COURT OF APPEALS DECISION
DATED AND RELEASED
MARCH 21, 1995

STATE OF WISCONSIN
IN COURT OF APPEALS
DISTRICT III

BROWN COUNTY,
Petitioner-Appellant,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, and AFSCME DISTRICT COUNCIL 40,
Respondents-Respondents.

No. 94-2261

APPEAL from a judgment of the circuit court for Brown County: VIVI L. DILWEG, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Brown County appeals a judgment affirming a WERC decision that a bargaining unit at a county hospital includes "nursing supervisors." Because WERC used the correct test to determine whether these employes are supervisors under Sec. 111.70(1)(o), Stats., 1/ and the record contains ample evidence to support WERC's decision, we affirm the judgment.

This dispute began when the union filed a petition to clarify the bargaining unit of municipal employes. The union contended that five employes designated nursing supervisors employed at the Brown County Mental Health Center should be part of the same bargaining unit as staff nurses employed at the same facility. Brown County opposed the nursing supervisors' inclusion in the bargaining unit, claiming that the nursing supervisors were management and therefore excluded from the bargaining unit under the Municipal Employment Relations Act (MERA), Sec. 111.70, Stats. The County argues that because nursing supervisors are supervisors for purposes of administrative rules and regulations, they must also be supervisors for purposes of collective bargaining units. WERC investigated the specific job duties of the nursing supervisors and determined that they were not supervisors for purposes of collective bargaining units and should be included in the same bargaining unit as staff nurses.

WERC's determination that the nurses in question are not supervisors for collective bargaining purposes is a mixed question of law and fact. When a legal question is mixed with determinations of fact, the court should defer to the agency having primary responsibility for these factual determinations. ***Nottelson v. DILHR***, 94 Wis.2d 106, 115-18, 287 N.W.2d 763, 767-68 (1980). We must defer to an administrative agency's findings of fact if they are supported by substantial evidence and to its interpretation of a statute when the agency's experience, technical competence

and specialized knowledge aid the agency in its interpretation and application of the statute. *See* ***Samens v. LIRC***, 117 Wis.2d 646, 660, 345 N.W.2d 432, 438 (1984); ***West Bend Educ. Ass'n v. WERC***, 121 Wis.2d 1, 12, 357 N.W.2d 534, 539 (1984).

WERC used the proper seven item test when it determined that nursing supervisors are not supervisors for purposes of determining the collective bargaining unit, *see* ***City Firefighters Union v. Madison***, 48 Wis.2d 262, 279-81, 179 N.W.2d 800, 804 (1970), and its findings on each of these factors is supported by substantial evidence. First, WERC found that the nursing supervisors did not have authority to effectively recommend hiring, promotion, transfer, discipline or discharge of employes. This finding was supported by evidence that no nursing supervisor had ever disciplined a staff nurse, nor did the nursing supervisors participate in hiring decisions or staff nurses' evaluations.

Second, WERC found that the nursing supervisors do not exercise independent judgment in assigning and directing the work force. This finding is based on evidence that the nursing supervisors merely applied hospital policies and procedures when reassigning employes and did not supervise the employes, but rather the activity they performed.

Third, WERC found that the nursing supervisors oversaw twenty to sixty employes, but that there are several layers of management above nursing supervisors. A high level administrator was on call for nursing supervisors to contact for certain situations and problems. WERC also found that the nursing supervisors needed to contact superiors to begin investigations and disciplinary actions.

Fourth, WERC found that nursing supervisors were paid nineteen percent more than staff nurses, but that the higher level of pay was for the nursing supervisors' higher level of professional responsibility. This finding was based on evidence that nursing supervisors must have more experience than staff nurses, but they are paid on an hourly basis with overtime and shift differentials just like the staff nurses. This hourly pay is in contrast to the administrative pay scale according to which all other hospital employes with supervisory responsibilities are paid.

Fifth, WERC determined that nursing supervisors oversee an activity rather than supervising employes. Nursing supervisors carry out almost all of the same tasks as staff nurses and take over staff nurses' duties when there is an absence. Nursing supervisors are primarily responsible for patient care and oversight of the institution as a whole and do not significantly participate in supervisory functions such as hiring, evaluations and discipline.

Sixth, WERC found that nursing supervisors spend a minority of their time performing supervisory functions. This finding is supported by evidence that nursing supervisors spend up to twenty-five percent of their time providing direct patient care and much of the remaining time admitting patients and performing other tasks of a clerical nature.

Seventh, WERC found that nursing supervisors exercise independent judgment but not as supervisors of other employes. Administrators, not nursing supervisors, dictate when investigations and disciplinary actions will be carried out.

Brown County argues that the subject nurses are supervisors within the meaning of MERA, as a

matter of law, because they are considered supervisors under Wis. Adm. Code Sec. HSS 124. There is no evidence that the department in promulgating its rules or the legislature in passing MERA intended that supervisors for purposes of hospital safety are also supervisors for purposes of collective bargaining. The record does not contain any basis for believing that inclusion of the nurse supervisors in the collective bargaining unit will have any effect on the regulations set out in Sec. HSS 124.

Brown County argues that WERC failed to consider the conflict of interest created when a supervisor is in the same collective bargaining unit as the person he or she oversees. This argument is based on the County's assertions regarding the nurses' duties. In light of WERC's finding that these employes do not have real supervisory power, no actual conflict of interest exists.

Finally, Brown County contends that WERC's decision is not consistent with its prior decision. In its memorandum accompanying its order, WERC discusses each of the cases cited by the County and distinguishes them from this case. Consideration of the totality of the seven criteria, rather than piecemeal review of individual factors in different cases, supports WERC's determination.

By the Court.--Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

ENDNOTES

1/ A supervisor within the meaning of MERA is "any individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employes, 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 merely routine or clerical nature, but requires the use of independent judgment." Section 111.70(1)(o), STATS. (1991-92).