

STATE OF WISCONSIN
COLUMBIA COUNTY
CIRCUIT COURT

COLUMBIA COUNTY,
Petitioner

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Respondent

Case No. 88 CV 098
Decision No. 25092

MEMORANDUM DECISION

In 1974, Local 2698, AFSCME, AFL-CIO was certified by the Wisconsin Employment Relations Commission (WERC) as the exclusive bargaining agent for this Columbia County (Home and Hospital) bargaining unit. Included within this bargaining unit were employees who were employed in the classification of licensed practical nurse (LPN).

On March 20, 1987, Columbia County filed a petition with the WERC seeking a clarification of the bargaining unit represented by AFSCME Local 2698. The object of the County's unit, clarification petition was to exclude the LPN classification from the existing unit. Currently there are fourteen (14) LPN positions in the bargaining unit.

Columbia County seeks judicial review of a decision of the WERC, which found that the position of "Licensed Practical Nurse Team Leader" (LPN) at its Columbia County home is not a supervisory one within the meaning of Wis. Stat. 111.70(1)(o). Columbia County initiated the action before the commission to clarify the existing bargaining unit of employees at the County Home. It contended that its licensed practical nurse-team leaders should no longer be included within the bargaining unit because they functioned as supervisors under the Municipal Employment Relations Act ("MERA"), The WERC concluded that all of the nursing personnel in the home's five patient units are under the supervision of a single registered nurse (RN) supervisor on each shift. The petition seeks a review of these findings and conclusions.

The Columbia County Home is licensed as a nursing home pursuant to Wis.Stat. 50.01(3) and 50.03. Its internal organization includes a nursing department headed by the director of nursing to be a registered nurse. The home also employs RN's to function as the charge nurse, or supervising nurse, on each shift in accordance with Wis. Admin. Code. An RN charge nurse is required on each shift because the home has more than 100 skilled care patients in residence. The charge nurse reports to the DON and is responsible for the oversight of the nursing services in the entire facility on each shift. Of the remaining nurses, irrespective of whether they are RN's or LPN'S, one functions as a team leader in each of the 5 units over the nursing assistants.

The LPN'S, with the exception of two employees who were classified as LPN II's were originally included within the collective bargaining unit by stipulation at the time of the original representation election. The union subsequently petitioned for clarification of the unit to include the two 2 LPN II's in the unit after the employer hired additional RN's to staff every shift. In a 1975 decision, the commission concluded that these two LPN's were not supervisors, and hence were also includable within the collective bargaining unit.

Beginning in 1983 there were three changes in the operation of the County Home which impacted on the job duties of LPN'S. First, because of the reimbursement of hospitals based upon diagnostically related groups (DRG's), the patient mix at the Home became progressively more skilled and required both a substantially larger nursing staff and a greater degree of supervision over the nursing assistants providing the care. Second, the nursing home added additional beds in the form of a locked and semi-locked ward. This-changed both the physical layout of the facility and the way that services were provided in the home. Finally, a nursing shortage required the LPN's and RN's be hired and used virtually interchangeably, which raised the level of--responsibility of the LPN'S. These changes led to the development of the team leader concept of operation.

There are now five separate nursing work units, each of which is overseen by a team leader. Four of the units function in the main building or "Manor", each on a separate wing, and the fifth unit is the locked/semi-locked ward. Each of these teams is "headed by a nurse team leader, who is either a registered nurse or a licensed practical nurse. On all units, RN's and LPN's are used as team leaders interchangeably. All of the LPN'S serve as team leaders at all times, there are no other jobs performed by LPN'S.

There are currently twelve RN's in the facility, nine part-time and three full-time, who perform team leader responsibilities. There are approximately 14 LPN team leaders, nine part-time and five full-time.

The only significant difference in responsibility between an RN/team leader and LPN/team leader is that the RN can do a formal patient assessment and can take telephone orders from physicians. These additional patient responsibilities for the RN's do not, however, affect the degree of supervisory authority exercised by each of the two types of nurses over the nursing assistants. Each team leader is responsible for supervising between three and six nursing assistants at any given point in time.

The nursing home is physically laid out so that the four wings in the manor come together at one' point like the spokes of a wheel. The hub of that wheel is a single nursing station, but a person cannot physically see from one wing to another.

The locked/semi-locked unit is physically removed from the other units. The team leaders are therefore directly responsible for overseeing these wings or work units to insure that each of the nursing assistants are performing their job assignments properly. Decisions regarding what needs to be done and which assignments need to be made to resolve problems occurring on each work unit during a shift are made by the individual team leaders.

A typical team leader's day is spent in passing medications and doing prescribed treatments,

charting in patient records, and overseeing the other care being given to the residents by the aides. The medications and treatments take between one and one-half to two hours, twice per day, and the charting takes about a half-hour each day. During their passing of medications and performing of treatments, however, the team leaders also observe the work of the nursing assistants. The unrebutted evidence at the hearing established that team leaders spend in excess of 50% of their time actually supervising the nursing assistants in the performance of their job duties.

The team leaders, including the LPN'S, actively participate in the written evaluations of the nursing assistants that they supervise. In fact, these evaluations are routinely done by the LPN team leaders themselves. These evaluations are taken into consideration when employees are considered for transfer, discipline, and pay adjustments. LPN's themselves are evaluated on the basis of the supervisory skills that they possess.

The team leaders are expected to take corrective action on employee matters, administer oral and written reprimands, and to recommend more severe forms of discipline for the members of their teams, when warranted. Such discipline is routinely imposed by all team leaders, although admittedly the need for discipline is not frequent. The recommendations of the team leaders on these more severe disciplinary matters are generally followed.

ISSUES

1. Was there a rational basis for the decision of the Wisconsin Employment Relations Commission that the LPN's employed by Columbia County should not be classified as supervisors under Sec-111.70, Wis-Stat., the Municipal Employment Relations Act (MERA), and therefore could be properly included within the collective bargaining unit represented by Local 2698, AFSCME, AFL-CIO?

2. Did the WERC err as a matter of law in considering evidence that was not admitted into evidence at the hearing nor for which official notice was properly taken, and did they err as a matter of law in entering findings of fact contrary to the undisputed evidence of record?

The Commission concluded, as a matter of law, that the LPN position at the Columbia County Home is not supervisory within the meaning of Sec. 111.70(1)(o), Wis.Stat., and therefore, the occupants of said position are municipal employees within the meaning of Sec. 111.70(1)(i), Stats.

The interpretation of a statute by the Commission presents a question of law that the court reviews without deference, Sec. 227.57(2), Wis. Stat. The Commission's interpretation of the Municipal Employment Relations Act is entitled to "great weight" and will be affirmed if it is reasonable, even though an alternative interpretation is also reasonable. In light of the Commission's expertise in this area, a reviewing court will sustain the agency's interpretation of the statute if it rests upon a rational basis and is consistent with the purposes of the statute. City of Milwaukee v. WERC, 71 Wis.2d 709,715, 239 N.W. 2d 63, 66 (1976).

Sec.111-70(1)(o), Wis. Stat., defines a supervisor, for the purposes of the Municipal Employment Relations Act, as:

[A]ny 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 merely routine or clerical nature, but requires the use of independent judgment.

The Commission considered several factors in making its determination as to whether a position is supervisory in nature,

factors that have been applied consistently in the past, including:

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 skills or for his supervisor 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;
7. The amount of independent judgment exercised in the supervision of employees.

In an effort to determine whether or not there was a rational basis for the decision of the Wisconsin Employment Relations Commission that the LPN's employed by Columbia County should not be classified as supervisors under Sec. 111.70, Wis-Stat., the Municipal Employment Relations Act, and therefore could properly be included within the collective bargaining unit, this Court has reviewed the entire record of the proceedings in question.

The first finding of fact that is completely incorrect and fatally defective, is that the home is divided into two units, the Manor and the East Wing. The uncontroverted testimony is that the operation consists of 5 units, 4 of them radiating out from the center, and the 5th, the locked unit, that is actually a separate wing, with a separate nurses' station, and separate staff that is located by the kitchen, and dietary unit. The uncontroverted testimony also indicates that there is a team leader in charge of all of the nursing assistants on each of the wings, and also the locked unit. As to the locked unit, the testimony is that the supervising nurse may spend as little as five minutes a day in that unit.

The Commission, in its decision, relied very heavily on a prior Case between the same parties involving LPN II's. This evidence was clearly not introduced in the hearing, and no reference of any kind was made during the hearing. This Court has read the entire record of the proceedings, and the first time that this Court was aware of the LPN II's, was in the decision of the Commission. The Commission went to great lengths to compare the authority and responsibility of the current LPN's and the LPN II's, even though the case of the LPN II's was a fifteen year old determination, on the status of two LPN II's, and was a number of years prior to the introduction of the team concept currently in existence. The Court notes that approximately one-half of the discussion portion of the decision is related to the comparison with the former LPN II positions and the Commission's prior decision on these two individuals, and that this material was improperly interjected to this hearing in that it was not properly admitted or referred to, and the improper admission of a fifteen year old case, to a controversy after the team concept had been admitted, was improperly and extremely prejudicial to the county.

After giving the great weight to the Commission's interpretation of the Municipal Employment Relations Act, this Court feels that their interpretation is unreasonable, and finds as a matter of law, that the LPN'S, who are all team leaders, are in fact, supervisory personnel, and as such, should be excluded from the bargaining unit represented by AFSCME Local 2698.

Prior to 1983 or 1984, nursing homes were basically long-term care facilities, where now, hospitals discharge the patients much sooner, and many are there for a shorter period of time, requiring rehabilitative services. Because of this, staffing patterns have been upgraded, and the number of employees required has increased, as has the need for supervisory personnel. The Columbia County Home switched to the team concept where each of the 5 units would have a team leader, who would supervise the three to six nurses' aids in that particular unit. There would be one RN as supervisor over the team leaders, and the Director of Nursing would be in charge of the entire nursing staff. The team leaders could be either an RN or an LPN, however the nursing supervisor, by State law, would have to be an RN. The team leader supervised all of the aids on her particular wing. The team leader is responsible for the directing of the patient care in the unit and to the individuals supplying this care. The team leader is the first stage in the grievance procedure in that if something is not done correctly, she may speak to the individual involved, and may also directly

recommend an employee nursing Assistant for discipline. As stated previously, the RN's (who are already excluded from the bargaining unit), and the LPN's are both utilized as team leaders, and as such, their supervisory duties are identical. The only differences between the two would be any duties or responsibilities that would have to be assumed by the RN by virtue of their license, such as an evaluation of a patient.

It is correct, that the LPN's do not have the authority to transfer, promote, suspend, terminate or hire, and they cannot grant requests for vacation, personal days, sick leave, or overtime. However, the RN's are in exactly the same position, as they do not have any of the above duties or responsibilities either, as all of the above are vested solely in the Director of Nursing or her designee, in her absence.

The Director of Nursing cannot supervise all of the details for this entire large complex operation. There must be supervisory assistants. The county has set forth this supervisory level in its organization structure.

This Court further finds that the WERC's finding, deviates from its most closely related prior decisions without providing significant explanation. These decisions are the decisions in Sauk County and Dodge County, which are comparable institutions in the same general location in the State.

For all of the reasons previously set forth, the Court does hereby set aside the findings and order of the WERC, and directs entry of an order, excluding the LPN's from the collective bargaining unit of Local 2658, AFSCME.

The attorney from the county may draw up the necessary documents in accordance with this decision.

Dated this 28th day of February, 1990.

By the Court

/s/ Donn H. Dahlke

Donn H. Dahlke, Circuit Judge