

COURT OF APPEALS DECISION
DATED AND RELEASED March 7, 1991
STATE OF WISCONSIN
IN COURT OF APPEALS
DISTRICT IV

Columbia County,
Petitioner-Respondent,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Respondent-Appellant,

AFSCME LOCAL 2698,
Co-appellant.

No. 90-0987
Decision No. 25O92

APPEAL from an order of the circuit court for Columbia county:
DONN H. DAHLKE, Judge. Order modified and, as modified, affirmed.

Before Eich, C.J., Dykman and Sundby, JJ.

PER CURIAM. The Wisconsin Employment Relations Commission (WERC) and AFSCME Local 2698 appeal from an order reversing a decision of WERC which classified a collective bargaining unit represented by AFSCME Local 2698 to include licensed practical nurses (LPN's) employed at the Columbia County Home. Because we conclude that WERC's decision depends on a finding of fact which is not supported by substantial evidence in the record, we modify the trial court's order to remand the matter to WERC and affirm as modified.

Columbia County, which operates the Columbia County Home, petitioned WERC to clarify an existing bargaining unit at the Home to exclude LPN's on the ground that they are supervisors within the meaning, of sec. II 1.70(1)(o), Stats. Following an evidentiary hearing, WERC concluded that the LPN's were not supervisors and should be included in the bargaining, unit. The trial court concluded that WERC's decision was unreasonable and reversed.

In reviewing a trial court's reversal of an administrative agency decision, our scope of review is the same as the trial court's. We owe no deference to the trial court's decision. Esparza v. DILHR, 132 Wis.2d 402, 405, 393 N.W.2d 98, 100 (Ct. App. 1986). A reviewing court must uphold WERC's findings of fact if they are supported by substantial evidence in the record. Sec. 227.57(6), Stats.

Section 111.70(1)(o), Stats., defines "supervisor" as

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.

WERC examines the following factors to decide whether a public employee is a supervisor:

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 or her skills or for his [or 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 [or she] spends a substantial majority of his [or her] time supervising employees; and
7. The amount of independent judgment and discretion exercised in the supervision of employees.

City Firefighters Union, Local No. 311 v. City of Madison, 48 Wis.2d 262, 270-71, 179 N.W.2d 800, 804-05 (1970). No one factor is determinative; rather, the totality of the criteria must be considered. Crear v. LIRC, 114 Wis.2d 53-i, 541-42, 339 N.W.2d 350, 353 (Ct. App. 1983).

WERC found that, since approximately 1983, when state directives brought residents to the Home who required a higher degree of skilled care, the levels of care became more acute, requiring the upgrading of staffing patterns and the hiring of more licensed personnel, namely LPN's and RN's. As a result, more LPN's took on leadership roles. All LPN's serve as team leaders. The team leader job description provides in part that the employee supervises the nursing staff, completes nursing assistant evaluations, documents work rule violations and makes specific recommendations of corrective action. The LPN job description also provides that the LPN recommends discharge or termination of nursing assistants.

WERC found that, the LPN'S, functioning as team leaders, are not involved in the hiring process, cannot grant requests for vacation, sick leave or overtime, do not decide whether to replace an employee who calls in sick, and do not have direct access to personnel files.

WERC further found that LPN's report deviations from standard patient care or inappropriate behavior to the Director of Nursing or a supervising nurse and recommend what should be done. If the employee is verbally counseled the LPN is present along with the supervising nurse. LPN'S, acting as team leaders, have authority to issue, and have issued, disciplinary notices, which are the first step in the disciplinary process, after reporting and discussing the matter with the supervising nurse. LPN's have recommended follow-up corrective action as well as discipline. However, WERC found that LPN's lack authority to effectively recommend discharge.

WERC further found that LPN's perform approximately four annual and probationary evaluations on nursing assistants each year. The evaluations LPN's perform cannot lead to a nursing assistant being denied a transfer, forfeiting a pay raise or being disciplined, although a nursing assistant who receives a poor evaluation will not be retained. LPN evaluations of nursing assistants are often signed by an RN.

WERC compared the present LPN job description, but not the team leader job description, with that at issue in its prior decision involving the same employer. It found the present LPN's have less supervisory authority. It also compared this case to two of its prior decisions, but found those cases distinguishable.

The County claims that WERC's decision is erroneous because the LPN's have authority to impose discipline and recommend higher levels of discipline. WERC specifically found that "[t]he current LPN job description states that LPN's may recommend the discharge or termination of nursing assistants, however, there was no evidence that this has in fact occurred." Gerald Baldwin testified that an LPN, Lisa McNamee, effectively recommended that an aide, Charlotte Clark, be let go for failing to satisfactorily perform her job. (An exhibit indicates that it was, in fact, LPN, Clara Kennedy, who wrote the disciplinary warning'.) WERC's finding that the LPN's do not have authority to effectively recommend termination lacks a substantial basis in the record.

When an agency's decision depends on any fact found by the agency which is not supported by substantial evidence in the record, the reviewing court shall set aside the decision or remand the case to the agency. Sec. 227.57(6), Stats. Because WERC's decision depended, in part, on this finding, we remand the matter to the agency for further consideration.

We comment briefly on the other issues decided by the trial court in case they arise again in another appeal. First, we disagree with the trial court's conclusions that WERC made a "fatally defective" finding concerning the structure of the home. WERC correctly found that the Home is divided into the Manor, which has four wings, and the East Wing, which is physically separated from the Manor. We further disagree that WERC failed to provide a rational basis for its deviation from its prior decisions in Dodge County, Dec. No. 11469-A and Sauk County, Dec. No. 17882-A. Finally, WERC did not err in comparing the job duties of the LPN's with those found in its previous decision regarding the Home. The County argued to WERC that the changes which occurred at the Home beginning in 1983 impacted on the LPN's job duties, changing those duties from what they had been when the LPN II's were previously included in the bargaining unit. WERC could rely on the prior decision to determine whether the County's argument was accurate. However, WERC did not compare the team leader job description with the LPN II job descriptions from 1975. It should do so on remand because all of the LPN's function as team leaders.

By the Court. Order modified to provide that the matter is remanded to WERC for further consideration and, as modified, affirmed.

This opinion will not be published. Rule 809.23(1)(b)5, Stats.