

RECEIVED

MAR 22 1982

STATE OF WISCONSIN : CIRCUIT COURT :
BRANCH 10

WISCONSIN EMPLOYMENT
COUNTY OF DANE
RELATIONS COMMISSION

WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL
EMPLOYEES, AFSCME, AFL-CIO,

Petitioner,

-vs-

Case No. 81 CV 1992

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION,

Respondent. Decision No. 17882-A

MEMORANDUM DECISION

This is an action for judicial review of a decision and order of the Wisconsin Employment Relations Commission (WERC) finding that Licensed Practical Nurses (LPNs) employed by the Sauk County Health Care Center (SCHCC) are "supervisors" within the meaning of the Municipal Employment Relations Act ~~(the Act)~~, and excluding LPNs from the employee bargaining unit.

The issue on review is whether WERC correctly concludes as a matter of law that the duties of LPNs employed by SCHCC are sufficiently supervisory in nature to justify excluding the position from the bargaining unit. For the reasons that follow, the decision of WERC is affirmed.

FACTS

Petitioner filed a request with Respondent for a determination of whether LPNs should be included in, or excluded from, an existing certified bargaining unit that included all employees of SCHCC,

except supervisory, managerial, professional, confidential, craft and seasonal employees. After hearing, Respondent made the following findings of fact:

SCHCC, a municipal employer, is a health care center consisting of seven separate patient care units with separate nursing stations. On both day and evening shifts, each unit is under the direction of a Unit Supervisor. On the evening shift, a Unit Supervisor is usually responsible for more than one unit. On each shift, there is a Supervisory Nurse, who must be a Registered Nurse (RN) to whom the Unit Supervisors report. On the day shift, the Supervisory Nurse is the Assistant Director of Nursing, or in her absence, the Director of Nursing. The Unit Supervisors are either RNs or LPNs.

SCHCC employs approximately 18 RNs and 20 LPNs. Additionally, SCHCC employs approximately 160 Nursing Assistants (NAs).

From three to six NAs are assigned to each unit on the day shift; from three to five on the evening shift; and from three to four on the night shift.

The maximum hourly wage rate paid by SCHCC (after 13 months employment) are \$7.19 for Supervisory Nurse, \$6.85 for RN, \$5.36 for LPN, and \$4.44 for NA. The hourly night shift differential is \$.75 for RNs and LPNs and \$.20 for NAs.

The Unit Supervisors spend the majority of their time on patient care, which involves some different duties for RNs than for LPNs. Each Unit Supervisor on a daily basis, irrespective of whether the individual is a RN or LPN, assigns and oversees the

patient care by NAs and schedules their work breaks. Unit Supervisors issue oral and written warnings to NAs. They evaluate the performance of each probationary NA, recommending continuation or termination of employment. The Unit Supervisors' recommendations are usually followed by SCHCC.

Unit Supervisors evaluate the performance of all non-probationary NAs annually and review those written evaluations with the NAs. If an NA's performance is unsatisfactory, Unit Supervisors can -- and have -- recommended either the delay of the NA's movement on the merit wage progression schedule, the transfer of the NA to a non-patient care position, or the termination of employment. On at least one occasion in the year prior to the hearing before Respondent, a Unit Supervisor effectively recommended that a NA be promoted to a non-posted position.

No Unit Supervisor, whether a RN or LPN, interviews or hires new employees, sets staffing levels, schedules work for employees, or arranges replacements for absent employees. All of these functions are performed centrally by SCHCC's Personnel Department.

Both RN and LPN Unit Supervisors represent SCHCC at the first step of the grievance procedure initiated by NAs.

On the basis of these facts, Respondent concluded that LPNs are supervisory employees within the meaning of Section 111.70 (1)(b), Stats., and ordered that they be excluded from the bargaining unit.

STATUTES INVOLVED

Section 111.70(2). Rights of municipal employees. Municipal employees shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection

.

Section 111.70(1)(b). "Municipal employee" means any individual employed by [inter alia, a county] other than an independent contractor, supervisor, or confidential managerial or executive employee.

Section 111.70(1)(o). "Supervisor" means: 1. As to other than municipal and county firefighters, 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 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.

DECISION

There is substantial evidence in the record supporting WERC's findings of fact. Petitioner contends only that WERC drew an erroneous legal conclusion under Section 111.70(1)(a), Stats., from the facts.

Because the application of Section 111.70(1)(a), Stats., to the facts herein is a question of law, WERC's conclusions are not binding on the Court. See, e.g., Dairy Equipment Co. v. DILHR, 95 Wis. 2d 319, 326, 327 (1980). Nonetheless, the reviewing court is to give deference to the administrative agency's knowledge and expertise, particularly in an area where the legal determination

requires administrative expertise. Section 227.21(11), Stats. See also, Milwaukee v. WERC, 71 Wis. 2d 709, 714-15 (1976).

Whether a particular employee is a "municipal employee" under Chapter 111.70, Stats., for inclusion in a certified bargaining unit is an issue requiring application of such administrative expertise. See, e.g., Milwaukee v. WERC, 43 Wis. 2d 596, 601 (1969).

The appropriate scope of judicial review herein is to determine whether the agency's conclusion is consistent with the purpose of the statute, and whether it is reasonable. Milwaukee v. WERC, 71 Wis. 2d at p. 716. Moreover, the agency's interpretation need not be the only reasonable one. Milwaukee v. WERC, 43 Wis. 2d at p. 602.

The self-avowed administrative criteria Respondent uses in deciding whether a supervisory capacity exists include 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 skill or for his 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 time supervising employees; and

(7) The amount of independent judgment and discretion exercised in the supervision of employees, Firefighters Union v. Madison, 48 Wis. 2d 262, 270-71 (1970).

Respondent has frequently explained that it is not necessary that all of the above factors be present in order to find that an employee is a supervisor; but, rather, that the factors need only appear in sufficient combination to support that conclusion. See, e.g., Village of Chenegra, Dec. No. 13653 (1975).

Respondent based its conclusion herein upon a number of factors it found on the record: (1) LPNs function in an identical manner when acting as Unit Supervisors as do RNs, who are apparently excluded from the bargaining unit; (2) LPNs acting as Unit Supervisors have the capacity to effectively recommend the promotion, transfer, discipline or discharge of NAs; (3) LPNs acting as Unit Supervisors assign patient care work to NAs on a daily basis and schedule their work breaks; (4) the overall ratio of LPNs to NAs is 20 to 160; (5) an LPN acting as Unit Supervisor at any given time has authority over three to six NAs; and (6) LPNs acting as Unit Supervisors serve as the representatives of SCHCC in the first level grievance procedure at the health care facility.

The record, of course, permits identification of additional factors which mitigate against the conclusion that the LPNs are supervisory employees of SCHCC: the absence of any role in hiring NAs; the small pay differential between LPNs and NAs; the characterization of LPNs as "working supervisors"; and the substantial portion of LPN time spent in primary patient care as opposed to supervision.

The weight to be given to the factors present in the record, and the ability to distinguish employees, whose relationship to management imbues them with interests which are significantly at variance with those of other employees, lies peculiarly within the administrative expertise of the WERC. Milwaukee v. WERC, supra, 71 Wis. 2d at p. 716. Unless Respondent's determination is inconsistent with the purpose of the Act, or is unreasonable, it should be affirmed.

Because the record reflects that LPNs, like RNs, have significant duties connecting them with management and with management functions at SCHCC, supporting the conclusion that their interests may be significantly at variance with NAs, this Court cannot say Respondent's conclusion that LPNs are "supervisors" is either inconsistent with the Act or unreasonable.

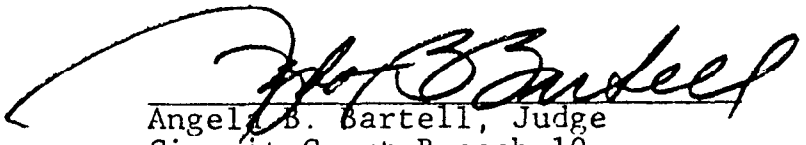
Petitioner argues, however, that Respondent's conclusion is inconsistent with its prior decisions (See Petitioner's Brief at pp. 4, 5, 7, 8). Respondent disagrees, of course, with Petitioner's interpretation of those cases. Assuming arguendo that earlier WERC decisions support petitioner's claim, it is clear that while "[C]onsistency, of course, is a virtue both in administrative and in judicial determinations. . . inconsistencies. . . arising by comparison are not proof of arbitrariness or capriciousness." Robertson Transportation Co. v. PSC, 39 Wis. 2d 653, 661 (1968). "[A]n agency does not act in an arbitrary or capricious manner if it acts on a rational basis." Id.

CONCLUSION AND ORDER

For the reasons stated above and on the basis of the entire record herein, I conclude that Respondent's exclusion of LPNs from the bargaining unit certified at SCHCC is reasonable and is not inconsistent with the purpose of Chapter 111.70, Stats. Deferring, therefore, to Respondent's application of administrative expertise in reaching its conclusion of law, Respondent's decision and order dated March 19, 1981, is hereby affirmed.

Dated this 17th day of March, 1982.

BY THE COURT:



Angel B. Bartell, Judge
Circuit Court Branch 10
Dane County, Wisconsin

cc: Richard V. Graylow
Robert M. Hesslink, Jr.
✓ John D. Niemisto, AAG