STATE OF WISCONSIN CIRCUIT COURT SAUK COUNTY

SAUK COUNTY,

Petitioner,

Vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, et al,

Respondents.

MEMORANDUM DECISION

Decision No. 17343-E

[NOTE: This document was re-keyed by WERC. Original pagination has been retained.]

Case No. 03CV085

Background Facts and Procedural Status

This is a proceeding under Wis. Stat. §§227.52 - 227.57, seeking judicial review of a decision of the Wisconsin Employment Relations Commission (WERC) under the Municipal Employment Relations Act (MERA). The review is from a decision issued by the WERC pertaining to a unit clarification petition filed by District 1199W / United Professionals for Quality Health Care, SEIU, AFL-CIO (United Professionals). The petition originally filed asked that two Sauk County Jail and Occupational Health Nurses (Jail Nurses) be included in the bargaining unit represented by UP. Sauk County opposed the petition and accretion of the two jail nurses into the bargaining unit. The WERC granted the petition and in doing so determined (1) that the jail nurses were neither "supervisory" nor "Managerial" employees within MERA, (2) that the collective bargaining agreement between the County and United Professionals does not bar inclusion of the two jail nurse positions in the bargaining unit covered by the

agreement, and (3) that the bargaining unit appropriately includes the two jail nurse positions.

The facts adduced at the hearing are set forth at length in the record. They will not be repeated here other than as necessary

Decision

This case involves a judicial review of an administrative decision. If the findings of fact of the Commission is supported by substantial evidence they must be affirmed. Chicago, M., St. P. & P.R.R. Co. v ILHR Dept., 62 Wis.2d 392, 396, 215 N.W.2d 443 (1974). Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion. Gateway City Transfer Co. v. Public Service Comm., 253 Wis.2d 397, 405-06, 34 N.W.2d 238 (1948). If there are two conflicting views of the evidence and each may be sustained by substantial evidence, it is for the agency to determine which view of the evidence it wishes to accept. Roberston Transport Co. v. Public Service Comm., 39 Wis.2d 653, 658, 159 N.W.2d 636 (1968). When more than one inference can reasonably be drawn from the evidence the agency finding is conclusive. Vocation Tech. And Adult Ed. Dist. 13 v. ILHR Dept., 76 Wis.2d 230, 240, 251 N.W.2d 41 (1977). The weight and credibility of the evidence and witnesses are matters for the agency to determine rather than the court. Bucyrus-Erie Co. v. ILHR Dept., 90 Wis.2d 408, 418, 280 N.W.2d 142 (1979). The reviewing court is limited to the determination of whether there was substantial

evidence to sustain the findings of fact made by the agency, E.F. Brewer Co. v. ILHR Department, 82 Wis.2d 634, 636, 264 N.W.2d 222 (1978), that is, a court may not second guess the agency's proper exercise of the fact-finding function even though, *ab initio,* it might have come to a different result. Briggs & Stratton Corp. v ILHR Department, 43 Wis.2d 398, 409, 168 N.W.2d 817 (1969). Finally, the court is to search the record to determine if there is substantial evidence to support the agency decision. Vande Zande v. ILHR Department, 70 Wis.2d 1086, 1097, 236 N.W.2d 250 (1975).

There are three areas of challenge to the WERC decision:

(1) Could the WERC reasonably determine that the two jail nurses were neither "supervisory" nor "managerial" employees within the meaning of MERA;

(2) Could the WERC reasonably determine that the collective bargaining agreement between the county and the United Professionals does not bar the inclusion of the jail nurse positions in the bargaining unit covered by the agreement;

(3) Could the WERC reasonably determine that the bargaining unit appropriately includes the jail nurse positions.

The first issue is whether the WERC could reasonably determine that the two jail nurses were neither "supervisory" nor "managerial" employees within the meaning of MERA. Municipal employees as defined by MERA, §111.70(1)(i),

excludes those who are supervisors or managerial employees. A supervisor is defined as one 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 …

Sec. 111.70(1)(o)1, Wis. Stats.

A "managerial" employee is not defined by MERA. However, in Milwaukee v. WERC, 71 Wis.2d 709, 715-16, 239 NW 2d 63 (1976), the court approved the Commission's interpretation of a "managerial" employee within the meaning of MERA as an employee who (1) participates in the formulation, development and implementation of management policy, or (2) possesses effective authority to commit the employers resources. Effective authority to commit the employer's resources means the power to establish an original budget or to allocated funds for differing purposes under such a budget. Kewaunee County v. WERC, 141 Wis.2d 347, 353, 415 NW 2d 839 (Ct. App. 1987). The Commission concluded that neither jail nurse was a supervisor. In reaching this conclusion the Commission reviewed the activities of both nurses against the following seven criteria set forth in City Firefighters Union v. Madison, 48 Wis.2d 262, 270-71, 179 N.W.2d 805 (1970).

(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 skill or for his supervision or 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 time supervising employees, and

(7) The amount of independent judgment and discretion exercised in the supervision of employees.

No one of these factors is determinative of the issue and the totality of the criteria must be considered. Crear v. LIRC, 114 Wis.2d 537, 541-42, 339 N.W.2d 350 (Ct.App. 1983).

The Commission looked at each of these factors. It concluded that neither nurse Busser nor Whalen could hire, fire, promote, transfer or discipline employees. It conceded that Busser had some input into some of these processes but did not have decision-making authority. Generally, in personnel matters Busser either worked in committee with others or her recommendations were approved by other persons. There was virtually no evidence that Whalen had any duties that approximated supervisory duties.

Factor two is the authority to direct or assign the workforce. The Commission again concluded that no authority existed for Whalen and Busser in this regard. Clearly both Busser and Whalen could direct matters relating to

health care but not as to other matters. The health care decisions would be based upon their occupations as nurses rather than a general supervisory responsibility. There was substantial evidence to sustain the commission determination as to this factor.

Nurse Busser provided some supervision to Whalen but many of the decisions were made collegially. There is no evidence to show that Whalen supervised anyone. In working with jail staff or inmates, other than health related decisions, any suggested supervisory activities of Busser were subject to approval of a sergeant, the jail administrator or sheriff.

The record establishes a slight pay differential between Busser and Whalen but attributed Busser's higher level to longevity rather that a supervisory distinction.

The fifth factor or criteria involves looking at whether one is supervising activities versus employees. The WERC concluded that nurses Busser and Whalen were primarily supervising work activities in the medical or health areas rather than supervising other employees.

Factor six is whether the person spends a substantial majority of his or her time supervising employees. Again, Whalen had virtually no responsibilities that could be considered supervisory and thus spend little time in this area. The record establishes that Busser perhaps spent about twenty percent of her time supervising Whalen. Neither Nurse directly supervised other jail employees.

The last of the seven criteria deals with the exercise of independent judgment. Both Busser and Whalen were required to exercise independent judgment relative to their occupations of jail nurse. Any decisions, however, that suggest supervisory responsibilities were subject to approval by the sheriff or jail administrator.

The second exclusion relied upon by the Commission is that of the managerial employee. The WERC concluded that neither Busser nor Whalen were managerial employees as neither had the power to establish an original budget nor to allocate funds for differing program purposes under such a budget. Most of their activities that could be peripherally managerial were subject to approval by others, including policy drafts.

Certainly while there are some activities of primarily nurse Busser that could be suggestive of supervisory responsibilities, there are other reasonable inferences that can be drawn from the same evidence that those activities don't reach the threshold of supervisor. The function of this court is limited to reviewing the record to see if there is substantial evidence to support the Commission decision. It does not independently analyze the evidence. The record shows that there is substantial evidence to support the Commission finding of the neither the nurses were supervisors nor managers under MERA and the Commission must be affirmed relative to this.

The second issue raised by the petition for review is could the Wisconsin Employment Relations Commission reasonably determine that the collective bargaining agreement between the

county and the United Professionals does not bar the inclusion of the jail nurse positions in the bargaining unit covered by the agreement.

This issue involves an interpretation of the collective bargaining agreement. In 1979, in defining the bargaining unit, the agreement read:

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

Sauk County, ME-1732, Dec. No. 17343 (WERC 11/79).

The union recognition clause of the collective bargaining agreement at issue relative to this action reads:

> The County of Sauk hereby recognizes its legal obligation to bargain with … United Professionals … as the exclusive representative for the purposes of collective bargaining … for all regular, full-time and part-time professional employees employed by the Department of Human Services and Public Health Department of Sauk County, but excluding supervisors, craft employees, managerial and confidential employees, **in accordance with WERC Decision 25107 ME-1732**. (bold added).

The Commission has concluded that the current agreement is ambiguous because of the bold-faced language cited above. The reasoning is that the 1979 agreement did not limit professional employees to the social services and public health departments but simply included them. The subsequent more recent language does limit the unit to full and part-time professional employees employed by the Department of Human Services and Public Health Department of Sauk County by deleting the word "including" that was part of the 1979 agreement. The agreement at issue, however, goes on to add the language "in

accordance with WERC Decision 25107 ME-1732". This latter language, in the opinion of the Commission, creates an ambiguity thus requiring interpretation by the Commission.

A reviewing court must give deference to the Commission's findings of fact. Kitten v State Department of Workforce Development, 2002 WI 154, 252 Wis.2d 561, 576, 644 N.W.2d 649. In addition, because of their experience with the interpretation and application of MERA, WERC's legal determinations have "great weight". "If the agency is charged by the legislature with the interpretation of a statute; the interpretation of the agency is long-standing; and the agency has experience, technical competence, and specialized knowledge that aid the agency in its determination and application of the statute, we have afforded the agency determination great weight." Muskego-Norway v. WERC, 35 Wis.2d 540, 562. WERC has extensive experience in both interpreting and applying MERA for many years. As a result deference must be given to the agency decision in this area as well.

The question is then, under the standard that this court must follow, is the clause ambiguous. The answer is yes. Sauk County argues in its brief to this court that the parties have the right to bargain and change the language of the Recognition Clause to limit the coverage to Human Services and Public Health. This is, however, not the issue. The issue is what does the reference to the 1979 decision mean in the context of the clause. A cursory reading of the language does not clarify what is meant by that clause and the County, in its submission,

does not explain this but merely concludes that the parties are free to modify existing units by mutual agreement.

Since the inclusion of this language is not adequately explained, there is a basis upon which the Commission could find the agreement to be ambiguous. Since there is a basis in the record for support the Commission finding, this court must affirm that portion of the decision.

The third issue is: Could the WERC reasonably determine that the bargaining unit appropriately includes the jail nurse positions. The Commission answered this question in the affirmative. The WERC is empowered by MERA to determine the appropriate collective bargaining unit for the purpose of collective bargaining. See, Wis. Stat. §111.70(4)(d)2.a. WERC is to avoid fragmentation by maintaining as few collective bargaining units as practicable in keeping with the size of the municipal work force. Id. The WERC may decide, in a particular case, that municipal employees in the same or several departments constitute an appropriate collective bargaining unit. Id.

The criteria to be used by the Commission in determining whether individual employees are to be grouped within a single bargaining unit are set forth in Arrowhead United Teachers, 116 Wis.2d, 580, 591-93, 342 NW 2d 709 (1984). They are:

1. Whether the employees in the unit share a "community of interest" that is distinct from that of other employees.

2. The duties and skills of employees in the unit sought as compared with the duties and skills of other employees

3. The similarity of wages, hours, working conditions or other employees.

4. Whether the employees in the unit sought or have separate or common supervision with all other employees.

5. Whether the employees in the unit sought have a common work place with the employees in the desired unit or whether they share a workplace with other employees.

6. Whether the unit sought will result in undue fragmentation or bargaining units

7. Bargaining history.

After applying these criteria the WERC concluded that there did exist a community of interest between the jail nurses and others within the bargaining unit and were appropriate for inclusion. The Commission found that while there were differences, that is no common supervision or work locations, between the jail nurses and others within the unit, that as nurses in a single profession that there is an inherent and substantial community of interest. Again, while differences were noted in terms of programmatic responsibilities of the departments, the nurses share the same fundamental functions and skills. A wage similarity was noted between the groups. The Commission also concluded that inclusion would avoid fragmentation.

Again, the law that is to be applied by the reviewing court is clear. If there is substantial evidence to support the Commission determination it must be

affirmed. Deference is again given to the Commission due to its expertise in the area.

A review of the facts relied upon by the Commission makes it apparent that there is evidence to support its conclusions. This, again, is not to say that the evidence is not subject to different interpretation, however, a different interpretation is beyond the authority of the reviewing court.

The decision of the Commission must be affirmed.

Dated this 11 day of August, 2003.

BY THE COURT:

James Evenson /s/
James Evenson
Circuit Judge

Copies to; Chad Hendee
David Rice