

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:

JENNIFER COOPER

Involving certain employees of:

NEWPORT HOSPITAL (PEND OREILLE
PUBLIC HOSPITAL DISTRICT 1)

CASE 24036-E-11-3653

DECISION 11197 - PECB

ORDER ON ELIGIBILITY

Jennifer Cooper, appeared pro se.

K&L Gates LLP, by *Brian M. Werst*, Attorney at Law, for the employer.

Douglas Drachler McKey & Gilbrough, by *Paul Drachler*, Attorney at Law, for the incumbent union.

On June 13, 2011, Jennifer Cooper (Cooper) filed a petition seeking to decertify the Service Employees International Union Healthcare 1199NW (union) as the exclusive bargaining representative of employees of Newport Hospital (employer) included in the unit that was certified on June 7, 2010:

All full-time and regular part-time employees of Pend Oreille Public Hospital District 1 (Newport Hospital and Health Services) in the following job classifications: LPN, certified nursing assistant (nursing assistnat-certified (sic), HUC/NAC, NAC-activities aide, restorative therapy aide, restorative aide, HUC/NAC admitting: activities coordinator), nursing assistant-registered, health unit secretary (HUCs), emergency department technician, (ed tech), medical assistant and or technician (scrub tech) employed at Newport Community Hospital (sic), the long term care unit, River Mountain Village, Family Medicine Newport and Family Health Center Newport, excluding supervisors, confidential employees, casual employees and all other employees.

Newport Hospital (Pend Oreille Public Hospital District 1), Decision 10776 (PECB, 2010).

On July 13, 2011, Representation Coordinator Sally Iverson held an investigation conference during which the union asserted that Petitioner Cooper is a supervisory employee. The union argued that because Cooper is a supervisor, the decertification petition is procedurally defective because supervisors may not file decertification petitions for non-supervisory employees.

On August 8, 2011, the union filed an unfair labor practice complaint alleging, among other things, that Cooper was a supervisory employee who unlawfully assisted in the effect to decertify the union that represents the non-supervisory bargaining unit. Case 24167-U-11-6188. Because the supervisory status of an employee is an investigatory matter, as opposed to an adversarial issue, Cooper's supervisory status can best be determined by this proceeding.

On August 23, 2010, Representation Case Administrator Dario de la Rosa held a hearing to develop a record regarding Cooper's supervisory status. The parties filed post-hearing briefs that were considered.

ISSUE PRESENTED

The only issue presented in this matter is whether Cooper is a supervisory employee as defined by Chapter 41.56 RCW and WAC 391-35-340.

Based upon the testimony and evidence presented, Cooper is not a supervisory employee as defined by WAC 391-35-340. Cooper does not perform a preponderance of the duties of a supervisory employee, nor does she spend a preponderance of her time performing supervisory duties. Although Cooper possesses independent authority to assign and schedule work, and has some say in the temporary transfer and evaluation of employees, she does not have the independent authority to hire or discipline employees or implement meaningful changes to employees' work environment.

Applicable Legal Standard

The determination and modification of bargaining units is a function delegated to this Commission by the Legislature. RCW 41.56.060. The Commission has exercised its unit

determination authority to maintain a separation of supervisors from their subordinates, and has adopted a rule requiring exclusion of supervisors from bargaining units containing their subordinates:

WAC 391-35-340 UNIT PLACEMENT OF SUPERVISORS--BARGAINING RIGHTS OF SUPERVISORS. (1) It shall be presumptively appropriate to exclude persons who exercise authority on behalf of the employer over subordinate employees (usually termed "supervisors") from bargaining units containing their rank-and-file subordinates, in order to avoid a potential for conflicts of interest which would otherwise exist in a combined bargaining unit.

See also Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977); City of Lynnwood, Decision 8080-B (PECB, 2006).

In the absence of a test within Chapter 41.56 RCW, Commission precedents adopt the test set forth in RCW 41.59.020(4)(d) that distinguishes supervisors from employees who are merely lead workers. Under that statute, if the preponderance of an employee's duties demonstrates that the employee has authority to "hire, assign, promote, transfer, layoff, recall, suspend, discipline, or discharge other employees, or to adjust their grievances, or to recommend effectively such action, if . . . the exercise of such authority is not merely routine or clerical in nature but calls for the consistent exercise of independent judgment," then the employee shall be considered a supervisory employee.

A supervisor can perform a "preponderance" of the supervisory duties in two ways. If a majority of an individual's time is spent performing supervisory duties, that individual may be a supervisor. *Richland School District, Decision 10151 (PECB, 2008)*. Alternatively, an individual who spends less time performing supervisory duties but performs a preponderance of the enumerated duties, may be considered a supervisor. *King County, Decision 10075 (PECB, 2008)*.

While there may be some indicia within a record demonstrating that "lead workers" exercise some supervisory authority, there still must be a sufficient preponderance of supervisory duties to warrant their separation from the rank-and-file employees they lead. *City of Lynnwood,*

Decision 8080-B. Discretionary authority in administrative matters or having the ability to direct employees in daily job assignments may not rise to the level of possessing independent authority to act or effectively recommend personnel actions. *Granite Falls School District*, Decision 7719-A (PECB, 2003); *City of Gig Harbor*, Decision 4020-A (PECB, 1992).

Application of Standard

The employer is a public hospital. Tom Wilbur is the Chief Executive Officer. Roger Rasmussen is the Director of Human Resources and Chief Administrative Officer. The employer operates a Long Term Care Unit (LTC) as part of its operation. Shannon Ennis, the Director of Residential Services, manages the LTC. The employees who work in the LTC include a nursing staff, Rehab Coordinator Larry Hagat, Social Services Coordinator Margaret Cuerton, Cooper, and various staff supporting Hagat, Cuerton, and Cooper.

Cooper has been employed by the hospital for approximately 20 years. She has worked in the Activities Coordinator position for approximately the last eight years. As the Activities Coordinator, Cooper provides social activities and entertainment for the residents of the LTC, such as games, family barbeques, church services, and outings to community events. Currently, there are two “activities aides” who work under Cooper.¹ Cooper testified at the hearing that she views herself as a supervisor.

Cooper is responsible for the general operation of the activities program, including the scheduling and coordinating of leisure activity programs to meet the needs of the LTC’s residents. In April 2010, Cooper prepared a job description she sent Rasmussen that demonstrated she understood her responsibilities to include the hiring, training, as well as supervising, scheduling and directing, and evaluating the performance of the activities aides. Exhibit 3. Recognizing that an employee’s job description is less important than the actual duties the employee performs, *see Ronald Wastewater District*, Decision 9874-B (PECB, 2008), a job description nevertheless provides a reference point to begin the analysis.

¹ Cooper is also the LTC’s “Volunteer Coordinator” and directs the work of approximately 30 volunteers who participate in the social activities with the LTC’s patients. The volunteers are not employees within the meaning of Chapter 41.56 RCW, and therefore Cooper’s oversight of those employees is not dispositive of her status.

Scheduling and Directing Employee Work

It is clear from the testimony and evidence that Cooper's actual duties make her responsible for directing the daily duties of the aides within the activities department. Cooper plans and schedules the activities the LTC residents participate in during the course of a month.

To effectuate the activities planned for the residents, Cooper develops the monthly work schedule for the two activity aides and adjusts the schedule to allow for employees' vacations and absences. In formulating employee schedules, Cooper takes into consideration the fact that one employee works from 6 a.m. until 2:30 p.m., and the other works from 1:00 p.m. until 7:30 p.m. Cooper must also develop weekend schedules because some activities require weekend staffing. When an employee requests time off, Cooper has the authority to accept or reject the request. However, if an employee requests to be absent from work for an extended period of time, Cooper takes the leave request to Ennis for final approval. Although rarely exercised, Cooper has the authority to approve employee overtime should an activity require an employee to work longer than her or his regularly scheduled work day.

Cooper's duties also include being part of the Residential Care Planning Team. That team, which includes the Resident Care Coordinator, Social Services Coordinator, Rehab Coordinator, and Dietary Manager, meets weekly to discuss the overall care of LTC patients with their respective family members. If Cooper is not available to attend this meeting, one of the activities aides will attend in her place. Cooper also attends other meetings that do not focus specifically on the care of residents, such as safety meetings.

Although Cooper assigns and directs the work of the two employees within the activity department, she also works side-by-side with those employees performing the same duties. As examples, Cooper assists the activity aides in setting up and tearing down the events that her department coordinates, drives residents to and from outings, serves meals, and plays games. Additionally, Cooper works side-by-side with the activities staff in determining the likes and dislikes of the individual residents to help determine the plan of care. Cooper also responds to resident requests for assistance if other employees are unavailable.

Evaluating Employees

Cooper testified that she evaluates the two activities aides, and testified that she uses her own judgment in the evaluation process. However, Cooper also testified that Cooper spends only a very small percentage of time, two hours, to complete an evaluation. Evaluations are done on an annual basis.

The Transferring, Hiring, Recalling, and Laying Off of Employees

During Cooper's eight-year tenure as the Activities Coordinator, she has not had the opportunity to hire a new permanent employee into the activities department, and she did not hire either of the existing activities aides that currently work in the department. Cooper testified that at times she has required additional help from employees not currently employed in the activities department. In order to receive temporary help, Cooper worked with Ennis and the Director of Nursing Services to post a notice that a temporary position was available in the activities department. Following an interview with Cooper, a current hospital employee "transferred" into the activities department on a temporary basis. Cooper testified that she had final say regarding who worked in the activities department. Ennis testified that she (Ennis) believed she had the ultimate authority to approve the transfer, but for the most part trusted Cooper's judgment. The employee also had to get permission from her or his supervisor to work in the activities department. The transferred employee remained part of the department that he or she originated from, and earned the same pay rate. Additionally, under these circumstances the employer does not complete any paperwork changing the employment status of the employee. Ennis testified that if a new employee were needed in the activities department, she anticipated that she would take a more active role in the process than she currently does.

Although Cooper has not had to lay-off or recall any employees, the record demonstrates that Cooper has made at least one employment related recommendation that affected the activities department. In March 2010, Carol Becks, a former activities aide, announced that she was retiring. Recognizing the employer's budget situation, Cooper approached Ennis and Rasmussen and informed them that she had studied the situation, discussed it with her staff, and determined that there was no need to replace Becks' position, as Cooper and the two existing activities aides

could accomplish the work without a loss of service to the residents. Ennis and Rasmussen adopted Cooper's plan, and Becks' position was not filled.

Cooper has not laid-off or recalled any employees, and there are no promotional opportunities within the activities department.

Disciplining of Employees

This record demonstrates that there were a few instances where Cooper was involved in disciplinary actions. Cooper testified that she had to counsel one employee who needed to focus on accomplishing her own duties instead of helping other employees carry out their duties. However, this was not formal discipline. Cooper has not suspended or discharged an employee, and there is no evidence that she has adjusted any employee grievances.

Cooper also testified about an instance where a complaint was registered by an activities aide against a nurse who verbally abused a patient. Together, Ennis and Cooper interviewed the activities aide, and based upon that interview determined that the activities aide needed to be counseled about timely reporting instances of abuse in accordance with the state law.

Cooper is a Lead Employee

Cooper does not perform a preponderance of the supervisory duties. While it is clear that Cooper is the primary person responsible for scheduling and directing the work of the activities aides and evaluating those employees, the evidence and testimony in this case demonstrate that Cooper is a "lead employee" as opposed to being a statutory supervisor. Cooper does not have the independent authority to hire, discharge, suspend, discipline, lay off or recall employees. Additionally, while Cooper does have some input regarding the temporary transfer of employees into her work unit, she does not possess the independent authority to permanently transfer employees into or out of her unit.

Furthermore, Cooper does not spend a preponderance of her time performing supervisory activities on a regular basis. Cooper's testimony is that she spends 50% of her time with residents and the other 50% assigning, directing, and scheduling the two aides.

In this manner, this case is similar to *Ronald Wastewater District*, Decision 9874-B (PECB, 2008), *aff'd*, Decision 9874-C (PECB, 2009). In *Ronald Wastewater District*, the employee at issue monitored and directed the staff who worked beneath her, including scheduling their work hours and signing leave slips; however, the employee worked side-by-side with the staff beneath her in the performance of their duties. There was no evidence that the employee exercised independent judgment in hiring of employees, and the employee had never promoted, laid off, suspended or discharged an employee.

Conclusion

Like the employee in *Roland Wastewater District*, Cooper is a lead employee who schedules and directs the employees in her work unit. She does not have the independent authority to make meaningful changes to the employees' working environment. Because Cooper is a non-supervisory employee, she is an employee who has standing to file a decertification petition, and the union's challenge to the validity of Cooper's petition is rejected. However, because the unfair labor practices in Case 24167-U-11-6188 could affect the outcome of this representation petition, WAC 391-25-370 is invoked and processing of Cooper's petition is blocked pending a resolution of the union's unfair labor practice complaint.

FINDINGS OF FACT

1. Newport Hospital is public employer within the meaning of RCW 41.56.030(13).
2. Service Employees International Union Healthcare 1199NW is a bargaining representative within the meaning of RCW 41.56.030(2).
3. Jennifer Cooper is the Activities Coordinator in the Activities Department of the employer's Long Term Care Unit.
4. Cooper has the independent authority to plan and direct the work of two activities aides, including scheduling their hours of work, and approving employee leave.

5. Cooper does not spend a preponderance of her time performing the activities described in Finding of Fact 4.
6. Cooper does not have the independent authority to hire, promote, transfer, lay off, recall, suspend, discipline, or discharge other employees or adjust their grievances.

CONCLUSIONS OF LAW

1. The Public Employment Relation Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-25 WAC.
2. As described in Findings of Fact 4 through 6, the Activities Coordinator is a public employee within the meaning of RCW 41.56.030(12) and is not a supervisor within the meaning of RCW 41.59.020(4)(d) or WAC 391-35-340.

ORDER

1. The Activities Coordinator is included in the bargaining unit involved in this proceeding.
2. Pursuant to WAC 391-25-370, processing of this case is suspended pending the resolution Case 24167-U-11-6188.

Issued at Olympia, Washington, this 7th day of October, 2011.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



CATHLEEN CALLAHAN, Executive Director

This order will be the final order of the agency unless an appeal is filed with the Commission under WAC 391-25-660.



PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS
COMMISSION


BY: /S/ ROBBIE BUFFIELD

CASE NUMBER: 24036-E-11-03653 FILED: 06/13/2011 FILED BY: PARTY 2
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