

STATE OF WISCONSIN
CIRCUIT COURT
COUNTY OF BROWN
BRANCH II

BROWN COUNTY,
Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Respondent.

Case No. 93 CV 1441
Decision No. 17585-A

DECISION

Brown County filed a Petition with this Court on September 28, 1993, for the judicial review under Chapter 227 of a Decision of the Wisconsin Employment Relations Commission (WERC) dated September 21, 1993. Local 1901E, Wisconsin Council 40, AFSCME, AFL-CIO (Union), petitioned to clarify a bargaining unit which includes registered nurses employed at the Brown County Mental Health Center (MHC). The WERC based its Decision on the following facts and findings:

22. The incumbents in the position of Nursing Supervisor do not possess supervisory duties and responsibilities in sufficient combination and degree to be supervisory employees.
23. The incumbents in the position of Nursing Supervisor do not exercise sufficient control and authority over the County's resources or have sufficient involvement at a high level of responsibility in the formulation, determination and implementation of management policy so as to be managerial employees.

The WERC then concluded, based on the Findings of Fact, that "the positions of Nursing Supervisors at the Brown County Mental Health Center are hereby included in the bargaining unit represented by Brown County Professional Employees (Registered Nurses) Local 1901E, AFSCME, AFL-CIO."

After several preliminary matters had been decided by the Court, a briefing schedule was entered, the record was received and the briefs filed. The Petitioner has claimed the WERC committed six errors that demand review and reversal of its Decision. The alleged errors are as follows:

1. Numerous fact findings are not supported by substantial evidence.
2. The WERC erroneously interpreted provisions of applicable law.

3. The WERC failed to consider evidence and make findings on undisputed evidence.
4. The Decision deviated from established decisions and precedents of the Respondent and the Wisconsin Supreme Court.
5. The Decision was in violation of applicable statutory and Administrative Code provisions relating to the regulation of hospitals.
6. The Decision and Order are based on an erroneous application of law to the evidence submitted.

I have reviewed the entire record of the WERC, as submitted to me by the County, paying special attention to the record citations submitted to me by both sides to this dispute. I made notes as I read the transcripts of the various hearings. When I reviewed my notes and compared them to the Findings of Fact of the WERC, which I had not read since November of last year, I found that my notes coincided with its findings. My conclusion after reading the record, with no dependence on the WERC's expertise, was that the Nursing Supervisors lacked the supervisory responsibility required both by decisions of the WERC in the past and decisions of the courts. The Nursing Supervisors clearly lacked the duties in management to classify them as management personnel. That issue has not been strongly argued by the County. There is conflicting evidence on some points raised by the County, but the fact finder is the appropriate entity to make the determination of which witnesses to believe. Every finding of fact that the WERC made is supported by evidence in the record. While it is true that the evidence is not always uncontested, it is always substantial. In fact, if I were reviewing the record de novo, I would make the same findings of fact as the WERC. Obviously, based on my review of the record, I cannot agree with the County that the totality of the evidence leads to only one rational conclusion, that the Nursing Supervisors are supervisory.

The requirement under Sec. HSS 124 of the Wisconsin Administrative Code that hospitals have at least one registered nurse with administrative authority on "all shifts" does not require that those employees meet the requirements of supervisory authority under Sec 111.70(1)(o), Wis. Stats. The County seems to place great dependence on the HSS requirement and even claims that the WERC, in its Decision, has removed the administrative authority from its nursing staff. However, the WERC has simply found that the County has not provided its Nursing Supervisors with sufficient supervisory authority to meet the tests set forth in the law.

First, the Nursing Supervisors do not have the authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees. Although there were witnesses who testified that they did have the authority to effectively recommend, there were others who testified that the Nursing Supervisors' only responsibility was to report the incident. All other nursing staff had the same responsibility. If the incident occurred when no superiors were on duty, then they had the responsibility to contact their superior by telephone to be instructed on how to proceed. Bonnie LaRose testified that if there was an incident of alleged or actual client abuse, the Nursing Supervisor must call to report it and give her all the data. Then Ms. LaRose makes the decision whether to have the Nursing Supervisor serve a Notice of Investigation or whether some other action needs to be taken. There was no dispute that they had no authority to promote, reward, adjust grievances, decide even the most minor discipline or determine staffing levels, other than on an emergency basis.

The one fact that was repeated again and again was that the most important function of Nursing Supervisors is supervising the care given to patients by the nursing staff. As I reviewed the record, I also determined that the Nursing Supervisors spent substantial time taking care of covering sick calls by staff. This did involve the authority to direct and assign the work force to cover any absences or increased admissions. It did not involve planning or scheduling the regular work force according to the testimony of Maureen Ackerman. The procedure for filling staff vacancies was set forth in detailed policy and procedure manuals which the Nursing Supervisors were required to follow, taking into account seniority and other factors. Brown County emphasized the Nursing Supervisors' duty to admit patients. Yet, even that task was controlled by detailed policy and procedure that have been developed by the medical staff and administration, which direct what clients can be admitted to the facility and under what circumstances. Usually the admission must be approved by a member of the medical staff. Their authority to direct and assign the work force is limited, and the assignment only lasts for one shift or a portion of a shift. They play no role in scheduling a week's or month's work for their shift. Neither admissions or scheduling to cover missing staff involves supervision of the nursing staff.

The third factor that the WERC examined was the number of employees supervised. The WERC found that 20 to 60 employees were giving patient care on any one shift. Again, there was a dispute in that testimony, and some witnesses said the census never exceeded 40.

The fourth factor was the level of pay. It is undisputed that the Nursing Supervisors are paid 19% more than other registered nurses. However, it is also undisputed that they are paid by the hour, as are all other registered nurses, and not on the administrative pay scale, as are all other persons with supervisory authority at the institution.

The fifth factor was whether the Nursing Supervisors are primarily supervising an activity or primarily supervising employees. The WERC concluded they were primarily supervising an activity, nursing care. The registered nurse on a unit carries out almost all the same tasks as the Nursing Supervisor, and the Nursing Supervisor does not get involved in the unit, except to do rounds. If there is no registered nurse on a unit, the Nursing Supervisor then takes over the registered nurse's duty. While the Nursing Supervisor must interpret policies and procedures, so must the other registered nurses supervise policy and procedure. While the Nursing Supervisor must report incidents of patient abuse and misconduct, so must the registered nurses report the same incidents. The staffing duties, admission duties and some very limited investigatory functions seem to be exclusive to the Nursing Supervisors. The Nursing Supervisors also act as a resource to the other nursing staff, giving advice when asked and being available through rounds to answer questions.

If there is a medical situation that arises, the Nursing Supervisor or the registered nurse on a unit must make a determination that this medical situation needs to be addressed. Then they are required to telephone the physician on call to get permission to send the patient to a medical hospital. If the direction is given, then they fill out the paperwork to transfer the patient and send the patient to the emergency room. This function is again patient care rather than supervision.

The sixth factor was the amount of time the Nursing Supervisors expend in supervising employees

rather than patient care. Testimony indicated the Nursing Supervisors spend up to 25 % of their time in patient care, while all the remainder of their time is not spent in supervising employees. Instead, they spend much time admitting patients, handling telephone calls and other typically clerical duties. The County argues that the small amount of time in direct care of patients means that they are supervisory personnel. The County's argument is not supported by the evidence. Yet, while a small amount of the Nursing Supervisors' time is spent in direct care, the rest of their time is spent in other activities, not involving the supervision of personnel.

The final criteria was the amount of independent judgment and discretion exercised in the supervision of employees. The WERC found that the Nursing Supervisors exercise discretion and independent judgment, but so do the other registered nurses. The County argues that the nurses use such judgment in admissions, and I believe that they do, but admissions do not involve the supervision of employees. The WERC found that the Nursing Supervisors use little independent judgment when it comes to the supervision of employees. The findings of the WERC are fully supported by substantial evidence.

The County argued in its third point that the WERC failed to consider the testimony and documentary evidence submitted to it which was uncontroverted. I have already addressed most of the points argued above. I find no evidence that it failed to consider. I do find evidence that it rejected in favor of other competing evidence; for instance, the evidence that Nursing Supervisors possess the authority to "effectively recommend" as to personnel matters. The record is replete with people saying that Nursing Supervisors can effectively recommend, but no evidence that they ever have effectively recommended. In fact, there is testimony that all they can do is report the conduct. Sometimes they have the duty to collect facts, but they are never further involved in the discipline or hiring of personnel.

The County has argued vigorously that the WERC's Order creates a conflict of interest between the Nursing Supervisors and the registered nurses and that the WERC erred when it made no finding of fact as to the conflict of interest issue. The issue was addressed in the proceedings, and there was conflicting testimony as to whether having the Nursing Supervisors in the same bargaining unit as the registered nurses would cause a conflict of interest. The same witnesses who testified that the Nursing Supervisors had direct supervision of the registered nurses found a conflict. The witnesses who testified that the Nursing Supervisors had very limited supervisory authority, if any, found no conflict. Since the WERC found that the Nursing Supervisors were not acting in a supervisory capacity, and since it found that the registered nurses had many of the same supervisory duties as the Nursing Supervisors, there is no necessity of such a finding. The finding the County asks for would only be necessary if the WERC had found that the registered nurses were directly supervised by the Nursing Supervisors.

The County's position that the WERC's Decision has no basis in fact or law does not conform with my reading of the cases. Again, after I read the cases and reviewed the record, I had noted every fact and conclusion that the WERC made without looking at its findings.

I have already addressed the County's fifth objection, that the WERC's Decision violates applicable statutory and administrative provisions relating to the regulation of hospitals by the Wisconsin Department of Health and Social Services. The Decision of the WERC does not affect the

Department of Health and Social Services requirements. They are separate and distinct.

The County's sixth objection, in light of my review, is unfounded. The major objection the County has, that permeates all its allegations of error, is that the County does not agree with the WERC's view of the evidence. The County believes that the Nursing Supervisors have supervisory authority under the existing case law. The WERC, based on its Findings of Fact, does not. I agree with the WERC. Not only are its findings based on substantial evidence, reviewing the record *de novo*, I would come to the same conclusion. Because of my review of the record, I do not address the burden of proof issues. Whatever burden of proof I apply, I would affirm the Decision and Order of the WERC.

Counsel for the Respondent shall prepare an Order in accordance with this Decision and submit it to the Court for approval and signature.

Dated this 28th day of June, 1994.

BY THE COURT:

/s/ Vivi L. Dilweg

Honorable Vivi L. Dilweg
Circuit Judge, Branch II