

**BEFORE THE STATE BOARD OF MEDIATION
STATE OF MISSOURI**

SERVICE EMPLOYEES INTERNATIONAL)		
UNION, LOCAL 50,))	
)	
Petitioner,))	
)	
v.))	Public Case No. R 91-016
)	
MONROE COUNTY NURSING HOME))	
DISTRICT, d/b/a MONROE MANOR,))	
)	
Respondent.))	

JURISDICTIONAL STATEMENT

This case appears before the State Board of Mediation upon the filing by Service Employees' International Union, Local 50, of a petition for certification as public employee representative for all service, maintenance and technical employees of Monroe Manor. A hearing was held on June 18, 1991, in Paris, Missouri, at which representatives of Local 50 and Monroe Manor were present. The case was heard by State Board of Mediation Chairman, Mary L. Gant and Employer Member, Milton O. Talent, who submitted the record to Employee Member, Joel Rosenblit. The State Board of Mediation is authorized to hear and decide issues concerning appropriate bargaining units by virtue of Section 105.525 RSMo 1986.

At the hearing, the parties were given full opportunity to present evidence. The Board, after a careful review of the evidence, sets forth the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Employer, Monroe County Nursing Home District, d/b/a Monroe Manor, operates a nursing home in Monroe County, Missouri. The Home is a 120 bed intermediate care nursing facility that primarily services the elderly. Its average census

is 119 residents, and it employs about 110 employees to provide services to those residents. Of those 110 employees, the majority (about 70 employees) work in the nursing department, the department involved here.

The nursing department is headed by a director of nursing. Prior to 1989, the Home was not required by law to have a registered nurse as its director of nursing, so a licensed practical nurse served in that capacity. After the regulations changed, a registered nurse was hired as director of nursing and the then incumbent director of nursing became personnel director. Most of the employees in the nursing department are certified nurse's aides (hereinafter referred to as CNA's) and some are orderlies and certified medication technicians (hereinafter referred to as CMT's). There are eleven employees in the nursing department who are known as "charge nurses", ten of whom are licensed practical nurses (hereinafter referred to as LPN's) and one of whom is a CMT. These charge nurses are directly underneath the director of nursing in the Home's organizational structure. Although the Home's organizational chart identifies an assistant

director of nursing position, that position was not filled at the time of the hearing, nor does the record indicate that it was about to be filled.

The facility is divided into two wings, each serving 60 residents (at full census), and there is one charge nurse assigned to each wing at all times. On the day shift, each wing is typically staffed with one charge nurse, one CMT and between six and eight CNA's. On the evening shift, each wing would normally include one charge nurse, one CMT and four CNA's. On the night shift, each wing typically would include one charge nurse and three CNA's. The Home administrator, director of nursing and personnel director generally are not present on weekends or after 5:00 p.m. on weekdays. When those managers are gone, the charge nurses are the highest ranking employees present at the Home and are in charge of the facility.

Each charge nurse directs the CNA's, CMT's and orderlies on his or her wing who, in turn, provide the direct patient care to the residents. Although the percentage changes slightly depending on the shift, charge nurses generally spend about 25% of their working time providing hands-on specialized care to residents such as handling tube feedings for a few residents who cannot chew their food and performing special dressing changes on injuries or sores. The charge nurses spend the remainder of their working time (about 75%) overseeing the work of the CNA's, CMT's and orderlies to ensure they perform their duties correctly. Included in this category is the time charge nurses spend performing paperwork, checking charts and ordering medications. The charge nurses assign work to the CNA's. By in large, these work assignments are made in accordance with statutory requirements. The charge nurse performs the same responsibilities that a registered nurse would perform in a skilled nursing facility.

The Home is legally required to maintain a certain number of nursing staff employees on each shift and the charge nurses ensure that this staffing level is maintained. When a shift is short-staffed, it is the charge nurse's responsibility to either call in additional aides in accordance with the Home's written call-in procedure or to require personnel from the prior shift to work overtime in accordance with pre-established "stay-over lists". The overtime stay-over list is prepared in advance by the personnel director. If employees are needed to work overtime, the charge nurse consults this list to determine which employee stays over to work overtime. The charge nurse then directs that employee to stay-over and work overtime even if it is involuntary. With regard to call-ins, the charge nurses call individuals from a list of part-time employees first; if additional employees are needed they call off-duty employees to come in to work. Charge nurses make up the work schedule for CNA's, schedule their work breaks and approve shift changes such as moving a CNA from first to second shift. Charge nurses initial time cards for employees when they fail to properly clock-in.

The Home conducts in-service meetings for the staff. These in-service meetings, which are required as part of the Home's licensure, give employees information about procedural changes and provide training. The charge nurses train the CNA's and other nursing department employees at these in-service sessions in providing patient care. For example, the charge nurses train employees in the proper performance of giving a bath, bedmaking, oral care, etc. All nurse's aides in Missouri are required to become certified nurse's aides and the training that charge nurses conduct for nurse's aides assist in this certification process.

Charge nurses do not have the authority to hire, promote or layoff employees. With regard to hiring, charge nurses do not participate in the interviewing process. Nevertheless, since the Home has a large staff turnover rate, the director of nursing considers any individual suggested for employment and several individuals suggested for employment by charge nurses have been hired. With regard to promotions, charge nurses cannot promote, per se. Promotions at the Home are possible only when an employee attains additional education and/or certification. The only upward progression within a classification is based on merit pay increases. With regard to layoffs, there have never been any layoffs at the Home. Thus, the role of the charge nurse in determining who would be laid off has never been addressed.

The director of nursing evaluates the charge nurses who, in turn, evaluate the remaining employees in the nursing department (i.e. the CNA's, CMT's, and orderlies). The charge nurses evaluate employees when they finish their probationary period or on their anniversary date. The charge nurse completes the employee evaluation form in a meeting with the personnel director. At that meeting the personnel director asks the charge nurse for their opinion as to the numerical rating that should be given to the various items appearing on the employee evaluation form, which is then written on the form itself. The numerical ratings that employees receive on these evaluations from the charge nurses results in a point total. This point total determines the amount of the

employee's merit pay increase for that year. Although in theory the charge nurse's evaluation is subject to review or changes by the personnel director, Home administrator or the Home Board of Directors, the record does not contain any instance where this has happened.

Charge nurses have the authority to issue verbal and written reprimands to employees without prior approval and have done so. If a charge nurse observes employee misconduct, they write up a disciplinary notice which includes the pertinent facts. If the misconduct is serious, the personnel director or the Home administrator reviews the incident and decides if additional discipline (such as suspension or discharge) is warranted. If it is, they impose the discipline without consulting with the charge nurse. The charge nurses have the authority to send employees home before the end of their shift for engaging in serious misconduct and rule violations, and have done so. For example, an employee who refused to do showers was sent home by a charge nurse. If an employee is sent home, the employee is to report to the Home administrator or the personnel director the next day. The purpose of this meeting the following day is to allow the employee to make a statement concerning the incident in question.

With regard to wages, all the employees at the Home are paid on an hourly basis with the exception of the Home administrator. Wage scales for LPN's and CNA's are keyed to wages paid to those classifications at other area nursing homes. Employees periodically get across-the-board pay increases and some qualify for merit increases. The starting pay rate for a charge nurse is approximately \$7.50 per hour, while the starting rate for a CNA is \$4.25 per hour. No CNA's are paid as much as a beginning charge nurse.

CONCLUSIONS OF LAW

Service Employees' International Union, Local 50 has petitioned to be certified as public employee representative of a bargaining unit comprised of all service,

maintenance and technical employees of Monroe Manor, hereinafter referred to as the Home. At the hearing, the parties stipulated to this unit. They further stipulated that the following classifications would be included in the petitioned-for bargaining unit: all certified nurse's aides, certified medical technicians, nurse's aides, orderlies, dietary employees, laundry employees, housekeeping employees, maintenance employees and activities and rehabilitation aides. An appropriate bargaining unit is defined by Section 105.500 (1) RSMo 1986 as:

A unit of employees at any plant or installation or in a craft or in a function of a public body which establishes a clear and identifiable community of interest among the employees concerned.

Since there is no dispute as to the appropriateness of the bargaining unit in this case, it follows that the aforementioned service and maintenance unit is an appropriate bargaining unit within the meaning of the Missouri Public Sector Labor Law.

The parties agree that the sole issue here is whether the ten licensed practical nurses (LPN's) and one certified medication technician (CMT) who collectively are known as charge nurses should be included in the above-described bargaining unit. The Employer contends they should not be included because of their supervisory status while the Union disputes this assertion. The parties stipulated that for purposes of the instant decision, all the charge nurses could be treated as a group. (i.e. that their job duties are essentially identical).

Although supervisors are not specifically excluded from the coverage of the Missouri Public Sector Labor Law, case law from this Board and the courts have identified such an exclusion. See Golden Valley Memorial Hospital v. Missouri State Board of Mediation, 559 S.W.2d (Mo.App. 1977) and St. Louis Fire Fighters' Association, Local 73 v. City of St. Louis, Missouri, Case No. 76-013 (SBM 1976). This exclusion means that supervisors cannot be included in the same bargaining unit as the

employees they supervise. Since the Employer contends that the charge nurses here are supervisors, it is necessary for us to determine if such is, in fact, the case. In making this decision, we will 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, including a consideration of the amount of independent judgment and discretion exercised in such matters.
- (3) The number of employees supervised, and the number of actual 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 a skill or for supervision of employees.
- (5) Whether the supervisor is primarily supervising an activity or primarily supervising employees.
- (6) Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employees.

Not all of these criteria need to be present for a position to be found supervisory. Rather, in each case the inquiry is whether these criteria are present in sufficient combination and degree to warrant the conclusion that the position is supervisory.

Applying these criteria to the charge nurses, we conclude that, on balance, they meet this supervisory test. Our analysis follows.

Attention is focused initially on factor (2), the authority to direct and assign the work force. There is no question that the charge nurses are in charge of the employees who report directly to them, namely the CNA's, CMT's and orderlies. The charge nurses direct these employees on a day to day basis in the performance of their work activities (i.e. patient care). They spend about 75% of their time overseeing the work of these employees and ensuring that they perform their duties correctly. Charge nurses can assign these employees to various job tasks and types of work activities, some of which is less desirable. Additionally, since charge nurses are responsible for maintaining a

specific staffing level, they approve voluntary overtime and assign involuntary overtime to employees as well. They spend the remaining 25% of their time performing the same hands-on patient care as the CNA's perform.

During a significant portion of each workweek (i.e. most of the second shift, the third shift and weekends), charge nurses are the highest ranking personnel present at the Home. This fact though does not automatically qualify them as supervisors however. For example, as noted by the Union, a night watchman is not a supervisor just because he is the only person on the premises at night, and if there were several watchmen, it would not follow that at least one was supervisory. In our view, the more important question is what the employee does during the time that they are the highest ranking person present. Here, the record indicates that on evenings and weekends, charge nurses are officially in charge at the Home and responsible for handling whatever situations arise. To be sure, some of these situations involve the care and treatment of patients. However, the charge nurses' responsibilities are not limited to just the activity of patient care. Other situations involve the direction of the employees themselves. As examples, charge nurses who were in charge of the facility have sent employees home as disciplinary measures and have called the police on disruptive employees. Additionally, it is noteworthy that the charge nurses do not have to get authorization or check with anyone before taking whatever steps they deem appropriate. Thus the charge nurses know they are empowered to make these decisions and have done so. While on some occasions the charge nurses have called other off-duty supervisors concerning extraordinary circumstances that have arisen, the critical point is that they (i.e. the charge nurses) did not have to do so. We therefore find that in the context of this case, this responsibility (i.e. being in charge of the facility when no higher management official is present) involves the exercise of substantial independent judgment and discretion.

Next, with regard to factor (3), no one (other than the charge nurses) exercises similar authority over the CNA's, CMT's and orderlies, and only the director of nursing (plus, of course, indirectly the personnel director and the administrator of the facility) exercises greater authority over these employees. Depending on the shift, a charge nurse controls from three employees (on the third shift) to eight employees (on the first shift). The charge nurses are the only level of supervision between the director of nursing and the approximately 60 CNA's, CMT's and orderlies in the nursing department. Were we to find that the charge nurses are not supervisors, there would be only one supervisor, the director of nursing, supervising all 70 employees in the nursing department. In our view, such a figure is inordinately high. With the charge nurses as supervisors though, the ratio of supervisors to employees in the nursing department becomes about one to six, a much more acceptable figure.

With respect to the level of pay (factor 4), it is noted that charge nurses earn substantially more than CNA's. Even senior CNA's are not paid as much as starting charge nurses. In our opinion, this higher rate of pay for the charge nurses is due in large part to their directing the workforce and performing those duties not performed by others in the nursing department.

Attention is now turned to factors (5) and (6) above. As previously noted, we have already found that the charge nurses supervise an activity (i.e. the patient care performed by the CNA's, CMT's and orderlies). Specifically, we noted that although they spend some time doing actual hands-on patient care duties, they spend the vast majority of their time directing the CNA's, CMT's and orderlies, assigning them work and ensuring that they perform it correctly. What we have just described though is the classic example of a leadworker (i.e. someone who supervises a work activity). Leadworker status, in and of itself, is insufficient to convey supervisory status. Instead, supervision of employees is required. That being so, if the foregoing leadworker duties were the extent of the charge nurses' management responsibilities, we would be hard

pressed to call them supervisors. However, the charge nurses have additional responsibilities involving some of the matters contained in factor (1) above that satisfy us that they are not mere leadworkers.

First, although charge nurses cannot discharge employees, it is undisputed that they can, and do, routinely issue verbal counseling and written warnings to employees. The charge nurses can issue this discipline on their own without clearing it in advance with anyone else in management. Specifically, they can write up disciplinary notices for employee misconduct, instances where employees fail or refuse to perform work assignments or for infractions of the Employer's policies and rules. The charge nurses usually write up these disciplinary notices because they are the individuals who observe the misconduct in question. These write-ups indicate the facts involved in the incident but do not include any recommendations for additional disciplinary action. If suspensions are later imposed, it is done so by the personnel director or the Home administrator, not the charge nurses. While the Union characterizes these disciplinary write-ups as mere "factual reports", we are persuaded they are far more than that. In so finding, we note that these write-ups become a part of the employees' personnel record, can affect the employees' merit pay increases and can affect the employees' job security. We expressly reject the Union's contention that these disciplinary write-ups do not constitute discipline in and of itself. In our view, any employee who receives a written warning understands that they have been disciplined, even if no further action is taken. Additionally, the charge nurses can send employees home for the remainder of their shift and have done so. When this happens, the situation is later reviewed by higher management authority (namely the personnel director or the Home administrator), who decide what to do next. Although the Union sugar-coats this disciplinary action by characterizing it as merely asking an employee to leave for the remainder of their shift, we view it as a suspension, pure and simple. Moreover, the fact that this suspension is for no longer than a shift does not diminish its importance.

Instead, what is more important that the length of the suspension is the authority to impose it in the first place, and charge nurses obviously have that authority.

Second, charge nurses annually evaluate the CNA's, CMT's and orderlies on their performance in a variety of areas (i.e. personal attributes, work ability, dependability and job preparedness). Although the charge nurses complete these evaluations in a meeting with the personnel director, the personnel director does not dictate what ratings are given to the employee; that is solely up to the charge nurse. After these evaluations are completed by the charge nurse, they are theoretically subject to modification by the personnel director, Home administrator and/or the Board of Directors. However, the record does not contain a single instance where this has happened. Thus, as a practical matter, the evaluations completed by the charge nurses have not been changed or altered by higher management officials. Most important though is the fact that these evaluations directly determine, through the use of a point system, the amount of merit increase that will be awarded to the evaluated employee. This authority to award, or conversely to withhold, merit pay is certainly indicative of supervisory status. In making this finding, we are well aware of those cases cited by the Union where we held that the preparation of evaluation forms was a minor factor which did not indicate supervisory status.¹ However, those cases are easily distinguishable from the instant case on the grounds that in none of them was the evaluation directly tied to a merit increase, as is the case here.

Given the foregoing, we are persuaded that although the charge nurses cannot hire, fire or promote employees, they nevertheless wield potent authority over the

¹ Meramac Valley R-3 School District, Case No. R 88-001 (SBM 1987); Riverview Fire Protection District, Case No. R 87-017 (SBM 1987); and City of Frontenanc, Case No. 86-010 (SBM 1986).

employees under them because they are empowered to reward them (via their evaluations) and punish them (via discipline).

DECISION

It is the decision of the State Board of Mediation that the charge nurses at issue here are supervisory employees. They are therefore excluded from the stipulated service and maintenance bargaining unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Chairman of the State Board of Mediation, or its designated representative, among the employees in aforementioned bargaining unit, as early as possible, but not later than thirty days from the date below. The exact time and place will be set forth in the notice of election to be issued subsequently, subject to the Board's rules and regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during the period because of vacation or illness. Ineligible to vote are those employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election. Those eligible to vote shall vote whether or not they desire to be represented for the purpose of exclusive recognition by SEIU, Local 50.

It is hereby ordered that the City shall submit to the Chairman of the State Board of Mediation, as well as to Local 50, within fourteen days from the date of this decision, an alphabetical list of names and addresses of employees in the stipulated bargaining unit who were employed during the payroll period immediately preceding the date of this decision.

Signed this 5th day of September, 1991.

(seal)

STATE BOARD OF MEDIATION

/s/ Mary L. Gant

Mary L. Gant, Chairman

/s/ Milton O. Talent

Milton O. Talent, Employer Member

DISSENT

Joel Rosenblit, Employee Member

DISSENTING OPINION
Public Case No. R 91-016

The record in this case reveals that the licensed practical nurses (LPN's)/charge nurses are not supervisors because they lack sufficient authority. They do not have the power to make important decisions on behalf of the management of the nursing home. They perform their duties in the interest of patient care, which befits their training as nurses. Public employees must not be stripped of their statutory rights unless their authority and duties clearly establish that they are supervisors, allied with management. An examination of the six criteria for determining supervisory status, as enumerated in the majority opinion, indicates that the LPN/charge nurses lack the characteristics of supervisory status.

The LPN/charge nurses have limited roles in hiring, discipline, and discharge. Although they may suggest names for openings, like other employees, the LPN/charge nurses do not interview candidates and do not make the decision about whether to hire. The LPN/charge nurses record incidents of misconduct by certified nurse's aides (CNA's) but these written reprimands and other oral reprimands are not part of a progressive discipline system. In situations of serious misconduct, such as intoxication at work, an LPN/charge nurse may send the CNA home for the rest of the shift. However, the LPN/charge nurse may not announce a suspension for longer than the remaining portion of the shift. The next day, the employee meets with the Director of Nursing, the Director of Personnel or the Administrator and the employee can make a statement about the incident. Management may investigate the alleged misconduct and issue a suspension or a discharge. The minimal authority to send home an intoxicated employee for the remainder of a shift without an effective recommendation to suspend or discharge does not constitute supervisory authority.

An LPN/charge nurse testified that the CNA's are evaluated by the LPN/charge nurses at irregular intervals. These evaluations influence merit pay increases. However, these evaluation forms are filled out in the Director of Nursing's office, in her presence. The Director of Nursing testified that she suggests changes when she disagrees with a rating. The evaluations are not independently produced by the LPN/charge nurse and are not binding upon the Administrator or the Board of Directors in the determination of raises.

The LPN/charge nurses prepare the work schedules of the CNA's to ensure adequate staffing levels required by law and to provide for patient care. If a shift has too few CNA's, the LPN/charge nurse calls in additional aides in accordance with a written call-in procedure or requires CNA's from the prior shift to remain, in the order of pre-established "stay-over lists." Overtime lists are prepared by the Director of Personnel and the LPN/charge nurse must follow the list when assigning overtime. These tasks do not require independent judgment. At these times the LPN/charge nurse is a conduit for orders from above. The approval of shift changes and assignment of breaks, standing alone, do not indicate that the LPN's assign the workforce at their own discretion. The jobs of the CNA's are standardized and the CNA's generally know what they must do without the direction of the LPN/charge nurse. The LPN/charge nurse merely oversees the work activities to ensure that the work is properly performed. The LPN/charge nurses supervise activities rather than employees in the manner of a leadperson. All of the routine tasks involved in the assignment and direction of the CNA's are intended to provide for the care of the residents. Thus, the LPN/charge nurses are engaged in patient care during most of their work time with about one-quarter of their time consisting of actual skilled nursing care.

The LPN/charge nurses are paid in accordance with their skills as nurses, pursuant to wage surveys of similar institutions. There is no evidence that they are paid a premium for supervisory duties. A promotion to the LPN/charge nurse position can only be obtained through additional education and licensing. The pay level of the LPN/charge nurse is a result of becoming a skilled LPN, not because of the granting of the title of charge nurse.

The LPN/charge nurses are the highest ranking employees present at the facility during the evenings and on the night shifts. This fact alone, without the exercise of supervisory authority, does not establish supervisory status in the private sector. NLRB v. Res-Care, Inc. d/b/a Hillview Health Care Center, 705 F.2d 1461, 113 LRRM 2336 (1983). Waverly Cedar Falls Health Care Center, 297 NLRB No. 40, 132 LRRM 1396 (1989). Similarly, a high ratio of employees to supervisors does not necessarily require the finding of more supervisors, if the LPN/charge nurses do not exercise independent judgment. Waverly Cedar Falls Center v. NLRB, 933 F.2d 626, 137 LRRM 2393 (1991). I would accept the guidance of the Federal courts and the National Labor Relations Board in this instance.

The foregoing examination of the criteria for supervisory status discloses that the criteria are not present in sufficient combination and degree to warrant a conclusion that the LPN/charge nurse position is supervisory. Accordingly, I dissent.

/s/ Joel Rosenblit
Joel Rosenblit
Employee Member