

BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
STATE OF KANSAS

Kansas Association of Public Employees (KAPE),
Petitioner,
vs.
State of Kansas-Osawatomie State Hospital (OSH),
Respondent.

Case No. 75-UDC-2-2002

INITIAL ORDER

NOW on this 20th day of October 2005, the above-captioned Petition for Unit Determination and Certification came on for decision pursuant to K.S.A. 75-4321 et seq. and K.S.A. 77-514(a) before the presiding officer Darren E. Root.

APPEARANCES

Kansas Association of Public Employees (KAPE) appears through counsel, Donald R. Hoffman, Attorney at Law, Hoffman & Hoffman.

State of Kansas - Osawatomie State Hospital (OSH) appears through counsel, Jane Kelly Coates, Attorney at Law, Kansas Department of Social and Rehabilitation Services.

PROCEEDINGS

On December 3, 2001, KAPE filed a Petition for Unit Determination and Certification with the Public Employee Relations Board (PERB).

KAPE seeks the determination that a bargaining unit comprised of state employees at OSH within the classes of Registered Nurse I, Registered Nurse II, Registered Nurse III, and Infection Control Nurses, excluding "all supervisory, confidential, professional, elected and

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management employees," is an appropriate unit under the Kansas Public Employer-Employee Relations Act (PEERA), K.S.A. 75-4321 et seq. *Petition, paragraph 6.* Notwithstanding KAPE's statement in paragraph 6, KAPE's clear and concise statement of other relevant facts is, "The appropriate unit consists of all licensed nursing staff." *Petition, paragraph 13.*

As the litigation proceeded, the parties narrowed the scope of OSH employees subject to this dispute to those employed within the Registered Nurse III (RN III) class.

OSH filed its response to the Petition on January 7, 2002, initially through the Kansas Department of Administration. OSH asserted that an appropriate statewide unit already existed which includes registered nurses. *In the Matter of the Petition Filed By: Kansas Association of Public Employees for unit clarification or amendment of certain employees of the State of Kansas (Statewide unit of professional Patient Care Employees except those employed at universities.) Case No. 75-UCA-4-1989.* OSH complains that the determination and certification of such a unit would contribute to over fragmentation of the state's work force and be contrary to the principle of efficient administration of government. *Answer of Respondent Department of Administration, January 7, 2002.*

The evidentiary hearing occurred in two phases before two presiding officers. Douglas A. Hager was the first hearing officer. Mr. Hager took testimony on October 8, 2002; October 9, 2002; October 15, 2002; October 16, 2002; and October 17, 2002. Following the initial 5 days of hearings, the matter was reassigned to Donald Doesken. Mr. Doesken resumed the hearing of this matter on October 18, 2004; October 19, 2004; and October 21, 2004. Following Mr. Doesken's resignation from the department, Darren E. Root became the third presiding officer assigned to this case.

KAPE and OSH submitted post-hearing legal memoranda.

After reviewing the parties' pleadings and the extensive record, the presiding officer considers this matter as fully submitted and ready for the issuance of an initial order. See K.S.A. 77-526(b).

The presiding officer decided this case by applying the PEERA definition of "supervisory employee" (K.S.A. 75-4322(b)) to the duties of the RN III employed by OSH.

LEGAL ISSUE

The parties do not dispute that OSH is a "public agency" or "public employer" as defined by the PEERA. K.S.A. 75-4322(b). The only dispute is whether the RN IIIs employed by OSH are public employees as defined by the PEERA. *Ibid.*

Therefore, the only issue for the presiding officer to decide is whether RN IIIs employed by OSH are supervisory employees.

If the facts supporting the legal conclusion that the RN IIIs are supervisory employees, KAPE's petition is denied; however, if the facts support the legal conclusion that the RN IIIs are not supervisory employees, KAPE's petition is granted and RN IIIs employed by OSH form an appropriate unit.

PERB has extensively researched and analyzed the legal issue of supervisory employee under PEERA. Therefore, the presiding officer refers the parties to these initial orders: *Teamsters Local Union #955 vs. Wyandotte County, Kansas, Case No. 75-UCA-3-19992; United Rubber Workers Local Union 851 vs. Washburn University of Topeka, Case No. 75-UDC-3-1994* and *International Association of Firefighters, AFL-CIO, CLC, Local No. 2612 vs. Sedgwick County Fire District No. 1, Case No. 75-UCA-3-1999.*

These previous decisions do not bind the presiding officer to specific findings of fact or conclusions of law for,

There is no rule in Kansas that an administrative agency must explain its actions in refusing to follow a ruling of a predecessor board in a different case or that it must articulate in detail why the earlier ruling is not being followed. *In the Matter of K-Mart Corporation*, 238 Kan. 393, 396, 710 p.2d 1304 (1985).

See also, *Kansas University Police Officers Association v. Public Employee Relations Board of Kansas*, 16 Kan.App.2d 438, 441-2, 828 P.2d 369, *rev. denied* (1991).

The presiding officer finds that OSH established the statutorily excepted status of the RN IIIs as supervisory employees. Consequently, the presiding officer denies KAPE's petition.

BACKGROUND

The legislature clearly sets out the public policy and objective of the PEERA in governing the labor relations between public employees and the public agency or public employer. The public policy and objective motivating the enactment of the PEERA is,

Subject to the provisions of subsection (c), it is the purpose of this act to obligate public agencies, public employees and their representatives to enter into discussions with affirmative willingness to resolve grievances and disputes relating to conditions of employment, acting within the framework of law. It is also the purpose of this act to promote the improvement of employer-employee relations within the various public agencies of the state and its political subdivisions by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice, or to refrain from joining, and be represented by such organizations in their employment relations and dealings with public agencies. (Emphasis added.) K.S.A. 75-4321(b).

For the purposes of the PEERA, public employee,

means any person employed by any public agency, except those persons classed as supervisory employees, professional employees of school districts, as defined by subsection (c) of K.S.A. 72-5413, elected and management officials, and confidential employees. (Emphasis added.) K.S.A. 75-4322(a).

For the purposes of the PEERA, supervisory employee,

means any individual who normally performs different work from his subordinates, having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend a preponderance of such actions, 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. A memorandum of agreement may provide for a definition of "supervisory employees" as an alternative to the definition herein. K.S.A. 75-4322(b).

Therefore, within the framework of the statutory definition of supervisory employee the actual work carried out by the RN IIIs at OSH is measured.

The list of the supervisory duties in K.S.A. 75-4322(b) is disjunctive. *Kansas University Police Officers Association*, 16 Kan.App.2d at 440-1, 828 P.2d 369 (1991). As a result, if OSH proved that the RN IIIs exercised any one of the duties listed in the statute the RN IIIs are supervisory employees. *United Rubber Workers, Case No. 75-UDC-3-1994*, page 21. The supervisory functions require the use of independent judgment in the exercise of any one of the functions. K.S.A. 75-4322(b).

FINDINGS OF FACT

1. OSH is a licensed in-patient psychiatric hospital operated by the State of Kansas. (Transcript Vol. I, p. 200 - 2; Exhibit 13.1.)
2. OSH must meet professional accreditation standards before it receives federal funding. These standards specifically require RNs to supervise certain types of patient care and to comply with applicable state laws. (Transcript Vol. I, p. 202 - 3; Exhibit 14.3.)
3. To be licensed, as a Psychiatric Hospital K.A.R. 28-34-7 requires that OSH have a RN on duty at all times and that a RN supervises all nursing personnel. OSH could lose it's license and funding if OSH failed to comply with these requirements. (Transcript Vol. III, p. 569 - 72; Exhibit 13.1 and 14.2.)

4. The staff that provides patient care at OSH is Mental Health Trainees ("MHT"); Mental Health Aides ("MHA"); Licensed Mental Health Technicians ("LMHT"); Licensed Practical Nurses ("LPN"); and Registered Nurse III ("RN III"). (Transcript Vol. I, p. 201-2; Exhibit 1.2 - 1.4 and 18.)
5. Of the roughly 200 direct care staff members at OSH, about 40 are full-time RN IIIs. RN IIIs supervise lower range direct care staff including the MHTs, MHAs, LMHTs, and LPNs in all OSH living units. (Transcript Vol. I, p. 43 - 7, p. 204 - 6; Exhibit 1.2 - 1.4 and 18.)
6. There are seven RN IVs at OSH. RN IVs have more administrative duties than a RN III. While a RN III directs the work of staff on a single unit, the RN IV Program Nurse Manager is responsible for all nursing functions of an entire building. (See generally Transcript Vol. I, p. 43-7; Transcript Vol. IV, p. 687, p. 813 - 88, Transcript Vol. V, p. 892 -9; p. 900 - 946; Transcript Vol. VIII, p. 1548 - 1730; Exhibit 1.2 -1.4 and 18.)
7. At times, there is no RN IVs on grounds at OSH. RN IVs do not work every shift. There are always RN IIIs on duty. (Transcript Vol. V, p. 964; Exhibit 1.2 - 1.4.)
8. All RNs in Kansas must comply with the provisions of the Kansas Nurse Practices Act (KNPA), K.S.A. 65 - 1113 et seq. (Transcript Vol. III, p. 563 - 4, p. 568 - 9; Exhibit 14.7.)
9. KNPA requires RNs to make initial care assignments, direct and supervise the work of the other direct care staff. (Transcript Vol. I, p. 166 - 7; Transcript Vol. III, p. 663 - 9; Exhibit 14.7.)
10. The types of patient care work RN IIIs are trained to provide and at OSH do perform are different from other patient care staff. (Transcript Vol. I, p. 179 - 81.)
11. MHAs are taught basic clinical skills so that they can alert the RN III when there is a problem. In the performance of these activities while the RN III may do identical work as an MHA, or other direct staff, the RN III must still perform more technical skilled

- patient care procedures than the MHA or other direct care staff. (Transcript Vol. III, p. 536 - 8.)
12. Staff is aware that their nursing work must be directed and supervised by the RN III making the assignment. (Transcript Vol. IV, p. 796 - 8, p. 800 - 1; Exhibit 1.2 - 1.4.)
 13. The RN III in charge of the unit must assign all patient work performed by direct care staff. (Transcript Vol. I, p. 149; Transcript Vol. III, p. 591 - 2; Transcript Vol. V, p. 911; Exhibit 6 and 8.5.)
 14. RN IIIs are responsible for completing the Patient Care and Work Assignment Sheets. The assignment sheet shows the patient care tasks assigned by the RN III. (Transcript Vol. I, p. 149; Transcript Vol. III, p. 609; Exhibit 7.3 - 7.5.)
 15. The ability to assign tasks to staff is an element of the RN III's job performance evaluation. (Exhibit 4.1 - 4.3.)
 16. OSH disciplined other patient care staff for failing to follow assignments made by RN IIIs. (Transcript Vol. II, p. 421 - 2, 428-30; Transcript Vol. VII, p. 1400 - 2; Exhibit 11.)
 17. RN IIIs are also responsible for determining how many staff is needed to work their units. (Transcript Vol. III, p. 532 - 3; Transcript Vol. IV, p. 717 - 8, p. 843, p. 847 - 50; Transcript Vol. V. p. 912, p. 915 - 25; Exhibit 7.1, 7.3 and 7.5.)

FINDINGS OF LAW

The facts support OSH's argument that RN IIIs "normally perform different work" from the other direct care staff and the RN IIIs "in the interest of the employer" exercise the "responsibility to direct other direct care staff." The RN III performs these tasks through exercising "independent" judgment." K.S.A. 75-4322.

RN IIIs normally perform different work than other direct care staff.

There is no credence in KAPE's argument that because a RN III changes a patient's bed

sheets, empties trash, or does similar tasks, that in same way the RN III is not a supervisor. These types of tasks are auxiliary to the RN IIIs performance of their duties as registered nurses. The presiding officer did not depend largely on the RN III written job description. *Kansas University Police Officers Association*, 16 Kan.App.2d at 440-1, 828 P.2d 369 (1991) and *Kaczynski v. Draper Printing*, 848 F.Supp. 1060 (1994, DC Mass.). However, the job description provided some guidance on OSH's expectations concerning the tasks performed by its RN IIIs.

The analysis of the RN IIIs status under PEERA relies on the facts of the work environment at OSH.

The Kansas Nurse Practice Act (KNPA), K.S.A. 65-1113, et seq. clearly sets out the professional standards under which a registered nurse must provide their services in the care of patients. The KNPA is like other laws that express the legislature's intent concerning the standards by which licensed professionals, i.e. attorneys, must provide their services. These laws proscribe unlicensed persons from performing the professional tasks. Additionally, the laws define the nature of the services that each law governs.

The KNPA defines the practice of nursing. K.S.A. 65-1113(d). This definition "is open-ended, and describes nursing as a process rather than as specific tasks." *Kan. Op. Atty. Gen. 18*.

At OSH, MHTs, MHAs LMHTs, and LPNs do not perform the same professional tasks as the RN IIIs; therefore, RN IIIs at OSH "normally perform different task," than other direct care staff. (Finding of Fact 7, Finding of Fact 9 and Finding of Fact 10.)

RN IIIs perform their duties in the interest of the employer.

OSH's existence depends on (1) providing quality to psychiatric patients and (2)

maintaining its accreditation as a psychiatric hospital. (Finding of Fact 2 and Finding of Fact 3.)

OSH's business is the care of psychiatric patients and the providing of quality professional care to the patients. (Finding of Fact 1.)

For purposes of this order, an overreaching requirement is that OSH, as a licensed psychiatric hospital, must have a RN III on duty at all times and that the RN III supervise direct care personnel. K.A.R. 28-34-7. OSH's failure to follow this regulation subjects it to adverse administrative action that could threaten its accreditation, which could have financially disastrous results and threaten OSH's existence.

The evidence in the record describes the RN III as the common denominator for patient care. (Finding of Fact 5, Finding of Fact 6 and Finding of Fact 7.)

The caring for patients who are customers of OSH depends largely on the performance of RN IIIs.

Therefore, RN IIIs perform their duties in the interest of OSH for, "The welfare of the patient, after all, is no less the object and concern of the employer than it is of the nurses." *N.L.R.B. v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 580, 114 S.Ct. 1778, 1783(1994).

RN IIIs possess the responsibility to direct the work of subordinate patient care staff and assign them duties. K.S.A. 75-4322(b)

The KNPA requires that the RN IIIs make initial care assignments, direct and supervise all other patient care staff. K.S.A 65-1113(d), K.S.A. 65-1124, and K.S.A. 65-1165. Secondly, K.A.R. 28-34-7 requires,

(e) All licensed practical nurses and other ancillary personnel performing patient care services shall be under the supervision of a registered nurse.

(f) There shall be at least one registered nurse on duty in the hospital at all times. K.S.A. 65-4202 requires that an MHT perform their duties under the supervision of a registered nurse.

The record shows the following facts, that at OSH (1) RN IIIs must take responsibility to assign all patient care tasks and direct other caregivers as they provide patient care. (Finding of Fact 13 and Finding of Fact 14.) (2) RN IIIs' ability to assign tasks is an element of their performance evaluation. (Finding of fact 15.) (3) Direct care staff is disciplined for not obeying a RN III's order. (Finding of fact 16.) (4) Other direct care staff understands that a RN III directs their work. (Finding of fact 12.) (5) RN IIIs must decide the unit staffing needs. If the unit's needs exceed the staffing capability, a RN III can seek reassignment of staff from other hospital unit. A RN III can reassign unit staff to work in another unit when the need arises. (Finding of fact 17.)

It is clear from the KNPA mandates and the above facts that the RN IIIs at OSH possess the responsibility to direct other patient care staff and furthermore act upon that responsibility to provide in the interest of OSH medical care to OSH patients.

RN III perform supervisory duties by exercising independent judgment.

The presiding officer adopts by reference the extensive legal analysis of independent judgment as set forth in *United Rubber Workers*, Case No. 75-UDC-3-1994, pages 28 – 32. The presiding office adds the following cases to those cited by Monty R. Bertelli in the *URW* order: *Schurmacher Nursing Home v. N.L.R.B.*, 214 F.3d 260 (2d Cir. 2000) and *National Labor Relations Board v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 121 S.Ct. 1861 (2001).

It is a question of fact in every case as to whether an individual is merely a superior worker who exercises the control of a skilled worker over less capable employees, or is a supervisor who shares the power of management. [cite deleted]. The directing and

assisting of work by a skilled employee to less skilled employees does not involve the use of independent judgment when it is incidental to the application of the skilled employee's technical or professional know-how. In such a situation the skilled employee does not exercise independent judgment as a representative of management within the meaning of statutory requirement. [cites deleted]" *United Rubber Workers*, Case No. 75-UDC-3-1994, pages 32-33.

In this case, considering the totality of the circumstances, i.e. the KNPA mandates the duties and responsibilities of the RN IIIs at OSH, and the actual work performed by the RN IIIs, the RN IIIs at OSH exercise independent judgment in directing patient care staff.

OSH is a hospital providing medical care to psychiatric patients. It is inherent in any medical facility that patients demand continual and, at times, acute medical care. Therefore, there must be some direction and supervision in addressing patients' medical needs, if not OSH fails in its purpose to provide medical care to its patients.

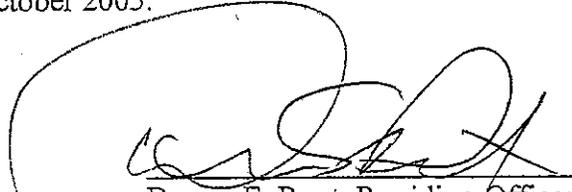
In taking into consideration the totality of the circumstances at OSH, even though there are generally accepted methodologies in caring for a specific medical condition, it is fool-hearted to assume that medical care depends on a one size fits all mentality. There is a distinction between following medical procedures in lock step and possessing the responsibility to decide the procedure proper the medical care of a patient with individual needs. It is reasonable to conclude from the record, that the RN IIIs at OSH are not robots in their approach to patient care but are the front line decisions makers when it comes to patient care. For example, RN IIIs are always on duty at OSH. (Finding of Fact 6 and Finding of fact 7.) According to the KNPA, the implementing administrative regulations, and OSH's medical care policy RN IIIs are responsible for directing the work of subordinate patient care staff and assigning duties to subordinates. Consequently, at OSH "where the RN IIIs go, there goes OSH patient care."

THEREFORE, it is the finding of the presiding officer that OSH proved by substantial competent evidence that RN IIIs in the interest of the hospital possess the authority to direct the work of subordinates and assign work-related duties to subordinates. In exercising their authority, RN IIIs use independent judgment. Because RN IIIs at OSH possess this authority, they are supervisory employees.

OSH met its burden proving that RN IIIs at OSH are excluded from the definition of public employee and hence do not qualify for inclusion in a bargaining unit.

KAPE's petition is denied.

IT IS SO ORDERED this 20th day of October 2005.



Darren E. Root, Presiding Officer
Public Employee Relations Board

NOTICE OF RIGHT TO REVIEW

This Initial Order is your official notice of the presiding officer's decision in this case. The order may be reviewed by the Public Employee Relations Board, either on the Board's own motion, or at the request of a party, pursuant to K.S.A. 77-527. Your right to petition for a review of this order will expire eighteen days after the order is mailed to you. See K.S.A. 77-527(b), K.S.A. 77-531 and K.S.A. 77-612. To be considered timely, an original petition for review must be received no later than 5:00 p.m. on November 8th, 2005, addressed to: Public Employee Relations Board & Labor Relations, 401 SW Topeka Blvd., Topeka, Kansas 66603.

CERTIFICATE OF MAILING

I, Sharon L. Tunstall, Office Manager, Public Employee Relations Board, Kansas Department of Labor, hereby certify that on the 21st day of October 2005, a true and correct copy of the above and foregoing Initial Order was served upon each of the parties to this action and upon their attorneys of record, if any, in accordance with K.S.A. 77-531 by depositing a copy in the U.S. Mail, first class, postage prepaid, addressed to:

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Sharon L. Tunstall
Sharon L. Tunstall, Office Manager

Mailed to the PERB members on the 1st day of November, 2005.

Sharon L. Tunstall
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