishing the terms of the contract between the County and the independent contractor Medical Director. However, in our view, her role does not demonstrate managerial status. Like an assistant city attorney or an assistant corporation counsel, Busser was doing no more than applying her professional expertise to insure that the relationship between the County and the Medical Director was satisfactorily and accurately established and recorded. As is true for an assistant city attorney or an assistant corporation counsel, this role does not establish managerial status. CITY OF MILWAUKEE, DEC. NO. 12035-A (WERC, 2/74), AFF'D CITY OF MILWAUKEE V. WERC, 71 WIS.2D (1976); KENOSHA COUNTY, DEC. NO. 15371 (WERC, 3/77)

### **Whalen**

Whalen assists Busser in her policy role and in advocating for equipment purchases. Given our conclusion as to Busser's lack of managerial status, it is apparent that Whalen is not a managerial employee.

**Is Inclusion of the Jail Nurses in the United Professionals Unit Appropriate?**

The County asserts that even if Busser and Whalen are not supervisors or managerial employees and their inclusion in the United Professionals unit is not precluded by prior agreement of the parties, they should not be included in the unit because they lack a sufficient community of interest with professional employees already in the United Professionals unit.

When considering whether employees share a sufficient community of interest with employees in the existing unit so as to make inclusion appropriate, we consider the extent to which employees have a common purpose through their employment, common supervision, common work locations, similar duties and skills and similar wages, hours and conditions of employment. OREGON SCHOOL DISTRICT, DEC. NO. 28110-C (WERC, 4/96); MADISON SCHOOLS, DEC. NO. 12654-E (WERC, 1/02).

The County correctly notes that Busser and Whalen do not share common supervision or common work location with other employees in the United Professionals unit. However, we have consistently held that:

. . . nurses, as members of a single profession, have an inherent and substantial community of interest simply by virtue of their similar educational and training backgrounds, shared career aspirations, and common purpose of providing health care. CHIPPEWA COUNTY, DEC. NO. 26126 (WERC, 8/89).

Thus, although the Jail Nurses have different programmatic responsibilities than do other nurses in the United Professionals unit, they share the same fundamental functions and skills with some employees who are already included in the unit.

The wages and hours of the Jail Nurses are similar to or the same as certain nurses in the United Professionals unit.

Considering all of the foregoing, we conclude that the shared purpose of providing health care, and the similarity in duties and skills and wages and hours are more than sufficient to establish a community of interest between the Jail Nurses and nurses in the existing United Professionals unit. 2/

---

*2/ The County has argued that the Jail Nurses have an even greater community of interest with the supervisory nurses at the County Health Care Center. Because those nurses are not in (or eligible to be in) a collective bargaining unit, the extent of any community of interest is not relevant to this proceeding. Further, to the extent the County's argument is premised on the allegedly shared supervisory status between the Jail Nurses and the nurses at the Health Care Center, we have rejected that premise by concluding that the Jail Nurses are not supervisors.*

---

It is important to note that inclusion of the Jail Nurses in the existing Sheriff's Department unit (an alternative urged by the County) would be contrary to our consistent holding that it is inappropriate to include employees without the power of arrest in the same unit as employees who have that power. MARATHON COUNTY, DEC. NO. 21815-A (WERC, 9/94).

Further, inclusion of the Jail Nurses in the United Professional unit is consistent with the statutory directive in Sec. 111.70(4)(d), Stats., that we avoid fragmentation of a municipal employer's workforce through creation of too many bargaining units. If the Jail Nurses were not included in the United Professional unit, there would be the potential for a union to seek to represent the Jail Nurses as a new separate unit of County employees- a result that is inconsistent with this statutory admonition.

Given all of the foregoing, we conclude that inclusion of the Jail Nurses in the United Professionals unit is appropriate and we have so ordered said inclusion.

Dated at Madison, Wisconsin, this 25<sup>th</sup> day of November, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steven R. Sorenson /s/

---

Steven R. Sorenson, Chairperson

A. Henry Hempe /s/

---

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

---

Paul A. Hahn, Commissioner