

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

Guernsey/Noble Education Association, OEA/NEA,

Employee Organization,

and

Guernsey County Board of Mental Retardation and Developmental Disabilities,

Employer.

CASE NUMBER: 94-REP-03-0044

OPINION

POTTENGER, Vice Chairman:

This representation case is before the State Employment Relations Board ("SERB") upon the filing of exceptions to the Hearing Officer's Recommended Determination issued on June 14, 1995, and the filing of responses to the exceptions. For the reasons below, we find the Guernsey County Board of Mental Retardation and Developmental Disabilities has failed to produce substantial evidence that the Program Nurse in question is a supervisor in accordance with O.R.C. § 4117.01(F). Accordingly, the Employer's amended Petition for Amendment of Certification is dismissed.

I. BACKGROUND

On March 17, 1994, the Guernsey County Board of Mental Retardation and Developmental Disabilities ("Employer") filed an amended Petition for Amendment of Certification with SERB for the purpose of removing one employee, Phyllis Wright, occupying the classification of Program Nurse, from a bargaining unit represented by the Guernsey/Noble Education Association, OEA/NEA ("OEA"). A public hearing was held to determine whether any change in duties performed by Ms. Wright warranted a change in her status from a public employee to a supervisor as defined by Ohio Revised Code ("O.R.C.") Chapter 4117. The Hearing Officer's Recommended Determination, issued on June 14, 1995, concluded that Ms.

OPINION

Case No. 94-REP-03-0044

Page 2 of 10

Wright did not meet SERB's standard for supervisory status and should, therefore, remain in the bargaining unit. The Employer filed exceptions to the recommended determination on June 26, 1995. The OEA filed a response to the exceptions on July 10, 1995.

The Employer operates a one-shift daytime mental retardation and developmental disability facility. Ms. Wright, a registered nurse, is employed there as a "Program Nurse." Ms. Wright is the only registered nurse at the facility and there are no licensed practical nurses. Ms. Wright's job duties as a Program Nurse have remained virtually unchanged since 1986 and have not changed materially, with the exception of delegating certain nursing tasks, since SERB's approval in April 1992 of a joint petition filed by the present parties to add the position to OEA's existing bargaining unit. Although the OEA and the Employer disagree whether the delegating functions now make the Program Nurse a supervisor under O.R.C. § 4117.01(F), the parties agreed during negotiations for their 1994-97 collective bargaining agreement to let SERB, and then the courts, decide the issue of the exclusion/inclusion of this position rather than to negotiate the same at the table.¹

The delegating functions in question arise from legislation passed by the Ohio Legislature that permits registered or licensed practical nurses in mental retardation and developmental disability ("MR/DD") programs to delegate limited nursing functions to non-nurses. Pursuant to Substitute House Bill 715 ("Sub. H.B. 715"), which became effective April 22, 1994, each County MR/DD Board was required to formulate a written policy addressing whether the MR/DD Board's non-nurse employees would be permitted to give or apply prescribed medication or to perform other delegated nursing functions. The legislation also provided that if the MR/DD Board's policy did allow delegation,² a registered or licensed practical nurse was required to implement it. Accordingly, in October 1993, the Employer

¹Findings of Fact ("F.F.") Nos. 1 and 2.

²The training workbook of the Ohio Board of Nursing defines "delegation" as follows:

"Delegation" means the transfer of a selected nursing activity or task from a licensed nurse to a trained unlicensed person working under nursing supervision in a selected situation. (Petitioner's Exhibit 6).

OPINION

Case No. 94-REP-03-0044

Page 3 of 10

developed and implemented a policy authorizing its non-nurse employees to perform nursing tasks and functions involving the processing of medication. Ms. Wright, the only nurse at the Guernsey County facility, completed training for the delegated nursing program in September 1993. Ms. Wright, however, did not understand her role to be that of a supervisor, but instead a nurse delegator.³

When present at work, Ms. Wright performs all tasks associated with her job description and has the discretion to determine which nursing tasks to delegate in her absence. Ms. Wright determined that only those tasks involving no independent judgment would be delegated to non-nurse employees to perform, i.e., dispensing medications and applying topical medications. These particular duties had previously been performed by the parents of the MR/DD clients when the Program Nurse was sick, on vacation, or otherwise unavailable. The collective bargaining agreement between the OEA and the Employer provides for an extra \$10.00 per day stipend for any non-nurse employee who performs delegated nursing tasks in Ms. Wright's absence.⁴

Employees to whom Ms. Wright delegates nursing tasks are selected from among those who have completed a training program consisting of fifteen (15) hours of initial instruction followed by five (5) hours of annual training. These employees participate in the training program voluntarily and must each perform the delegated nursing tasks five (5) times under Ms. Wright's observation before they are permitted to perform the tasks on their own. At the conclusion of the training course, Ms. Wright gives each volunteer a written test that she grades. From the test results, she determines which employees will be delegated nursing tasks. If an employee makes a serious mistake due to improper training, Ms. Wright's license could be at issue.

³F.F. Nos. 3 and 11; Transcript ("Tr.") 78.

⁴F.F. Nos. 4, 5, 9, and 11.

OPINION

Case No. 94-REP-03-0044

Page 4 of 10

The duties delegated typically involve picking up the medication to be dispensed from a locked cabinet and handing it to the client; observing the client take the oral medication; and making a written record of the name of the client, the medication given, and the time of day it was taken, as well as noting any problems that may have arisen. No one on the Employer's site directly supervises the employees performing the delegated nursing tasks when Ms. Wright is away from her job. A step-by-step manual of each procedure is available at the site where any delegated nursing task is to take place. Also, a nurse is available by telephone from another facility to answer questions or deal with any problems.⁵

The first time that the non-nurse staff was allowed to perform the delegated duties in Ms. Wright's absence was May 1994. In compliance with state guidelines requiring a nurse to check at least once per month to see if the delegated nursing tasks are being done, Ms. Wright, upon her return to work, monitors the task(s) that she has delegated by checking the medication records to make sure that the staff member(s) gave the proper medication to the correct client; by reviewing the log to see if any problems arose; and by asking questions of staff and clients regarding whether there were any problems or complaints.⁶

II. DISCUSSION

A. Definition Of "Supervisor" Under O.R.C. § 4117.01(F)

The determination of whether an employee having particular job duties qualifies as a supervisor under O.R.C. § 4117.01(F) depends on the facts of each case. *In re Office of Collective Bargaining*, SERB 89-016 (7-13-89). O.R.C. § 4117.01(F) defines "supervisor" as:

(A)ny individual who has authority, in the interest of the public employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other public employees; to responsibly direct them; to adjust their

⁵F.F. Nos. 5, 6, 8, and 9.

⁶F.F. Nos. 7, 9, and 10.

6

OPINION

Case No. 94-REP-03-0044

Page 5 of 10

grievances; or to effectively recommend such action, if the exercise of that authority is not of a merely routine or clerical nature but requires the use of independent judgment

Previously, SERB held that an individual must exercise more than one of the responsibilities listed in O.R.C. § 4117.01(F) in order to qualify as a supervisor. *In re Office of Collective Bargaining, supra; In re Ohio State University*, SERB 90-005 (2-23-90). This position changed, however, when the Board announced a new standard for determining supervisory status in *In re Mahoning County Dept. of Human Services*, SERB 92-006 (6-5-92). Specifically, the Board held:

Accordingly this Board rules that henceforth an individual will be excluded from a bargaining unit, pursuant to O.R.C. Sec. 4117.01(F), so long as the record contains substantial evidence that the employee has the authority to perform *one or more* of the functions listed in that section, actually exercises that authority and uses independent judgment in doing so.

Id. at 3-19 (footnotes omitted, emphasis in original).⁷

The *Mahoning* standard involves three (3) steps. First, the evidence must show the employee at issue has the authority to perform one or more of the supervisory functions listed

⁷In *Mahoning, supra* at 3-19 n.1, we stated:

This standard is to be applied prospectively only. If an individual's status has previously been determined through stipulation or litigation, we decline to re-examine that status under the new standard. If it is contended that the individual's duties have changed so as to justify a change of status, then the party advocating the change must demonstrate a change of status under the standard existing at the time of the original stipulation or litigation.

This statement was intended to foreclose parties from filing new actions to relitigate this issue. In the present case, the change of duties for Ms. Wright were the result of a subsequent statutory change, the enactment of Sub. H.B. 715 effective April 22, 1994. Until the passage of this legislation, nurses lacked the authority to delegate these duties to non-nurse staff. Naturally, the ability to delegate was not a consideration or possibility when the Program Nurse was added to the bargaining unit in April 1992. Because this substantial change in the factual underpinnings of the parties' previous actions was statutory in origin, we conclude the appropriate standard to use in this case is the *Mahoning* standard.

7

OPINION

Case No. 94-REP-03-0044

Page 6 of 10

in O.R.C. § 4117.01(F), which may be evidenced by the employee's job description. Second, the employee must actually exercise this authority, which may be illustrated by specific incidents in which the employee performed the relevant function. Third, the exercise of this function cannot be routine and clerical, but must involve independent judgment. *In re Medina County Health Department*, SERB 95-006 (4-21-95).

The Employer contends: (1) the evidence presented at the hearing clearly establishes Ms. Wright as a supervisor under the *Mahoning* standard and (2) the amendment to remove the Program Nurse classification from CEA's bargaining unit is necessitated by Sub. H.B. 715. After a thorough review of the record, we find insufficient evidence to substantiate a finding that Ms. Wright is a supervisor under the *Mahoning* standard.

First, several of the duties in question pertain to training, such as selecting MR/DD Board workers to be trained to perform delegated nursing functions; training the selected individuals; administering, grading and recording tests results from training courses; and issuing certificates upon the worker's training course completion. Training functions are not activities which will satisfy the standard for a finding of supervisory status under O.R.C. § 4117.01(F) because they are not listed in this section. *In re Medina County Health Dept.*, *supra* at n.14.

Second, the record does not support the argument that Ms. Wright's supervisory status is evidenced by her providing ongoing supervision to the staff performing the delegated nursing task, i.e., supervising MR/DD Board workers' distribution of medication. Sub. H.B. 715 allows for the supervision of those employees performing the delegated nursing tasks to be on-site or, pursuant to some means of telecommunication, off-site. When Ms. Wright is present on the job, she performs all those nursing tasks that are otherwise delegated in her absence. The only time that Ms. Wright observes the non-nurses perform delegated nursing tasks is when, as a part of training, they are required to perform them five (5) times under her observation before being authorized to do so independently. On all other occasions, the employees assigned these particular duties must carry them out on their own with the assistance of a step-by-step manual or, when necessary, with telephone assistance of another

9

OPINION

Case No. 94-REP-03-0044

Page 7 of 10

nurses at a different facility. Based upon this evidence, the Employer has failed to meet its burden of proof and, therefore, we conclude that Ms. Wright does not provide ongoing supervision to her subordinates so as to exercise the requisite authority to responsibly direct them pursuant to O.R.C. § 4117.01(F).

Third, even though Ms. Wright has the discretion to select those employees to whom she will delegate nursing tasks in her absence, we find that the performance of this function does not establish her as their supervisor. In determining which students or enrollees of the Employer's programs and services are to receive delegated nursing services and in documenting their performance quarterly, Ms. Wright is not "hiring" or "assigning" within the context of O.R.C. § 4117.01(F), nor is she "promoting" or "rewarding" those employees selected. In effect, Ms. Wright is merely choosing from among existing *volunteers* who themselves may exercise discretion as to whether to perform the delegated nursing responsibilities by replacing her in certain pre-determined functions.⁸ This sporadic delegation of non-supervised, routine tasks does not elevate the person delegating such authority to supervisory status. Further, inasmuch as it has been established in the collective bargaining agreement between the OEA and the Employer that those volunteers performing the delegated nursing tasks are to receive compensation of \$10.00 per day, Ms. Wright has neither the discretion nor the authority to "reward" these employees so as to establish her as their supervisor pursuant to O.R.C. § 4117.01(F).

Fourth, it is argued that Ms. Wright's ability to withdraw a volunteer's authority to perform delegated nursing tasks is a disciplinary function that is indicative of her supervisory capacity. We disagree. The withdrawal of *additional* duties for the non-nurses is not a disciplinary act. This does not rise to the level of a demotion since this authority is only to remove duties that are not routinely a part of the non-nurses' jobs. In addition, pivotal in establishing an employee's supervisory status is the *actual exercise* of such authority. *Mahoning, supra*. Ms. Wright testified that she *believed* she had authority to recommend disciplinary action for individuals who did not properly perform their delegated nursing tasks;

⁸Tr. 85.

however, she had not exercised such authority.⁹ Further, Ms. Wright testified that she did not have the authority to compel the volunteers who were delegated the nursing task to perform those tasks.¹⁰ Based upon these facts, Ms. Wright's assumed, but unexercised, authority to discipline subordinates fails to satisfy the *Mahoning* standard in establishing her as a supervisor.

B. Use Of The Term "Supervision" In Sub. H.B. 715

Section 151(C)(5) of Sub. H.B. 715 provides in part:

An MR/DD board worker shall give or apply prescribed medication or perform a delegated nursing task only pursuant to the direction and *supervision* of the nurse who delegates the authority to give or apply the medication or perform the nursing task. The *supervision* may be on-site or, pursuant to some means of telecommunication, off-site, but must meet the standards established by rule of the Board of Nursing adopted pursuant to division (E) of this section. A nurse who delegates authority to give or apply prescribed medication remains responsible for the care of the MR/DD board client. (emphasis added).

The General Assembly used the general term "supervision" without any special language in the provision at issue. The Employer argues that the foregoing language in Sub. H.B. 715 is controlling under O.R.C. Chapter 4117 and requires the exclusion of the Program Nurse from the bargaining unit as a supervisor. This contention is not persuasive. The use of this general term does not control over the specific definition of "supervisor" under O.R.C. § 4117.01(F). Had the General Assembly intended such an interpretation, it would have manifested its intent within Sub. H.B. 715.

The O.R.C. § 4117.01(F) definition clearly applies to the actions and responsibilities of one individual toward public employees. However, the use of the term "supervision" throughout the Code is not likewise restricted. For example, the act of supervision can be

⁹Tr. 39-40.

¹⁰Tr. 85.

OPINION

Case No. 94-REP-03-0044

Page 9 of 10

performed by a county probation department (O.R.C. § 2951.05), by a school district board of education or a nonpublic school (pre-school services operated by or under its supervision - O.R.C. § 3109.051) or by the Public Utilities Commission (commission has general supervision over all public utilities within its jurisdiction and over certain other companies - O.R.C. § 4905.06). The Ohio Revised Code not only discusses supervision of public employees, but also supervision and maintenance of recreation facilities (O.R.C. § 755.13(A)) and supervision over the installation, performance of major repairs on site to, abandonment of, and removal of underground storage tank systems (O.R.C. § 3737.881(DH1)). None of the foregoing examples fall within the activities performed by, nor would the entities doing these actions meet the definition of a "supervisor" under O.R.C. § 4117.01(F).

O.R.C. § 3319.088(C) states in part "Educational aides shall at all times while in the performance of their duties be under the supervision and direction of a teacher. . . ." Following the Employer's line of reasoning, this would make each of these teachers a supervisor, a result clearly not intended by this statutory provision. O.R.C. § 4303.202(A) provides in part "On a premises on which the [F-2 liquor] permit is to be used shall be clearly defined and sufficiently restricted to allow proper supervision of the permit use by state and local law enforcement personnel." Again, the Employer's line of reasoning would lead incorrectly to the conclusion the law enforcement personnel are "supervisors" because they performed acts of "supervision." For all of the foregoing reasons, we reject this argument advanced by the Employer.

C. Comparison With NLRB v. Health Care & Retirement Corporation of America

Finally, we reject the Employer's comparison between the facts of this case and a private sector case, *NLRB v. Health Care & Retirement Corporation of America*, 114 S. Ct. 1778, 146 L.R.R.M. 2321 (1994), for the purpose of showing that even though Ms. Wright has never actually exercised her authority to discipline an employee, she is nevertheless a supervisor. In that case, the National Labor Relations Board ("NLRB") maintained that a nurse's supervisory activity was not exercised in the interest of the employer if it were incidental to the treatment of patients and, therefore, certain nurses employed by an Ohio

nursing home were not "supervisors" for purposes of the National Labor Relations Act. The United States Supreme Court rejected this argument stating the NLRB's test for determining whether nurses were supervisors was inconsistent with the statute and the NLRB had created a false dichotomy between acts taken in connection with patient care and acts taken in the interest of the employer. Moreover, the Court rejected the NLRB's argument because it had not sought to sustain its position that the employees in question were not supervisors based upon the twelve (12) listed supervisory indicia in the National Labor Relations Act, but instead chose to rely on the interpretation of the phrase "in the interest of the employer."

The Employer's reliance on *NLRB v. Health Care & Retirement Corporation of America supra*, is misplaced. The U.S. Supreme Court limited its focus in that case to addressing the NLRB's supervisory standard, which places great emphasis on its broad interpretation of the statutory phrase "in the interests of the employer." In the matter before us now, the issue has nothing to do with whether delegated nursing tasks are performed "in the interest of the employer," but instead with whether any of the duties performed by Ms. Wright, in her capacity as Program Nurse, are indicia of supervisory status in accordance with the listed functions in O.R.C. § 4117.01(F). We have not found any of those duties cited by the Employer to meet the statutory criteria.

III. CONCLUSION

For the reasons above, we find the Guernsey County Board of Mental Retardation and Developmental Disabilities has failed to produce substantial evidence that the Program Nurse is a "supervisor" in accordance with O.R.C. § 4117.01(F). Accordingly, the Employer's amended Petition for Amendment of Certification is dismissed without prejudice.

Pohler, Chairman, and Mason, Board Member, concur.