

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



STATE OF CALIFORNIA (DEPARTMENT OF)
PERSONNEL ADMINISTRATION),)
)
Employer,) Case No. S-S-129-S
)
and) PERB Decision No. 1025-S
)
AMERICAN FEDERATION OF STATE,)
COUNTY AND MUNICIPAL EMPLOYEES,)
LOCAL 2620,)
)
Exclusive Representative,)
)
and)
)
GUILD FOR PROFESSIONAL PHARMACISTS,)
)
Petitioner.)
)
_____)

Appearances: Warren C. Stracener, Labor Relations Counsel, for State of California (Department of Personnel Administration); Beeson, Tayer & Bodine by Joseph R. Colton, Attorney, for American Federation of State, County, and Municipal Employees, Local 2620; Posner & Rosen by Michael Posner, Attorney, for Guild for Professional Pharmacists.

Before Blair, Chair; Carlyle and Garcia, Members.

DECISION

CARLYLE, Member: This case is before the Public Employment Relations Board (Board) on appeal by the Guild for Professional Pharmacists (Guild) to the proposed decision (attached hereto) of an administrative law judge's (ALJ) dismissal of the Guild's severance petition. The Guild sought to sever 172 pharmacists from State Bargaining Unit 19 (Professional, Health and Social Services).

The Board has reviewed the entire record, including the proposed decision, transcripts, the Guild's appeal, and responses

of the American Federation of State, County and Municipal Employees, Local 2620 and the State of California (Department of Personnel Administration). The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself.

ORDER

Based upon the entire record in this case, the administrative law judge's proposed decision in Case No. S-S-129-S is affirmed and it is ORDERED that the severance petition filed by the Guild be DISMISSED.

Chair Blair joined in this Decision.

Member Garcia's concurrence begins on page 3.

Garcia, Member, concurring: I concur with the majority decision to dismiss the severance petition and agree that the administrative law judge's (ALJ) proposed decision is free of prejudicial error; however, I choose not to adopt the ALJ's proposed decision as the decision of the Public Employment Relations Board (PERB) itself.

Section 3521 of the Ralph C. Dills Act (Dills Act) provides mandatory criteria for determining an appropriate unit¹ and the ALJ considered many statutory factors in reaching her decision. However, the proposed decision identifies one of the factors in a manner which suggests that factor is to be given more weight than the other statutory factors.

In describing the rationale for her conclusion, the ALJ wrote in the proposed decision, at page 33:

In reaching this conclusion, the overriding consideration has been the practice . . . of AFSCME to accommodate the interests of the pharmacy-related classifications.

(Emphasis added.)

Although PERB has exercised great flexibility in past decisions to weigh and balance the various statutory criteria in light of a particular set of facts, I would not want to give the impression that the past bargaining history between a union and the group seeking severance is the overriding consideration. In many cases, it may be an important and even decisive factor; however, in this case I believe that many of the other statutory

¹See proposed decision, pp. 24-25, citing the pertinent portion of the statute.

criteria were equally important in deciding whether Unit 19 remains an appropriate unit for the pharmacists, and the stated rationale for the decision should reflect this.

Also, the proposed decision, at page 32, refers to a "public policy, codified by statute, favoring broad units." No statutory citation was provided for this proposition. When a proposed decision makes such a statement, it is helpful to provide a citation to a statute, or to case law that supports such an interpretation. It is likely that the ALJ meant to refer to Dills Act section 3521(b)(5),² but to characterize that code section as constituting a "codification" of "public policy" "favoring board units" could set a precedent which I am reluctant to do without more support and analysis.

²Section 3521(b)(5) requires PERB to consider:

[t]he impact on the meet and confer relationship created by fragmentation of employees or any proliferation of units among the employees of the employer.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATION BOARD



STATE OF CALIFORNIA (DEPARTMENT OF)
PERSONNEL ADMINISTRATION),)
Employer,) Representation
and) Case No. S-S-129-S
AMERICAN FEDERATION OF STATE, COUNTY) PROPOSED DECISION
AND MUNICIPAL EMPLOYEES, LOCAL 2620,) (4/16/93)
Exclusive Representative,)
and)
GUILD FOR PROFESSIONAL PHARMACISTS,)
Petitioner.)

Appearances: Warren C. (Curt) Stracener, Labor Relations Counsel, for State of California (Department of Personnel Administration); Beeson, Tayer & Bodine by Joseph R. Colton, Attorney, for the American Federation of State, County, and Municipal Employees, Local 2620 (AFSCME); Posner & Rosen by Michael Posner, Attorney, for the Guild for Professional Pharmacists.

Before Barbara E. Miller, Administrative Law Judge.

STATEMENT OF THE CASE

The Guild for Professional Pharmacists (Guild or Petitioner) requests that State employee bargaining unit 19 be separated into two units. The Guild contends that the unit, in its present configuration, does not adequately satisfy the representational rights of approximately 172 pharmacists.

The exclusive representative of the employees in unit 19, also identified as the Professional Health and Social Services Unit, is the American Federation of State, County, and Municipal Employees (AFSCME or Local 2620), which opposes the Petition.

This proposed decision has been appealed to the Board itself and may not be cited as precedent unless the decision and its rationale have been adopted by the Board.

Similarly, the State of California (State), the employer of the unit 19 work force, opposes division of the unit. Both AFSCME and the State argue that the current unit of approximately 3400 employees is appropriate as presently constituted and in fact is more appropriate than two units, a separate unit of employees in pharmacy-related classifications and a unit of the remaining classifications.

AFSCME further maintains that it has effectively represented the pharmacists and organized itself in such a way so as to insure that classifications which have a small number of incumbents are not underrepresented in terms of influence within the group as a whole.

PROCEDURAL HISTORY

On or about November 7, 1990, the Guild filed a severance petition with the Public Employment Relations Board (Board or PERB). In response to the Petition and in a separate unfair practice charge, identified as PERB Case No. S-CE-474-S, AFSCME alleged that the State interfered with its rights by bypassing, undermining and derogating the authority of the exclusive representative and by providing managerial and/or supervisory support to the Guild's severance efforts.¹

PERB's Division of Representation conducted an investigation, an informal settlement conference, and commenced the formal hearing on May 2 and 3, 1991, in San Francisco.

¹The unfair practice complaint issued on March 13, 1991. That action was placed in abeyance on December 12, 1991, pending the issuance of a proposed decision in the instant proceeding.

Ultimately, the case was reassigned to PERB's Division of Administrative Law and the formal hearing was reconvened in Los Angeles on February 3, 1992, April 13-15, 1992, and April 27-29, 1992, and in Sacramento on April 30 and May 1, 1992, and May 26, 1992.

Each party to the proceeding requested substantial extensions of time for filing either opening or reply briefs. Good cause having been shown for each such request, they were granted. Accordingly, the case was not submitted for proposed decision until December 10, 1992.

FINDINGS OF FACT

The Existing Unit and The Pharmacists

Unit 19 was constituted after a lengthy hearing by PERB to determine the appropriate units for bargaining under the Ralph C. Dills Act (Dills Act).² Classifications within unit 19 and the approximate number of positions allocated to each classification are set forth below:

Adoption Case Workers	68
Chaplains	63
Child Nutrition Consultants	19
Physical and Occupational Therapists	60
Licensing Program Analysts	361
Vocational Rehabilitation Counselors	750
Audiologists	10
Dieticians	50
Social Workers	800
Psychologists	500

²At the time the unit was created, the collective bargaining statute applicable to State employees was commonly referred to as the State Employer-Employee Relations Act or SEERA. It is now properly referred to as the Dills Act, and is codified beginning at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

Rehabilitation Therapists
Pharmacists

500
172

Pharmacy-related classifications include Pharmacists, Pharmaceutical Consultants I and II, and Board of Pharmacy Inspectors.

Although the evidentiary hearing of this matter produced little evidence of a dramatic change in circumstances since the determination of that unit, no group sought to represent the pharmacists alone at that time. Accordingly, the Petition herein has resulted in the development of evidence not hitherto presented to either Board agents or the Board itself.

At the present time, there are six separate departments in which pharmacists are employed. The Department of Developmental Services (DDS) provides services to clients with developmental disabilities. Facilities vary and may include long-term residential, intermediate and acute care programs. There are seven developmental facilities around the state, Agnews, Camarillo, Fairview, Lanterman, Porterville, Sonoma, and Stockton which employ 59 pharmacists who execute clinical, dispensing, and manufacturing responsibilities.

Thirty-three pharmacists in unit 19 work for the Department of Mental Health (DMH), which maintains five State hospitals providing care for patients with a variety of mental disorders and illnesses who have been diagnosed as having acute, or chronic, severe behavioral problems. The hospitals are Atascadero, Metropolitan (in Los Angeles County), Napa, Patton and Vacaville. Camarillo State Developmental Center is

considered a "split" facility which is used both by DDS and DMH. Like their counterparts employed by DDS, DMH pharmacists perform clinical and dispensing functions.

Approximately 33 Pharmacists are employed at the Department of Corrections (CDC) at 20 correctional facilities throughout the state. Pharmacists working for CDC perform primarily dispensing functions, although they may perform the clinical function of conducting hospital rounds.

There are 21 Pharmaceutical Consultant I's and five Pharmaceutical Consultant II's employed by the Department of Health Services (DHS), which, as part of its responsibilities, audits and investigates compliance with Medi-Cal program requirements. The pharmaceutical consultants, on the lookout for fraud and other violations of law or regulations, also approve requests for drugs not on the State formulary. In addition, they inspect hospitals to look for compliance with Title 22 requirements.

Within the Department of Consumer Affairs, there are 13 Board of Pharmacy Inspectors whose primary responsibilities are to monitor and investigate private and public pharmacies throughout the state to ensure compliance with pharmacy and related statutes.

The Department of Veterans Affairs (DVA) employs approximately eight Pharmacists who work at DVA's single, long-term care facility. They are primarily involved in the dispensing pharmacy function.

All pharmacists, regardless of work location, have similar education and training. They have ordinarily participated in five-year education programs which include an internship component. Like other employees in the unit, pharmacists possess advanced degrees. Pharmacists must have their license renewed every two years and a current distinction between pharmacists and other members of the unit is that pharmacy license renewal is contingent upon completion of a minimum 30 units of continuing education.

In terms of on-the-job responsibilities, the interaction of pharmacists with others in unit 19 ranges from modest to virtually nonexistent. More than one-half the pharmacists in unit 19 work for DDS or DMH where they work as either clinical or dispensing pharmacists. Whether performing a clinical or a dispensing function, pharmacists do not have the same chain of command as other members of unit 19. Most other unit 19 members report to program directors; pharmacists do not.

The description of the duties of a dispensing pharmacist are set forth in the State's opening brief:

Dispensing duties generally involve the preparation, manufacture, and distribution of medication according to a specified medical plan or prescription, as well as the inspection and verification of inventory. In hospitals or developmental centers utilizing the "unit dose" system, Pharmacists will fill cassettes designed to maintain a 24 to 48 hour supply of medication for a patient. The cassettes are then delivered to the appropriate patient care units or residences. . . .

Pharmacists assigned to hospitals and developmental centers utilizing the "ward stock" system are responsible for maintaining a general supply of medications for patients on a particular ward or unit. The medication is stored at the nursing station on the ward and medical staff are responsible for dispensing the medication to individual patients.

Whether using a unit dose system or a ward stock method, dispensing pharmacists have little contact with other members of bargaining unit 19. Questions about medication appropriateness are addressed to or proffered by doctors, nurses, or psychiatric technicians, all of whom are in separate units. These pharmacists have no direct client contact.

The physical space occupied by the pharmacy is distinct from the residential units in the facility and is locked. Dispensing pharmacists do not eat in common areas with other employees in the unit and have no measurable on-the-job contact. Unlike many, but not all, occupational groups in unit 19, at least one dispensing pharmacist is on duty all the time and more than one pharmacist may remain on call.

Clinical pharmacists have more contact with members of the bargaining unit, even though a great deal of it may be indirect contact, which results from reviewing patient notes, or working in the same general area. Unlike most other unit 19 employees who work in the clinical environment, pharmacists have little, or no, direct client contact. The interpersonal skills required of other unit members for effective client contact are not required of pharmacists.

Ann McIntyre (McIntyre), a Pharmacist at the Sonoma Developmental Center, testified that she might be assigned tasks as either a dispensing or a clinical pharmacist. As a clinical pharmacist, she has never attended interdisciplinary team meetings, commonly identified in State service as IDT's, although she did attend Drug Regimen Reviews, required by state and federal regulations, which she described as psychotropic drug review meetings.³ Such meetings are held once a month at her facility, but primarily with doctors, nurses, and psychiatric technicians, all individuals outside bargaining unit 19. The testimony of William Weisband (Weisband), also a pharmacist at Sonoma, supports McIntyre. His testimony that his contact with other unit members ranged from 8-10 hours per 176 hour month, when he performed a clinical function, is credited.

The institutions vary but at all in-patient facilities, IDT's are convened, with varying regularity. The teams discuss a wide range of subjects, including patient diagnoses and treatment plans, patient behavioral problems, and, where appropriate, disposition plans for patients leaving the institution. Team members ordinarily include a psychologist, a psychiatrist, and a registered nurse or psychiatric technician. Dentists, podiatrists, dieticians, other unit 19 members, and pharmacists may be included depending on the needs of the patients, the

³Stephen Donoviel is the clinical director at Sonoma Developmental Center. He testified that there were monthly meetings of Drug Intervention Review Teams to discuss patients on psychotropic drugs.

workload of the individual, or the approach of the concerned management personnel. All IDT's formally meet at least once a year for annual reviews. Some meet monthly or quarterly depending on the needs of the institutions or patients, or requirements of state and federal law. The general trend, based on the evidence presented, is that pharmacists are increasingly unlikely to participate in the IDT meetings.

More than 22% of the members in the bargaining unit do not perform either clinical or dispensing duties. Those individuals work for the Department of Consumer Affairs or the Department of Health Services. Unlike the pharmacists described above, they have no relationship to institutionalized clients and no functionally related work with other unit 19 members. Training, education, pharmacy associations, and transfer and/or promotional opportunities give them a bond with other pharmacists in unit 19.

Although most of the evidence produced at the hearing addressed the uniqueness of pharmacists, there was substantial evidence on the ways in which pharmacists share common concerns with other classifications in unit 19. Travel reimbursement is an issue of importance to both Pharmaceutical Consultants and Board of Pharmacy Inspectors and it is also a concern for Rehabilitation Counselors and Licensed Program Analysts. Similarly, overtime, an issue to pharmacists who were required to work nights and weekends was of concern to psychiatric social workers and psychologists. Like other groups, pharmacists also had a deep concern regarding the employment of less skilled and

lower-paid technicians or interns, an issue referred to sometimes as de-professionalization.

There are other groups in unit 19 which have sought representational autonomy or which are fairly autonomous in terms of their daily duties and responsibilities. The State Psychologists in Public Service filed a severance petition with PERB in November of 1990. The Petition was denied in State of California (Department of Personnel Administration) (1993) PERB Decision No. 988-S.

At the hearing herein, Leonard Potash (Potash), an AFSCME Council 57 staff representative responsible for unit 19, testified that Licensing Program Analysts, of which there are 325 in the unit, are completely separate in terms of job functions and on-the-job contacts from other members of unit 19. Licensing Program Analysts work exclusively for the Department of Social Services. Their job is to monitor community care facilities which take care of the aged, the disabled and children. The incumbents in that classification are employed in 15 different district offices around the state.

AFSCME's Structure

AFSCME Local 2620 is part of AFSCME Council 57, comprised of more than 30 locals which, pursuant to AFSCME national policy, band together in order to pool resources. AFSCME Local 2620's jurisdiction is limited to bargaining unit 19, and Council 57 has assigned two full-time representatives, Nancy Clifford (Clifford) and Potash, and two part-time representatives, Kathing Widing and

Gene Stamm, to work with that local. Each of the aforementioned field staff work out of different field offices at which they have support staff also serving Local 2620.

The Local 2620 Constitution provides that the Executive Board is the highest body, except when the membership convenes a convention. The Executive Board is comprised of an executive committee with a president, southern and northern California vice-presidents and secretary and treasurer. Chief stewards are also members of the Executive Board. There is provision for a chief steward from each of the 11 state hospitals and developmental centers. There are also seven chief stewards from geographic areas. In addition, there are seven standing occupational committees which have representation on the Executive Board. The seven groups are Rehabilitation Counselors, Social Workers, Rehabilitation Therapists, State Psychologists, Licensing Program Analysts, Pharmacists and Chaplains. The AFSCME Local 2620 Constitution makes provision for occupational committees. Article IX, Section 1 provides:

An Occupational Committee shall function to develop, coordinate, articulate and implement the unique interests and activities common to work-related classifications. Membership on such committees shall be open to all members in good standing in each related work classification. The organizational structure and program of each committee shall be determined by the committee itself. Each committee shall submit a proposed budget to the Executive Board and shall operate within the fiscal constraints imposed by the approved budget. The committees shall be

encouraged to meet locally, regionally and statewide.⁴

Section 3 provides:

Each Occupational Committee shall have a chairperson who will represent the committee as a voting member of the executive board. The chairperson shall be elected by all union members in the work-related classification(s) defined as the constituency of each Occupational Committee.

Elections for any position on the Executive Board are held every year, candidates can nominate themselves or be nominated by others and eligible voters include Local 2620 members within the constituent group.⁵ For example, Local 2620 members at Metropolitan State Hospital could nominate and vote for the chief steward from Metropolitan but they would not also vote for the chief steward from Los Angeles County. Pharmacists can also vote for statewide offices and either the southern or northern vice-president. They also vote for the chair of the Pharmacists Occupational Committee (PHOC).

Historically, pharmacists have had representation on the Executive Board beyond that of occupational committee chair. Chuck Hoagland, a pharmacist, was northern vice-president in 1990 and, although the record is not entirely clear, he was chief

⁴As stated in the Constitution, the structure and membership of the pharmacy occupational committee itself is determined by the pharmacists. When the committee was first formed in 1987, Beth Spiegel (Spiegel) its first chair, made a specific proposal for its organization and the way its meetings would be conducted. Subsequent chairs changed the structure to meet changing needs. For the most part, however, the changes were dictated by the pharmacists themselves, not by AFSCME.

⁵Fair-share payers do not have voting rights.

steward from Napa State Hospital for one or two years before that. Alden Shearer, a pharmacist from Porterville, also served in the capacity of chief steward from his area.

In addition to the system for chief stewards, there are also stewards for work sites, the numbers depending on the size or organizational complexity of the site. Whether those stewards are responsible for physical areas or occupational groupings is decided by employees at the site itself. Stewards handle day-to-day contract administration issues and act as conduits for information from AFSCME to members of the unit and vice-versa.

Stewards, chief stewards and occupational committee representatives are given training, most recently a two-day program, on grievance handling and negotiations. Stewards also receive training or get an ongoing education at the monthly stewards' council meetings. The Council 57 staff representatives provide back-up to the stewards and, for more complex matters, get directly involved themselves.

Local 2620 also has two appeal and arbitration committees, one for northern and one for southern California. These committees decide whether to process certain grievances or appeals. In addition, if anyone in unit 19 believes he/she is not getting adequate representation or is denied representation, the committee has jurisdiction to review the matter and take remedial action. At the time of the hearing, one of the five members of the northern appeal and arbitration committee was Martin Levine, a Board of Pharmacy Inspector. There was no

evidence regarding whether or not employees in pharmacy related classifications had filed appeals with the above-described committee.⁶

Since 1987, the chair of PHOC has been a member of the negotiating team.⁷ In 1982, a pharmacist was an alternate on the team. In 1984, a pharmacist was a liaison, and in 1985, there was a pharmacist on the team as an expert witness and one who served as a liaison. The team ordinarily had 10 to 11 members, with the president, northern and southern vice-presidents and the staff representative taking four of the slots.

In addition to the structure described above, AFSCME has instituted a program for getting information from individual members of the unit, who are AFSCME members, about issues of importance. One vehicle is a membership survey which is sent out prior to collective bargaining negotiations. It covers every item in the contract and has space for the member to give individual or class feedback. During contract negotiations, AFSCME regularly publishes and distributes information to its membership. For example, in 1988, from April 18 through

⁶There was evidence that AFSCME had represented one pharmacist who filed numerous grievances but no evidence it had failed to pursue contract grievances concerning pharmacists.

⁷In 1991, before the completion of negotiations, Nancy Avery (Avery), for reasons which were never made clear, resigned from her position as chair of PHOC and from the negotiating team. She was not replaced. Although the Guild points to this as evidence of ways in which their rights were not adequately protected, the undersigned has concluded that the failure or inability to find a committed replacement for Avery had more to do with the attitudes of the potential candidates due to the pendency of this proceeding than to AFSCME's willingness to provide representation.

September 6, 10 bulletins were sent out on the progress at the table.

The PHOC also conducted surveys in preparation for negotiations. For example, in 1990, in preparation for 1991 negotiations, AFSCME sent out a multi-page questionnaire to all pharmacists. It requested information about the physical plant, the age of the personnel, recruitment and retention problems, hours, and other working conditions. Although the PHOC developed the survey, it was edited and put in final form by Clifford, who facilitated distribution. Similarly, a PHOC salary survey was distributed under AFSCME's auspices.

Bargaining History and AFSCME Representation

AFSCME is the only organization to represent unit 19 since its creation. The State and AFSCME have entered into five collective bargaining agreements. AFSCME maintains that a number of those agreements contained provisions which were of benefit to pharmacy-related classifications.

Potash identified the following gains of particular concern to pharmacists: the 1982-84 contract provided for a minimum four hours of callback pay and employees were granted one hour of pay for each eight hours of standby time; effective April 1, 1984, agreement was reached for a 5% realignment for Pharmacist I and a 10% realignment for Board of Pharmacy Inspectors; the 1984-85 contract provided for two hours of pay for eight hours of standby time, license renewal fees were reimbursed, and some provision was made for continuing education and training; the 1985-87

contract provided a 5% special adjustment for Pharmaceutical Consultant I's, Pharmacist I and Board of Pharmacy Inspectors. The same contract provided that a study would be done to consider adding Pharmacist I's and Board of Pharmacy Inspectors to the State's Safety Retirement System; the 1987-88 contract provided for one hour of pay for four hours of standby time; and, the 1988-91 contract expressly provided for the right of pharmacists to volunteer for vacancies on particular shifts. The matters set forth above were in addition to general provisions for across-the-board salary increases or matters of general benefit to all members of the unit.

The testimony elicited from the pharmacist witnesses during the course of this protracted proceeding make clear that they believed their interests were not adequately represented by AFSCME. The Guild argues that, notwithstanding AFSCME's organizational scheme, intended to offset the limitations caused by the relatively small number of pharmacists, in reality, their rights were trampled by the majority. There is no question that pharmacists did not always get the result they wanted with respect to contract negotiations or with respect to problems or questions which arose during the term of the contracts.

There is also no doubt that, from time to time, there were communications breakdowns, when messages were either not delivered or not understood. Those facts, however, do not necessarily lead to the conclusion that AFSCME was derelict in

its duty to represent. A review of a number of "incidents" focused on during the course of the hearing is appropriate.

1. Salary Inequities and 1988 Contract Negotiations

During the course of AFSCME negotiations with the State, it was fairly commonplace for occupational committees to make salary realignment proposals. The phrase "salary realignment", as used herein, means an adjustment to salary rates, other than through an across-the-board increase, which brings the occupational group either in closer alignment with similarly situated professionals in the private sector or other public service, which makes adjustments within State service because of changes in duties and responsibilities, or which otherwise adjusts the salary rates so that the classification in question is more equitably aligned with other classifications.

Historically, salary realignment proposals for employees within a particular occupational group have been made by that occupational group and thereafter carried or pursued by the AFSCME negotiating team. In 1988, although the PHOC and its chairperson, Beth Spiegel (Spiegel), believed a salary realignment was necessary and appropriate for the pharmacy classifications, they made a tactical decision not to make a proposal. Spiegel and members of the committee apparently concluded that the environment for negotiations would be improved in 1989, when they anticipated a change in the executive branch

of State government.⁸ Had a realignment proposal been made, there is no dispute that it would have been advanced by the AFSCME negotiating committee.

Sometime late in the negotiations process, the State proposed a three-year agreement. The multi-year package included across-the-board salary increases beyond the first year. After due consideration, a majority of the AFSCME team wanted to accept it. According to Potash, "the negotiating team made the decision that it was to the Unit's advantage to get everything they could in a multi-year agreement."

Although the testimony from no source was entirely clear, it is apparent that the pharmacists wanted to submit a counter-proposal on the issue of pharmacists' salary realignment. Other occupational groups had also, for their own reasons, not submitted a proposal for the one-year contract. Other issues the entire team considered important had not been advanced as a result of tactical or other considerations. Outside the formal negotiations arena, AFSCME negotiators did ask State representatives how the pharmacists' proposal would be viewed. They were told it would not be productive and thereafter made a decision, as a group, not to advance the pharmacists' demands.

⁸Spiegel testified that her strategic decision was based upon the assumption that the parties would continue what she thought was a well-established practice of only entering into one-year agreements. Although a one-year agreement is what was originally on the table in 1988, the parties had in fact entered into prior multi-year agreements; one year contracts were not the norm.

2. Recruitment and Retention Differentials

Pharmacists also expressed concern about AFSCME's alleged failure to act as a strong advocate with respect to their perceived need for recruitment and retention incentives at some of the facilities which employ pharmacists. Recruitment and retention differentials are, theoretically, advantageous to the State when its normal recruitment techniques do not produce an adequate applicant pool. If implemented, it makes additional money available for salary in locations where State salaries are simply not competitive.

According to AFSCME witnesses, the State has promoted the use of such incentives. AFSCME has not been enthusiastic about including such incentives in collective bargaining contracts as a trade-off for something else, because the incentive has in fact been paid just once. Moreover, AFSCME took the position that the incentives should be available for the entire classification at all locations.

In any event, a controversy did arise because some pharmacists believed that AFSCME was not advancing their cause. AFSCME representatives knew that employees at Metropolitan State Hospital wanted recruitment and retention and, along with management, had directly petitioned the Department of Personnel Administration (DPA). DPA had contacted AFSCME because it had an interest in permitting the incentives at Patton State Hospital. AFSCME, believing the problem with pharmacists' recruitment was not site specific, wanted to reopen the contract and add the

entire classification. Management was not interested in that proposal.

Certain management representatives allegedly encouraged the belief that AFSCME was not willing to go to bat for its pharmacy members, a view adopted by the Guild as further evidence of AFSCME's failure to properly represent pharmacists. This issue is a red-herring. Like others raised in the proceeding, it evidences not difficulty with the actual representation, but the perception of such representation.

The 1991-1992 Collective Bargaining Agreement contains the recruitment and retention differential sought by the pharmacists. AFSCME adequately explained its failure to get it earlier. What AFSCME did fail to do is communicate with the pharmacists, in a way they could understand, the problems with pursuing the issue in the way the pharmacy advocates may have preferred.

3. Continuing Education and Other Issues

In her testimony, Spiegel identified a number of issues which the pharmacists believe did not get appropriate attention because of their relative numerical importance within the unit. At one point, AFSCME, with Spiegel's support, put forward a proposal for education and training. When the State rejected the proposal, AFSCME backed down and settled for something Spiegel viewed as less advantageous to pharmacists.

In 1988, the year of the previously discussed multi-year agreement, the State was willing to give a special increase to occupational therapists and dance and art therapists. The

chair of the Rehabilitation Therapists Occupational Committee, which included all three classifications being offered realignment, suggested that the money for the occupational therapists be spread over the unit membership as a whole. Over Spiegel's objection, the money was not given to the specialized group. Thus, her position was not adopted and she was given what she took as evidence of the treatment accorded to smaller populations within the unit. In reality, the representative of the therapists thought it was in the long-term interest of all to evenly distribute the money, particularly since the physical therapists already received compensation 5-10% higher than others in their occupational category.

Several years after Spiegel's tenure as PHOC chairperson, conflict existed between AFSCME and some of the pharmacists over the resignation of Nancy Avery as chairperson in August 1991. The evidence suggests that the tension between pharmacists seeking severance and others in the unit may have contributed to Avery's resignation. Avery told Clifford she felt betrayed by the pharmacists; there were people she had relied upon as resources and they had gone and signed the severance petition. Avery also confided in Clifford that there were matters going on in her personal life which might conflict with her duties as PHOC chair. In any event, in early August, Avery announced to the bargaining team that she was resigning. She stated she was being pulled in too many directions in her personal life and that the group was too inefficient.

According to Clifford, pharmacists were contacted throughout the state and no one expressed an interest in replacing Avery. The matter was not vigorously pursued at the time because negotiations were about to conclude. Not long thereafter, there were elections for AFSCME officers and no one stepped forward to fill the position of PHOC chair. Clifford testified that attempts were made to continue to communicate via newsletter, organizational networking, and telephone with the pharmacists. There is no reason or evidence to dispute Clifford's assertions, although there is evidence that various pharmacists did not consider the communications sufficiently effective to keep them informed.

Another issue involves the contracting out of pharmacy work. Dr. Bob Blair (Blair), a Pharmacist I employed by the Department of Corrections at the San Luis Obispo Men's Colony Facility, spoke to and sent a letter to Clifford concerning the improper contracting out of pharmacy services, a practice which was being threatened at his work site and was apparently already taking place elsewhere in State service. Blair testified that Clifford did not properly communicate with him regarding what actions, if any, she had taken, and he suggested that AFSCME had failed to take any action.

Clifford testified that she followed through, with telephone calls and eventually with a letter to Warren Schwegel at the State Personnel Board. In the letter, Clifford protested the contracting out of services at institutions which were listed in

an attachment, she demanded an investigation, claimed the contracts were not in compliance with State regulations, and requested the termination of all contracts which were not in compliance. Almost simultaneously, Kathy Widing, Clifford's co-worker wrote a letter to Dorothy Allen, the Labor Relations Analyst with the Department of Mental Health, protesting the contracting out of services and demanding meet and confer sessions regarding the impact of any such contracting out. Based upon the documentary evidence, it is clear that Clifford did follow through as she told Blair she would.

Proliferation of Units

Throughout the hearing, there was much talk, and little concrete evidence regarding the consequences of creating a separate unit of pharmacists. State witnesses testified regarding the burdens such a unit would impose upon State resources.

The evidence that the granting of this severance petition would be unduly burdensome was not persuasive. Calculations about the amount of extra work, training and expense which would go into the negotiation and administration of an additional collective bargaining agreement was speculative, at best.

The real concern is what would happen to the State's labor relations program if, based upon standards established for severance in this proceeding, other occupational groups were successful in their bids to become separate bargaining units.

That theoretical question, as well as the appropriate standards to be applied, are properly left for the discussion below.

The Guild for Professional Pharmacists

The Guild for Professional Pharmacists is an established organization representing pharmacists and radiopharmacists in the public and private sector. Ralph Vogel, its executive director and president, is the only full-time employee of the Guild but three pharmacists work for the Guild on a part-time basis. The Guild is the exclusive representative of units of pharmacists for Los Angeles County, Fedco Professional Pharmacies, Kaiser Permanente in Southern California, Kaiser Permanente in Northwest Region, Savon Drugs in the Southern California area, and Farmer Jack Pharmacies in Detroit, Michigan.

No other information was provided about the manner in which the Guild carries out its representational function, the nature of the organization, or the complexity of the companies with which the Guild has collective bargaining contracts or relationships.

ISSUE

Should the proposed unit of Pharmacists, Board of Pharmacy Inspectors, and Pharmaceutical Consultants be severed from existing unit 19?

DISCUSSION

Section 3521 of the Dills Act sets forth the following criteria to be considered in determining an appropriate unit:

- (b) (1) The internal and occupational community of interest among the employees,

including, but not limited to, the extent to which they perform functionally related services or work toward established common goals; the history of employee representation in state government and in similar employment; the extent to which the employees have common skills, working conditions, job duties, or similar educational or training requirements; and the extent to which the employees have common supervision.

(2) The effect that the projected unit will have on the meet and confer relationships, emphasizing the availability and authority of employer representatives to deal effectively with employee organizations representing the unit, and taking into account such factors as work location, the numerical size of the unit, the relationship of the unit to organizational patterns of the state government, and the effect on the existing classification structure or existing classification schematic of dividing a single class or single classification schematic among two or more units.

(3) The effect of the proposed unit on efficient operations of the employer and the compatibility of the unit with the responsibility of state government and its employees to serve the public.

(4) The number of employees and classifications in a proposed unit and its effect on the operations of the employer, on the objectives of providing the employees the right to effective representation, and on the meet and confer relationship.

(5) The impact on the meet and confer relationship created by fragmentation of employees or any proliferation of units among the employees of the employer.

When unit 19 was created, the Board made the following findings:

The Board finds that a professional health and social services unit is appropriate. The unit contains approximately 3,700 employees in 160 classifications. It is found that

employees in this unit have a strong community of interest, common goals and skills and interrelated functions.

These employees also possess advanced educational qualifications and skills and typically require licensure, certification or credentialing. Most employees perform similar functions focusing on evaluation and assessment of client needs, client counseling and consultation, or client follow-up services of a health, social or employment nature. Some employees plan, organize and coordinate programs while others, such as the pharmacists or the hearing and vision specialists, concentrate on a single area of expertise. Yet these varied occupations work toward the common established goals of assisting the whole person to achieve a satisfying and self-sufficient life.

The Board has not divided the schematic classifications of employees, such as social workers, who work in various settings, such as hospitals, offices and in the community. Instead the Board focuses on the large extent to which employees in all locations render functionally related services, coordinate the delivery of services, have frequent contact and share common skills, working conditions and duties. It would not be unusual for a client in the course of her/his treatment to have contact with a wide variety of employees in this unit. To disregard this inherent community of interest would result in a proliferation of units and fragment employees, and would thereby have a detrimental impact on the employer-employee meet and confer relationship.

There is no doubt that in its decision, the Board recognized that pharmacy-related classifications were not exactly like other classifications in the unit. The difficulty presented herein is that the Board's discussion appears to embrace those pharmacists whose work is carried out in hospitals and institutions as distinguished from those pharmacists filling positions in the

classifications of Pharmaceutical Consultant I and II and Board of Pharmacy Inspectors.

It is noteworthy that approximately 22% of the employees in pharmacy-related classifications have no functional working relationships with the balance of the unit. Their job duties, their reporting relationships, their working conditions, and their geographic locations are qualitatively different from those of all unit members, including pharmacists, who work with institutionalized patients, veterans, or prison inmates. As noted above, these classifications do have common education, training, skills, and transfer and promotional opportunities which tie them to other pharmacists, but not other members of unit 19. In terms of some of the unit determination criteria, it is concluded that it would be more appropriate to include these pharmacists in a unit of pharmacy-related classifications rather than in the broad unit of Professional Health and Social Services. Analysis of this 22%, however, does not end the inquiry.

Since the initial establishment of the 20 state units, the Board has considered relatively few requests to alter those units. In State of California (Department of Personnel Administration) (1990) PERB Decision No. 794-S, the Board held that for severance to be appropriate, the proposed unit must be, after consideration of all the factors, more appropriate than the existing unit. That standard was affirmed with respect to the psychologists in unit 19 in State of California (Department of

Personnel Administration), supra, PERB Decision No. 988-S. In an earlier case, State of California (Department of Personnel Administration) (1989) PERB Decision No. 773-S, the Board dismissed a petition to sever a group of employees from bargaining unit 7. The Board accepted the findings of the administrative law judge (ALJ) to the effect that the law enforcement personnel for whom severance was sought shared a certain community of interest with personnel excluded from the proposed unit. The Board held:

The ALJ found that, although the employees within the proposed severance unit may share a community of interest among themselves, their commonality of skills, working conditions, duties, and training are also shared, to varying degrees with other Unit 7 employees. The ALJ also made factual findings regarding the interrelationships between classes, job function, equipment and, perhaps most importantly bargaining history. (Id. at pp. 17-18.) (Emphasis added.)

Bargaining history and the relationship between the group seeking severance and the majority are relevant and key factors to be considered when considering the question of whether one unit is more or less appropriate than another. AFSCME suggests that the appropriate standard when reviewing that history is "whether the interests of one group of employees have been trampled upon or ignored to the point that their representational rights have been abrogated." That is a standard articulated by then Chairperson Deborah Hesse in her dissent to the Board's decision State of California (Department of Personnel Administration), supra, PERB Decision No. 794-S. That is not the

standard set forth in the main and concurring opinions and not the one controlling herein. Internal union strife is merely one factor, and, obviously, its intensity impacts upon any decision regarding unit appropriateness.

In the instant case, as noted above, there is substantial evidence that employees in pharmacy-related classifications do not feel that AFSCME adequately represents their interests. Feelings are not facts, however. The evidence presented indicates that AFSCME's structure and its practices give pharmacists an opportunity to be heard and an opportunity to have an impact upon the results that are within AFSCME's control. In other words, even if AFSCME had pursued without qualification all issues raised by the pharmacists, there was no guarantee that the State would have accepted AFSCME proposals.

The differences of opinion or differences in approach between AFSCME and the Guild which were disclosed during the course of the evidentiary hearing are perhaps persuasive evidence of a breakdown in communications, they are not evidence of a breakdown in AFSCME's ability or willingness to effectively represent the pharmacists. Indeed, there is some basis for concluding that some of the problems disclosed were a function of pharmacists' refusal to participate in or support the AFSCME program in order to help color the record herein.

Whatever the reason for the current level of dissension, it cannot be disregarded. The strong desire of a relatively homogeneous group of employees for self-determination should not

be ignored. That is particularly true where, as here, the level of integration with other groups of employees is not significant. There are factors present herein which make it tempting to consider use of the National Labor Relations Board (NLRB) Globe doctrine, which would give pharmacy related classifications the opportunity to vote on inclusion in the larger unit or a pharmacists' unit. In Globe Machine and Stamping Co. (1937) 3 NLRB 294 [1-A LRRM 122], the NLRB found that the considerations of the appropriate unit were so evenly balanced, "the determining factor is the desire of the men themselves." (Id. at p. 300.) In Pittsburgh Plate Glass Company v. National Labor Relations Board (1941) 313 U.S. 146 [8 LRRM 425], however, the Supreme Court underscored the fact that workers' desires do not override other considerations. The Court noted:

Naturally the wishes of employees are a factor in a Board conclusion upon a unit. They are to be weighed with the similarity of working duties and conditions, the character of the various plants and the anticipated effectiveness of the unit in maintaining industrial peace through collective bargaining. (8 LRRM at p. 429.)

Applying the concepts in the private sector cases cited above, it is concluded that the wishes of the employees are just one factor to be considered. That factor alone does not make the proposed unit more appropriate. Moreover, this is not an initial unit determination proceeding and PERB standards appear to require more than a mere showing that both units would be appropriate.

Another factor of relevance herein is the State's and PERB's concern regarding the proliferation of units and the impact on

the system as a whole. In Mallinckrodt Chemical Works (1966) 162 NLRB 387 [64 LRRM 1011], the NLRB discussed the dilemma it faced in severance cases. The case is of value in the analysis here on a number of points. On its role, the NLRB noted:

At the outset, it is appropriate to set forth the nature of the issue confronting the Board in making unit determinations in severance cases. Underlying such determinations is the need to balance the interest of the employer and the total employee complement in maintaining the industrial stability and resulting benefits of an historical plantwide bargaining unit as against the interest of a portion of such complement in having an opportunity to break away from the historical unit by a vote for separate representation. The Board does not exercise its judgment lightly in these difficult areas. Each such case involves a resolution of "what would best serve the working man in his effort to bargain collectively with his employer, and what would best serve the interest of the country as a whole." (Id. at p. 392) (Citations omitted.)

In considering its obligations, the NLRB developed "areas of inquiry" it considered illustrative of what should be considered in a "craft" severance case:

1. Whether or not the proposed unit consists of a distinct and homogeneous group of skilled journeymen craftsmen performing the functions of their craft on a nonrepetitive basis, or of employees constituting a functionally distinct department, working in trades or occupations for which a tradition of separate representation exists.

2. The history of collective bargaining of the employees sought and at the plant involved, and at other plants of the employer, with emphasis on whether the existing patterns of bargaining are productive of stability in labor relations, and whether such stability will be unduly

disrupted by the destruction of the existing patterns of representation.

3. The extent to which the employees in the proposed unit have established and maintained their separate identity during the period of inclusion in a broader unit, and the extent of their participation or lack of participation in the establishment and maintenance of the existing pattern of representation and the prior opportunities, if any, afforded them to obtain separate representation.

4. The history and pattern of collective bargaining in the industry involved.

5. The degree of integration of the employer's production processes, including the extent to which the continued normal operation of the production processes is dependent upon the performance of the assigned functions of the employees in the proposed unit.

6. The qualifications of the union seeking to "carve out" a separate unit, including that union's experience in representing employees like those involved in the severance action. (Footnotes omitted.)

Unlike the case presented to the NLRB in Mallinckrodt, wherein a well established practice of craft-severance was under consideration, no evidence was presented in this proceeding regarding a generally accepted practice of pharmacists functioning in their own collective bargaining units. Indeed, notwithstanding the earnestness of the witnesses herein, there is a significant question about the viability of a unit of 172 employees at approximately 40 separate geographic locations.

The concerns about the effectiveness of the Guild, given the composition of the proposed unit, must be looked at in the context of the public policy, codified by statute, favoring broad

units.⁹ Although the evidence about the burdens on the State should the Petition be granted was not particularly persuasive, the negotiation and administration of an additional agreement would have a negative impact upon the State's personnel resources. There is no reason to conclude that a ruling for the Guild would result in a flood of severance actions and the proliferation of an untenable number of units, but the additional burden on the State is a factor to be considered.¹⁰

Weighing all the factors presented, and given the current state of the law, it is concluded that the Petition should be dismissed. The Guild has not rebutted the presumption that the existing unit is more appropriate than the proposed unit. In reaching this conclusion, the overriding consideration has been the practice, in terms of organizational structure and otherwise, of AFSCME to accommodate the interests of the pharmacy-related classifications. The record does not support or justify disrupting the existing pattern of representation.

⁹Nothing said herein is intended to suggest that the Guild could not or would not effectively represent a separate unit of employees in pharmacy-related classifications. It is noted, however, that the record does not present sufficient evidence upon which to make any judgment in that regard.

¹⁰The argument made by AFSCME that a ruling for the Guild would open the floodgates to any discreet occupational group is rejected. The instant case presents not only a discreet occupational group, but a group that is not particularly functionally integrated with other employees in the same unit. In other words, there is a coalescence of factors here that you would not find with social workers, occupational therapists, or psychologists.

PROPOSED ORDER

Based upon the foregoing and entire record in this case, IT IS ORDERED that the severance petition filed in this case is DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc., sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

Barbara E. Miller
Administrative Law Judge