

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

MENOMINEE COUNTY HUMAN SERVICES  
DEPARTMENT PROFESSIONAL EMPLOYEES,  
AFSCME, AFL-CIO

Involving Certain Employes of

MENOMINEE COUNTY

Case 43  
No. 50263 ME-683  
Decision No. 26983-B

Appearances:

Lindner & Marsack, S.C., Attorneys at Law, by Mr James S. Clay, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, on behalf of the County.

Mr. Phil Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin 54476, on behalf of AFSCME.

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

Menominee County Human Services Department Professional Employees, AFSCME, AFL-CIO filed a petition on December 16, 1993 with the Wisconsin Employment Relations Commission to clarify a professional bargaining unit of Menominee County employes by including the position of Personal Care Nurse Supervisor. The parties then attempted to settle the matter until April 7, 1994 when they requested a hearing. A hearing was held on July 11, 1994 before Examiner Sharon A. Gallagher, a member of the Commission's staff. A stenographic transcript of the proceedings was made and received by August 1, 1994. The parties filed briefs until October 12, 1994. The Commission having considered the evidence and arguments of the parties and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. Menominee County, hereafter the County, is a municipal employer which operates inter alia, a Human Services Department through its Human Services Board. The County maintains its offices at Menominee County, P.O. Box 280, Keshena, Wisconsin.

No. 26983-B

2. Menominee County Human Services Department Professional Employees, AFSCME, AFL-CIO, hereafter the Union, is a labor organization which is the exclusive representative of the following employees as described in the 1993-1994 contract between the Union and the County:

. . . all regular full-time and regular part-time professional employees in the Human Services Department, excluding all supervisory, managerial and confidential employees and all other employees. . . .

The Union maintains its offices c/o Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin 54476.

3. The County Human Services Department (HSD) has four major divisions: Economic, Business, Community Service and Public Health. The Public Health Division is headed by a Public Health Manager, a position which was vacant at the time of the hearing. Part of the Public Health Division, the Personal Care unit, is headed by Personal Care Nurse Supervisor, Becky Johnson. The Personal Care Nurse Supervisor (PCNS) is the sole position in dispute herein. On the current organizational chart for the County's HSD, the PCNS is listed under the "Public Health Nurse - Program Manager" position (PHN-PM). The PHN-PM position has been vacant for several years because public health functions have not been performed by the County during this time. RN Rebecca Johnson, incumbent of the PCNS position since 1989, reported directly to the HSD Director during 1989 and 1990. Since 1990 Johnson has reported to Long-Term Support Unit Manager Joann Eisfelder but Eisfelder has not exercised any supervisory authority over her. In 1994, the County Board approved the filling of the PHN-PM position but it had not been filled as of the instant hearing. The County is considering Rebecca Johnson for the PHN-PM position and will fill the PCNS position if Johnson becomes the PHN-PM.

4. The PCNS position was originally a temporary part-time position. On January 2, 1990, the PCNS position was made a permanent part-time position. On September 4, 1990, the PCNS position was placed in the Long-Term Support Division. On December 1, 1992, the position was made permanent full-time and the County then placed the PCNS position on its "Supervisory-Management Classification/Compensation Plan." The incumbent currently receives a salary of \$33,384.00 (\$16.05 per hour). Other managers listed on this plan make from \$29,900 to \$40,100 annually while bargaining unit employees (not under the Plan) make approximately \$10,000 less.

5. The job description for the PCNS reads as follows:

QUALIFICATIONS: Graduation from a four (4) year NLN accredited School of Nursing and be licensed as a Registered Nurse in the State of Wisconsin.

RESPONSIBILITIES: Under the direct supervision of the LTS Program manager shall perform duties detailed below:

SPECIFIC DUTIES: 1. Shall be responsible for the general supervision of the

Personal Care Program and Personal Care Workers.

2. Shall make monthly visits to monitor the progress of the patient in respect to the treatment plan for personal care.
3. Shall document all supervisory visits and be responsible for the timely submission of all activity logs related to the Personal Care Program.
4. May be required to provide in-service to POW's (sic) and forty hour basis training to all non-certified Personal Care Workers.
5. Shall review and update client records and obtain all necessary documentation as required by the state.
6. When appropriate, individual waivers should be sought from the Bureau of Health Care and Financing for home-health aid services.
7. Shall be responsible to provide skilled nursing services and care to clients in their home in accordance with physician instructions.
8. Shall perform nursing procedures such as injections, wound irrigations, dressing changes, etc.
9. Shall make home visit assessments with Social Workers to determine individual needs and eligibility for services.
10. Shall be responsible for the timely submission of reports and records as required by state and federal regulations and the Human Services Department.
11. Shall work closely with the Mental Hygiene and Social Services Units.
12. Shall participate in available training opportunities appropriate to the position.

13. Shall be responsible to carry out any other duties as may be assigned and/or approved by the LTS Program Manager.

AUTHORITY: Authority shall be delegated as is required and necessary to carry out the responsibilities and duties of this job description.

The above description is accurate with three exceptions -- Johnson does not perform the duties described in numbers 7 and 8 of the description above and she is involved in budgetary duties not listed above. Johnson drafted a more detailed document describing her regular duties, as follows:

I. PERSONAL CARE PROGRAM

A. RECEIVE INCOMING REFERRALS

1. Review all referrals
2. MA verification

B. DETERMINE ELIGIBILITY

1. Complete Needs Assessment Form
2. Review health records
3. Review client chart
4. Schedule Interview with client and/or family members
5. Interview client and/or family members
6. Determine physical abilities/ disabilities
7. Physical Assessment
8. Home Assessment
9. Medical Assistance verification mandated by state/federal regulations
10. Establish need for services mandated by state/federal regulations
11. Develop Patient Plan of Care
12. Obtain Medical Doctor's signature/order for services

C. PRIOR AUTHORIZATION

1. Home visit to obtain client participation in MA home care assessment
2. Medical Doctor order signed/dated within 3 months as mandated by state/federal regulations
3. Submit completed MA home care assessment requesting hours of service per day/week/year
4. State (EDS) reviews assessment and approves, modifies or denies service

D. ASSIGNMENT OF PERSONAL CARE WORKERS

1. Screen potential workers
2. Elicit client preference
3. Develop personal care contracts
4. Develop record of assignment as mandated by state/federal regulations
5. Obtain signatures of client and personal care worker

E. SUPERVISION OF PERSONAL CARE WORKERS

1. Observe personal hygiene tasks as demonstrated by personal care worker as mandated by state/federal regulations
2. Make Nurse Supervisory Visit every 50-60 days as mandated by state/federal regulations
3. Provide training in personal care tasks, medical diseases, etc.
4. Develop worker schedules as needed
5. Develop daily work schedules as need (sic)
6. Delegate personal care tasks to personal care workers as mandated by state/federal regulations
7. Delegate medically orientated tasks to personal care workers as mandated by state/federal regulations
8. Make arrangements with NWTC for 40 hours of training for certification of workers, may need to do the actual teaching
9. Review, evaluate, monitor worker activity logs
10. Calculate time sheets for personal care workers
11. Verify employment for tribal housing, JOBS program, etc.
12. Verify eligibility reports for Unemployment Compensation as mandated by state regulations
13. Recruit and interview personal care workers
14. Draft letter of recommendation for personal care workers
15. Handle disciplinary problems
16. Draft letter of reprimand for personal care workers

F. DOCUMENTATION MANDATED BY STATE/FEDERAL REGULATIONS

1. Medical Doctor's order for service (Must be dated on/or before service can begin and must be in place for each day of services)
2. Medical Assistance Home Care Assessment Client must participate in assessment and signature obtained
3. Prior Authorization Request  
Must be approved before 50 hours of service are provided and includes: Doctor's order and MA Home Care Assessment
4. Medical Assistance Home Care Assessment Update must be submitted after initial prior authorization and assessment is on file, when submitting a request to amend prior authorization, and after every RN supervisory visit WHEN THERE HAS BEEN A CHANGE

IN CONDITION which results in changes to Sections 8-11, form must be submitted whether or not the change results in a change in treatment or care

5. Personal Care Worker Record of Assignment identifies personal care tasks and medically orientated tasks delegated to personal care worker
6. Waiver Request for allowance of additional home health aide tasks and medically orientated tasks
7. Amendment Request for additional hours of service
8. Maintain file on each client
9. Other paper work as required
10. Required paper work MUST be submitted on time, cannot be late or else not billable

## II. SUPERVISION OF OTHER STAFF

### A. LONG TERM SUPPORT STAFF IN ABSENCE OF LONG TERM SUPPORT MANAGER

1. Supervise case managers and medicaid specialist
2. Authorize purchase orders
3. Approve employee time slips and mileage logs

## III. ADMINISTRATION

### A. ATTEND MANAGEMENT/UNIT MEETINGS

### B. CONSULTANT/RESOURCE PERSON/PROFESSIONAL ADVICE

1. Case Managers/ Social Workers
2. Medical Records Staff
3. Billings Clerk
4. Menominee Tribal Clinic Nurses
5. Participate in clinical consultation sessions
6. Participate in multidisciplinary team meetings
7. Participate in staffings
8. Participate in family meetings
9. Represent HSD in the community

### C. CLERICAL DUTIES

1. Review and update client records
2. Obtain necessary documentation
3. Take and make referrals as needed
4. Submit reports as required by state mandate
5. Submit reports to Long Term Support Manager

6. Work closely with Long Term Support Case Managers/Social Workers and Long Term Support Manager
7. Maintain personnel record on each personal care worker, to include copy of certificate of training

D. PROGRAM PLANNING

1. Responsible for short/long term planning for the Personal Care Program
2. Assist Executive Director in Agency/Program planning

E. FISCAL PLANNING

1. Assist Executive Director in budgeting for Personal Care Program
2. Project revenues for program

F. MANAGEMENT DUTIES

1. Supervise Long Term Support Staff in the absence of Long Term Support Manager
2. Participate in recruiting and interviewing appropriate staff as assigned by the Executive Director
3. Responsible for other duties assigned and/or approved by the Long Term Support Manager or Executive Director
4. Take referrals
5. Act on behalf of LTS Manager when she/he is absent: Sign purchase orders, do pay roll for LTS staff, etc.

G. COMMITTEES

1. Participate in committees appropriate to the position ex. COP, Eldercare, Long Term Support, etc.

H. TRAINING

1. Participate in available training opportunities appropriate to the position
2. Keep WI Registered Nurse License up to date
3. Keep certification for CPR up to date

I. STATE ORGANIZATION

1. Participate in the State Organization called WISCONSIN PERSONAL SERVICES ALTERNATIVES (WPSA)

6. Johnson, who has a B.S. degree in nursing and has worked as a nurse for the past 20 years, has approximately 32 clients who receive personal care as well as other services in their homes. Johnson spends between 30 and 40 percent of her time supervising Personal Care Workers (PCW's)

and 10 to 15 percent of her time performing administrative duties, including the one or two days per year she spends preparing, presenting and defending her program budget to the Executive Director of the HSD, Barbara Nelson. In regard to her duties relating to receiving and processing new referrals, Johnson reviews and prepares the paperwork for new clients; gets the doctor's orders for services; interviews the clients at their homes, often with the Long-Term Care Case Manager (a bargaining unit employe) present to determine the client's needs for Personal Care (PC) work and other services; puts together a Patient Plan for Care (a sample of which is set forth below) and fills out a 14 page State of Wisconsin verification form for each client. This form must be submitted before 50 hours of PC work is performed for each new client so that the State will begin and continue to reimburse the County for PC-billable hours worked by the PCW's. Johnson alone retains the Patient Plan of Care forms. The Patient Plan of Care form reads as follows:

Client Name: \_\_\_\_\_ Physician: \_\_\_\_\_

Date of Birth: \_\_\_\_\_ Allergies: \_\_\_\_\_

Diagnosis: \_\_\_\_\_

\_\_\_\_\_

Diet: \_\_\_\_\_

Self-Care Status: Indep. Assist Total Comments

Bed Mobility \_\_\_\_\_

Bathing \_\_\_\_\_

Dressing \_\_\_\_\_

Feeding \_\_\_\_\_

Brush Teeth \_\_\_\_\_

Shaving \_\_\_\_\_

Toileting \_\_\_\_\_

Transferring \_\_\_\_\_

Walking \_\_\_\_\_

Wheelchair \_\_\_\_\_

Orientation Status: \_\_Person \_\_Place \_\_Time

Disabilities      Behavior      Impairments

<u>_amputation</u>	<u>_forgetful</u>	<u>_vision</u>
<u>_paralysis</u>	<u>_confused</u>	<u>_hearing</u>
<u>_contracture</u>	<u>_withdrawn</u>	<u>_sensation</u>
<u>_decubitus</u>	<u>_wanders</u>	<u>_speech</u>
<u>_other</u>	<u>_other</u>	<u>_safety/judgement</u>



\_\_other

Bladder: Continence Level:\_\_\_\_\_

Catheter: Type:\_\_\_\_\_ Irrigations\_\_\_\_\_

Charge equipment\_\_\_\_\_

Depends:\_\_\_\_\_

Bowel: Continence level:\_\_\_\_\_ Ostomy:\_\_\_\_\_

Special Equipment/Devices:

\_\_cane            \_\_commode            \_\_depends  
\_\_walker        \_\_shower/tub transfer    \_\_blue pads  
\_\_crutches      \_\_electric bed            \_\_ace bandage  
\_\_wheelchair    \_\_trapeze                \_\_lamb's wool  
\_\_dentures      \_\_lift chair              \_\_eggcrate mattress  
\_\_eyeglasses \_\_raised toilet seat    \_\_heating pad  
\_\_hearing aid    \_\_tub/shower grab bars  
\_\_prosthesis \_\_w/c cushion  
\_\_brace        \_\_w/c foot rests  
\_\_sling        \_\_gait belt

Sleep/Rest Pattern:\_\_\_\_\_

\_\_\_\_\_

Additional Comments:\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_  
RN Signature      Date

7. Based on her assessment of the client's needs, Johnson decides in conjunction with each client's doctor how many hours of PC work a client needs. Johnson and the Long-Term Support (LTS) Care Manager cooperate in setting the number of supportive home care hours (unit work)

which each client will receive. Johnson can make recommendations regarding supportive home care service which LTS unit Manager Joann Eisfelder has taken into consideration. Often Johnson's PCW's perform supportive home care services while in the home performing PC work for the client.

8. PCW's are not County employees but rather independent contractors who provide skilled service for clients that need personal care in their homes due to illness or other health reasons. Johnson is solely responsible for recruiting, interviewing and hiring all PCW's. Johnson uses the form set forth below, which she developed from requirements listed in State regulations, as a guide in hiring qualified PCW's:

### **QUALIFICATION & DUTIES OF PERSONAL CARE WORKER**

Personal care services are medically oriented activities related to assisting a recipient with activities of daily living necessary to maintain the recipient in his or her place of residence in the community. These services shall be provided upon written orders of a physician by a provider certified under s. HSS 105.17 and by a personal care worker employed by the provider or under contract to the provider who is supervised by a registered nurse according to a written plan of care. The personal care worker shall be assigned by the supervising registered nurse to specific recipients to do specific tasks for those recipients for which the personal care worker has been training. The personal care worker's training for these specific tasks shall be assured by the supervising registered nurse. The personal care worker is limited to performing only those tasks and services as assigned for each recipient and for which he or she has been specifically trained.

#### **PERSONAL CARE DUTIES ARE:**

1. Assistance with bathing;
2. Assistance with getting in and out of bed;
3. Teeth, mouth, denture and hair care;
4. Assistance with mobility and ambulation including use of walker, cane or crutches;
5. Changing the recipient's bed and laundering the bed linens and the recipient's personal clothing;
6. Skin care excluding wound care;
7. Care of eyeglasses and hearing aids;
8. Assistance with dressing and undressing;

9. Toileting, including use and care of bedpan, urinal, commode or toilet;
10. Light cleaning in essential areas of the home used during personal care service activities;
11. Meal preparation, food purchasing and meal serving;
12. Simple transfers including bed to chair or wheelchair and reverse;
13. Accompany the recipient to obtain medical diagnosis and treatment.

**QUALIFICATIONS:** Personal care workers shall have the following qualifications:

- A. Be trained in the provision of personal care services. Training shall consist of a minimum of 40 classroom hours, at least 25 of which shall be devoted to personal restorative care, or 6 months of equivalent experience acquired before July 1, 1988. Training shall emphasize techniques of caring for the population served by the provider;
- B. Provide documentation of required training to the personal care provider for the provider's records;
- C. Be a person who has not been convicted of a crime which directly relates to the occupation of providing personal care or other health care services.

PCW's are required to be certified and must have 40 classroom hours of training in personal restorative care from a technical school or possess six months of equivalent training in the field. Johnson alone decides whether or not to hire each applicant and, if hired, each PCW must sign a "Supportive Home Care Agreement," a document revised by Johnson from one used by her predecessor in personal care. The terms of these contracts (a sample of which is set forth below) are completed by Johnson. The document is then signed by the PCW (as provider), by the client and by Johnson (as agency representative). These contracts have never been checked or approved by anyone in a higher position than Johnson at the HSD.

The Supportive Home Care Agreement reads as follows:

Client

Provider

\_\_\_\_\_  
(NAME)

\_\_\_\_\_  
(NAME)

\_\_\_\_\_  
(ADDRESS)

\_\_\_\_\_  
(ADDRESS)

\_\_\_\_\_  
(CITY) (STATE) (ZIP) (CITY) (STATE) (ZIP)

\_\_\_\_\_  
(TELEPHONE NO.)

\_\_\_\_\_  
(TELEPHONE NO.)

\_\_\_\_\_  
(SOCIAL SECURITY NO.)

1. We, the above named person, agree to the following Supportive Home Care Services:

**BEGINNING DATE:** \_\_\_\_\_ **ENDING DATE:** \_\_\_\_\_

**Personal Maintenance Services Activities:** \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_ **Home Maintenance Services Activities:**

\_\_\_\_\_

\_\_\_\_\_

2. **Provider's Work Schedule:** \_\_\_\_\_

\_\_\_\_\_

3. **Provider Orientation Completion Date:** \_\_\_\_\_

4. **Rate of reimbursement based upon actual services rendered:**

\_\_\_ Hourly \$ \_\_\_

\_\_\_\_\_  
**CLIENT (RESPONSIBLE PERSON)**

\_\_\_\_\_  
**PROVIDER**

\_\_\_\_\_  
**AGENCY REPRESENTATIVE**

\_\_\_\_\_  
**DATE**

**\*NOTE:** Service may not be initiated until the Agreement is signed by all parties: Client **OR** responsible person, provider, and agency representative. A signed copy of the Supportive Home Care Agreement shall be sent to all parties.

Johnson also fills out another form which she developed on her own known as the "Record of Assignment." This form is designed to give both the client and the PCW a clear idea of what services are to be performed by the PCW for the client, and how often and how much time each task should take. Both the client and PCW must sign this form:

Client Name: \_\_\_\_\_ Worker Name/Title: \_\_\_\_\_

Address: \_\_\_\_\_ Address: \_\_\_\_\_

Phone #: \_\_\_\_\_ Phone #: \_\_\_\_\_

ACTIVITY	Days/Week	COMMENTS
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1. Assist with bathing	_____	_____
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2. Assist w/getting in/ out of bed	_____	_____
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3. Oral and/or hair cares	_____	_____
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4. Routine skin cares	_____	_____
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5. Eyeglass, hearing aid care	_____	_____
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- 6. Assist w/dressing/undressing \_\_\_\_\_
  
- 7. Assist w/mobility, ambulation \_\_\_\_\_
- 8. Routine toileting \_\_\_\_\_
- 9. Feeding and meal serving \_\_\_\_\_
- 10. Simple transfer \_\_\_\_\_
- 11. Go w/client to dr.'s appointment \_\_\_\_\_
- 12a. Change bed \_\_\_\_\_
- 12b. Launder personal items \_\_\_\_\_
- 13. Meal preparation \_\_\_\_\_
- 14. Light cleaning in areas used during personal care \_\_\_\_\_
- 15a. Grocery scoping \_\_\_\_\_
- 15b. Pick up Rx meds & medical supplies \_\_\_\_\_
- 16. Yard work, shoveling, etc. \_\_\_\_\_
- 17. Splitting, hauling firewood \_\_\_\_\_
- 18. Other shopping \_\_\_\_\_
- 19. Heavy housecleaning \_\_\_\_\_
- 20. Companionship \_\_\_\_\_
- 21. Recreation/alternative activity \_\_\_\_\_
- 22. Supervision of self-medication \_\_\_\_\_
- 23. Other \_\_\_\_\_
  
- 24. Observe and report the following signs and symptoms as soon as possible: \_\_\_\_\_  
\_\_\_\_\_
  
- 25. In the event of a medical emergency, call 799-3881. Be prepared to

give the dispatcher your name, exact location and a list of symptoms s/he is experiencing or events that have taken place.



Schedule (use pencil) Total Authorized Hrs/Day  
 Sun. Mon. Tues.  
 Wed. Thurs. Fri.  
 Sat.  
 Total Authorized Hrs/Wk\_\_\_\_\_ Total Authorized Hrs/mo\_\_\_\_\_

I, \_\_\_\_\_ understand that any hours submitted over and above the total authorized hours per month. \*May not be submitted for payment without prior approval except in the case of a medical emergency. I agree to provide the previous mentioned personal care services to the client listed below.

\_\_\_\_\_  
 Worker's Signature Date \_\_\_\_\_ Witness

I, \_\_\_\_\_ agree to the previous mentioned personal care services to be provided for me by the above named worker.

\_\_\_\_\_  
 Client's Signature Date \_\_\_\_\_ Witness

Record of Assignment prepared on \_\_\_\_\_

Johnson independently developed another form entitled "Worker Activity Log." This form covers one month's time and is used each day that care is given as a checklist of the Supportive Home Care, Personal Care, Housekeeping and other service tasks which are performed by the PCW. This form, which also includes the number of hours worked each day, must be signed by the PCW, the client and submitted to Johnson. These forms are then used to issue monthly paychecks to the PCW's, to bill the State of Wisconsin for reimbursable personal care services given, and to bill the County for Supportive Home Services for which the PCW is paid separately. The State of Wisconsin has set certain time guidelines for billing purposes for each task to be performed by PCW's. Johnson alone has argued with the State for more billable time for PCW's to perform certain tasks for some patients due to unusual circumstances -- for example, Johnson has argued successfully that the State-set time of 11 billable minutes is insufficient for hair care of some male and female clients with long hair. None of these forms is checked, approved or signed by any HSD manager above Johnson. Like Johnson, Long Term Care Case Managers also fill out and sign contracts with Supportive Home Care workers without approval from higher authority.

9. Johnson is the only one responsible for observing and evaluating PCW's. In this capacity, Johnson goes to clients' homes to observe the PCW's at work and to talk with the PCW and the client. Johnson can bill the State of Wisconsin for a maximum of a one-hour visit to each client every 50 to 62 days. Johnson can decide on her own to visit a client or watch a particular PCW

more often than is billable to the State without approval from anyone. Although she has consulted Director Nelson regarding some of her decisions to discipline PCW's, she has, on her own authority, issued verbal and written warnings to PCW's. She disciplined one PCW by suspending her without pay for one month. Further she has refused to assign certain individuals to do PC work in the County. These decisions have never been checked, approved or disapproved by any of Johnson's superiors.

10. Johnson is treated as part of the HSD management team by Director Nelson. As such, Johnson attends monthly management meetings with all managers, which meetings bargaining unit employees never attend. Director Nelson conducts these meetings at which topics such as budgets, unit problems, agency policy/procedure, dress code and flex hour policies are discussed. Johnson has also served on three or four interviewing teams on behalf of the HSD at Nelson's request. Her hiring recommendations were accorded the same weight as other interview team members. All managers, including Johnson, prepare monthly reports for the Director to give to the HSD regarding the progress of each manager's program(s), although none of the program managers attend the HSD meetings with Nelson.

Johnson sets her own hours of work, her daily schedule and vacations without approval from anyone. Bargaining unit employees have hours of work set by contract. Johnson spends perhaps five percent of her time filling in for Long Term Support Manager Joann Eisfelder when the latter is on vacation, sick leave or at conferences. During these times, Johnson has the authority to grant vacations, and otherwise direct the work of three bargaining unit Case Manager employees and an unrepresented clerical worker. Johnson also has the authority to fill in for other absent Managers as assigned by Nelson.

11. The PC Program brings in approximately \$400,000 per year in State funds to the HSD. After paying the PCW's and bills for equipment, supplies and other expenses, the County has in excess of \$120,000 which the HSD can then use to defray the costs of operating its other programs. If the County lost the PC program, its other HSD programs would have to operate at a deficit. As a part of Johnson's duties, she drafts and presents her program's budget to Director Nelson, as do all other managers. No managers of the HSD, including Johnson, may spend over the approved budgetary amounts nor may they grant raises and promotions without County Board approval. Although Johnson technically reports to Long-Term Support Unit Manager Joann Eisfelder, Eisfelder does not approve Johnson's budget before Johnson presents it to Nelson. At budget time, Johnson seeks pay rate increases for her PCW's, which she advocates to Nelson. These rates are set once every year at budget time and PCW's may not be hired at any rate other than that approved by HSD and ultimately by the County Board. Johnson has the full authority to decide how many PCW's to employ and her only constraint is that she cannot hire more PCW's than she can supervise, observe and evaluate.

12. Since the PCW's are independent contractors not County employees, Johnson does not exercise supervisory responsibilities in sufficient combination and degree to be deemed a

supervisor. However, Johnson does participate sufficiently in the formulation, determination and implementation of management policy so as to render her a managerial employe.

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

#### CONCLUSION OF LAW

1. Rebecca Johnson, the incumbent in the Personal Care Nurse Supervisor position, is not a supervisor within the meaning of Sec. 111.70(1)(o), Stats., but is a managerial employe within the meaning of Sec. 111.70(1)(i), Stats., and therefore, is not a municipal employe within the meaning of Sec. 111.70(1)(i), 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 1/

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1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

(Footnote continued on page 18)

The position of Personal Care Nurse Supervisor shall remain excluded from the bargaining unit set forth in Finding of Fact 2.

Given under our hands and seal at the City of Madison, Wisconsin, this 3rd day of April, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/  
A. Henry Hempe, Chairperson

Herman Torosian /s/  
Herman Torosian, Commissioner

William K. Strycker /s/  
William K. Strycker, Commissioner

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1/ (Continued)

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision

are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

...

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

Menominee County

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

Positions of the Parties

Union

Commission caselaw has provided that managerial and executive employees are to be excluded from the bargaining unit because their relationship to management creates unique interests which could conflict with those of other employees. The criteria to decide whether an employee qualifies as managerial include the ability to formulate, determine and implement management policy and whether the subject position has the authority to commit the employer's resources. The record clearly establishes that the PCNS does not qualify as a managerial employee. The PCNS processes referrals, determines eligibility, secures authorization and assigns Personal Care Workers in compliance with state and federal regulations. These duties are clearly ministerial. Further, there is no evidence that the PCNS has independent authority to commit the County's resources. The Executive Director of the Human Services Department is the position's immediate supervisor. The Executive Director testified that she is primarily responsible for the budget of the department and that increases or changes in expenditures must be approved by her.

The job description does not mention budget formulation or implementation for the patient care program. The incumbent testified that she spends minimal time in fiscal planning. She does not have independent authority to establish an original budget.

Further the PCNS position is structurally equivalent to other bargaining unit positions represented by the Union. Thus the position has more of a community of interest with those employees rather than management personnel.

While the County argues that the pay rate for this position is more in line with other management personnel, it is important to note that the development of this wage rate is more of a historical function of individual bargaining rather than an attempt to have the wage rate conform to that of other supervisors or managers.

The PCNS position is not a supervisory position. While the incumbent is responsible for reviewing, recruiting, evaluating and possibly disciplining PCW's, the PCW's are independent contractors, not employees of the County. Commission caselaw is clear that supervisory status cannot be conferred when individuals are not supervising employees. If the PCW's were employees of the County, their argument might have some legal basis. The fact that the PCNS may "supervise" employees when a direct supervisor is absent should be given little weight. The record supports that the times that this may occur are very infrequent. This de minimis exposure does not

warrant a supervisory conclusion.

### County

The PCNS is completely in charge of the County's personal care program. As an agency manager she works very independently and is not required to account for her hours. She schedules her work time and is allowed to work a flexible schedule. Neither the Executive Director nor the Long Term Service Manager approve her schedule. The PCNS is paid approximately \$10,000 a year more than any bargaining unit employe. The agency's Executive Director conducts management meetings every month. All of the agency's management staff, including the PCNS, attend this meeting. The participants provide reports and receive information regarding agency operation. This group provides input concerning agency policies, procedures and budgetary considerations. This group of managers along with the Executive Director establish policy and make agency decisions.

The PCNS develops her program's budget and presents it to the Executive Director. The Executive Director presents all agency budgets to the Human Services Board for approval. The PCNS constructs the budget which contains an estimate of revenue and request for equipment and supplies. The PCNS also includes requests for compensation to be paid to PCW's during the next year. While the Executive Director may modify the PCNS's budget, this is no different than the treatment received by any other agency manager. This budget is particularly significant inasmuch as it generates revenue which helps fund other long term support programs.

The PCNS is completely responsible for billing the state for services rendered and administering funds received by the personal care program.

The PCNS is responsible for the development and operation of the agency's personal care program. She has developed many of the systems crucial to the operation of the program. She ensures the clients are certified and recertified so that reimbursement can be received from the state. She establishes qualifications and hires PCW's as independent contractors to provide the services needed for clients. A treatment plan is developed by the PCNS in conjunction with the client and the PCW. The PCNS has developed procedures to ensure that the treatment plans are followed and that time spent in various functions is identified. The extent and types of services are identified by the PCNS. The PCNS evaluates the services provided by direct observation of the PCW and discussions with the client. If problems develop or changes need to be made with the care plan, the PCNS responds.

In summary, the PCNS is responsible for the operation of the personal care program. Johnson determines the procedures to be used and decides what services will be provided to whom. The PCNS independently contracts with PCW's who provide the services. Given the foregoing, the PCNS should be excluded from the County's professional bargaining unit as a managerial employe.

The PCNS position is also supervisory in nature. The County acknowledges that the majority of supervision provided by the PCNS is for the PCWs who are independent contractors and not employees of the County. However, the County identifies that the PCNS spends approximately 5 to 10 percent of her time supervising County employees or performing supervisory duties. She fills in for other County managers who are absent due to vacation, sick leave or other reasons. When other managers are absent, unit employees report to the PCNS. The PCNS is also involved in the hiring of County employees. She has participated as a member of an interview panel on several occasions. Her recommendation is given the same weight as other participants on the interview panel. The PCNS has participated in management meetings dealing with layoffs as well as other supervisory issues. Her involvement as a supervisor is sufficient to warrant exclusion from the professional employee bargaining unit.

### Discussion

Section 111.70(1)(o)1, Stats., defines supervisor as ". . . any individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend, layoff, 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." The indicia by which the Commission has consistently judged supervisory status are as follows:

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. 2/

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2/ See, e.g., Muskego-Norway School District, Dec. No. 10585-A (WERC, 12/91); City of



In addition, the Commission has historically held that not all of the above-quoted factors need be present, but if the factors appear in sufficient number and degree, the Commission will find an employe to be a supervisor.

One of the keys to this analysis is that the factors must be applied to employes of the organization. Even if all factors are present, supervisory status would not be confirmed on the subject position unless the supervisory authority is exercised with regard to employes. As we noted in Northland Pines School District, Dec. No. 27154 (WERC, 2/92), the "authority to contract out for temporary . . . services and to terminate such a contract is not relevant in determining supervisory status . . . "and" that supervisory status cannot be found through the supervision of non-employes." (quoting from Jackson County, Dec. No. 17828-E (WERC, 3/91). While the PCNS role in directing the PCW's is impressive, this role cannot be considered in evaluating supervisory status because the PCW's are independent contractors not employes.

The facts of the instant case show that Johnson has at most de minimis supervisory authority over actual County employes -- she has only acted as supervisor to some County employes when their regular supervisors have been on vacation or are otherwise absent from work. We have previously concluded that the occasional assumption of supervisory responsibilities is insufficient to warrant a supervisory exclusion. See, City of New Berlin, Dec. No. 13173-B (WERC, 8/83); City of LaCrosse, Dec. No. 14019 (WERC, 10/75); City of Franklin, Dec. No. 6147 (WERC, 10/62). Because of the limited time each year that Johnson is designated to act as a supervisor over unit employes and the other limited evidence of supervisory authority, we conclude that she is not a supervisory employe.

Managerial employes are excluded from the definition of municipal employes pursuant to Sec. 111.70(1)(i), Stats. The Commission has developed a definition of managerial status through case law in the absence of a statutory definition of a "managerial" employe. In determining whether a position is managerial, the Commission considers the degree to which the incumbent of the position actually participates in the formulation, determination and implementation of management policy or possesses the authority to commit the employer's resources. See, e.g., Milwaukee VTAE, Dec. No. 8736-B (WERC, 6/79); Northwood School District, Dec. No. 20022 (WERC, 10/82); Marinette County (Pineview Health Care Center), Dec. No. 26154-B (WERC, 3/92), and cases cited therein. The necessary level of managerial responsibility must be "at a relatively high level".  
3/ As we stated in Marinette County (Pineview Health Care Center), Dec. No. 26154-B (WERC, 3/92):

To confer managerial status, an individual's authority to commit resources must involve allocation of resources in a manner which significantly affects the nature

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Milwaukee, Dec. No. 6960 (WERC, 12/64).

3/ City of Milwaukee, Dec. No. 12035-A (WERC, 2/74).

and direction of the employer's operations. Authority to significantly affect the nature and direction of the municipal employer's operations includes, inter alia,

authority to determine the following: the kind and level of services to be provided; the kind and number of employees to be utilized in providing services; the kind and number of capitol improvements to be made; and the systems by which the services will be provided, including the use of outside contractors. (Footnotes omitted).

See, also, DePere Unified School District, Dec. No. 26572 (WERC, 8/90) and Jackson County, Dec. No. 17828-B (WERC, 10/86).

The record in this case shows that Johnson functions very independently as the PCNS. While she is listed as being under the supervision of the Long-Term Support Manager, the record demonstrates that she receives little if any direct supervision. The Long-Term Support Manager does not evaluate Johnson or monitor her work activities. Johnson functions as do the other non-represented agency managers who report to the Executive Director of Human Services. Johnson sets her own hours of work and schedules her own vacations. She is a salaried employee and paid on the same basis as other County managers, receiving approximately \$10,000 more per year than bargaining unit employees. She attends regularly scheduled meetings of the management team and participates in developing policy and procedures along with other agency managers. On a monthly basis, she reports to the County Board regarding the status of her program, the number of clients served, any program problems and the financial condition of the program. Other agency managers similarly report to the County Board.

Johnson personally develops the personal care program budget. She estimates revenue, and initiates requests for equipment, supplies, and increases in patient careworker compensation for the next year. She presents and defends her budget, as other agency managers do to the Executive Director. We note that none of the County's managers have the actual authority to reallocate County resources and that Johnson has the same budgetary authority as other exempt County managers.

The patient care program generates significant revenue for the County. The excess revenue is used to supplement other programs in the long term care area. Johnson's decisions regarding her program potentially affect the continued staffing levels and viability of other HSD programs which do not generate excess revenue.

The record supports that Johnson has complete responsibility for the patient care program. Under the guidelines established by the State, Johnson has developed management systems under which to operate. She has developed forms that assess client needs and are necessary for reimbursement, job descriptions for PCW's, agreement forms that identify obligations of PCW's for

the treatment of clients, service plan forms to determine care needs of clients, time records identifying the length of time spent on specific services, worker activity logs and other documents necessary for the administration of the program. When needed, she has approached the State to modify standards usually in place for certain activities.

The PCNS determines the type and level of care provided to the agency clients. Johnson determines the amount of time available to provide the care and when the services will be provided. The service plan developed by the PCNS is signed by the client, the PCW and Johnson on behalf of the agency. On behalf of the County, Johnson evaluates the services that are provided and makes necessary modifications. Johnson ensures that clients are certified initially and recertified each year. At her discretion, she decides whether or not to add additional clients. She prepares documents needed to comply with State and federal regulations. She also prepares reports for program and fiscal planning purposes. The PCNS is completely responsible for billing the State for services rendered and administering funds received by the PC program. Johnson selects and purchases all equipment and supplies for the PC program.

The PCNS contracts on behalf of the County for the services of PCWs. Johnson decides on the number of PCWs necessary for the program. She independently evaluates their background and makes selection decisions. She takes independent action on behalf of the County if the patient care program needs revision or if the provided service is unsatisfactory. She has decided at times not to add clients because of the size of the program and her inability to supervise more PCWs.

Johnson, in fulfilling her duties as the PCNS, has to a "significant degree" and "at a relatively high level of responsibility" participated in the formulation, determination and implementation of management policy relating to the personal care program. Based upon the entire record, we conclude that Johnson is a managerial employe and should remain excluded from the Union's bargaining unit.

Dated at Madison, Wisconsin, this 3rd day of April, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/

Herman Torosian /s/

Herman Torosian, Commissioner

William K. Strycker /s/

William K. Strycker, Commissioner