

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
WISCONSIN COUNCIL 40, AFSCME, AFL-CIO
Involving Certain Employees of
LINCOLN COUNTY (PINE CREST NURSING HOME)

Case 83
No. 57635
ME(u/c)-985

Decision No. 25513-D

Appearances:

Mr. Phil Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, WI 54476, appearing on behalf of the Pine Crest Nursing Home Employees Union, AFSCME, AFL-CIO, Local 342.

Mr. John Mulder, Administrative Coordinator, 1104 East First Street, Merrill, WI 54452, appearing on behalf of Lincoln County.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER
CLARIFYING BARGAINING UNIT

Wisconsin Council 40, AFSCME, AFL-CIO, filed a petition with the Wisconsin Employment Relations Commission on June 29, 2000, asking that the positions of Recreational Therapy Assistant I and II (RTA-I and II) (referred to by AFSCME in its petition as "Activity Aides") be included in a Lincoln County non-professional employee bargaining unit represented by Pine Crest Nursing Home Employees Union, AFSCME, Local 342. The County and AFSCME subsequently agreed that three RTA-IIs properly belonged in the AFSCME bargaining unit leaving the sole position at issue the RTA-I. The County, contrary to AFSCME, argues the RTA-I is a supervisor and/or a professional employee.

Dec. No. 25513-D

A hearing in the matter was held in Merrill, Wisconsin, on January 3, 2001, before Examiner Steve Morrison, a member of the Commission's staff. The parties submitted briefs on March 21, 2001.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Pine Crest Nursing Home Employees, AFSCME, AFL-CIO, Local 342, herein the Union, is a labor organization with a mailing address of 7111 Wall Street, Schofield, WI 54476.

2. Lincoln County, herein the County, is a municipal employer with a mailing address of 1104 East First Street, Merrill, WI 54452. The County owns and operates a long-term care facility called Pine Crest Nursing Home, herein Pine Crest. At full capacity, Pine Crest has 180 residents. The Administrator of Pine Crest is Tim Meehan, the Recreation Director is Jean Curtis and the incumbent Recreational Therapy Assistant I is Angela Severt.

3. The Union represents all regular full-time and regular part-time employees who are employed at Pine Crest, excluding department heads/supervisors, professional, confidential and office personnel, registered nurses, licensed practical nurses and student trainees.

4. The Recreational Therapy Assistant I job description is as follows:

Recreational Therapy Assistant I
Reports to: Recreation Director

JOB OBJECTIVES:

Under the supervision of the Recreation Director, assists in the provision of Recreational Therapy to residents, leads group activities and one to one therapy as directed. Provides documentation in resident medical records describing progress achieved toward the goals and doing assessments of resident's activities needs to promote their quality of life. This position carries with it the responsibility of supervising other recreational staff as directed in the absence of the Recreation Director.

JOB STANDARDS:

1. Graduation from high school is required. Prior experience or training with geriatric residents in a care setting is preferred.

2. Knowledge of the principals, methods, materials and techniques of Recreational Therapy is preferred.
3. The ability to motivate and involve residents to participate in Recreational Therapy is required. Must be able to form trusting and therapeutic relationships with residents.
4. The ability to read, write and spell in English is required. Basic math skills are required.
5. The ability to make accurate observations and document observations in a clear, concise manner, both orally and in writing is required. Must be able to evaluate resident progress toward recreational goals and assess resident's needs to promote their quality of life.
6. Must be dependable, honest and able to form professional working relationships with Supervisor, other staff and volunteers.
7. The ability to work independently, organize job duties and resident groups is required.
8. Must be able to maintain entrusted confidential information.
9. Must have a valid Wisconsin Driver's License.
10. Must adhere to departmental dress code.
11. Must be able to safely perform Essential Job Functions with or without reasonable accommodation.
12. Must have the ability to supervise other Recreation Staff in the absence of the Recreation Director.
13. Must have the ability to use computer for documenting on the resident's medical record.

ILLUSTRATIVE EXAMPLES OF ESSENTIAL JOB FUNCTIONS:

1. Assists in planning and execution of large and small groups and individual activities.
2. Documents resident participation and progress on appropriate forms in the medical record, OPOC and MDS. Updates Recreational Assessments as needed and as directed.

3. Interviews residents to determine if Recreational Goals are appropriate and meet resident needs and expectations.
4. Prepares materials, gathers residents and holds group and individual activities.
5. Makes one to one visits to residents.
6. Maintains records documenting resident attendance in Recreational Programs.
7. Assists in taking residents on group outings.
8. Maintains records of resident birthdates, anniversaries, etc. for recognition.
9. Assists in the supervision of volunteers.
10. Assists in the seasonal decoration of the facility.
11. Prepares craft and activity material.
12. Provides transportation duties in the absence of the Transportation Clerk and on some outings.
13. Performs related duties as assigned.

ENVIRONMENT:

Approximately 95% of work is done indoors, 5% outdoors. Outdoor work includes taking residents on outings which may entail pushing residents in wheelchairs on even or uneven ground. Exposure to seasonal heat and humidity indoors, to cold, sun and heat when outside. Occasional exposure to blood and bodily fluids due to close work with residents. Exposure to sharp objects such as knives, scissors, tools when preparing resident activities. Some exposure to loud noises from disoriented residents and to some injury due to the unpredictable behavior of disoriented residents. Exposure to paint, paint removers, varnish, nail polish, nail polish remover during resident activities. Regular exposure to cleaners, soaps and disinfectants.

EQUIPMENT USED:

Computer, copy machine, tape player, record player, VCR, electric drill, staple gun, glue gun, hand saw, screw driver, paper cutter, clamps, common electric and plumbing fixtures, telephone, piano, intercom, activity cart, various SS and RO items and Diversional Activities supplies including but not limited to: parachute, beach balls, games, puzzles, cards, dice, etc.

PHYSICAL REQUIREMENTS NEEDED TO PERFORM ESSENTIAL JOB FUNCTIONS:

Strength: Must be able to lift up to 15# regularly throughout shift to handle and carry supplies and push wheeled cart weighing up to 30# regularly in assigned area. Must be able to push a resident in a wheelchair (resident weighing up to

250#) from 50-300 feet up to 130 x per shift. Must be able to push resident weighing up to 250# in wheelchair on uneven ground such as the Fair Grounds, during summer outings.

Coordination: Must be able to set up activity area which entails moving chairs and tables. Must have good hand/eye coordination to assist residents with games, when cutting, sewing, playing musical instruments and preparing supplies and decorations. Must be able to lead resident “exercise” program and drive a van. Must be able to move about between objects and residents to assist in participation.

Mobility: Must be able to transport self and supplies to appropriate areas. Must be able to frequently squat, bend to the floor, reach over the shoulder, twist and kneel when helping residents and communicate at eye level with residents in wheelchairs. Must be able to remain in uncomfortable positions for short periods of time. Must be able to stand on a stool as when hanging decorations and mobiles, must be able to walk with residents. Approximately 20% of time is spent standing, 50% walking and 30% sitting. Must be able to sit for periods of time up to an hour or more when documenting and preparing materials.

Manual Dexterity: Must be able to manipulate equipment listed previously as well as zippers, buttons and ties (as in shoe strings) when working with confused residents to insure their proper attire and safety. Must be able to handle writing instrument.

Vision: Must be able to see objects up close to read, document, use equipment and recognize residents. Must be able to identify a resident within a reasonable distance (20 feet) to recognize a “wandering resident” and to provide general supervision of residents during activities. Must pass Wisconsin Driver’s License exam with or without corrective glasses. Must be able to read directions and warning labels.

Hearing: Must be able to receive verbal directions and hear normal sounds with some background noise so as to communicate with residents and co-workers. Must be able to hear emergency warnings, telephone and intercom.

Speech: Must be able to communicate verbally with residents to provide therapeutic conversation, ask questions and lead groups. Must be able to verbally cue residents to maximize participation. Must be able to report observations.

Smell: Must be able to identify smells from SS Kits and the smell of smoke.

MENTAL REQUIREMENTS NEEDED TO PERFORM ESSENTIAL JOB FUNCTIONS:

Must be able to concentrate on over-all recreational objectives with constant interruption from disoriented residents. Must be able to establish and follow routines, but also vary routines based on individual resident needs. The individual must understand the general concepts of Recreational Therapy and provide input into programs. Must be able to remember what approaches work best with individual residents so as to help them reach optimal functioning.

This position has the responsibility to provide objective direction, supervision and discipline to other Recreation Staff. The individual must be able to deal effectively with conflicts between Activity Staff and/or other departments in the absence of the Recreation Director. Must be able to make decisions, judgements and assessments within the scope of responsibilities and provide a leadership role within the Department. The individual must be able to form supportive relationships with other Departments and motivating relationships with residents. It is necessary to be able to work compassionately with ill and dying residents, help meet social and emotional needs and prevent feelings of isolation.

EMPLOYEE RESPONSIBILITY IN AN EMERGENCY:

Must be able to remember and follow emergency procedures to insure the safety of residents with whom they are working.

This job description is not intended to be all-inclusive. The employee will also perform other reasonably related duties as assigned by the Supervisor.

Management reserves the right to change job responsibilities, duties and hours as needs prevail. This document is for management communication only and is not intended to imply a written or implied contract for employment.

. . .

5. Angela Severt was hired by Pine Crest in March of 1991 as a dietary department employee serving meals to patients and working in the kitchen. She transitioned to the position of Recreation Therapy Assistant I sometime in 1999. Severt reports to Recreation Director Curtis. Curtis supervises five people; three RTA-IIs, Severt, and a Transportation Clerk. Severt has a set schedule dictated by Curtis. Her hours are 8:15 a.m. to 4:30 p.m., Monday through Friday and she works some evening hours if needed for special events. She does not work on weekends. The RTA-IIs also work a set schedule that includes

Saturday work hours. Their schedule is prepared by Curtis and all three of the RTA-IIs are part-time employees. RTA-IIs working on the weekends are not supervised by anyone and work independently.

6. The difference between the maximum hourly pay rates of the Recreational Therapy Assistant II and I is \$.61 (\$10.31/\$10.92). The difference between the maximum hourly pay rates of the Recreational Therapy Assistant I and the Recreation Director is \$7.19 (\$10.92/\$18.11).

7. Severt assists the Pine Crest residents to and from activities and completes various forms relating to resident participation in recreational activities. She evaluates the progress residents are making in their activities and makes changes in activity goals and attendance in the event of their illness or physical declination. Severt assists Curtis and other staff in planning and carrying out activities, interviews patients regarding their desires relating to recreational endeavors, works with the patients to set goals and recreational approaches and makes decisions as to whether they can or cannot participate in given activities. She completes a small section of the "Minimum Data Set" (MDS) referring to "Activity Pursuit Patterns" including sub-sections asking generic questions about residents, for example: "Time Awake," "Average Time Involved In Activities" and "General Activity Preferences." She attends staff meetings in Curtis' absence to discuss the residents' care plans with other departments. She has attended four such meetings since April, 1999. She and the Recreation Director split the resident population roughly in half for the above activities giving Severt about 90 residents to manage and 50% of the form completion work. They switch resident populations every three months. Severt spends roughly 50% of her workday performing the same duties as the RTA-IIs and the other 50% filling out administrative forms.

8. Severt has a high school diploma. She has no post-secondary education nor does she have any formal technical training of any kind. The position description of RTA-I does not require any formal education or course of study beyond high school although some knowledge of "Recreational Therapy" is preferred. The only training Severt received upon assuming the position of RTA-I was provided by Director Curtis who instructed Severt on filling out the assessment forms and on ways to interview new patients in order to assess their recreational needs, wants and desires. Severt observed Curtis for a period of about three months during which time Curtis provided on the job training. In addition, the incumbent received two half days of in-house training on how to fill out the MDS. Curtis also has some books published by the State and various materials on recreational therapy in her office which Severt is free to read to enhance her technical knowledge.

9. Severt supervises the work activity of the three RTA-IIs. She can change their work assignments and independently authorize overtime. She may, in the absence of Director Curtis, switch RTA-IIs on the work schedule but she must note the change on the schedule to inform the Director of her actions. Curtis generally approves leave requests.

10. Severt is not involved in the formal hiring process, although because Severt knew them personally, Curtis did ask for her opinion regarding the two employees hired since Severt became the Recreational Therapy Assistant I.

11. Severt has verbally reprimanded employees. If she concluded an employee was abusing a patient, she has the authority to remove the employee from the work place. In one instance, she was directed by Curtis to speak with an employee about the employee's lack of detail in doing her sensory stimulation notes. Severt spoke to the employee and reported back to Curtis. When Curtis decides whether an employee will pass their probation period, she consults with Curtis.

12. Aside from her job description entries that reference supervisory functions, no written guidelines, directives or procedures regarding Severt's authority to engage in any supervisory functions exist nor has she received any training in this regard.

13. Severt does not possess supervisory authority in sufficient combination and degree to be a supervisor.

14. The job duties of the Recreational Therapy Assistant I do not require knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher education.

Based upon the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSION OF LAW

The occupant of the position of Recreational Therapy Assistant I in the Pine Crest Nursing Home is neither a supervisor within the meaning of Sec. 111.70(1)(o)1, Stats., nor a professional employee within the meaning of Sec. 111.70(1)(L), Stats.

Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

ORDER CLARIFYING BARGAINING UNIT

The bargaining unit represented by the Union is hereby clarified to include the Recreational Therapy Assistant I in the Pine Crest Nursing Home.

Given under our hands and seal at the City of Madison, Wisconsin, this 19th day of September, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

LINCOLN COUNTY (PINE CREST NURSING HOME)

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION
OF LAW AND ORDER CLARIFYING BARGAINING UNIT**

BACKGROUND

The parties' dispute in this matter concerns the position of Recreational Therapy Assistant I at the Pine Crest Nursing Home which is currently excluded from the unit. Contrary to the Union, the County considers the incumbent to be a supervisor or a professional employee who therefore should continue to fall outside of the bargaining unit.

POSITIONS OF THE PARTIES

The Union

Regarding the issue of supervisory status, the Union argues that the Recreational Therapy Assistant I does not spend a substantial amount of time supervising the activities of others; does not rate other employees for promotional opportunities; does not have the ability to initiate disciplinary warnings; and primarily supervises work activities as opposed to exercising supervisory authority over employees. The Union further asserts that the incumbent does not exercise significant independent judgment or discretion relative to the supervision of employees and that the number of employees allegedly supervised vis a vis the number of other persons exercising authority over them is insufficient to qualify the position as supervisory. By reason of the foregoing, the Union argues that the Recreational Therapy Assistant I does not have a sufficient combination and degree of supervisory authority to be excluded from the bargaining unit.

Regarding the issue of professional status, the Union argues that the position does not require a college degree nor does the incumbent have a college degree or any other course of study which would qualify her as a professional.

The County

On the issue of supervisory status, the County argues the position is supervisory because the position has some responsibility for developing a portion of the patient's care plan; a responsibility to ensure that employees are following that care plan; a responsibility to direct other employees as to how to follow the plan; is expected to recommend discipline of employees in the event they fail to follow the plan; and directs and assigns the work of other employees.

On the issue of the professional status of the position, the County contends that the Recreational Therapy Assistant I does not share a community of interest with the other members of the non-professional bargaining unit; that the lack of a college degree or the requirement for such a degree does not bar the Commission from designating the incumbent a professional within the meaning of Sec. 111.70(1)(L), Stats., and that she exercises sufficient independent judgment and discretion in her duties developing patient care plans, assessing the recreational needs of the residents and documenting these assessments to qualify her as a professional. The County asserts that the incumbent has knowledge of an advanced type because she assists in the development of care plans and that this puts her in a different position than RTA-IIs who are only required to carry out the dictates of those plans.

DISCUSSION

Professional Status

We look to Sec. 111.70(1)(L), Stats., to evaluate the County's assertion that the Recreational Therapy Assistant I is a professional. That statutory section provides that a professional employee is:

1. Any employee engaged in work:
 - a. Predominately intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work;
 - b. Involving the consistent exercise of discretion and judgment in its performance;
 - c. Of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time;
 - d. Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher education or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical process; or
2. Any employee who:
 - a. Has completed the course of specialized intellectual instruction and study described in subd. 1. d.;
 - b. Is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in subd. 1.

In order for a position to be deemed professional, all of the criteria set forth in 1 or 2 above must be present. MARINETTE COUNTY, DEC. NO. 26675 (WERC , 11/90).

The Recreational Therapy Assistant I spends about 50% of her time assisting residents to and from their various daily activities and in conducting some of those activities. The

activities include playing cards, arts and crafts, music, exercise, watching television, walking/wheeling outdoors, reading and the like. The remainder of her time is spent assessing the recreational needs of various residents by interviewing them and inquiring about their individual preferences for various types of available recreational activities. As a part of the assessment function she enters data on various administrative forms including an initial "Recreation Assessment," the resident's MDS and the resident's Care Plan. The "Recreation Assessment" form, Employer's Exhibit 4A, consists of one page of objective questions designed to gain some initial idea of the resident's activity patterns. This information is then used to complete a small section of the MDS (Employer's group Exhibit 4B) relating to the resident's activity pursuit patterns. This section, Section N, sets forth information such as the extent to which the resident takes naps, the average amount of time he or she spends involved in activities, the resident's preferred activities and his/her general activity preferences. The MDS containing the incumbent's input is then used to create the resident's care plan (Employer's group Exhibit 4E) upon which the incumbent enters notes relating to problems the resident may encounter ("resident aware of limitations;" "needs assist to and from activities;" "spend more time sleeping;" "resident likes to make own activity choices and stay active"), notes relating to goals ("resident will participate in group activities as allowed by doctor and as tolerates;" "resident will read and watch T.V. in room daily;" "resident will structure his day with independent activities, socializing out of his room and attending group activities of choice") and notes relating to approaches staff could take to encourage or aid the patient in the various activities ("space activities to allow time to complete them and for rest periods;" provide letter writing materials as needed;" "validate resident's feelings;" "encourage watching T.V and the bird;" "offer to polish nails during beauty hour").

If we assume, strictly for the purposes of analysis, that the above described duties rise to the level of being sufficiently intellectual and varied in character and that they involve the consistent exercise of discretion and judgement in their performance and are incapable of standardization in relation to a given period of time, thus satisfying the requirements of a, b, and c of paragraph 1 of Sec. 111.70(1)(L), the knowledge requirements set forth in paragraph d would still have to be satisfied before we could reach the conclusion that Severt is a professional employee.

As the County correctly argues, the statute does not require that Severt hold a college degree to be a professional employee, but it does mandate that Severt's duties require knowledge of an advanced type which is customarily acquired via a "prolonged course of specialized intellectual instruction and study in an institution of higher education. . . as distinguished from an apprenticeship or from training in the performance of routine mental, manual or physical process" Hence, the course of study leading to a degree merely defines the body and breadth of knowledge required to perform the job duties. In the instant case, the incumbent received a period of on the job training and two half-day sessions of in-house instruction on how to fill out the MDS form. We conclude that this indicates that the job duties in question do not require knowledge of an advanced type customarily acquired through a prolonged course of specialized instruction. Consequently, the Recreational Therapy Assistant I is not a professional employee under Sec. 111.70(1)(L), Stats.

Supervisory Status

A “supervisor” is defined at Sec. 111.70(1)(o)1 as follows:

. . . 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 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.

When evaluating a claim of supervisory status under Sec. 111.70(1)(o)1, Stats., we consider the following factors:

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 employees 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 her skill or for 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 she spends a substantial majority of her time supervising employees; and
7. The amount of independent judgment and discretion exercised in the supervision of employees. MUSKEGO-NORWAY SCHOOL DISTRICT, DEC. NO. 10585-A (WERC, 12/91); CITY OF MILWAUKEE, DEC. NO. 6960 (WERC, 12/64)

Not all of these factors must be present but they must appear in sufficient combination and degree before the Commission will find an employee to be a supervisor. CITY OF LAKE GENEVA, DEC. NO. 18507 (WERC, 3/81); LODI JT. SCHOOL DISTRICT NO. 1, DEC. NO. 16667 (WERC, 11/78)

As to Factor 1, we conclude that Severt has no formal role in the hiring of Recreational Therapy IIs and does not effectively recommend the hiring of employees. While she was informally consulted by the Recreational Director as to the two such employees hired since she became the Recreational Therapy Assistant I, she did not participate in the interview process and the consultation only occurred because she knew the individuals in question. Regarding her disciplinary authority, we conclude that Severt’s disciplinary authority is limited to

issuance of verbal reprimands and that Recreation Director Curtis would impose any more significant discipline after making an independent assessment of the employee's conduct. Although Severt testified that she has the authority to issue a written reprimand, the small number of employees under Severt and Curtis and the parallel nature of Curtis' and Severt's work hours persuade us that Curtis would independently determine and impose any discipline beyond a verbal reprimand. There are no promotions or transfers within the Recreation Department.

As to Factor 2, Severt does have some authority to direct and assign the work of employees but it is Curtis who schedules the employees and is generally responsible for granting or denying leave requests.

Turning to Factor 3, there are three Recreational Therapy IIs whose work is directed by Severt. Director Curtis exercises greater supervisory authority over these same employees.

Regarding Factor 4, the very limited difference between the hourly pay rate of Severt and the Recreational Therapy IIs (\$.61 per hour) and the substantial difference between Severt's and Curtis' hourly rates (\$7.19) strongly support a conclusion that Severt is not a supervisor.

As to Factors 5, 6 and 7, we conclude Severt is primarily supervising activities and not employees. She spends 50% of her time performing the same duties as the Recreational Therapy IIs and the remainder of work time assessing and documenting residents' recreational needs. She exercises independent judgment when assessing these needs but generally has little discretion in the supervision of employees.

Assessing all of these factors, we conclude Severt is not a supervisor. Recreation Director Curtis possesses all of the significant indicia of supervisory authority over Recreation Department employees. By virtue of her presence in the work place whenever Evert is working, we are satisfied that it is Curtis who will make all significant supervisory decisions that need to be made as to Recreation Department employees.

Dated at Madison, Wisconsin this 19th day of September, 2001

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner