

P.E.R.C. NO. 91-2

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY,

Public Employer,

-and-

Docket No. RO-H-89-121

HOSPITAL PROFESSIONALS AND ALLIED
EMPLOYEES OF NEW JERSEY, AFT, AFL-CIO,

Employee Organization.

SYNOPSIS

The Public Employment Relations Commission adopts a Hearing Officer's recommendation for a professional nurses unit, including graduate and per diem nurses, at the University of Medicine and Dentistry of New Jersey. A representation petition had been filed by the Hospital Professionals and Allied Employees of New Jersey, AFT, AFL-CIO.

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Appearances:

For the Public Employer, Robert Del Tufo, Attorney
General (Vicki A. Mangiaracina, Deputy Attorney General)

For the Employee Organization, Loccke & Correia,
attorneys (Richard D. Loccke, of counsel)

DECISION AND ORDER

On April 27, 1988, the Hospital Professionals and Allied Employees of New Jersey, AFT, AFL-CIO ("HPAE") petitioned to represent all registered, graduate and assistant head nurses employed by the University of Medicine and Dentistry of New Jersey ("UMDNJ"). UMDNJ refused to consent to a secret ballot election. It asserted that: (1) a nurses-only unit is inappropriate; (2) even if such a unit is appropriate, assistant head nurses should be excluded as supervisors within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., and (3) graduate and per diem nurses should be excluded because they have insufficient continuity and regularity of employment.

On May 26, 1989, the Director of Representation issued a Notice of Hearing. On July 20, 21, and 31 and August 1, 1989, Hearing Officer Elizabeth J. McGoldrick conducted a hearing. The parties examined witnesses and introduced exhibits. They filed post-hearing briefs by November 13.

On March 30, 1990, the Hearing Officer issued her report and recommendations. H.O. No. 90-5, 16 NJPER 228 (¶21095 1990). She found that a negotiations unit of registered nurses, graduate nurses and per diem nurses is appropriate and recommended that an election be ordered.

On April 27, 1990, after an extension of time, UMDNJ filed exceptions. It argues that a professional nurses unit conflicts with our long-standing policies of avoiding undue fragmentation of units and of prohibiting units based solely on distinct professional identity. It also argues that graduate and per diem nurses do not have sufficient continuity and regularity of employment to be included in a professional nurses unit. On May 10, HPAE filed a reply urging adoption of the report and recommendations.

Pursuant to N.J.A.C. 19:11-8.8, we have transferred the case to ourself. We have reviewed the record. The Hearing Officer's findings of fact (H.O. at 2-11) are generally accurate. We incorporate them with these modifications.

We add to finding no. 9 that graduate nurses are informed that if they do not pass the required examination, they probably will not be employed by UMDNJ (TC106). Of approximately twenty-one

graduate nurses hired, ten failed the examination. Six resigned immediately; four were placed on leaves of absence and later resigned (TC187).

We modify finding no. 8 to indicate that as of August 23, 1989, eleven of the twenty per diem nurses who had worked in fiscal year 1988-89, had worked in calendar year 1989.

We first address the appropriateness of a professional nurses unit. After carefully reviewing the caselaw and the particular circumstances of this case, we adopt the Hearing Officer's thoughtful recommendation.

In State v. Professional Ass'n of N.J., 64 N.J. 231 (1974), the Supreme Court upheld our rejection of a petition seeking a unit limited to the State's professional nurses. See State of New Jersey, P.E.R.C. No. 68, NJPER Supp. 273 (¶68 1972). We had held, in part, that when dealing with professional employees, the individual distinctions among the professions should not be regarded as controlling. The Hearing Officer here correctly noted those determinations. But she looked beyond the holding, under that case's facts, to these relevant portions of the Court's decision:

Nothing we have said is intended to suggest that a respectable if not persuasive case for separate representation has not been advanced by the petitioning organizations, particularly the registered nurses.... [Id. at 252]

* * *

If, after rendition of our determination herein, there continues for a substantial period to be no movement in that direction, [toward organizing professional employees en masse] it will be open

to any interested organization or group of professional employees to lay the matter of appropriate units before the Commission anew. Clearly, the ultimate organization of all employees who desire collective negotiation with the State is a logical objective of the public policy underlying the statute. [Id. at 253]

* * *

In any event, nothing in our holding or in the decision of P.E.R.C. precludes a later determination, under circumstances then existing, authorizing units of less than the total body of professional employees.

Thus, Professional Ass'n laid the groundwork for finding a professional nurses unit to be the most appropriate should the facts warrant. Because those facts are present here, we depart from our normal pattern of finding that units based on a single profession are not the most appropriate.

UMDNJ makes a number of arguments in its exceptions to the Hearing Officer's recommendations. We will respond to each one.

It claims that there are no extraordinary circumstances warranting a professional nurses unit. It relies on language in UMDNJ, P.E.R.C. No. 84-28, 9 NJPER 598 (¶14253 1983), where we stated that we would not subdivide the nonfaculty, professional, nonsupervisory employees at UMDNJ absent extraordinary circumstances. But such extraordinary circumstances now exist. Although no single factor by itself might warrant a separate unit, together they do.

It is undisputed that nurses have a strong occupational identity. While this fact has never been an overriding consideration in unit determinations, it is a significant factor we

should not ignore. Nurses make up the only professional group that provides 24 hour patient care. They are the front line of patient care. As stated by the Hearing Officer:

These duties in combination with unique educational, licensing and practice standards set forth in state law and by professional associations give nurses at UMDNJ a strong, unique professional identity. [H.O. at 20]

UMDNJ argues that relative size of the workforce should not be a factor in determining an appropriate unit. We disagree. The sizeable percentage of nurses in UMDNJ's professional workforce (596 out of 1557) does not alone compel our establishing a separate unit, but it is relevant to the viability of such a unit.

UMDNJ argues that the fact that we have permitted nurses-only units elsewhere is not relevant to whether a nurses-only unit is appropriate here. While the existence of such units elsewhere does not control this determination, it does support a finding that such units may be the most appropriate in certain circumstances.^{1/}

UMDNJ argues that the ten year lapse since the failed attempt to organize an all-professional unit at UMDNJ is an insufficient rationale for creating a professional nurses unit. While this factor alone might not justify a professional nurses unit, we cannot ignore it. The Supreme Court stressed the statutory

^{1/} We note that even in Professional Ass'n, the Supreme Court found that the nurses had advanced a persuasive case for separate representation, id. at 252, and such a unit "could well have been found to be appropriate."

objective of organization of all employees who desire collective negotiations. Id. at 253. UMDNJ's assertion that the nurses can be adequately represented in a unit of all professionals may be valid. But it is unrealistic. There is no such unit now and it has been ten years since a failed attempt to organize such a unit. A scenario raised in Professional Ass'n now exists. There has continued for a substantial period to be no movement in the direction of organizing an all-professional unit.

UMDNJ argues that In re State (New Jersey State Firemen's Mutual Benevolent Ass'n) 114 N.J. 316 (1989) is strong support for the public interest in avoiding fragmentation of bargaining units. We agree with that proposition, but the circumstances of that case were radically different since it involved a severance petition rather than an initial unit determination. There the Supreme Court upheld our determination that State firefighters should not be severed from an existing broad-based unit. A refusal to sever absent proof of ineffective representation or a demonstrated instability in labor-management relations preserves labor stability. See Jefferson Tp. Bd. of Ed., P.E.R.C. No. 61 NJPER Supp. 248 (¶61 1971). Thus in Mercer Cty., P.E.R.C. No. 89-112, 15 NJPER 277 (¶20121 1989), we noted that even if a separate unit of registered nurses would have been most appropriate as an initial matter, that did not require severing registered nurses from a unit with licensed practical nurses. The standards for initial unit determination and severance are very different. Furthermore, creation of a large unit of professional nurses here does not

portend a proliferation of small, single occupation professional units. In fact, the Director of Representation rejected a proposed unit of this employer's pharmacists, in part because it might lead to a proliferation of occupational units, while noting that nurses might seek their own unit. New Jersey Coll. of Medicine and Dentistry, D.R. No. 77-17, 3 NJPER 178 (1977).

In sum, the Hearing Officer's report carefully considered the facts and applied the relevant legal standards. We adopt her recommendation for a professional nurses unit and proceed to determine the scope of that unit.

In the absence of exceptions, we adopt the Hearing Officer's recommendation to exclude assistant head nurses as supervisors.

We also adopt the recommendation to include graduate nurses. Graduate nurses are like probationary employees. Cherry Hill Tp. Dept. of Public Works, P.E.R.C. No. 30, NJPER Supp. 114 (¶130 1970). They have an expectation of continued employment subject only to their passing the licensing examination. UMDNJ, P.E.R.C. No. 87-165, 13 NJPER 603 (¶18226 1987) is distinguishable. Under the particular facts of that case and in the absence of exceptions, the Chairman adopted a Hearing Officer's recommendation to dismiss a representation petition for a separate unit of public safety interns. Such a unit was not appropriate because interns were generally hired for a maximum of one year and then became either security guards or police officers. The Hearing Officer did

not decide the appropriateness of including interns in a unit with other employees. H.O. 87-18, 13 NJPER 470, 473 n.7 (¶18174 1987).

While the employees here may only hold the graduate nurses title for four months, their expectation of continued employment distinguishes them from temporary employees and warrants their inclusion in a professional nurses unit. See Lydia E. Hall Hosp., 227 NLRB No. 85, 94 LRRM 1105 (1976); Meharry Medical Coll., 219 NLRB No. 57, 90 LRRM 1108 (1975).

Finally, we adopt the recommendation to include certain per diem nurses. We recognize that per diem nurses have not been guaranteed a schedule or regular hours. We recognize also that per diem nurses have had no guarantee of future regular employment. But these factors do not diminish the organizational rights of individual employees who have demonstrated continuous and regular employment and a willingness to continue such employment. See Newton-Wellesley Hosp., 219 NLRB No. 80, 90 LRRM 1090 (1975) (on-call nurses). This holding does not require inclusion of all per diem nurses and therefore we do not, as suggested by UMDNJ, look to the average hours of per diem nurses as a group. Instead, only individual nurses who have exhibited sufficient regularity and continuity of employment are included in the unit with other registered nurses.

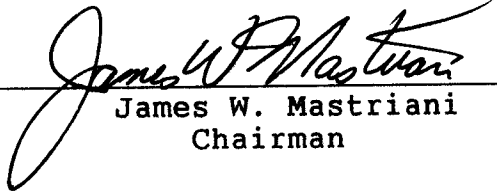
We modify slightly the recommended unit description covering per diem nurses. Per diem nurses must be in their second year of work as a per diem nurse, have worked at least one sixth the hours of full-time nurses during their first year, and express a

willingness to continue working as a per diem nurse. To require work in two consecutive fiscal years would have some nurses waiting a year to be in the unit and others, hired at the end of a fiscal year, waiting a few days.

ORDER

This case is transferred to the Director of Representation to conduct an election consistent with this opinion.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
July 19, 1990
ISSUED: July 19, 1990

H.O. NO. 90-5

STATE OF NEW JERSEY
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HOSPITAL PROFESSIONALS AND ALLIED
EMPLOYEES OF NEW JERSEY, AFL, AFL-CIO,

Employee Organization.

SYNOPSIS

A Hearing Officer of the Public Employment Relations Commission finds that a unit composed of registered nurses, graduate nurses and per diem nurses is appropriate for collective negotiations and recommends that an election be ordered among such employees. The Hearing Officer finds that Assistant Head Nurses are supervisors within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.3 ("Act") and recommends that they be excluded from the petitioned-for unit. The Hearing Officer found that under the circumstances here, the nurses share an unique community of interest in their terms and conditions of employment and professional identity, and that the purposes of the Act are best effectuated by allowing the nurses to be represented in a separate unit. The employer's interest in preventing unit proliferation does not outweigh the desires of nurses to be represented in a separate unit where the University now negotiates with two other units of single category professional employees, and with a total of seven units; where the proposed nurses unit would be the fourth largest one; and where no union has successfully sought to represent the entire unit of all professional employees. The Hearing Officer finds that these facts constitute extraordinary circumstances justifying a re-examination of the issues and a separate nurses unit as contemplated by the Supreme Court's analysis in State v. Professional Ass'n. of N.J. Dept. of Ed., 64 N.J. 231 (1974).

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.

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Appearances:

For the Public Employer,
Hon. Robert Del Tufo, Attorney General
(Alice J. Guttler, Deputy Attorney General)

For the Employee Organization
Loccke & Correia, Esqs.
(Richard D. Loccke, Of Counsel)

HEARING OFFICER'S RECOMMENDED
REPORT AND DECISION

On April 27, 1989 the Hospital Professionals and Allied Employees of New Jersey, AFT, AFL-CIO ("HPAE") filed a representation petition with the Public Employment Relations Commission ("Commission") seeking to represent all registered, graduate, and assistant head nurses employed at the University of Medicine and Dentistry ("UMDNJ" or "University"). UMDNJ opposed the petition and refused to consent to a secret ballot election. The University asserts that: (1) a nurses-only unit is inappropriate and

the appropriate unit should include all professional employees; (2) even if the Commission finds an all nurses unit appropriate, assistant head nurses must be excluded because they are supervisors within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1.1 et seq. ("Act"); and (3) graduate and per diem nurses should be excluded because their employment relation to the University is tenuous.

On May 26, 1989 the Director of Representation issued a Notice of Hearing. On July 20, 21, and 31 and on August 1, 1989 I conducted a hearing in this matter, at which the parties examined and cross-examined witnesses, presented evidence and argued orally. Post hearing briefs were submitted by November 13, 1989.

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. UMDNJ employs approximately 9,000 employees. There are currently seven separate bargaining units representing University employees. They are:

- a. American Association of University Professors (950 medical faculty);
- b. Allied Health, NJEA (35 allied health faculty);
- c. International Operating Engineers, Local 68 (160 operating engineers and skilled trades);
- d. Professional Employees International Union, Local 153 (70 security officers);
- e. Fraternal Order of Police, Local 74 (70 police officers);

f. International Brotherhood of Teamsters, Local 98 (2700 clerical and unskilled); and,

g. Committee of Interns and Residents (900 residents and osteopathic interns.(TC9, TC10, R-8, P-18, P-4)1/

HPAE's proposed unit contains approximately 596 nurses. In addition to those nurses, about 1000 other professional employees, and an unknown number of supervisors, administrators, and managerial executives employed by the University are unrepresented. The nurses unit would be the fourth largest unit. (TC36)

2. Although HPAE's proposed unit would include 596 nurses, the University's proposed unit of all professional employees, including nurses, is 1557. (R-18)

3. The University has a centralized personnel system. The petitioned-for employees work in Newark-University Hospital, Stratford-Camden facilities and Piscataway-New Brunswick facilities. (TB85, TB92, TB93, TB110) The University promulgates personnel policies in various sources or Policy and Procedure Manuals. A manual (P-1, P-1A, P-2) promulgated by the human resources

1/ Transcripts will be referred to as "TA"--hearing on July 20, 1989; "TB"--hearing on July 21, 1989; "TC"--hearing on July 31, 1989; and "TD"--hearing on August 1, 1989. Exhibits are referred to as "C-" are Commission exhibits; "J-" are joint exhibits; "P-" are petitioner's exhibits; and "R-" are respondent's exhibits

department applies to all employees. Policies applicable only to nurses are also promulgated by in the Nursing Department. (R-12, R-13) These nursing manuals contain personnel policies as well as nursing practice policies. The University uses the Hay evaluation system to evaluate its jobs. (TB100) The impact of the external market on hiring takes certain jobs outside of this compensation system. (TB101)

4. The State Office of Employee Relations (OER) directs labor relations policy at UMDNJ, including participating in the University's negotiations. (TD202) The record shows that the historic centralized personnel operation resulting from New Jersey's Civil Service law and the chaotic experiences in New York City caused the state to insist upon large broad-based units.

(TD149-TD152) This civil service system established a broad range of administrative controls affecting the terms and conditions of state employees prior to the Act.(TD145) The state professional employees unit consists of about 12,000 employees in about 1,000 titles. These employees work in all state agencies in a wide range of occupations and working conditions. The OER has taken a position that smaller, fragmented units would hinder agencies' abilities to deliver services and as a policy, it has resisted single job class units. (TD152) The OER argued a nurse only unit would open the door to numerous narrow groups and is not in the public interest.

(TD145, TD152, TD179)

5. Since 1971 the University has negotiated with Teamsters'

represented broad based non-professional unit. These parties have negotiated unique contract terms for particular titles such as Emergency Medical Technicians. (TC11-TC13) The University argued that a unit of only nurses leading to a proliferation of other units will result in employees taking extra time off for conventions, multiple shop stewards and too many grievances. (TC16,TC59)

6. There are 27 Assistant Head Nurses ("AHN") at UMDNJ. AHNs report to head nurses who supervise and manage nursing care in all units. (TC112) AHNs perform regular nursing duties and oversee other staff nurses. The position of "charge nurse" is a rotating assignment and for a particular shift is the supervisor under the head nurse. AHNs have authority to recommend that disciplinary action be taken against other nurses and technical staff. (TC110, TC112) Joanne Newkirk, AHN in the Labor and Delivery Department, reported another nurse for abuse of time. Subsequently this nurse was suspended. Esperanza Herrera, AHN in the dental clinic, has signed written warnings, and has observed a probationary technical/clerical employee. The same employee was dismissed at the end of the probationary period. The AHNs in the emergency department have authority to give oral and written warnings. They also enforce new policies. There have been recent occasions in the emergency department where AHNs have initiated disciplinary recommendations. (TB19, TB20, TB60, TB69-TB71, TB76-TB78, TD35, TD36, TD109, TD110, TD123-TD125, TD126, TD132, TD134)

7. On occasion AHNs have participated in hiring other nurses and technical staff. Christine McCallion, the Assistant Director for the emergency department, has considered the recommendations of emergency department AHNs who interviewed applicants in hiring nurses for that department. Herrera, AHN in the dental clinic participated in an interview of a technical employee. (TB117, TB118, TD19, TD33, TD34, TD118, TD138, TD139)

8. Per diem nurses are hired as-needed. (TC115) Regular full-time nurses work approximately 36 to 40 hours per week (TA16, TD121, TD122, TD134) The University uses per diem nurses as substitutes in cases of long and short term nursing shortages. They are paid on an hourly basis, and receive no health, sick or vacation benefits. They have no guarantee of future regular employment with the University. (TB103-TB107) In fiscal year 1988-89 the University had a roster of twenty per diem nurses. Seventeen of them also worked in calendar 1989. Six on the list worked over 345 hours in a year, about one-sixth of a full time nurse's hours.(R-21) The per diem nurses may work a maximum of 24 hours in a week. (TC115)

9. Graduate nurses have graduated from an accredited school of nursing but have not yet taken or passed the State Board of Nursing examination and received a license. They are employed at UMDNJ and provide direct patient care under the supervision of a registered nurse. They cannot evaluate other nurses but can direct LPNs and student nurses under supervision. They are informed when hired that if they do not pass the exam they may be dismissed. The

Nursing Practice Act prohibits UMDNJ from retaining nurses who have failed the exam. (TC105-TC107) Most of those who pass the exam are retained. Over the period 1987 to 1989 an average of 63 percent of all graduate nurses at UMDNJ passed the exam. Of those who failed, almost all resigned.(TC188, R-19)

10. In the private sector, organizing nurses is difficult because of unit composition disputes. Employers resist nurses-only units and nurses resist broad-based unit representation. Private sector experience shows that when employers object to nurses-only units, the process of organizing is prolonged by litigation and this delay and uncertainty affects nurses willingness to be organized. (TA18, TA27-TA29) ^{2/} An example is the 1983 American Federation of Teachers ("AFT") campaign to organize nurses at a private hospital in New Jersey. There, the employer objected to the unit just prior to the election and the matter was not resolved for two years. (TA45-TA47) Finally, the union there agreed to a larger mixed unit and this was the main reason why the union lost that election. (TA47,TA48) A union is reluctant to organize nurses units where the issues are very complex and the outcome uncertain. (TA49,TA50) In addition, there are difficulties in contract administration in mixed units where nurses may be represented in

^{2/} Richard H. Schwartz, executive director of the Oregon State AFT has had several years experience at national and regional levels organizing and advising health care organizers. He helped prepare the AFL-CIO response to National Labor Relations Board ("NLRB") health care rulemaking. I credit his testimony and qualify him as an expert in health care labor relations

grievances or other problems by non-nurse shop stewards. (TA52)

11. In April 1980 the International Brotherhood of Teamsters, Local 286 filed a petition seeking to represent all professional employees, including registered nurses, at the then College of Medicine and Dentistry (now UMDNJ). The N.J. State Nurses Association/JNESO intervened; an election and run-off election were held at which a majority of votes was cast for no representative. The Director of Representation issued a certification of these results on September 3, 1981.

12. Nursing in New Jersey is controlled by the Nursing Practice Act, N.J.S.A. 45:14 et seq., which states:

Nursing is diagnosing and treating human responses to . . . physical and emotional health problems, through . . . case finding, health teaching, health counseling and provision of care supportive to or restorative of life and well-being, and executing medical regimen as prescribed by the licensed . . . physician or dentist. N.J.S.A. 45:11-23 1.b.

Professional nurses must be at least eighteen years old; possess a high school diploma or equivalency, and a diploma from an accredited professional nursing school. N.J.S.A. 45:11-26 4. a.

13. Professional nurses must be licensed by the New Jersey Board of Nursing. N.J.S.A. 45:-26 (4) b. Registered nurses can delegate selected nursing tasks to other health care employees, including licensed practical nurses ("LPNs"), aides, assistants and technicians. N.J.A.C. 13:37-6.2(a) Nursing practices are also governed by American Nursing Association standards on diagnosis, documentation, and nursing process steps. (P-11, P-12, P-13, P-14, P-15) At UMDNJ, nurses provide direct care to patients and

supervise and manage other staff in providing care to patients. (TC79) Nurses interact with other health care professionals at university hospital. Under a physician's authority nurses sometimes direct other therapists to assist them, especially in the emergency department. A physician is always ultimately in charge of patient care and of all other professionals. The emphasis in patient care is for all professionals to work together as a team. (TC88,TC89)

14. Nurses receive different vacation benefits than other University employees. They receive an extra week of vacation leave after three years; other employees receive the week after 12 years employment. (TB207, TB208) Under a special creative staffing plan, nurses can opt to work 24 hours during a single weekend and are paid for forty hours. (P-16)

15. Other medical disciplines develop treatment plans for patients. Nurses coordinate and recommend changes in the delivery of these plans. UMDNJ provides 24-hour patient care. Nurses provide care twenty-four hours, in shifts of 12 or 8 hours. Nurses observe patients more frequently than other medical professionals (physical therapists, social workers, respiratory therapists, etc.) Nurses recommend treatment or medication changes to a physician who, in consultation with, or on his/her own modifies treatment and medicines. All professionals work with physicians as a team. (TC93, TC94, TC130, TC131)

16. The University proffered a list of titles which would comprise the most appropriate unit. (P-2) The list covers many

different disciplines and includes titles which have no patient contact. (TB114, TB115)

17. UMDNJ is organized into two types of hospital departments, single medical discipline departments (nursing, physical therapy, respiratory therapy, pharmacy, etc.), and treatment types (emergency, surgery, obstetrics, pediatrics, medicine, psychiatric). Nursing practice and policy issues are implemented from the nursing department. (TC71) Darlene Cox, Associate Administrator for Nursing at UMDNJ, stated that the Nursing department table of organization is unique. (TB67, TC68). The nursing department is organized hierarchically; the associate administrator is in charge; reporting to her are administrative staff who are primarily not nurses. They include clerical support, budget analysts, staffing coordinators, equipment and supplies staff, quality assurance, research, recruiting, and continuing education and development personnel. Also reporting to the associate administrator are Assistant Directors of Nursing ("ADNs") for psychiatry, obstetrics, outpatient, dialysis, pediatrics, medicine, neurology, intensive care, surgery, dental, and operating room. The ADN for emergency reports directly to another hospital administrator and indirectly to the nursing department. Other ADNs assist the chairpersons of their assigned departments, overseeing nursing aspects. (TC71-TC73, TC76-TC77)

18. UMDNJ hires nurses through the nursing department. There is an Assistant Director for nurse recruitment and retention

on the Associate Administrator's staff. (TD74) Assistant Directors of Nursing or Head Nurses handle and may delegate interviewing and screening nurse applicants to AHNs. (TB117, TB118) There is a significant nursing shortage which is a subject of concern to UMDNJ. (TB145, TB146) The University uses per diem nurses, including its own full-time nurses as per diems or by offering a creative option shift plan to maintain adequate staffing in the face of this shortage. (TB148, P-16) The external market shortage plays a significant role in setting nurses' salaries at UMDNJ. (TB200, TB201)

19. Nine of the thirteen county hospitals in New Jersey have separate certified or recognized units of nursing personnel. Irvington Hospital and Jersey City Medical Center also have nurses only units certified by the Commission. 3/

3/ I take administrative notice of the following unit certifications and findings of fact from the following decisions: Middlesex County, certification issued July 13, 1978 (RN/LPN unit); Monmouth County, certification issued June 29, 1981 (RN unit); and Passaic County, certification issued February 7, 1977 (RN/LPN unit); Bergen County, D.R. No. 90-20, 16 NJPER _____ (¶ _____ 1989); Mercer County, P.E.R.C. No. 89-112, 15 NJPER 277 (¶20121 1989) (RN/LPN unit); Atlantic County, D.R. No. 87-9, 12 NJPER 871 (¶17336 1986) (RN unit); Camden County, D.R. No. 81-3, 6 NJPER 415 (¶11209 1980) (RN unit); Hudson County, P.E.R.C. No. 84-131, 10 NJPER 320 (¶15153 1984) (RN unit); Essex County, H.O. No. 87-5, 12 NJPER 788 (¶17301 1986) (RN unit).

ANALYSIS

The issues presented in this case are:

- (1) Whether a unit composed solely of professional nurses is appropriate?
- (2) Whether assistant head nurses are supervisors within the meaning of the Act, and should be excluded from the proposed unit?
- (3) Whether graduate nurses and per diem nurses have the requisite continuity and regularity of employment to warrant inclusion in the unit?

UMDNJ argues that nurses do not comprise an appropriate, separate unit for purposes of collective negotiations. Rather, UMDNJ contends that the appropriate unit for representation of the nurses would be one consisting of all unrepresented professional employees. The University asserts that permitting a unit limited to a single occupational category to organize separately would lead to unit fragmentation and increased collective negotiations and contract administration costs.

HPAE asserts that (a) registered nurses at UMDNJ enjoy a unique community of interest by virtue of their skills, working conditions and terms and role in patient care; (b) the nurses community of interest with the broad based unit proposed by UMDNJ is weak, especially since many of the titles do not even work in a patient care setting; and (c) the best representation for nurses can be provided in a nurses-only unit. The HPAE also argued that there are many all-nurse units in the private and public sector and that the National Labor Relations Board has recently sanctioned such a unit configuration through rulemaking.

Appropriateness of Nurses-Only Unit

The Commission is charged with determining in each instance what unit is appropriate. N.J.S.A. 34:13A-6. Where more than one unit is potentially appropriate, the Commission must determine which unit configuration is most appropriate. State v. Professional Association of N.J. Dept. of Ed., 64 N.J. 231 (1974) ("Professional Ass'n.") N.J.S.A. 34:13A-5.3 requires that negotiations units be defined "with due regard for the community of interest among the employees concerned." The Commission favors structuring negotiations units along broad-based, functional lines and has been reluctant to find appropriate units structured along occupational or departmental lines. ^{4/}

In making unit determinations, we must consider the general statutory intent of promoting stable and harmonious employer-employee relations. The desires of the employees and the desires of the parties, while relevant, are not paramount. The totality of circumstances of the particular case must be considered, including the history of the negotiations unit and extent of organization of the employer's employees. ^{5/}

^{4/} See State of New Jersey, P.E.R.C. No. 68; South Plainfield Bd. of Ed., P.E.R.C. No. 46 (1970); Piscataway Tp. Bd. of Ed., P.E.R.C. No. 88-124, 10 NJPER 272 (¶15134 1984).

^{5/} Township of Teaneck, P.E.R.C. No. 88-20, 13 NJPER 483 (¶18270 1987); Passaic County Board of Freeholders, P.E.R.C. No. 87-141, 13 NJPER 483 (¶18179 1987); Englewood Bd. of Ed., P.E.R.C. No. 82-25, 7 NJPER 516 (¶12229 1981)

This case involves a large group of unrepresented professional nurses. The rights of these public employees who desire representation must be balanced against the effect such organization will have on the employer's overall labor stability. Generally, where an employee group is found to appropriately belong in an existing, overall, broad-based unit, a request to represent the residual group separately will fail, absent exceptional circumstances. ^{6/} There are persuasive arguments that nurses properly belong in a unit of all UMDNJ professional employees. A broad based professional unit was found appropriate in 1977. ^{7/} After reviewing the totality of circumstances in this case I conclude that extraordinary circumstances exist and I recommend that the petitioned-for unit be found appropriate.

In Professional Ass'n. the New Jersey Supreme Court considered a petition seeking a nurses only unit. The court there upheld the Commission's finding that a Statewide unit of all professional employees would better serve the purposes of the Act. But there, the court noted:

"If, after rendition of our determination herein, there continues for a substantial period to be no movement in

^{6/} See Tp. of Teaneck; Camden Bd. of Ed., P.E.R.C. No. 87-53, 12 NJPER 847 (¶17326 1986); County of Camden, D.R. No. 88-3, 13 NJPER 663 (¶18251 1987); Bd. of Ed. of the City of Camden and Camden City School Psychologists, E.D. No. 76-32, 2 NJPER 123 (1976) ("Camden I")

^{7/} In New Jersey College of Medicine and Dentistry, D.R. No. 77-17, 3 NJPER 178, (1977) ("Pharmacists") the Director of Representation determined at UMDNJ (then College of Medicine and Dentistry) that a unit of all professional employees, not just a pharmacists unit, was the most appropriate one.

that direction, [toward organizing the state professional employees en masse] it will be open to any interested organization or group of professional employees to lay the matter of appropriate units before the Commission anew. Clearly, the ultimate organization of all employees who desire collective negotiation with the State is a logical objective of the public policy underlying the statute.
64 N.J. 253

"In any event, nothing in our holding or in the decision of PERC precludes a later determination, under circumstances then existing, authorizing units of less than the total body of professional employees.
64 N.J. 253 n.6.

Nothing we have said is intended to suggest that a respectable if not persuasive case for separate representation has not been advanced by the petitioning organizations, particularly the registered nurses. . .64 N.J. 252.

In that case the Court allowed for a re-examination of unit composition decisions if, after time no union had sought the broad based unit. Nothing there precludes a later determination that units of less than all professional employees would be appropriate. The Court was particularly impressed by the persuasive case made for separate representation by registered nurses.

The result in Professional Ass'n. should not control here for the attendant circumstances in that case are distinguishable. There, none of the professional employees employed by the State had been organized and the possibility of unduly narrow fragmented units was, on balance, more probable than it is here. Further, the existence of a comprehensive Civil Service law which treated all state employees comparably was another reason to deny a request for single profession unit. Here, the University has already been negotiating with several units for a relatively long period, in one

case for about twenty years. Although there is a central personnel structure, the Nursing Department functions in a parallel way to control nurses terms and conditions of employment. The University has treated professional nurses differently by offering additional benefits not available to other employees (vacation week and creative shift option). The University's Human Resource Director acknowledged the unique role that the market plays in setting nurses wage rates.

Three earlier UMDNJ cases are relevant here. In New Jersey College of Medicine and Dentistry, D.R. No. 77-17, 3 NJPER 178, (1977) ("Pharmacists") the Director of Representation dismissed a petition seeking a unit limited to pharmacists. There it was determined that a college-wide unit of professional employees was appropriate. The Director noted that the two existing professional units did not open the door to additional units along occupational lines "These units--instructional faculty and housestaff-- represent sound and coherent negotiating unit groupings. . . whose functions are distinct and removed from other professional employees." 3 NJPER at 180. Interpreting Professional Ass'n., the Director found:

The Supreme Court's prescription for re-examination contained in Professional Ass'n. clearly refers to a passage of time subsequent to the initial determination as to the appropriate unit structure. The Court's concern is not to create a circumstance which would for all effective purposes intolerably preclude the representation of any employees; and it provides for an opportunity to have the appropriate unit determination reviewed in the light of subsequent events. 3 NJPER 180

In April 1980 the Teamsters filed a petition with the Commission seeking to represent the University's professional employees. The N.J. State Nurses Association/JNESO intervened; an election and run-off were held. The majority of votes was cast for no representative. There have been no petitions filed since then, ten years time. This lapse of time together with the fact that the nurses now seek to have representation are of considerable weight in creating the extraordinary circumstances like those intended in earlier court and Commission case law.

In University of Medicine and Dentistry of New Jersey, P.E.R.C. No. 84-28, 9 NJPER 598 (¶14253 1983), ("Allied Health Faculty") the Commission directed an election among allied health faculty at the University. The Commission found, over the University's objections, that the petitioned-for unit was appropriate because of differences between the two faculty groups, and the lack of any real threat of unit proliferation. There, it was significant that the allied faculty would be left without any practical opportunity to be represented. The same is true here. It appears that UMDNJ professionals as a whole do not desire collective representation, but that cannot be said of the professional nurses. Practically, it appears these nurses will be without representation if the petition is dismissed. In passing the Act the legislature intended to give public employees the right to establish their own negotiations units. The petitioner here presented evidence that organizing nurses only units presents particular difficulties. Failure to approve a nurses only unit under the particular facts of this case will thwart the Act's purposes.

In Allied Health Faculty the Commission specifically rejected UMDNJ's fear that the decision would permit the breakdown of the previously defined but unrepresented unit of non-faculty, professional, non-supervisory employees into numerous narrow professional groups. A clearly appropriate unit would not be subdivided, absent extraordinary circumstances. As we said there:

The structure of negotiations units at UMDNJ appears to be fairly well fixed: there are six negotiations units already established and represented and another unit (of nonfaculty, professional, nonsupervisory employees) already established, but unrepresented.

9 NJPER 600

I find that the pattern and extent of collective negotiations at UMDNJ has remained stable for the past seven years. Approximately 4800 employees out of 9000 are represented. Adding the nurses unit will only bring the total number of units to eight. The unit would be the fourth largest one at the University, and I conclude the addition of the professional nurses unit would not disturb this stability. Moreover, it does not follow that because a nurses unit is found appropriate additional single occupational units will similarly be found appropriate. Such units will be subject to the same extraordinary circumstances, community of interest, and balancing undue fragmentation with effectuating employees representation rights standards.

The Commission has previously departed from a rigid application of the broad-based unit policy. An exception was found in Bergen Pines County Hospital, D.R. No. 87-3, 12 NJPER 619 (¶17234 1982), where the Director of Representation found a unit of physicians and dentists appropriate. The physicians/dentists

employee group pre-existed the organization of eleven subsequent negotiations units. He rejected the employer's argument that permitting doctors to organize separately into a twelfth negotiations unit could lead to unit fragmentation because it had already permitted several narrow professional groups to organize.

While the number of units here is no where near twelve, the University has been negotiating with three other single category units for at least seven years. Further, in the twenty years that the broad non-professional unit has been in existence, the registered nurses at UMDNJ have gone without any collective representation. An attempt was made about nine years ago to represent a broad-based unit but when a nurses union intervened, the attempt failed. Now the University negotiates with three other single category professional groups, the medical faculty, allied health faculty and interns and resident physicians, and with a total of seven units, four of which are significantly smaller than petitioner's proposed unit.

Nurses at UMDNJ share a unique community of interest. The effect of the external market shortage of nurses upon their terms and conditions of employment is unique at the University. It has meant disparate treatment in benefits and scheduling options. Structurally, a separate department of Nursing controls hiring, scheduling and disciplining of professional nurses. It is unique in the University because it performs the same functions as does the Department of Human Resources for other employees.

Nurses also have unique working conditions. They provide 24-hour patient care and have the most frequent and regular contact with patients. They are in the best position to observe changes in patients' progress. They coordinate nursing care with other treatment plans and the administration of drugs and medicines, always under a physician's authority. These duties in combination with unique educational, licensing and practice standards set forth in state law and by professional associations give nurses at UMDNJ a strong, unique professional identity.

The University's proposed unit consists of about 300 job titles. Many of the employees in those titles do not work in a hospital setting nor do they have any contact with patients, or involvement in patient care. The community of interest between many of those titles and the nurses is weak.

Finally, the Commission has permitted nurses only units elsewhere. Nine of the thirteen county hospitals have nurses only units. Irvington Hospital and Jersey City Medical Center also have nurses only units certified by the Commission. (Fact No. 19) In the private sector, the NLRB has also promulgated rules which found registered nurses only units appropriate. ^{8/} Thus, based upon the particular facts of this case and the above analysis I recommend the Commission find a nurses only unit appropriate here.

^{8/} Collective bargaining units in the health care industry rules were promulgated on April 21, 1989, 54 Fed. Reg. 16336 (1989), to be codified at 29 C.F.R. Part 103. On July 25, 1989 the U.S. District Court for the Northern Illinois District enjoined the rules. American Hospital Ass'n. v. NLRB, 132 LRRM 2033 (1989) There is an appeal in the U.S. Court of Appeals for the 7th Circuit, Dkt. Nos. 89-2065 and 89-2488.

Assistant Head Nurses

The issue here is whether the Assistant Head Nurses ("AHNs") are supervisors within the meaning of the Act. HPAE seeks to represent AHNs in the petitioned-for unit of all professional nurses. The University objects to the inclusion of the AHNs in the proposed unit because it asserts they are supervisors within the meaning of the Act. But for certain exceptions not present here, supervisory employees cannot be in units with non-supervisory employees. N.J.S.A. 34:13A-5.3 ^{9/}

The University has retained the final authority to hire, discharge and discipline. The question then is whether AHNs have the power to "effectively recommend" such personnel actions. "Effective recommendation" occurs when the recommendation is adopted without independent review and analysis by a higher level of authority. See, Teaneck Bd. of Ed., E.D. No.23 (1971); Borough of Avalon, P.E.R.C. No. 84-108, 10 NJPER 207 (¶15102 1984). The Associate Administrator for Nursing stated that AHNs have the authority to recommend discipline and to provide documentation for disciplinary hearings. (TC111-TC112)

Here, there were three instances where AHNs effectively recommended disciplinary action against other employees. Joanne Newkirk, AHN in Labor and Delivery, recommended disciplinary action

^{9/} This subsection provides, in relevant part: "...except where established practice, prior agreement or special circumstances, dictate the contrary, shall any supervisor having the power to hire, discharge, discipline or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits non-supervisory personnel to membership,..."

be taken of another employee and it was followed. (TB76-TB79) Esperanza Herrera, dental clinic AHN, participated in the removal of a probationary employee. The Assistant Director of Nurses for the emergency department stated that AHNs in that department had recently made effective disciplinary recommendations and were expected to do so as part of their regular responsibilities. (TD36, TD110) Herrera has taken part in hiring interviews for dental clinic positions, and emergency room AHNs opinions have also been relied upon in hiring. Based on those facts, I conclude that AHNs have met the statutory definition of a supervisor by their effective recommendations in hiring and disciplining other UMDNJ employees. Thus, I recommend that Assistant Head Nurses be excluded from a unit of nonsupervisory professional nurses.

Graduate and Per Diem Nurses

The first issue here is whether the graduate nurses at UMDNJ possess sufficient continuity and regularity of employment to organize and collectively negotiate under the Act. The second issue is whether per diem nurses possess sufficient continuity to be included in the unit. I find that both categories of nurses possess sufficient regularity and continuity to be included in the petitioned-for unit.

The Commission has distinguished casual employees as those who work sporadically or occasionally and whose contact with the employer is too tenuous and infrequent to warrant inclusion in the same unit with regular employees. Mt. Olive Bd. of Ed., P.E.R.C.

No. 82-66, 8 NJPER 102 (¶13041 1982) (substitute bus drivers who work less than one sixth of the average number of hours worked by regular drivers, worked too irregularly and infrequently to be entitled to unit eligibility).

Here, graduate nurses are employed full time and have an expectation of continued employment once they pass the State licensing exam. They perform almost all of the same duties that staff professional nurses perform, including patient care and directing the activities of aides and LPNs. Recent experience has shown that over 60 percent of graduate nurses hired by the University are retained beyond the State licensing exam. Graduate nurses have a high expectation of being retained. When hired they are informed that they will not be retained if they do not pass the exam, but if they do they are virtually guaranteed employment with the University. They are distinguishable from the employees in UMDNJ and OPEIU, Local 153, P.E.R.C. No. 87-165, 13 NJPER 603 (¶18226 1987) because those police interns had no expectation of continued reemployment, they were invariably commissioned as officers, demoted or fired, and their duties as public safety interns were markedly different than security officers' duties. Graduate nurses have a high expectation of reemployment, especially when one views the percentage who are retained. They perform substantially the same duties as regular staff nurses. They are not in a "training" status as are the public safety interns. This is consistent with Union Co. Reg. H.S. District #1, D. R. No. 83-22, 9 NJPER 228 (¶14106 1983)(Title I teachers included in a unit with

regular teachers where they are temporary, and positions are dependent upon enrollment and federal funding; fact that they are ineligible for tenure does not destroy community of interest); Passaic Co. Bd. of Chosen Freeholders, D.R. No. 78-29, 4 NJPER 8 (¶4066 1977)(Employees working under CETA program eligible for inclusion in unit even though they are "temporary" under the program); Gloucester City, D.R. No. 82-12, 7 NJPER 564 (¶12251 1981)("Temporary" status under Civil Service does not negate community of interest with permanent employees, since temporary employees have a reasonable expectation of permanent employment. See also, City of Bordentown, D.R. No. 81-27, 7 NJPER 120 (¶12949 1981) (probationary employees). Graduate nurses are most similar to probationary employees who must pass their probationary period, a type of "test", before achieving permanent employment status. Based on the above facts, I recommend that graduate nurses possess the requisite regularity and continuity of employment to be included in the petitioned-for unit.

In Mt. Olive Bd. of Ed., P.E.R.C. No. 82-66, 8 NJPER 102 (¶13041 1982) the Commission applied a test for part-time employees' inclusion in negotiations units with full-time employees. There, substitute bus drivers who worked less than one sixth of the average number of hours worked by 'regular' drivers, worked too irregularly and infrequently to be entitled to unit eligibility. Proposed units of employees who work more than one sixth of the average number of hours worked by regular full-time employees, who have some continuity of employment, and who express a willingness to work in

the future have been considered appropriate for collective negotiations. See, Rutgers University, E.D. No. 76-35, 2 NJPER 176, aff'd. P.E.R.C. No. 76-49, 2 NJPER 229, aff'd. App. Div. Dkt No. A-1652-76 (1977), certif. denied 76 N.J. 243 (1978)(Adjunct teachers employed for at least their second semester during a given academic year and who indicate their willingness to be rehired at least one semester during the coming academic year are eligible for inclusion in unit); Bergen County (Bergen Pines County Hospital), D.R. No. 87-3, 12 NJPER 619, (117234 1986)(election ordered where physicians work at least one sixth of a regular work year (.16 full-time equivalent -- at least 345 hours in a calendar year) and who continue to be on the active payroll in the next succeeding calendar year, but excluding interns and residents); State of New Jersey, PERC No. 86-24, 11 NJPER 16122 (1985)("Special Services" employees, hired on a "temporary" basis shared a sufficient community of interest to be included in unit, where they work at least 900 hours during the preceding 12 months or 225 hours during the preceding quarter, and are still on the payroll); and, County of Ocean, D.R. No. 79-25, 5 NJPER 128 (10076 1979)(employees working on a "temporary 80-day program are eligible for inclusion in a unit with full-time regular employees, where they had worked at least 45 days during one year, and had indicated willingness to accept additional employment)

Per diem nurses who meet the one sixth test are eligible for inclusion in the petitioned-for unit. The per diem list provided by UMDNJ showed that certain per diem nurses had worked

over one sixth of full-time regular employees' hours. I recommend that such per diem nurses who have worked at least one sixth (approximately 345 hours) and who have also been on the list for the previous fiscal year be included in the professional nurses unit.

CONCLUSIONS

On the basis of the entire record herein, and for the reasons set forth above, I recommend the following conclusions:

1. The petitioned-for unit of registered nurses, graduate nurses and per diem nurses is appropriate.
2. Assistant Head Nurses are supervisors within the meaning of the Act and should be excluded from the proposed unit.
3. Both graduate and per diem nurses have sufficient continuity and regularity of employment to be included in the professional nurses' unit.

RECOMMENDATIONS


I recommend that the Commission order an election to be conducted among the professional nurses employed by UMDNJ. The appropriate unit shall be as follows:

Included: all professional nurses employed by the University of Medicine and Dentistry, including graduate nurses and regularly employed per diem nurses.

Excluded: all assistant head nurses, nurse externs, all other professional employees, all employees represented by other negotiations units, managerial executives, confidential employees, craft employees, police, non-professional employees and supervisors within the meaning of the Act.

Only those per diem nurses who are on the per diem list for at least their second consecutive fiscal year and who have worked a total of at least one sixth the hours of full-time nurses shall be eligible to vote.

Respectfully Submitted


Elizabeth J. McGoldrick,
Hearing Officer

Dated: March 30, 1990
Trenton, New Jersey