

H.E. NO. 2004-12

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

In the Matter of

JNESO DISTRICT COUNCIL 1, IUOE,

RESPONDENT,

-and-

Docket No. CO-H-2003-161

COUNTY OF ESSEX (HOSPITAL),

CHARGING PARTY.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a Complaint based on an unfair practice charge filed by JNESO District Council 1, IUOE. The charge alleges that the County of Essex (Hospital) violated the New Jersey Employer-Employee Relations Act, specifically 5.4a(1) and (5), by assigning nursing negotiations unit work performed by a staffing coordinator (who transferred to another unit title) to an "administrator" outside that unit.

The Hearing Examiner found that the decision to assign work outside the unit was mandatorily negotiable and that the work had been historically performed by and currently shared with employees outside the negotiations unit. City of Jersey City v. Jersey City POBA, 154 N.J. 555 (1998).

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Appearances:

For the Respondent,  
Genova, Burns & Vernoia, attorneys  
(Lynn S. Degen, of counsel)

For the Charging Party,  
Lynch & Martin, attorneys  
(Curtiss Jameson, of counsel)

**HEARING EXAMINER'S REPORT**  
**AND RECOMMENDED DECISION**

On December 23, 2002, JNESO, District Council 1, IUOE filed an unfair practice charge against Essex County (Hospital). The charge alleges that on or around December 13, 2002, the County eliminated a negotiations unit title, staffing coordinator, and transferred the title's duties to an "administrator" outside the unit. The County's action allegedly violated 5.4a(1) and (5)<sup>1/</sup>

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<sup>1/</sup> These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to  
(continued...)

of the New Jersey Employer-Employee Relations Act, N.J.S.A.  
34:13A-1 et seq. (Act).

On June 4, 2003, a Complaint and Notice of Hearing issued. On July 10, 2003, the County filed an Answer, denying any violation of the Act. It contends, among other defenses, that staffing duties had been shared with non-unit employees and that it acted within managerial prerogatives to "transfer, assign and reassign employees," and to "reorganize operations and the way it delivers government services."

On October 8, 2003, I conducted a hearing at which the parties examined witnesses and presented exhibits. Briefs were filed by December 31, 2003. Based on the record, I make the following:

#### FINDINGS OF FACT

1. The County and JNESO, District Council 1, IUOE signed a collective negotiations agreement extending from January 1, 2000 through December 31, 2001. The agreement has a "Recognition and Scope" provision (Article 2) defining the unit to include "professional nurses, both registered or with state permit" in 13

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1/ (...continued)  
negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

listed titles, including "staffing coordinator" and "supervisor of nurses" (C-3). Assistant directors of nursing (ADNs) are excluded from the unit.

2. Christine Mosby is a registered nurse and has worked at the County hospital for many years. Sometime before 1999, she was promoted to the unit position, head nurse (T19, T33). She had observed nurse "staffing problems", including the Hospital's untimely replies to nurses' requests for "time off" (T21).

3. The parties stipulated that Christine Mosby was the staffing coordinator from July 1999 through December 2002, when she applied for and was promoted or transferred to another unit position (T28; C-3). The staffing coordinator position was not filled again (T14).

4. From July 1999 through December 2002, Staffing Coordinator Mosby "oversaw" nurse staffing for each care unit on the 7 am to 3 pm shift, and "reviewed" but did not "set up" coverages on the 3 pm to 11 pm and 11 pm to 7 am shifts. If Mosby learned of an impending vacancy on the 3 pm to 11 pm shift while she worked on the 7 am to 3 pm shift, she would "fill it", conceding that ADNs and supervisors performed the task "from time to time" (T37). She approved or denied nurses' requests for "benefit time [-off]" on all three shifts and "prescheduled" nursing overtime, if necessary, on weekends (T17). Mosby described the "overall purpose" of the coordinator: "[It] was to

organize staffing for three shifts in one place," thereby providing a "bigger picture" of staffing for the upcoming several weeks (T17; T27).

She also "oversaw" a "clerical staff" that "kept the time books", particularly the "punch detail", or way that unit employees are paid (T18). Mosby also directed clerical employees to call all the units and find out the names of all nurses on-duty. If she needed to assign a nurse to a unit by "pulling" one from another unit, the clerical employee implemented her directive to that effect (T22). Before 1999, clerical employees assisted ADNs and supervisors in the same or similar manner (T40).

Mosby "generated and approved" monthly schedules and vacations for all three shifts, ensuring their "fair distribution" (T18; T20). Monthly scheduling sheets were distributed to the nurses on all three shifts and were returned completed to Mosby. ADNs and supervisors completed these sheets on the 11 pm to 7 am shift (T34-T35). Mosby would "make some changes to balance out the coverage" (T39). If she was absent or on vacation, scheduling responsibilities and the granting of time-off fell to the ADNs or supervisor on each shift (T39; T56). Mosby admitted that the coordinator's goal in this regard was "to free up the ADNs and supervisors to do more of what ADNs and supervisors do, not [be] tied down with doing time" (T20). Mosby

also conceded that ADNs have authority over the coordinator to "grant time-off", which sometimes disrupted the schedules she had created (T26).

Mosby credibly testified that after she left the staff coordinator position, the "overseeing of schedules and daily staffing were divided between the shifts as it had been before" (T28-T29).

5. The Hospital employs about 120 nurses (at peak) on three shifts - 7 am to 3 pm; 3 pm to 11 pm; and 11 pm to 7 am (T17; T30). Before 1999, assistant directors of nursing and supervisors on each shift determined daily nurse staffing requirements and schedules for that shift and were assisted by clerical employees, except for the 11 pm to 7 am shift (T20; T54; T55). ADNs receive supplemental compensation for such efforts (T78). ADNs have authority over the staffing coordinator, which is comparable in the title hierarchy to supervisor (of nurses) (T26).

6. Wynsome Winter has been Director of Nursing at the Hospital since October 2001 and is responsible for the organization and administration of nursing services, among other responsibilities (T51). She is represented for purposes of collective negotiations by the IBEW (T80). Before October 2001, she was an ADN on the 7 am to 3 pm shift and had "staffing responsibilities" (T53). She credibly testified that no clerical

employees work on the 11 pm to 7 am shift; before and after 1999, ADNs and the supervisor on the night shift performed the "staffing duty" (T55). She testified that between 1999 and December 2002, they performed the duty "with [the] help of the staffing coordinator" (T54-T55). Before 1999, ADNs and the supervisor performed the staffing duties on the 3 pm to 11 pm shift. From 1999-2002, they "shared" the responsibilities with the staffing coordinator (T55). In the absence of specific evidence rebutting Winter's testimony, I credit it.

7. In January 2003, and after, ADNs and a supervisor (of nurses) on each shift performed staffing duties on both 3 pm to 11 pm and 11 pm to 7 am shifts (T57; T70). ADNs perform staffing duties on the 7 am to 3 pm shift, with assistance of clerical employees (T57). ADNs on one shift communicate with those on other shifts "verbally", or by examining the "daily" schedules and by discussion at "monthly" meetings (T62). Former ADN and Director of Nursing Wynter discussed staffing, including vacation schedules, corrections of "time issues" and other matters at such meetings, each of which consumed about two and one-half hours (T67). Attendees also spent about a third of each meeting discussing the scheduling of nurses' overtime (T68).

Winter credibly testified that she "ensures that [nurse] staffing on facility-wide basis across departments and shifts is accomplished" (T72). She speaks with ADNs, reviews staffing for

the monthly schedules and overtime reports for nurses (T70). She testified that she performed these duties since her promotion to Director of Nursing in October 2001 (T52; T70). Winter knew Mosby and the staffing coordinator's duties (T73). She testified that ADNs now "do the schedules and are responsible for signing-off on [them]", as Mosby had done in the coordinator title (T75). She testified that clerical employees now perform what Mosby had done "in regard to sending out vacation schedules, getting them back, and [having] the ADNs correct them. . ." (T74). The same procedure is followed concerning monthly nurse schedules (T93). Winter conceded that Mosby was "also responsible for other administrative paper flow. . . most of [which] is clerical function duties" (T75). Winter's testimony was not specifically rebutted. I credit it.

8. Winter also testified that she participated in the County's decision not to fill the staffing coordinator position after Mosby was promoted or transferred to another unit title (T58). She testified:

We were experiencing a nursing shortage of registered nurses. A RN could be better utilized on a unit instead of doing functions that a clerical with the assistance of ADNs could do. It was a better use of professional resources to have a RN on the unit than doing clerical functions. [T58]

She testified that shifting the staffing duties "back to the floors" improved efficiency; ADNs could "do their staffing within



an hour and would be able to be on the unit . . . without going through a third person [i.e., shift coordinator] to find out what was happening on the unit for those days" (T59). I credit her testimony.

The County currently employs about 86 nurses and has 22 vacancies (T84). Although the Hospital Director, Janet Tremont, approved a reorganization plan in 2002, it was not implemented by "the administration" (T90).

#### ANALYSIS

N.J.S.A. 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over mandatorily negotiable terms and conditions of employment. Section 5.3 also defines an employer's duty to negotiate before changing working conditions: "Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established."

The unit work rule provides that an employer must negotiate before using non-unit employees to do work traditionally performed by negotiations unit employees alone. In City of Jersey City v. Jersey City POBA, 154 N.J. 555 (1998), the New Jersey Supreme Court stated that the unit work rule typically applies to require negotiations before workers in a negotiations unit are replaced by workers outside the negotiations unit. The objective of the rule is to provide a majority representative

with an opportunity to negotiate over an acceptable alternative that would avoid a loss of jobs or a reduction in union membership. Id. at 576. However, the Court also ruled that the unit work rule cannot be applied on a per se basis. Instead, the negotiability balancing test set forth in Local 195, IFPTE v. State, 88 N.J. 393 (1982), must be applied to the facts of each particular unit work claim.

Local 195 states:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

There is no preemption argument so I will balance the parties' interests.

The entire negotiations unit of nurses represented by JNESO has an interest in not being reduced in size or strength and in not having a demonstrated expectation of work assignments disrupted. The Hospital asserts that the goal of shifting duties

was "increased efficiency" for the function; i.e., having nurses do nursing work and clerical employees do clerical work (brief at p.26). The record does not show that staffing coordinator duties have lessened after Mosby's transfer; nor has it been proved that they fall outside nursing responsibilities, generally. The Commission has determined that when the same amount of work is being performed and the employer is merely revamping personnel assignments, negotiations over preserving unit work does not significantly interfere with governmental policy determinations. Rutgers, The State University, P.E.R.C. No. 79-72, 5 NJPER 186 (¶10103 1979), recon. den. P.E.R.C. No. 79-92, 5 NJPER 230 (¶10128 1979), aff'd 6 NJPER 340 (¶11170 App. Div. 1980).

On this record, I believe that the unit employees' interests in continuing to have the staffing coordinator's duties assigned to the unit outweigh the employer's interests in "increased efficiency." This appears to be a case in which the employer is substituting a non-unit employee (or employees) for a unit employee with no change in the responsibilities or duties attendant to a position and with an objective of reducing labor costs. See Bergen Pines Cty. Hosp., I.R. No. 91-16, 17 NJPER 236 (¶22102 1991). Accordingly, I find that the Hospital's decision to use non-unit ADNs and the Director of Nursing to do work previously performed by the staffing coordinator is mandatorily negotiable unless an exception applies.

An employer does not incur a duty to negotiate with the majority representative where the union has waived its right to negotiate over the transfer of unit work; or the disputed duties were historically performed by non-unit personnel exclusively or in conjunction with unit employees; or it has exercised a managerial right to reorganize the way it delivers government services. Jersey City; Rutgers, The State University, P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981), aff'd NJPER Supp.2d 132 (¶113 App. Div. 1983).

In Town of Dover, P.E.R.C. No. 89-104, 15 NJPER 264 (¶20112 1989), recon. den. P.E.R.C. No. 89-119, 15 NJPER 288 (¶20128 1989), the Commission found that the employer did not violate a negotiations obligation when it laid off civilian dispatchers and assigned work out of the unit to police officers who had previously performed dispatching functions.<sup>2/</sup> Civilian dispatchers provided 24-hour coverage on weekdays and police officers provided the coverage on weekends. The Commission wrote that the record did not prove that the Town had shifted unit work, noting that police officers did dispatching when there were no dispatchers in the previous 25 years (i.e., the three laid off dispatchers had worked one, two and four years); continued to do

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<sup>2/</sup> Jersey City described the special status of police officers for the purpose of making negotiability determinations. Dover, written many years before Jersey City, draws no such distinction and is a "pure" unit work decision, retaining its relevance for non-police settings.

the functions every weekend, with the possible exception of paperwork; and "filled in" during the week. Under the circumstances, the Commission "did not believe that negotiations were required before the Town assigned more dispatching duties to police officers who had historically performed those duties alone or in conjunction with civilian dispatchers." Id. at 15 NJPER 65.

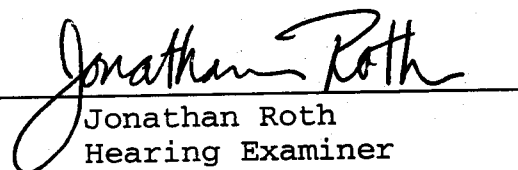
I find that the County did not violate a negotiations obligation when it did not fill the vacated staffing coordinator position and assigned work to non-unit ADNs, primarily. From July 1999 through December 2002, the sole staffing coordinator worked on the 7 am to 3 pm shift for which she "set up" and "reviewed" nurse staffing; generated and approved monthly nurse schedules and vacations; and oversaw a clerical staff which assisted her. During that period, non-unit ADNs and unit supervisors "set up" nurse staffing on the 3 pm to 11 pm and 11 pm to 7 am shifts, and staffing coordinator Mosby "reviewed" them. When Mosby was out sick or on vacation, ADNs performed her scheduling duties. Also in that period, Director of Nursing (another non-unit title) Winter reviewed nurse staffing, overtime reports and monthly schedules, overlapping the same or substantially similar duties performed by Mosby. Before July 1999, the staffing coordinator position did not exist or was not

filled; ADNs and unit supervisors for each 8-hour shift performed nurse scheduling, including allotted time-off.

The principal duties of civilian dispatchers in Dover were historically performed by police officers and unfailingly performed by them on weekends. The principal duties of the staffing coordinator were historically performed by ADNs (albeit with additional compensation) and always performed by them on the evening and night shifts.

JNESO contends that "staffing coordination and staffing are not identical" and that the County "failed to provide evidence that [the] task of coordination has been shared" (brief at p.7). I disagree. Winter, the non-unit Director of Nursing has "ensure[d] nurse staffing on facility-wide basis across departments and shifts" during the period in which Mosby was staffing coordinator (finding no. 7). Assuming that Mosby's "coordinator" duties were more extensive than Winter's duties in that regard, I find that the record does not quantify those efforts and that JNESO's argument too narrowly defines staffing coordinator duties.

JNESO has not proved its case by a preponderance of the evidence. Accordingly, I recommend that the Commission dismiss the Complaint.

  
Jonathan Roth  
Hearing Examiner

Dated: March 18, 2004  
Trenton, New Jersey