

P.E.R.C. NO. 89-112

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of
COUNTY OF MERCER,

Public Employer,

-and-

NEW JERSEY STATE NURSES ASSOCIATION,

Docket No. RO-88-52

Petitioner,

-and-

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF
AMERICA, LQCAL 35,

Intervenor.

SYNOPSIS

The Public Employment Relations Commission dismisses a petition for certification of public employee representative filed by the New Jersey State Nurses Association. The Association seeks to represent registered nurses employed by Mercer County and presently represented by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 35. Applying Jefferson Tp. Bd. of Ed., P.E.R.C. No. 61 (1971), the Commission finds that the existing relationship is not so unstable or the union's representation so irresponsible as to warrant severance.

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INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF
AMERICA, LOCAL 35,

Intervenor.

Appearances:

For the Public Employer, Paul D. McLemore, Esq.

For the Petitioner, Sterns, Herbert, Weinroth & Petrino,
Esqs. (Mark D. Schorr, of counsel)

For the Intervenor, Markowitz & Richman, Esqs.
(Joel G. Scharff, of counsel)

DECISION AND ORDER

On October 2, 1987, the New Jersey State Nurses Association ("Association") filed a petition for certification of public employee representative. The Association sought to represent registered nurses ("RNs") and licensed practical nurses ("LPNs") employed by Mercer County and currently represented by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 35 ("Local 35"). On October 14, Local 35 and the Communications Workers of America, AFL-CIO ("CWA") intervened.

On October 26, 1987, the Association amended its petition to seek a unit of RNs only. It contended that severance of RNs from the existing unit is appropriate because RNs lack a community of interest with LPNs and because Local 35 failed to represent RNs adequately. Local 35 contended that the petition is untimely, RNs were properly represented, and the Association's showing of interest was wrongfully obtained.

On December 15, 1987, the Director of Representation found that the Association's petition was timely and the showing of interest adequate. He ordered a hearing to resolve factual disputes concerning the propriety of severing the RNs from the existing unit.

On February 1, 2 and 17, 1988, Hearing Officer Richard C. Gwin conducted a hearing. The parties examined witnesses and introduced exhibits.^{1/} Post-hearing briefs were filed by August 2.

On December 14, 1988, the Hearing Officer recommended the petition's dismissal. H.O. NO. 89-5, 15 NJPER 59 (¶20022 1989). Applying Jefferson Tp. Bd. of Ed., P.E.R.C. No. 61 (1971), he found that the existing relationship was not so unstable or the union's representation so irresponsible as to warrant severance.

On December 29, 1988, the Association filed exceptions.^{2/} It claims: there is no community of interest between RNs and LPNs; private sector precedent shuns mixed units of

^{1/} CWA did not participate.

^{2/} It incorporated its post-hearing brief and reply brief.

LPNs and RNs; the record demonstrates egregious representation and dramatic dissatisfaction and instability, and circumstances compel a redefinition of the negotiations unit.

On January 19, 1989, Local 35 filed a reply. It incorporated its post-hearing brief. It agrees with the Hearing Officer that severance is not warranted but disagrees with certain factual conclusions and the tenor of the recommended decision. It claims that severance would destabilize labor relations and conflict with the preference in State v. Prof. Ass'n of N.J. Dept. of Ed., 64 N.J. 231 (1974), for broad-based units. It further claims that Local 35 has faithfully served the interests of all unit employees.

We have reviewed the record.^{3/} The Hearing Examiner's findings of fact (pp. 3-17) are accurate. We incorporate them here.^{4/}

We reject the notion that mixed units of RNs and LPNs are never appropriate. The Act favors broad-based units and allows mixed units of professionals and nonprofessionals. Prof. Ass'n; N.J.S.A. 34:13A-6(d). Even if a separate unit of RNs would be most appropriate as an initial matter, that does not require a finding that a separate unit is most appropriate now.

^{3/} The case was transferred to us pursuant to N.J.A.C. 19:11-8.8.

^{4/} We add our later discussion about the president's reasons for the show of hands.

We have long held that severance from broad-based units can only occur under limited circumstances. Jefferson Tp. Bd. of Ed., P.E.R.C. No. 61 (1971) states:

The question is a policy one: Assuming without deciding that a community of interest exists for the unit sought, should that consideration prevail and be permitted to disturb the existing relationship in the absence of a showing that such relationship is unstable or that the incumbent organization has not provided responsible representation. We think not. To hold otherwise would leave every unit open to redefinition simply on a showing that one sub-category of employees enjoyed a community of interest among themselves. Such course would predictably lead to continuous agitation and uncertainty, would run counter to the statutory objective and would, for that matter, ignore that the existing relationship may also demonstrate its own community of interest. [Slip Op. at 4]

In applying the Jefferson standards, we review the parties' entire relationship, not just isolated occurrences. Passaic Cty., P.E.R.C. No. 87-73, 13 NJPER 63 (¶18060 1986); cf. State of New Jersey and New Jersey State FMBA, ___ N.J. ___ (1989).

We recognize that there is a nationwide shortage of RNs and, as a result, some RNs have gotten significant salary increases. But those facts and the facts of this case must be evaluated in light of the Jefferson standards. Under these standards, we must reject the Association's severance attempt. Local 35's conduct on the whole did not rise to the level of irresponsible representation and labor-management relations were not shown to be unstable.

The Association claims that Local 35's conduct during the 1987 negotiations was egregious. We disagree. Without passing on

the wisdom of every Local 35 action, we find that those actions fell within the wide range of reasonableness allowed negotiations representatives. Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976); see also Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

During negotiations for the 1987 contract, at least one RN attended negotiations and had input into what she thought were the RNs' needs: salary and time off. As a minority in the unit, the RNs failed to persuade Local 35 to negotiate an equal or greater percentage increase for them but did receive a larger dollar increase. The mere fact that a negotiated agreement results in less of a benefit to one group of employees does not establish a breach of the duty of fair representation, Belen at 490-491, or compel severance.

The 1987 contract ratification procedure also triggered discontent among RNs. Several RNs could not vote because of shift change obligations, but there was no evidence the timing was designed to exclude their votes. The contract was ratified at a membership meeting by a show of hands. Although internal union procedures mandate secret ballots, Local 35 President Lucidi explained that secret ballots were linked to automatic strike votes and that since strikes of New Jersey public employees are illegal, it was his decision how to administer the union's voting requirements (3T73).

Because they were dissatisfied with the 1987 negotiations, the RNs requested and received their own shop steward. A few months

later, that steward asked Local 35 for a separate unit for RNs. Local 35 refused. Soon after, the Association petitioned to represent the County's RNs and LPNs. Just after that, Lucidi solicited 1988 contract proposals from all stewards. The RN steward delayed her response because the RNs were then trying to disassociate themselves from Local 35 and because an Association lawyer advised them not to participate in negotiations. An RN steward ultimately participated. Those negotiations resulted in greater dollar increases for RNs for 1988 and 12% across the board increases for all titles for 1989 and 1990.

This scenario represents little more than the unfortunate but frequent conflicts of competing interests that occur within negotiations units. There was no evidence that this intraunit dispute disrupted labor-management relations with the County.

Under different circumstances, the Director of Representation severed RNs from a broad-based unit. Cty. of Camden, D.R. No. 81-3, 6 NJPER 415 (¶11209 1980). RNs were represented by the Registered Professional Nursing Unit ("RPNU") as part of Camden Council 10. Council 10 refused to move certain RN grievances to arbitration and to explain this refusal. During negotiations, Council 10 objected to benefits for RNs already agreed to by the County and RPNU and changed terms of a draft agreement without consulting RPNU. Eventually, the County and RPNU bypassed Council 10 in order to finalize that agreement. Also, Council 10 had discriminated against RPNU's chief negotiator because of her role in

the interorganizational dispute. At the hearing, Council 10 chose not to present any witnesses to rebut RPNU's allegations of irresponsible representation.

Camden is distinguishable on many grounds. Council 10's representation was irresponsible under the Jefferson standards. It acted arbitrarily and discriminatorily in grievance processing and negotiations. No legitimate reasons were offered to excuse its conduct. Here, Local 35 permitted and sometimes encouraged RN participation and explained its negotiations strategy. We need not agree with that strategy to reject allegations that Local 35 was irresponsible. As the Director of Representation explained in Clifton Bd. of Ed., D.R. No. 80-18, 6 NJPER 38 (¶11020 1980):

Where different classifications of employees within a negotiations unit have different views of economic interest, it is understandable that the views of the minority are often not favored and not accepted. A majority representative's responsibility is to assure, however, that the views of the minority are responsibly considered. [Id. at 40]

Finally, the Camden nurses never had the option of refusing representation in a mixed unit. The Act precludes certification of a mixed unit of professional and nonprofessional employees unless a majority of the professional employees vote for inclusion in such a unit. N.J.S.A. 34:13A-6(d). This is accomplished through a separate vote for professional employees to decide whether they wish to be included in a unit with nonprofessional employees. Here, the RNs voted in 1977 for inclusion in a mixed unit. Because the Association's amended petition does not seek a mixed unit, a

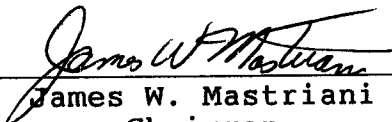
"professional option" would not be available. We need not decide whether the RNs could have had another option if the Association had maintained its petition for a mixed unit. Compare Westinghouse Electric Corp., 116 NLRB 1545, 39 LRRM 1039 (1956).

Although the Act affords certain extra rights to professionals, it does not grant them severance rights merely because they are different from or have differences with nonprofessionals. For all the above reasons, severance is not warranted.

ORDER

The petition is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Reid, Ruggiero, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Bertolino abstained.

DATED: Trenton, New Jersey
April 28, 1989
ISSUED: May 1, 1989

H.O. NO. 89-5

STATE OF NEW JERSEY
BEFORE A HEARING OFFICER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of
COUNTY OF MERCER,

Public Employer,

-and-

NEW JERSEY STATE NURSES ASSOCIATION,

Docket No. RO-88-52

Petitioner,

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INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 35,

Intervenor.

SYNOPSIS

A Hearing Officer recommends dismissal of New Jersey State Nurses' Association's petition to sever registered nurses from Teamsters Local 35's unit of professional and practical Mercer County nurses. NJSNA failed to prove that Local 35 represented professional nurses irresponsibly or that RNS had a Wilton conflict of interest with LPNs.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Report and Recommendations, any exception thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Officer's findings of fact and/or conclusions of law.

H.O. NO. 89-5

STATE OF NEW JERSEY
BEFORE A HEARING OFFICER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of
COUNTY OF MERCER,

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NEW JERSEY STATE NURSES ASSOCIATION,

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INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 35,

Intervenor.

Appearances:

For the Public Employer
Paul D. McLemore, Esq.

For the Petitioner
Sterns, Herbert, Weinroth & Petrino, Esqs.
(Mark D. Schorr, of counsel)

For the Intervenor
Markowitz & Richman, Esqs.
(Joel G. Scharff, of counsel)

HEARING OFFICER'S RECOMMENDED
REPORT AND DECISION

On October 2, 1987, the New Jersey State Nurses Association ("NJSNA" or "Association") filed a petition seeking certification as the representative of a collective negotiations unit of registered nurses (RNs) and licensed practical nurses (LPNs) employed by Mercer

County ("County"). On October 14, 1987, the Director of Representation approved a request to intervene made by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 35 ("Local 35"), the nurses' current representative. N.J.A.C. 19:11-2.7.

On October 26, 1987, NJSNA amended its petition to define its proposed collective negotiations unit to include only professional nurses (RNs) employed by the County.

On October 29, 1987, a Commission staff agent conducted an informal conference. Local 35 refused to consent to a secret ballot election. The parties were invited to file position statements and Local 35 and NJSNA did so on November 10, 1987. NJSNA argued that a severance of RNs from the existing unit was appropriate because the RNs are professionals and the other unit titles are technical, and because Local 35 had failed to responsibly represent RNs. Local 35 asserted that NJSNA's petition was untimely, that its showing of interest was wrongfully obtained, and that it was not an employee organization under the Act. Local 35 also denied that it irresponsibly represented RNs.

On December 15, 1987, the Director of Representation found that NJSNA's petition was timely and that a hearing was necessary to resolve factual disputes on the appropriateness of the severance of RNs from Local 35's existing unit.

I conducted a hearing on February 1, 2 and 17, 1988. After a lengthy delay in receiving transcripts, a briefing schedule was

established. On the parties' request, the briefing scheduling was extended. The final reply brief was received by August 2, 1988.

Based on the entire record, I make the following:

FINDINGS OF FACT

1. On May 19, 1977, Local 35 was certified to represent all professional and nonprofessional employees in the Mercer County Nursing Care Unit, including graduate nurses, head nurses, nurse supervisors, and licensed practical nurses. In the election leading to the certification, registered nurses were given a professional option. Of approximately 31 eligible professional voters, 23 voted: 2 cast void ballots, 20 voted for inclusion in the unit with nonprofessionals, and one voted against inclusion.^{1/}

2. The parties stipulated that Local 35 was an employee organization and the County a public employer within the meaning of the Act. Local 35, however, refused to stipulate that NJSNA was an employee organization within the meaning of the Act (TA5).

3. NJSNA is a professional organization for registered nurses. It has approximately 3500 members. Its purpose is to foster good health care by promoting professionalism and the economic and general welfare of nurses. Among the state agencies with which the Association cooperates are the Department of Health,

^{1/} I advised the parties at hearing that I would take administrative notice of prior representation proceedings involving the County and its nurses. This information was taken from RO-77-87; RO-77-88; and RO-77-93.

DYFS, the Division on Aging, the Board of Nursing and the Department of Higher Education. One of the Association's lobbying goals is to expand the rights of public service employees in the collective negotiations process (TB5-TB8; J-6).

4. The Association does not currently represent public employees in collective negotiations. It did, however, prior to 1985, when the New Jersey Nurses' Economic Security Organization ("JNESO") was a part of the Association. JNESO is no longer affiliated with the Association. The Association is taking steps to once again represent employees in collective negotiations. It has a staff in the organization to pursue this course. This decision was sanctioned by the Association's Board of Directors. (TB5-TB12; TB20-TB30).

5. The Association intends to collect no dues from its affiliate locals. The only dues it will receive will be from those professional nurses in the locals that join the Association. Locals will determine their own dues structures with no financial obligation to NJSNA. (TB30-TB33).

6. Section 3, DISCIPLINARY ACTION, of the Association's bylaws provides that "members shall be subject to censure or expulsion by this Association for violation of the ANA code for Nurses or for violation of the bylaws of the ANA, this Association, or its constituent Association." It also provides that "no such action shall be taken against a member...until such member shall have been served with specific charges, given a reasonable time to

prepare any defense, and afforded a full and fair hearing." A committee on ethical practice has jurisdiction over such disputes. [See also Section 6, ETHICAL PRACTICE COMMITTEE of the Bylaws--(J-6)].

7. The County employs nurses at its Geriatric Center, Detention Center, Correction Center, and Youth House. Approximately 20 nurses work at the three penal institutions. Of the 20, approximately 5 are RN's. About 55 nurses work at the Geriatric Center, approximately half of which are RNs and half LPNs (TB120, TB134).

8. The Geriatric Center is a 240-bed facility, divided into four, 60-bed units. The Center provides 24-hour nursing care in three, 8-hour shifts. A nursing supervisor is assigned to each shift. Usually, a head nurse is assigned to each of the four 60-bed units on each shift. Typically, there are 7 or 8 professional nurses assigned to a shift. (TA12, TA34).

9. The nursing supervisor directs and supervises the day-to-day nursing operation of the facility. Head nurses in charge of the 60-bed units report to the nursing supervisor. The nursing supervisors schedule the staff and handle employee problems, such as shift assignment refusals or sleeping on duty. Nursing supervisors also assist in training and evaluating both professional and practical nurses. (TA13, TA149, TA164-TA167; P-3).

10. Head nurses are responsible for the supervision and administration of nursing on their shifts. LPNs, RN staff nurses

and attendants report to the head nurse in their units. Head nurses substitute for nursing supervisors in their absence. If a head nurse is absent, an RN staff nurse may fill-in for her. If no RN staff nurses are available an LPN may fill-in. This happens rarely (TA13, TA14, TA34).

11. Registered or graduate nurses develop and carry out the nursing care plan of facility patients. The County's staff nurses, head nurses and nursing supervisors are all registered nurses. Staff nurses are usually supervised by a head nurse or nursing supervisor. They also often act as lead persons for practical nurses and nonprofessional nursing service employees (TA14; P-1).

12. The fundamental difference between registered nurses and practical nurses is reflected in the County's job descriptions for the titles. "The Practical nurse gives direct patient care and works independently in situations relatively free from complexity. In more complex situations the practical nurse functions as an assistant to the graduate professional nurse" (P-2). "While all nursing employees observe and evaluate...patients, only the graduate nurse may draw conclusions from the observations and, in turn, reassess the patients' needs" (P-1).

13. The distinction between the duties of professional and practical nurses in Mercer County also reflects New Jersey statutory and regulatory guidelines. Describing the general responsibility of the registered nurse, N.J.A.C. 13:37-6.2 provides that:

The registered professional nurse is responsible for the nature and quality of all nursing care including the assessment of nursing needs, the plan of nursing care, the implementation, and the monitoring and evaluation of the plan. The registered professional nurse may delegate selected nursing tasks and the implementation of the nursing regimen to licensed practical nurses and ancillary nursing personnel. Ancillary nursing personnel shall include but not be limited to: aides, assistants, attendants and technicians.

In delegating tasks, a registered nurse has the statutory responsibility to:

[exercise] that degree of judgment and knowledge reasonably expected to assure that a proper delegation has been made. A registered professional nurse may not delegate the performance of a nursing task to persons who have not been adequately prepared by verifiable training and education. No task may be delegated which is within the scope of nursing practice and requires:

1. The substantial knowledge and skill derived from completion of a nursing education program and the specialized skill, judgment and knowledge of a registered nurse;

2. An understanding of nursing principles necessary to recognize and manage complications which may result in harm to the health and safety of the patient" [N.J.A.C. 13:37-6.2(b)].

The registered professional nurse shall be responsible for the proper supervision of licensed practical nurses and ancillary nursing personnel to whom such delegation is made. The degree of supervision exercised over licensed practical nurses and ancillary nursing personnel shall be determined by the registered professional nurse based on an evaluation of all factors including:

1. The condition of the patient;

2. The education, skill and training of the licensed practical nurse and ancillary nursing personnel to whom delegation is being made;

3. The nature of the tasks and the activities being delegated;

4. Supervision may require the direct continuing presence or the intermittent observation, direction and physical presence of a registered professional nurse. In all cases, the registered professional nurse shall be available for on-site supervision. [N.J.A.C. 13:37-6.2(c)].

14. Registered and practical nurses are licensed separately by the State Board of Nursing, which establishes licensing requirements. Registered nurses must complete approved curriculum, usually offered in two or four-year college programs or in hospital nursing schools. The curriculum emphasizes the sciences: microbiology, chemistry, psychology, anatomy and physiology. Course work required of LPNs is much less extensive and focuses on the practical application of the sciences to patient care. Approximately 60% of the LPNs' curriculum is in the lab. They are taught skills such as medication, injections, bandaging, bedmaking and patient bathing. The LPN curriculum is typically offered in vocational programs at high schools, though an LPN need not possess a high school diploma to be licensed (TB67-TB70; see also N.J.S.A. 45:11-26 through N.J.S.A. 45:11-28, and N.J.A.C. 13:37-2 through N.J.A.C. 13:37-3.6).

15. Because the qualifications and responsibilities of professional nurses are more demanding than those of practical nurses, RN salaries are higher. The industry average of the ratio of LPN to RN salaries is about 75%, in a range of 70% to 80% (TB19-TB20).

16. In the last few years, New Jersey, with the rest of the nation, has suffered a serious shortage of nurses. The Governor has appointed a Commission to study the problem. The Association had sponsored a bill to create such a Commission before the Governor appointed one. In the past, nursing shortages have been alleviated by dramatic increases in nurses' salaries. Consistent with this trend, many employers increased RN salaries as much as 20% between 1986 and 1987 (TB9-TB11; T13-T14).

17. Nursing salaries are typically lower in southern New Jersey and higher in northern New Jersey. Most institutions in Mercer County pay their RNs \$3,000 to \$4,000 more than the County pays its RNs.^{2/} The ratio of LPN to RN salaries for County employees is between 80% to 86%, and at the entry level it is 83% (TB14-TB20, TB38-TB44).

18. Winifred Ridge is a head nurse at the Geriatric Center. She attended at least one negotiations session for the 1987 contract (J-4) between the County and Local 35. Ridge was not a formal member of Local 35's negotiations team but she appeared at one session and was permitted to stay. She had been asked by other RNs to represent them at negotiations. At the session she attended, she urged the Local 35 team to demand higher salaries and more time off for RNs. She reasoned that a large salary increase for RNs was

^{2/} Mercer County salaries were compared with those at Princeton Medical Center, Hamilton Hospital, St. Francis Hospital, St. Lawrence Rehabilitation Center and two local nursing homes.

justified by the nursing shortage and inflation (TA87-TA92; TC44, TC62).

19. In early March 1987, Local 35 members ratified J-4. The ratification meeting was held in the first floor cafeteria at the Geriatric Center. Between 40 and 50 members attended, about half of which were RNs. The meeting started shortly after 2:00 p.m. and ended shortly after 3:00 p.m. Local 35 President Frank Lucidi ran the meeting. Also attending for the local was its treasurer, Anthony D'Artiglio (TA19-TA22, TA35-TA36, TA152).

20. Lucidi began the meeting by describing the County's final offer. The offer included a 5.0% salary increase for the unit: LPNs would receive a 5.2% raise and RNs a 4.8% raise. The County's proposal also provided for a 15-minute extension of the work-day. The members rejected this offer, according to Lucidi, because of the work-day increase. Lucidi left the meeting and talked briefly to County negotiators. When he returned, he advised the nurses that the County had dropped their demand for the extended work-day. He asked for a new vote by a showing of hands. He said a hand vote was not legal but he would deny it if anybody later mentioned it. A majority of those attending the meeting voted in favor of ratification (TA38, TA54, TA70, TA155, TA174; TC45-TC49, TC73).

21. RNs attending the ratification meeting were upset about receiving a percentage increase lower than LPNs. When Ridge stood to speak, Lucidi pointed a finger at her and told her to sit

down because she was not a member. Ridge then showed him a dues receipt and Lucidi made a joke and let Ridge speak. She urged Lucidi to negotiate for a higher raise and she questioned the difference in the proposed LPN and RN salary increases. Lucidi explained that the team was trying to adjust (or close) the gap between RN and LPN salaries (TA36-TA37, TA65-TA66, TA153).

22. The March 1987 ratification vote was taken between 2:45 and 3:00 p.m. During this time, head nurses assigned to the 3-to-11 shift had left the meeting to pick up reports from the day shift. Pamela Bejma, a head nurse, returned to the meeting after the vote had been taken. There is insufficient evidence to suggest, however, that the timing of the vote was calculated to prevent RNs from participating. The ratification meeting was announced a few days in advance. Previous ratification meetings had been scheduled at the same time. No one had objected to the time the meeting was scheduled (TA21, TA26, TA30, TA32, TA52-TA54).

23. The Local 35 team that negotiated the 1987 contract consisted of Lucidi and four shop stewards. Each shift at the Geriatric Center elected a steward and a fourth steward represented the three penal institutions. Though not formally appointed to the team, Ridge attended one or two negotiation sessions (see Finding 18). Ridge had attended negotiations for a previous contract. She accompanied Pat Marchand, formerly an RN and shop steward, at those negotiations. All of the shop stewards on the team that negotiated the 1987 contract were LPNs (TA41, TA73, TA137-TA138; TC9-TC13).

24. After the ratification vote had been taken, Lucidi talked to a group of RNs. The RNs expressed their dissatisfaction at receiving a lower percentage increase than the LPNs. They told Lucidi that they needed more representation during negotiations and asked for two RN shop stewards. Lucidi told them that they could select an RN as a shop steward. The RNs selected Ridge (TA22, TA40-TA41, TA74, TA93, TA116; TC18).

25. The County negotiated collective agreements with twelve units in 1987. The 5% salary increase negotiated by Local 35 was exceeded by 5 other units, 4 of which consisted of police employees. The range of settlements the County negotiated in 1987 was 4.04% to 5.5% (TB117-TB122).

26. Although RNs received a smaller percentage salary increase than LPNs in 1987, their actual dollar increase was larger.

27. Shortly after the March 1987 ratification of J-4, RNs met and selected Ridge as their shop steward. On August 22, 1987 Ridge wrote Lucidi advising him that RNs at the Geriatric Center wanted a contract separate from LPNs (I-5). Lucidi replied in a letter dated August 25, 1987 that Ridge's request was untimely and that "no attempt can be made towards such an endeavor at the request of a single employee" (I-8). On September 4, 1987, Ridge again wrote Lucidi, this time inviting him to attend a meeting at which RNs intended to discuss measures to obtain their own contract (I-6). Lucidi refused, however, preferring not to meet with factions of the unit (TC118).

28. On October 2, 1987, the Association filed its petition seeking certification as the representative of the County's RNs and LPNs. On October 26, 1987, it amended its petition, proposing to represent only RNs.

29. On October 29, 1987, Lucidi wrote Ridge (he copied the four other shop stewards) asking her to submit by November 6, 1987, proposals for a successor agreement (P-6). This letter was not properly addressed^{3/} and was returned to Local 35. Lucidi mailed it again and Ridge finally received P-6 on November 12, 1987. She did not contact Lucidi, however, until November 19 or 20. On November 18, 1987, Lucidi wrote Roberta Summers, a nursing supervisor (RN), and explained:

On October 29, 1987, we advised in writing to the Stewards including Winifred Ridge, RN, that proposals for the new Labor Agreement be submitted to the Local Union Office so that they may be incorporated with others and submitted to the County. We have not received any response...and...assume that there presently exists no Steward from the classification of RN.

Lucidi advised Summers that any RN wishing to serve as a steward should contact him quickly because a negotiations session had been scheduled for November 23 (P-5). Lucidi interpreted Ridge's failure to respond to P-6 as a resignation of her shop stewardship even though Ridge had not told him she was resigning (TC86-TC87).

3/ The letter was addressed to Ridge at 8 Jonathan Drive. Her correct address is 9 Jonathan Drive (TA95).

30. After Lucidi sent P-5 to Summers, the RNs selected three shop stewards--one from each shift at the Geriatric Center. The RNs also met and prepared a list of proposals. On either November 19 or 20, 1987, Ridge called Lucidi and told him that she had proposals from the RNs and that three RNs would attend negotiations. Lucidi told Ridge that her proposals were late and that it would not be possible to seat all the RNs at negotiations. Ridge asked if there was a rule about the number of persons who could participate on the team. Lucidi replied that he made the rules. He instructed her to deliver the proposals so he could look at them before negotiations. She took the proposals (I-5) to Lucidi's office the next day. (TA42, TA97-TA98, TA110, TA116; TC53-TC57).

31. Ridge received P-6 on November 12 but did not call Lucidi until November 19 or 20. She said her reason for delaying was that, "at the time we were trying to disassociate ourselves from the Teamsters and I guess the question at that time was how appropriate would it be for me to set up proposals..." (TA113). Ridge had also mentioned to another RN that the Association's lawyer advised them not to participate in negotiations or show support for Local 35. This conversation took place a few days before Ridge gave Lucidi the RN proposals (TB101-TB102).

32. When Ridge and the three RN-designated shop stewards arrived at the November 23 negotiations session, Ridge gave everyone copies of the RN proposals. A spirited discussion followed. LPNs

were critical when Ridge or another RN emphasized some difference between RNs and LPNs. Lucidi was somewhat curt with the RNs, who had already filed their severance petition and written the County with a plea to assist them in obtaining their own unit (I-3). Ridge and other RNs present, claim that Lucidi called her a liar (TB49-TB50, TB77-TB78, TB86; TC21, TC98-TC99).

33. Shortly after the RNs arrived at the session, Lucidi advised Ridge and the three RNs accompanying her that the County would negotiate only with two Teamsters (Lucidi and D'Artiglio) and five shop stewards. Lucidi made the announcement after a brief discussion with Marie Gladney, the County's negotiator. The RNs decided that Ridge should stay and Lucidi did not object (TA95, TA99; TB77-TB80; TC20, TC59-TC60).

34. Prior to negotiations for a successor to J-4, Gladney prepared a list of comparable salaries, taken from other centers in the area and from a few private hospitals. She does not remember giving the list to Lucidi during negotiations. Though Lucidi did not prepare such a list, he did call JNESO prior to negotiations and ask about comparable salary rates. Gladney remembers Lucidi mentioning some salary comparables during negotiations but did not remember Lucidi saying anything about a nursing shortage (TB123-TB132; TC85).

35. After approximately five sessions, the County presented the Local 35 negotiations team with its final offer for a three-year contract (1988-90). Gladney, the County's chief

negotiator, wanted to negotiate expeditiously. She was aware of the nursing shortage and of the trend of increasing nursing salaries. She was concerned about losing nurses to higher paying competitors. Lucidi had given Gladney two lists of proposals at the first session: the list he prepared, which contained 13 to 15 items; and the list Ridge gave him, which contained five or six items. The lists addressed some issues differently. Gladney explained that she considered both lists as Local 35 proposals. Gladney considered Ridge to be part of the Local 35 team and remembered seeing her at two or three sessions (TB113, TB115, TB130, TB135-TB136; TC23, TC111).

36. After receiving the County's final offer, Lucidi distributed a memo summarizing its terms to the County nurses. The nurses ratified a successor agreement by secret ballot at a December 1987 meeting. Although a majority of nurses did not vote in favor of ratification, the opposing votes did not exceed two-thirds of those present, the amount required by Local 35's bylaws to reject the offer (TA156; TC102-TC107). Ridge complained that she was unable to obtain a copy of the bylaws to check the ratification rule (TB147).

37. The 1988-90 agreement with Local 35 was the first the County negotiated for 1988. County nurses received salary increases ranging from \$2,000 for LPNs to \$2,800 for nursing supervisors in 1988, and 12% across-the-board increases in both 1989 and 1990 (TB118; P-9, J-5).

38. Local 35 solicited proposals from the nurses before negotiations. Several RNs complained that the shop stewards on their shifts did not seek their proposals. Patricia Erboni, an RN staff nurse on the 7-to-3 shift at the Geriatric Center, was asked for her proposals by Ida Lee (an LPN), her shop steward (TB100-TB102).

39. The RNs were concerned that Lucidi was not aware of their differences with LPNs. They complained that Lucidi felt that a "nurse was a nurse." Lucidi knew generally that RNs and LPNs had separate licensing requirements but was not aware of the particulars. He said that he has no involvement in the professional aspects of nurses but that he was concerned about all of them (TB85; TC23, TC77-TC79).

40. There are 17 collective negotiations units in Mercer County (TB108).

ANALYSIS

The Association argues that RNs should be severed from the Local 35 unit because RNs do not share a sufficient community of interest with LPNs, and because Local 35 has represented them irresponsibly. Local 35 argues that its existing unit is appropriate and that it has not irresponsibly represented RNs. It

also asserts that the Association is not an employee organization under the Act.^{4/}

The parties refer to private sector cases and to the proposed amendments to 29 CFR 103,^{5/} dealing with appropriate bargaining units in the health care industry.

The National Labor Relations Board ("Board") has long recognized the unique interests of registered nurses in its determinations of appropriate bargaining units among health care employees. The Board has preferred separate RN units to broader units of health care professionals, [Mercy Hospitals of Sacramento, Inc., 217 NLRB 131, 89 LRRM 1097 (1975) rev'd and remanded, 589 F.2d 968, 98 LRRM 2800 (CA,9, 1978), cert. denied 440 U.S. 910, 100 LRRM 2687 (1979), decision on remand 244 NLRB 229, 102 LRRM 1016 (1979)],^{6/} and to mixed units of RNs and LPNs [Presbyterian Medical Center, 218 NLRB 192, 89 LRRM 1752 (1975)].

The Board has also proposed to add a Subpart C to 29 CFR 103, codifying the appropriateness of separate RN bargaining units.

^{4/} The only position the County presented was that it refused to consent to an election because it had a stable negotiations relationship with Local 35. The County presented this position by letter at a time when the Association was seeking to represent both RNs and LPNs. The Association later amended its petition to sever RNs from the existing unit.

^{5/} As a second notice of proposed rulemaking, the text of the proposed amendment was published on September 1, 1988 at 53 FR 33900. Comments were due October 17, 1988.

^{6/} Compare State v. Prof. Ass'n of N.J. Dept. of Education, 64 N.J. 231 (1974).

The proposed rules also provide, however, that various combinations of bargaining units may be appropriate.

Moreover, Board decisions on RN-LPN units have not been entirely consistent. Despite its decision in Presbyterian Medical Center, the Board held that a petitioned-for RN-LPN unit was appropriate in Maple Shade Nursing Home, Inc., 228 NLRB 1457, 96 LRRM 1411 (1977). In both cases the Board recognized that any RN-LPN unit would require an RN professional option because LPNs were nonprofessionals.^{7/}

The Commission certified Local 35's unit of Mercer County nurses only after a majority of the RNs voted in favor of representation with LPNs.^{8/} The Association now seeks to remove RNs from the unit. The Association can prevail only if it demonstrates that the interests of RNs conflict with those of LPNs, [West Orange Bd. of Ed. v. Wilton, 57 N.J. 404 (1971)] or if it meets the severance standard adopted by the Commission in Jefferson Tp. Bd. of Ed., P.E.R.C. No. 61 (1971):^{9/}

The question is a policy one: Assuming without deciding that a community of interest exists for the unit sought, should that consideration prevail and be permitted to disturb the existing

^{7/} Neither Presbyterian Medical Center nor Maple Shade were severance cases.

^{8/} The Commission has also certified negotiations units containing both RNs and LPNs in Hudson and Passaic counties.

^{9/} The Association did not argue that RNs should be removed from the unit based upon a statutory exclusion, such as supervisory, confidential or managerial status.

relationship in the absence of a showing that such relationship is unstable or that the incumbent organization has not provided responsible representation. We think not. To hold otherwise would leave every unit open to redefinition simply on a showing that one sub-category of employees enjoyed a community of interest among themselves. Such course would predictably lead to continuous agitation and uncertainty, would run counter to the statutory objective and would, for that matter, ignore that the existing relationship may also demonstrate its own community of interest.
[Slip Op., p. 4].

Relying on Jefferson, the Commission, in Passaic Cty., P.E.R.C. No. 87-73, 13 NJPER 63 (¶18026 1986), explained:

...[a]ssuming that a community of interest exists for the unit sought, we must decide whether the existing relationship is unstable or that the [Union] has not provided responsible representation. To answer that question it is not sufficient to merely examine one aspect of the parties' relationship; nor does a finding that the incumbent organization has breached its duty of fair representation on one occasion necessarily mean that employees must be severed from the existing unit. If this were the case, units would be constantly subject to redefinition and labor instability would inevitably result. Rather, determining whether an incumbent organization has provided responsible representation entails a review of the parties' entire relationship, not just isolated occurrences. [13 NJPER at 65].

The Commission also stated:

Our policy has been, and experience has confirmed, that under most circumstances broad-based units best serve the statutory goal of promoting permanent public employer-employee peace and the health, welfare, comfort, and safety of the people of New Jersey, N.J.S.A. 34:13A-2, and that undue fragmentation of units is to be avoided. Thus, in one of our earliest cases, State v. Prof. Ass'n of N.J. Dept. of Ed., P.E.R.C. No. 68 (1972), we dismissed a representation petition seeking to

exclude registered nurses from a state-wide unit of professional employees. The Supreme Court affirmed this determination. 64 N.J. 231 (1974). See also Hudson Cty., P.E.R.C. No. 84-85, 10 NJPER 114 (¶15059 1984). [13 NJPER at 65]

The Commission elaborated in Sussex-Wantage Bd. of Ed., P.E.R.C. No. 88-113, 14 NJPER 346 (¶19133 1988):

Thus, finding an unfair practice will only warrant severance under the unusual circumstances that the relationship is so unstable and the majority representative has so consistently failed to provide responsible representation, that negotiations would most likely produce instability rather than harmony. This, of course, does not mean that charging parties are without a remedy. Rather, it only means that a remedy redefining an appropriate negotiations unit would, absent compelling circumstances, generally not "effectuate the policies of this Act." This is especially true where a severed unit would ordinarily be considered to be inappropriate based on traditional standards of unit determination. Therefore, in cases of this kind we start with the unfair practice allegations. If a violation is found, we then decide whether the violation warrants severance based upon our representation principles and our obligation to determine the appropriate negotiations unit. [14 NJPER at 347].

Sussex-Wantage explains how the Commission analyzes a severance petition when it is filed with an unfair practice charge alleging a violation of the incumbent's duty to fairly represent employees holding the petitioned-for titles. Here the Association requested a hearing only on its severance petition, believing that a decision on the representation issue would resolve the entire matter. I will not decide whether Local 35's conduct violated its duty to fairly represent RNs. I will, however (consistent with Passaic and Sussex-Wantage), review the record to determine whether

the parties' relationship is so unstable (or that Local 35's representation of RNs was irresponsible) that severance is warranted under Jefferson.

The Association argues that RNs had inadequate representation during negotiations for the 1987 and 1988-90 agreements. It complains that the Local 35 team that negotiated J-4 consisted entirely of LPNs and that Ridge was merely an observer for a session or two. It complains of Lucidi's ad hoc rule-making, including the hand-vote ratification of J-4. It complains that Local 35 was reluctant to meet with RNs to discuss their concerns.

The Association also complains that Local 35 failed to recognize the RNs' professional status and discouraged any attempt to discuss it. It complains that Local 35 treated RNs rudely during negotiations for a 1988-90 agreement. It asserts that Local 35 did not adequately prepare for and was not aggressive during negotiations for the 1988-90 agreement. It contends that Local 35 did not solicit RN proposals. The Association's biggest concern is that Local 35 negotiated salaries that RNs considered inadequate, particularly the raise negotiated in 1987, which was smaller (in percentages) than the LPNs', and much lower than the 20% increases other professional nurses had been receiving as a result of the nursing shortage.

Local 35 has represented the existing unit since May 1977. It has negotiated 5 collective agreements with the County. LPNs now enjoy a slight numerical majority in the unit. Shop stewards are

elected by unit employees on each shift. In 1987, all of the elected shop stewards were LPNs. The negotiations team has historically consisted of two Local 35 officials and the local shop stewards.

Ridge attended one or two of the negotiation sessions for J-4. She presented the RNs' position to the team. She argued for higher RN salaries, citing the nursing shortage and inflation. The Local 35 team negotiated an agreement giving RNs lower percentage increases but higher dollar increases than LPNs. Local 35 had decided to adjust the RN-LPN salary differential. Local 35, negotiating with a public employer, was not able to secure in 1987 a salary increase for any of its unit employees as large as increases received by nurses working in private institutions.

The ratification of J-4 by a hand vote was probably in violation of Local 35's by-laws, which call for a secret ballot. At least one RN was not present at the vote because she left temporarily to prepare for her shift.

Local 35 did refuse to meet with RNs to discuss ways of obtaining a separate contract for them. Lucidi did not want to deal with factions of the union.

The treatment RNs received from Local 35 just prior to and during negotiations for the 1988-90 agreement must be considered in light of the fact that the RNs had been advised not to cooperate with or show support for Local 35. Lucidi specifically solicited RN proposals from Ridge. Although his letter arrived a week late,

Ridge delayed in responding, largely because she was not certain RNS should participate in negotiations. Not hearing from Ridge, Lucidi contacted another RN and invited RN participation in negotiations. Just days before the first session, Ridge contacted Lucidi and gave him the RN proposals. These proposals were given to the County in negotiations, though no apparent effort was made to integrate them with Local 35's other proposals.

The question is whether the record demonstrates that the relationship of Local 35 and the RNS is so unstable that severance is warranted. I conclude that severance is not warranted. Recently, in Camden Cty. Council No. 10, NJCSA, P.E.R.C. No. 89-54, 14 NJPER ____ (¶ ____ 1988), the Commission stated:

Unions have broad power to represent unit members and to negotiate their terms and conditions of employment. They must represent the interest of all such employees without discrimination. N.J.S.A. 34:13A-5.3. A breach of the duty of fair representation occurs only when a union's conduct toward a unit member is arbitrary, discriminatory, or in bad faith. Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976), citing Vaca v. Sipes, 386 U.S. 171 (1967). [Slip Op., p. 6].

In Belen, the court held that:

The mere fact that a negotiated agreement results in a detriment to one group of employees does not establish a breach of the duty by the union. Id. at 491. In Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), the Court expressed the realities that underlie this rule of law:

The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in

servicing the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. [Id. at 337-338]. [142 N.J. Super at 490-491].

In dismissing a severance petition in Clifton Bd. of Ed., D.R. No. 80-18, 6 NJPER 38 (¶11020 1980), the Director of Representation explained:

Where different classifications of employees within a negotiations unit have different views of economic interest, it is understandable that the views of the minority are often not favored and not accepted. A majority representative's responsibility is to assure, however, that the views of the minority are responsibly considered. It is the responsibility of the minority petitioner in a PERC proceeding to show that the majority representative has violated its responsibility. The ratification power of the majority of unit employees is at most, one isolated factor relating to the analysis of the representative's responsibilities and the fact that the majority out votes the minority does not create a substantial and/or material factual issue warranting a hearing into the alleged improper conduct of the majority representative. [6 NJPER at 40].

Like the maintenance personnel in Clifton, the RNs here are in a minority in the Local 35 unit and they are upset that the LPNs obtained a higher percentage salary increase in the 1987 agreement. While this reflects the competing interests among RNs and LPNs, it does not prove irresponsible representation. Local 35 acceded to the wishes of LPNs in 1987 and negotiated a higher dollar but lower percentage increase for RNs. Presented then with the dissatisfaction of RNs, Local 35 permitted them to select their own shop steward. Local 35 contacted this steward to prepare for

subsequent negotiations and when it received no response, it contacted another RN. Local 35 cannot be held accountable for the RNs' decision not to participate in the 1988-90 negotiations.

This conclusion should not be read as a vindication of Local 35's conduct. Local 35 has a troubled relationship with its RNs. Local 35 officials were not fully aware of the interests distinguishing RNs from LPNs. I conclude merely that Local 35's conduct does not warrant severance.

The Association also argued that RNs should now be permitted to vote for separate representation because their interests are distinct from those of the LPNs. The Association refers to differences in licensing and education requirements and in job responsibilities. The Association raises now what the Commission recognized in 1977: that RNs are professional employees and that LPNs are nonprofessional technical employees. The Commission addressed this issue when it required a professional option in the 1977 election. To remove the titles from the unit now, the Association must demonstrate a conflict between the interests of RNs and of LPNs as defined by the Court in Wilton. It has not met this burden.

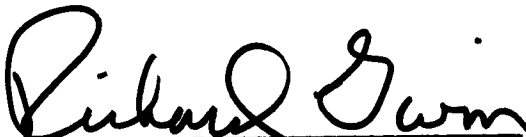
LPNs do often work under RN direction. RNs are responsible for the assignment of nursing tasks to LPNs and RNs must personally perform certain tasks. The only references in the record, however, to the type of conflict contemplated by Wilton, are the nursing supervisors' role in assisting in the training and evaluation of the

County's nursing staff and in disciplining staff. The references to nursing supervisors' evaluation and discipline roles apply both to LPNs and RNs and it is unclear to what extent the nursing supervisors "assist" the County in those roles. I find no basis to remove all RNs from the Local 35 unit based on facts suggesting that nursing supervisors have limited supervisory authority.

The only remaining issue is whether the Association is an employee organization within the meaning of the Act. Local 35 argued that internal disciplinary measures the Association may take against its members, and Association contacts with the State Board of Nursing should disqualify the Association as an employee organization. I disagree. The Association has a history of representing public employees in collective negotiations. The hypothetical conflicts posed by Local 35 were not substantiated by the record. Should such a conflict arise, the aggrieved employee would have recourse by filing unfair practice charges with the Commission.

RECOMMENDATION

I recommend that the Commission dismiss the Association's amended petition.


Richard C. Gwin
Hearing Officer

DATED: December 14, 1988
Trenton, New Jersey