LABOR RELATIONS COMMISSION: NOTICE OF DETERMINATION OF STATE EMPLOYEE BARGAINING UNITS (3/3/75)

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NOTICE TO INTERESTED PARTIES

Transmitted herewith please find an amendment to Article II, Section 5 of our "Rules And Regulations Relating To The Administration Of An Act Providing For Collective Barbaining By Public Employees", and our accompanying statement.

The amendment sets forth standards for appropriate bargaining units which may be petitioned for by, or on behalf of, certain employees of the Commonwealth.

The amendment has been duly adopted by the Labor Relations Commission pursuant to the authority vested in us by: Chapter 23, Section 9R of the General Laws, most recently amended by Section 2A of Chapter 1078 of the Acts of 1973; Chapter 150E, Section 3 of the General Laws; Chapter 30A of the General Laws; and rules and regulations previously adopted by us on July 1, 1974 and December 24, 1974.

ALEXANDER MACMILLAN, Chairman

MADELINE H. MICELI, Commissioner

HENRY C. ALARIE, Commissioner

AMENDMENT TO RULES AND REGULATIONS
OF THE LABOR RELATIONS COMMISSION

Section 5 of Article II of the "Rules and Regulations Relating to the Administration of An Act Providing for Collective Bargaining for Public Employees", is hereby amended by inserting after subsection 3 thereof the following new subsection:

4. With respect to employees of the Commonwealth, excepting only employees of community and state colleges and universities, no petition filed under the provisions of Section 4 of the Law shall be entertained, except in extraordinary circumstances, where the petition seeks certification in a bargaining unit not in substantial accordance with the provisions of this subsection. Bargaining units shall be established on a statewide basis, with one unit for each of the following occupational groups, excluding in each case all managerial and confidential employees as so defined in Section 1 of the Law:

NON-PROFESSIONAL EMPLOYEES:

UNIT 1: Administrative and Clerical, including all non-professional

employees whose work involves the keeping or examination of records and accounts, or general office work:

UNIT 2: Service, Maintenance and Institutional, excluding building trades and crafts and institutional security:

UNIT 3: Building Trades and Crafts:

UNIT 4: Institutional Security, including corrections officers and other employees whose primary function is the protection of the property of the employer, protection of persons on the employer's premises, and enforcement of rules and regulations of the employer against other employees:

UNIT 5: Law Enforcement, including all employees with power to arrest, whose work involves primarily the enforcement of statutes, ordinances and regulations, and the preservation of public order:

PROFESSIONAL EMPLOYEES, as defined in Section 1 of the Law:

UNIT 6: Administrative, including legal, fiscal, research, statistical, analytical and staff services:

UNIT 7: Health Care:

UNIT 8: Social and Rehabilitative:

UNIT 9: Engineering and Science:

UNIT 10: Education.

Notwithstanding any other provision of this subsection, nothing shall prevent the Commission from finding appropriate: (1) the inclusion of related technical employees in any of the professional units designated 6 through 10, provided that the requirements of Section 3 of the Law have been met; (2) one or more units of supervisory employees; (3) separate units for employees of constitutional officers; (4) separate units for employees of the judiciary; (5) separate units for employees of the General Court.

INTRODUCTION

On September 25, 1974 the Commonwealth of Massachusetts, acting through the Commissioner of Administration (hereafter the "Employer") filed with the Labor Relations Commission (hereafter, "the Commission") two petitions (SCRE-2000 and SCRE-2001) seeking the reorganization of state employees for purposes of collective bargaining into two single units for the approximately 43,000 non-professional and 12,000 professional employees.[1] Because of their extra-

[1] Professional and nonprofessional employees can be placed in the same bargaining unit only if a majority of the professionals so vote General Laws, Chapter 150E, Section 3. Moreover, the proposed units excluded employees of the several institutions of higher learning, for whom the Employers are the respective boards of trustees, not the Commissioner of Administration. General Laws, Chapter 150E, Section 1.

ordinary nature, the petitions were not processed in accordance with normal investigative procedures. Instead, the Commission solicited the views of every employee organization known to have an interest in representing state employees. See Notice to Interested Parties, October 23, 1974. Statements of position were requested on two issues: (1) the substantive merit of the employer's "two-unit" approach to state employee bargaining; and (2) the Commission's suggestion that standards for appropriate bargaining units be established through a rulemaking rather than adjudicative proceeding. The responses received unanimously opposed the omnibus units.[2] Thereafter, on November 11, 1974 the Commission dismissed the Employer's petitions on the ground that the absence of a claim by an employee organization to represent a "substantial number" of employees in the proposed units precluded the existence of a "question of representation" under Chapter 150E, Section 4 of the General Laws. On November 13, 1974 the Commission issued a "Draft Notice of Proposed Amendment to the Rules and Regulations of the Labor Relations Commission", mailed to all interested parties, which recommended that state employees be regrouped by occupation into 13 statewide units.[3] The Commission

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[2]None of the employee organizations which responded to the Commission's letter of October 23, 1974, favored the proposed two units. In opposition were Massachusetts State Employees Association; Local 254, Service Employees International Union; State Police Association of Massachusetts; Massachusetts Motor Vehicle Inspectors Association; Massachusetts Association of State Employed Psychologists; American Federation of Physiclans and Dentists; Nine to Five; National Association of Government Employees; Maintenance Trades Council of New England; Massachusetts Society of State Engineers; Maintenance Foremen's Association of Massachusetts; Association of Environmental Engineers and Scientists; Massachusetts State Scientists Association; Massachusetts Department of Education Association; Massachusetts Correctional Officers Federated Union; Institution Power Chief Plant Engineers, Inc.; Massachusetts Association of Volunteer Supervisors.

[3]1. Administrative, investigative and clerical, including all non-professional employees whose work involves the keeping or examination of records and accounts or general office work, excluding all institutional employees;

2. Service, maintenance and institutional, excluding building trades and crafts and institutional security;

3. Building trades and crafts;

4. Public safety, including all employees with power to arrest, whose work primarily involves the enforcement of statutes, ordinances and regulations and preservation of the public peace;

5. Institutional security, including all those employed as correction officers or to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises;

6. Non-professional technical, including all employees whose work is of a technical nature requiring exercise of specialized training usually acquired in colleges or technical schools or through special courses, and involving use of independent judgment;

7. Professional, including all employees whose work conforms to the definition of "professional employee" in section one of the Law, and divided into separate sub-units for each of the following occupational groupings: (cont'd)

also included an alternative draft proposal reflecting the "two-unit" preference of the Employer. Concurrently therewith, the Commission scheduled an "Informational Hearing" on November 27, 1974 to afford interested parties an opportunity to state their position with respect to the Commission's contemplated exercise of its rule-making authority. Parties were invited to submit written memoranda outlining their views on or before November 25, 1974. In conjunction with the foregoing, the Commission deferred consideration of all pending petitions seeking representation of state employees.

On November 27 the Employer, several employee organizations, and individuals availed themselves of the opportunity to express their views concerning the legality and/or utility of the proposed rulemaking procedure. Several parties, including the Employer, supported the Commission's position that a rulemaking proceeding was not only legal but also provided the most democratic and efficient vehicle for the prompt resolution of the unit questions. Moreover, several parties at the November 27 hearing raised questions concerning the substance of the draft proposals. All organizations which expressed a view, including the American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME") and the Massachusetts State Employees Association ("MSEA"), who represent the largest number of state employees, strongly opposed a two-unit approach.[4] In fact, until February 11, 1975, the final day of hearings on the proposed unit standards, no employee organization expressed public support for the "two-unit" approach. On that date, however, AFSCME reversed its earlier position and declared its support of the "two-unit" concept. AFSCME was joined therein by the Service Employees

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3(cont'd)

a. fiscal, research, statistical, analytical and staff services;
b. legal;
c. patient treatment;
d. patient care;
e. social services;
f. engineering and science;
g. educational services.

[4]The following exchange occurred between Chairman Alexander Macmillan and Augustus Camelio, General Counsel for Council 41, AFSCME:

CHMN. MACMILLAN: I take it if we had held a hearing on the employer's position, you would have strongly objected to the employer's position in that they would have had lumped everybody into two units?

MR. CAMELIO: That goes without saying. Our position is that we have certifications and we have bargaining units, and there should be no dispute here. Tr. Nov. 27, 1974 at 68-69.

General Counsel Mark Dalton similarly expressed MSEA's opposition to a "two-unit" proposal in unmistakeable terms:

> "And we certainly object to the two-unit monolithic approach that the employer suggested. We do not think it is democratic..." Tr. Nov. 27, 1974 at 68-69.

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International Union, ("SEIU"), AFL-CIO.[5]

Thereafter, on December 24, 1974, the Commission, upon due consideration of the presentations of the parties (written and oral) and the views of respected commentators, determined to conduct a rulemaking hearing, which was scheduled for February 10, 1975, with respect to a proposed amendment to the rules and regulations creating standards for 6-14 statewide units, including perhaps separate units for supervisors and employees of Constitutional officers.[6]

On February 10 and 11, 1975, a formal public hearing was conducted on the proposed rule, at which all parties were afforded full opportunity to introduce material and present argument in support of their positions. At the close of the hearing, interested parties were permitted to file by February 26, 1975 additional written memoranda for the record. Approximately 20 statements were received by the Commission as of February 26.

On February 28, 1975, in executive session, the Commission voted unanimously to adopt the attached "Amendment to Rules and Regulations of the Labor Relations Commission" which creates standards for 10 appropriate bargaining

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[5]Two of SEIU's three state-employee locals, however, remained opposed to two units. Thus, Local 254 of SEIU, represented by Business Agent Edward Sullivan, opposed both the Commission's proposal, and the "two unit" approach, arguing instead for vertical units. Tr. Feb. 10, 1975 at 98-99. Local 509 submitted a position favoring the general approach of the Commission but seeking to combine several of the professional subunits. Tr. Feb. 10 at 138.

[6]UNIT 1: Administrative, investigative, and clerical, including all non-professional employees whose work involves the keeping or examination of records and accounts, or general office work and excluding all institutional employees:

UNIT 2: (a) Institutional service, maintenance, clerical and administrative, excluding building trades and crafts and institutional security; (b) Non-institutional service and maintenance; (c) Building trades and crafts;

UNIT 3: Institutional security, including correction officers and other employees whose primary function is the protection of the property of the employer, protection of persons on the employer's premises, and enforcement of rules and regulations of the employer against other employees;

UNIT 4: Public safety, including all employees with power to arrest, whose work involves primarily the enforcement of statutes, ordinances, and regulations and the preservation of public order;

UNIT 5: Technical, including all employees whose work is of a specialized nature, requiring training usually obtained in colleges or technical schools or through special courses of instruction, who are not professional employees as defined in Section 1 of the Law.

UNIT 6: Professional employees, as defined in Section 1 of the Law, who may be divided into separate sub-units for each of the following occupational groupings: (a) fiscal, research, statistical, analytical and staff services; (b) legal; (c) patient treatment; (d) patient care; (e) social services; (f) engineering and science; (g) educational services.

units in state government.[7] In so acting, the Commission relied upon extensive and varied resource material. We surveyed the experience of other jurisdictions and carefully considered the views of experts in the field of public employee labor relations. (A 1357-1366)[8] On four occasions, we solicited the views of the employer and all organizations known to have an interest in the subject matter of state employee collective bargaining.[9] We were supplied with staffing documents and job descriptions covering every job classification in the Commonwealth. Incalculable staff hours were devoted to sifting through and evaluating the material submitted by the parties. On the basis of the parties' submissions, as well as the experiences of other jurisdictions and the analyses of respected scholars, the Commission concluded that the standards it adopted for appropriate units reflect a coherent structure predicated upon a significant community of interest that, to the extent possible, best safeguards the rights of employees to "effective representation" and of the Commonwealth and public to "efficiency of operations," (Chapter 150E, Section 3). In conjunction with the adoption of its rule, the Commission submits a rather lengthy statement in support thereof which reflects a conscientious discharge of its responsibility to fully apprise both the parties, who devoted substantial resources in presenting their positions, and the public of the reasons for

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[7]The rule was thereby duly adopted as an amendment to the Commission's Rules and Regulations.

[8]"A" references are to the Appendix attached hereto.

[9]See Notice to Interested Parties October 23, 1974; Notice to All Interested Parties, November 13, 1974; Notice of Public Hearing on Proposed Amendments to Rules and Regulations of Massachusetts Labor Relations Commission. At the close of the public hearing Chairman Macmillan again invited all parties to present additional views in writing. Tr. of Feb. 11 at 65-66.

All information available to the Commission has been made available for inspection by the parties. Numberous individuals and organizations have availed themselves of the opportunity to inspect these materials. In addition, accompanying the notices which the Commission has mailed to all parties were several hundred pages of explanatory and background data. In this light we have difficulty in understanding the objection voiced by the Director of the Office of Employee Relations, in his letter of February 26, 1975 to the Commission, that he has been denied a fair opportunity to present his case. In any event, even Mr. Bennett apparently does not consider the problem fatal, as he concludes:

> "Finally, the employer wishes to reiterate its concern that collective bargaining under Chapter 150E commence as soon as possible. In view of the fact that the rulemaking hearing lasted only one and one half days we are optimistic that a unit determination for the Commonwealth will be rendered without delay."

its action. Indeed, the integrity of the administrative process requires no less.[10]

APPROACHES TO BARGAINING UNIT STRUCTURE

The Commission's rule, which creates standards for ten statewide, broad, occupational bargaining units, is predicated upon two major assumptions concerning the theory of public employee bargaining and the intent of Chapter 150E of the General Laws. The first assumption is that the passage of Chapter 150E represents a legislative endorsement of collective bargaining as a method of determining conditions of employment and wages, and as a means of dispute resolution. Although Chapter 150E contains no specific statement of legislative intent, we assume that the General Court retained the basic commitment to the collective bargaining process which motivated the passage of Chapter 150A in 1937:

> It is hereby declared to be the policy of the Commonwealth to eliminate the causes of certain obstructions to the free flow of industry and trade, and to mitigate those obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Mass. Gen. Laws Ch. 150A, sec. 1.

Although subsequent enactments extending the right of self organization and collective bargaining to public employees lacked specific statements of

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[10] Subsequent to the close of the rulemaking hearing on February 11, 1975, the Commission received two petitions seeking to establish the unit structure favored by the Employer. The petitions were jointly filed by Council 41 of the American Federation of State, County, and Municipal Employees, and its Appropriate Affiliates, AFL-CIO; Local 285 of the Service Employees International Union, AFL-CIO. See, SCR-2051, 2052. Neither petition was supported by a showing of interest. In this regard they were similar to petitions filed by the National Association of Government Employees. See, SCR-2031, 2032.

Following receipt of the coalition petitions, correspondence was received from both the Office of Employee Relations and Council 41 of AFSCME on behalf of the coalition, suggesting that the filing of the petitions "revived" the employer petitions already dismissed by the Commission. The Commission is unclear as to the legal theory by which an employer petition, already dismissed, is revived by the filing of a petition which is accompanied by no showing of interest. In any event, we need not deal with such novel issues. As all parties have been made aware, action on all petitions seeking to represent state employees for whom the Commissioner of Administration is the Employer has been deferred, during the pendency of the rulemaking hearing. As this statement marks the completion of that proceeding, all pending matters will be processed in a manner consistent with the newly amended Rules and Regulations of the Commission.

legislative intent, we have always considered the intent to be substantially similar - a view that has received express judicial endorsement. Mendes v. City of Taunton, _____ Mass. ____, 315N.E. 2d. 865 (1974). Accordingly, the first assumption precludes adoption of a unit structure which impairs the rights of employees to select representatives of their own choosing, or to effectively resolve grievances over employment conditions.

The Commission's second major assumption is that a unit structure must be consistent with the public interest. Bargaining by governmental employees is of vital importance to the citizenry at large, since wages and fringe benefits for those employees require the expenditure of a substantial portion of tax moneys. Given the difficulty of directly representing the public interest at the bargaining table, it is, in the first instance, our obligation to create a structure likely to produce responsible barbaining conduct. Accordingly, the second assumption dictates that the present bargaining structure, with several hundred bargaining units, be consolidated for the benefit of the public and the employees of the Commonwealth.

Apart from the twin assumptions that units which impair employee rights or the public interest are foreclosed, the Commission was guided by considerations which, within practical limits, favored the continued existence of a number of labor organizations who may compete for the loyalties of state employees. For, if employees may designate only one organization as their collective bargaining representative, their right to "freely select" representatives is indeed illusory.[10a] On the basis of the foregoing assumptions and considerations the Commission next considers the diverse unit positions advanced by the parties.

One position advanced by a number of employee organizations was to maintain the status quo and thereby preserve the integrity of existing bargaining units established under the provisions of Mass. Gen. Laws Ch. 149, sec. 178F, which designated the appropriate department or agency head as the party with whom organizations were to negotiate. Such a structure was realistic given the fact that the scope of bargaining under Chapter 149 was limited to localized working conditions within the control of a department or agency head. Under Mass. Gen. Laws Ch. 150E the scope of bargaining, which is conducted by a single employer on behalf of all departments and agencies (other than the institutions of higher education), includes economic items. The public interest and the orderly administration of government require centralized leadership and direction for wage bargaining, which may not practicably be provided within the current framework of more than two hundred bargaining units. Accordingly, substantial reduction in the number of units is a precondition to effective negotiation.

Having rejected the existing fragmented unit system, the Commission considered several alternate structures for bargaining units. Bargaining units could be structured along the organizational lines of the employer, perhaps by major departments or secretariats. Such a vertical structure would have the advantages of facilitating top-to-bottom communication within organizational units and of grouping all employees who share a common departmental

[10a] A policy which, on the other hand, effectively preserves the employees' rights may be opposed with equal intensity by employers, who find organizational activities disruptive, and by large unions, who believe them wasteful.

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"mission" within a single unit represented by the same employee organization. Further, such a structure would better protect local interests by providing a more suitable framework within which to negotiate local agreements.

The vertical system has major failings, however, including placement of employees who perform substantially identical functions in different bargaining units, and severe limitation upon the flexibility of the government to inter alia transfer and promote employees, or, potentially, to administer benefit plans. Moreover, organizational changes in state government - a frequent phenomenon in recent years - could produce great instability in employer-employee relations. Finally, vertical units do not recognize the distinct negotiating concerns of various occupational groups within the large organizational unit. For these reasons, the Commission concluded that the creation of a vertical unit structure for state employees is neither feasible nor in compliance with the statutory requirement that units foster "efficiency of operations" and "effective dealings."

The Commission also considered a system of multi-level or tier-bargaining. See, e.g., New York City Administrative Code Ch. 54. Under such a system certain "statewide" issues would be negotiated by unions representing all state employees as a coalition. Another level of negotiations would focus upon localized working conditions and be conducted by individual employee organizations selected by the employees as their bargaining agent. The multi-tier system at least enjoys the major advantage of permitting immediate negotiation over economic items while preserving the integrity of existing organizations. Moreover, a gradual consolidation of units by the filing of petitions seeking broader units could be accomplished as the bargaining relationship matured.

While the multi-tier proposal is interesting in theory, the Commission rejects it in practice because of its questionable legality under Chapter 150E which contemplates "exclusive representation" and unitary negotiations which produce an agreement covering the range of negotiable items. Adoption of a unit system of uncertain legal status would inevitably leave state employee bargaining in a state of confusion until its legality was determined by the courts. The attendant delays would cause unrest and create pressure for hasty and perhaps ill-considered actions by the parties.

Two major approaches remain to be considered: the Commission's proposal for a moderate number of statewide occupational units; and the proposal, first advanced by the employer, to create two "omnibus units" for all state employees. We first consider in detail thp reasons for rejecting two units, which the Employer urged so strongly before discussing the rationale of the rule adopted herein.

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A. "Stable And Continuing Labor Relations"[11]

The Employer strongly contends that its proposed two units will most effectively provide for "stable and continuing labor relations." Contrary to the Employer's apparent assumption, however, "stability of labor relations" neither requires nor contemplates permanence or rigidity - the inevitable consequences of the two unit alternative. Stability does, however, require that both parties to the bargaining process be able to properly fulfill their responsibilities within the framework provided. If either party cannot function efficiently, neither stability not continuity will be achieved. The all-inclusive units suggested by the Employer are too large to permit effective performance of the bargaining function. More fundamentally, perhaps, stability can hardly be accomplished where, as here, the task of fully developing a unit structure is delegated to the "tender mercies" of the parties. Thus, the Employer concedes that an as yet-undefined substructure would be necessary to deal with specialized concerns of employees within the "omnibus units." See Sept. 25, 1974 letter of George Bennett. Moreover, the wildly differing and shifting positions on unit structure taken by employee organizations during the course of these proceedings clearly illustrates the dangers of permitting such an arrangement. Certainly, the guarantee of employee rights ought not depend solely upon the uncertainties of multilateral agreement among bargaining adversaries. In any event, the Commission is not prepared to sanction the Employer's concededly inadequate structure and remit to the parties the non-delegable task of "work(ing) out the details." Id. Adoption of such a position, in the Commission's view, would constitute a clear abdication of its responsibilities. Accordingly, the Commission concludes that if, as is clear, the suggested two units are unwieldy, they simply should not be established.

We also disagree with many of the unstated assumptions upon which the employer's "stability" argument rests. We believe that vigorous representation of employees designed to reatin their loyalty, and perhaps to secure the allegiance of other as yet unorganized employees, which the Employer seeks to eradicate, is clearly desirable. Brief for the employer at 16-17. Nor do we share the view that the fact-finding procedure, which in any event is advisory[12], is not sufficiently adaptable to permit a consideration of issues of public interest.

Most fundamentally, however, the Commission rejects the Employer's preconceived notion that collective bargaining must continuously justify itself:

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[11]The General Court has set out the criteria to consider in establishing appropriate bargaining units:

> The commission shall prescribe rules and regulations and establish procedures for the determination of appropriate bargaining units which shall be consistent with the purposes of providing for stable and continuing labor relations, giving due regard to such criteria as community of interest, efficiency of operations and effective dealings and to safe-guarding the rights of employees to effective representation.

Gen. Laws. Ch. 150E, sec. 3.

[12]Mass. General Laws Chapter 150E, section 9.

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> The General Court by enacting Chapter 150E has determined that collective bargaining will play an integral and essential role in labor relations. Despite many drawbacks and pitfalls, collective bargaining can result in a positive and constructive labor relations system. The processes working against the efficient functioning of a collective bargaining system - its fragile nature and the severe economic atmosphere - are serious and should not be regarded lightly.

Brief for the Employer at 14.

The Employer's strong focus upon the "pitfalls" of collective bargaining portends a self-fulfilling prophesy - i.e. its fixed notion that collective bargaining is fraught with difficulty guarantees that there will be difficulty.[13] In the Commission's view, collective bargaining is an effective and flexible tool which, far from creating the "pitfalls" seeks their resolution. Nor does the Commission accept the Employer's apparent view that discontent or alienation is an inevitable by-product of collective bargaining's adversary relationship. On the contrary, we believe that collective bargaining will minimize disruptions, resolve disputes and improve labor relations. In any event, the Employer's argument is properly addressed to the Legislature, not the Commission, for Chapter 150E clearly reflects a legislative design to foster collective bargaining as a vehicle for assuring stability of labor relations, which neither the Employer, nor this Commission, can rescind de facto.

B. "Efficiency of Operations"

The Employer also strongly argues that establishment of more than the statutory minimum of bargaining units would substantially impair "efficiency of operations" and, in particular, create insurmountable funding problems:

> A multi-unit bargaining structure will place the parties on an endless merry-go-round of negotiations. The submission of executed contracts to the General Court for appropriation will be scattered over an extended period of time. The General Court will be faced with the dilemma of determining whether one proposed contract should be funded or waiting until all proposed contracts are submitted before making such a determination.

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[13] As the Supreme Judicial Court stated in disposing of similar arguments in a different context:

> The argument assumes that bodies of men will be actuated by highly selfish and unsocial motives with a desire to wreck the law rather than to give it a fair trial. Every presumption is to the contrary. (citations omitted). If in the practical operation of the law abuses develop, doubtless means may be found to correct them.

Howes Brothers Co. v. Massachusetts Unemployment Compensation System, 296 Mass. 275, 5 N. E. 2d 720 at 729 (1936).

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> There are three approaches the General Court could take to resolve their dilemma. First, it can determine whether to fund one proposed contract without making any assumption about subsequent agreements. Second, it can determine whether to fund one proposed contract based upon the assumption that future agreements will follow the same pattern. Third, it can wait until other agreements are negotiated before taking action on any agreement.

Brief for the Employer at 19-20.

We believe the Employer's dilemma is more apparent than real, for only the uninitiate would suggest that a presumably sophisticated Employer would engage in negotiations in any bargaining units, regardless of number, without having attempted to "sound out" the legislature on the fiscal resources available for funding personnel costs. In any event, if the legislature funded, or the Employer negotiated, a contract without considering its impact on the negotiation of other contracts, neither the Labor Relations Commission nor the employee organization should be held responsible for the consequences. The realities of collective bargaining require that the negotiator maintain close contact with his principals. In public sector bargaining the representative of the employer must be aware of legislative restriction, as well as the desires of the executive branch.

In addition, we fail to understand why the Employer raises the spectre of noncooperation between the executive and legislative branches - the public employer equivalent of the "whipsaw" - to bolster its position. If the legislature is to be a third party at the bargaining table, or if a second round of negotiations on funding will follow the conclusion of each agreement with the executive, there would have been no need to depart from the pre-existing pattern of negotiations where special interest groups of state employees negotiated salary increases directly with the legislature. In rejecting the Employer's position herein, the Commission assumes cooperation and interchange between the executive and legislative branches in matters of labor relations - specifically, that the executive will apprise the legislature of the status of negotiations and their impact upon the funding of agreements already concluded. By the same token, we assume that the executive will be aware of the position of the General Court with respect to funding of agreements.

The nearly ten year municipal experience in collective bargaining supports the Commission's optimism. Thus, municipalities have since 1965 been engaged in collective bargaining under a similar system, with contracts negotiated by the executive branch and funded by the legislative. While the problems of multiple contracts and multiple funding cannot be minimized, none of the disastrous consequences predicted by the OER have occurred in the municipal sector. Indeed, in most municipalities the first contract settled provides a basis for subsequent settlements. A pattern is set, from which each bargaining unit varies to reflect the individual and distinct concerns of its membership. Whatever difficulties municipal government may have experienced, it has certainly not ground to a halt because of its collective bargaining responsibilities.

In any event, the Commonwealth, with its far greater resources, should adjust more easily than the municipalities to the conduct of collective bargaining. Thus, few municipalities have the advantages of the Commonwealth's full-time, in-house labor relations staff (OER). In addition, the Commonwealth may draw upon the considerable resources of the Civil Service Commission, the Bureau of Personnel and Standardization, the Office of Fiscal Affairs within the Executive Office of Administration and Finance, and other resources far beyond those available to municipalities. Finally, many departments and agencies have labor relations specialists who will presumably be available to the Employer. Given the resources at its command, the Employer cannot reasonably claim that bargaining with ten units is burdensome.

The Employer further urges that the administration of multiple contracts will be unduly onerous. Thus, the Employer maintains that:

> "the approximately 245 departments would have to efficiently implement and administer 14 different economic and non-economic packages."

Brief for the Employer at 35. And again:

> "Each Commonwealth department will be confronted by the implementation and administration of up to 14 different agreements."

Id.

The Employer, of course, exaggerates the gravity of the problem. Few Commonwealth supervisors will have to administer more than two agreements. Also, because of the nature of the occupational groupings, few Commonwealth agencies, departments or even secretariats will administer more than a few agreements.[14] In any event, the departments are currently administering multiple bargaining agreements without undue difficulty. With the personnel and staff resources available to the Commonwealth, the Commission does not consider that the creation of ten units will present any great difficulties in contract negotiation or administration.

Another of the asserted advantages of the "two-unit" proposal is the minimization of employee discontent and the consequent increased productivity and efficiency.[15] The Employer's argument that competition among unions inevitably

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[14] Any department which is so diverse has, or should have, the assistance of professional labor relations personnel.

[15] George Bennett, Director of the Office of Employee Relations, testified before the Commission that productivity increases were to be a major goal of the administration. Tr. of Feb. 10, 1975 at 10. Productivity bargaining would be extremely difficult in a unit of 45,000 employees and several hundred diverse job classifications. Conversely, a small number of more homogeneous units will favor increased productivity and efficiency, and serve the public interest.

produces friction and impairs productivity neither reflects the experience of other jurisdictions nor is supported by common sense. On the contrary, we submit that submergence of individual occupational identities into one, large, unresponsive bargaining unit with its inherent conflicts of interest is much more likely to foster discontent. See, e.g., Lefkowitz, The Legal Basis of Employee Relations of New York State Employees (1973), at 11. Employees in industry and government have been segregated into distinct units, not for the union's solace, or the employer's harassment, but in recognition of the self-evident proposition that "diverse" employees have different negotiating concerns. Arguments advanced by the Employer as to common wage plans, common benefits, or common civil service do not obscure this fact. Since unions have traditionally organized employees only along occupational lines, the conclusion is inescapable that a single unit which groups all non-professional employees will - to a far greater extent than ten units composed of occupational groupings - frustrate employees, lower their morale, create disharmony, and impair the efficiency of state service. As one commentator pointed out:

> "A single unit can, and commonly does, represent employees with varied and even competing interests. In fact, one function a union serves is to reconcile and compromise those interests by its internal processes. However, diverse interests within the union create internal tensions. If the diversity is too great the resulting tensions may be more than the union can manage. These tensions are then manifested at the bargaining table by the union making an array of demands designed to placate every group in the union. Bargaining becomes protracted and if the union is unable to resolve differences by its internal processes, it may be unable to work out compromises at the bargaining table or accept what might otherwise be considered a reasonable package. Thus, while multiple bargaining units add to the employer's negotiating burden, that cost may be less than negotiating with a conglomerate union which is trying to represent greater diversity than its internal processes can reconcile. Moreover, if bargaining reaches an impasse, the consequences will be less disruptive if only one group of employees is involved than if all employees are involved."

Summers, Public Employee Bargaining: A Political Perspective, 83 Yale L.J. 1156, 1190 (1974).[16]

C. "Community of Interest"

The Employer's argument[17] that a "two-unit" structure satisfies the

[16] Compare Sullivan, Appropriate Unit Determinations in Public Employee Collective Bargaining, 19 Mercer Law Review 402, 407-408 (1968).

[17] See Brief of Employer at 23-31.

community of interest requirement of the statute is similarly wide of the mark. Thus, in support of its position that state employees enjoy a fundamental community of interest, the Employer points to the fact that all employees are subject to a unitary budgeting and appropriation process. The Employer's argument is not only predicated upon an erroneous factual basis but also reflects a misconception of the term of art, "community of interest." While the law requires submission of a single budget to the legislature, that budget is broken down into thousands of components. Similarly, individual budgets submitted by departments and agencies are further broken down into single items. Personnel costs are funded from at least three of those accounts - the 01, 02, and 03. Each occupational group and job title is assinged separate pay grades. At the present time, justifications for staffing patterns and pay grades must be submitted to numerous executive and legislative departments. Finally, the legislature's analysis of the budget focuses, of course, upon particular programs and organizational units in accordance with legislative priority. In short, the budgeting and appropriations process is clearly not, as claimed by the Employer, "unitary." In any event, community of interest is not established, as the Employer would have us believe, by a unitary budgeting procedure or by the mere fact that all employees' paychecks are issued pursuant thereto. No state has ever so concluded, and no labor relations board or commission has ever accepted so simplisitc an analysis of "community of interest", which requires, rather, a similarity of interests and working conditions predicated upon, inter alia, common supervision, similar work environment, similar job requirements, education, training and experience, as well as interchange and work contact.

The Employer further claims that several non-economic considerations - including a single Civil Service system and standardized personnel rules and regulations - demonstrate a unity of interest among all state employees. The Employer's claim may be disposed of briefly. The factors upon which the Employer relies existed under the prior state bargaining law and were not then considered sufficient justification for broad, cross-occupational units. Further, the Civil Service and personnel systems themselves demonstrate clearly that occupational groupings are critical to their effectiveness and operation. For example, procedures for testing and qualifying applicants for employment are based on the unique characteristics of the job. Stripped of verbiage, the Employer's argument boils down to a circular statement that all employees of the Commonwealth are employed by the Commonwealth - a phenomenon which the Commission, in fact, has already observed.

D. "Effective Representation"

Finally, the Employer, with perhaps unwitting irony, urges that a "two-unit" structure best safeguards the rights of employees to effective representation:

> In a 14 unit structure each union may merely settle for the same benefit package as another union, its members might wonder what service the unions were performing. Employees generally evaluate their benefits by comparing benefits with other employees represented by different unions. Demands of unions in a 14 unit structure will be made with total disregard to how employees in other units will be affected. In a 2 unit

> structure a union will not advocate special consideration for one group or segment of employees without taking into account the effect on other employees. Representatives, in such a structure, must consider the historical internal relationship of Commonwealth employees and will be responsible for an equitable benefit package being attained for all employees through collective bargaining. (Brief for the Employer at 39-40.)

The Employer's argument completely reverses the roles of the employer and the employee organizations and ignores the fact that it is not the concern of one employee organization - but of the Employer - to insure that all employees are treated equitably. Moreover, the Employer advances the inconsistent positions that, on the one hand, groups of employees in a "two-unit" structure have special concerns which a single union can best accommodate and that, on the other hand, all employees share a community of interest in negotiating concerns sufficient to warrant their placement in single units. See Brief for the Employer at 23-31.

In seeking to effectuate the statutory criterion of "effective representation", the Commission recognized that the successful bargaining history of state employees by specialized organizations warranted consideration of the feasibility of preserving their status. Thus, state employees have been organized since 1968 for the limited purpose of bargaining over noneconomic working conditions. Many state employee organizations serve the specialized needs of groups like the state police, social workers, nurses, skilled tradesmen, and other occupations which have a distinct sense of identity, and have established a stable and continuing relationship with the Commonwealth through its departments and agencies. In recognition of this bargaining history, the Commission has attempted - consistent with its desire to avoid fragmentation - to preserve specialized organizations which effectively represent employees who enjoy a perceived community of interest.

Further, unlike the Employer, the Commission believes that the employees' right to effective representation is best assured by providing a framework within which employee groups may compete. Employees should have a realistic choice in the selection of a bargaining agent which will vigorously represent their interests. Absent competition for the loyalty of members, a single employee organization will have no incentive to fulfill its responsibilities. Moreover, absent either statutory regulation of the internal affairs of public employee unions[18] or inter-union rivalry, creation of a huge, monolithic bargaining structure would portend disastrous consequences for state employees in the exercise of their rights.

Were the Commission to create a unit of all non-professional employees,

[18] Thus, the federal Landrum Griffin law, which requires private sector unions to satisfy minimum standards of fairness in the conduct of their internal affairs, has no equivalent in the public sector in Massachusetts.

few unions would have the resources to compete for employee support in that unit. Once an employee organization was certified, few, if any employee organizations could ever afford to mount a campaign to replace the incumbent in a unit of 45,000 employees scattered throughout the entire state. The incumbent would be virtually assured of permanent status as employee representative regardless of its employee support. While the Commission acknowledges the imperative of stability in labor relations, it declines to sanction a "deep freeze" which sacrifices employee rights to effective representation.

In sum, the Commission, upon due consideration, rejected the proposed creation of two omnibus units because of their fundamental incompatibility with the statutory criteria which the Commission is directed to apply. Most apparently, neither community of interest nor the rights of employees to effective representation may be accommodated by establishing a "two-unit" structure which inevitably would engender friction and conflict of interest between hopelessly diverse occupational groups and which, moreover, would induce a stagnation and rigidity incompatible with the rights of employees to "effective representation". Further, even "efficiency of operations and effective dealings", which is the generally perceived advantage of the "two-unit" approach, is illusory if, as may reasonably be anticipated, the employee organization representing the amalgam of employee interests is incapable of accommodating or internalizing the inevitable conflicts. On the other hand, a structure of several, more coherent units, we submit, substantially reduces, though certainly does not eliminate, the risk of conflict and its consequent adverse impact upon "efficiency of operations." Accodingly, the Commission is persuaded that the Statutory criteria outlined above foreclose creation of the requested "two units" and dictate the formation of several large, essentially occupational units, as reflected in the adoption of its rule.

ADOPTION OF THE RULE

A. The Rationale and Procedure

The Commission today adopts the principle of a limited number of statewide occupational units, essentially as set out in the proposed rule published on December 24, 1974. The rationale and purposes of the Commission's rule, explicated more fully elsewhere (supra, p. 1327 et seq) (A. 29-30, 32-33, 38-41) are clear - i.e., only a coherent structure containing a limited number of broad, occupational units can most successfully accommodate the tripartite statutory standard for unit determinations, and avoid, on the one hand, the chaos of fragmentation and, on the other, the rigidity and unwieldiness of "monolithism". A limited-unit structure - albeit imperfect - not only groups employees who share a significant community of interest or who, stated otherwise, are not torn by inherent conflicts of interest, but also provides a framework within which the employees' right to effective representation is best preserved and the Commonwealth's performance of its public function best assured.

The procedural vehicle utilized by the Commission serves two primary

purposes:[19] (1) it facilitates the equitable formation of units[20] and thereby expedites the commencement of collective bargaining - the professed objective of all interested parties; and (2) it permits the participation of all interested organizations and individuals - a procedure which is not only fair but also conducive to the intelligent formulation of policy. While innovative in its procedure, the Commission has, in the substantive area, borrowed heavily from the experience of other jurisdictions, selecting what it considers the best aspects of their experiences, and adapting them to the unique requirements of the employees of the Commonwealth of Massachusetts. In addition, we have carefully considered the recommendations of highly respected commentators and scholars. On the basis of the foregoing, the Commission adopts the following standards for state employee units.

B. The Units

Non-professional

UNIT 1 --- THE ADMINISTRATIVE AND CLERICAL UNIT

While an overall, non-professional unit is too broad and too divisive to insure effective representation, and obscures fundamental communities of interest, the Commission concluded that only the most basic divisions were required to create optimum units. Units 1 and 2 reflect the historical differences between employees who work with their hands in a production capacity and those employees who perform essentially administrative, "support" duties and do not "produce" in the traditional sense of the term.[21] Clerical and administrative employees in Unit 1 share similar working conditions, including, most notably, an office environment; and perform similar tasks of paperwork and of production, filing, distribution, and examination of documents. Their work is almost exclusively indoors and does not normally require heavy physical labor. They generally work with only light office machinery such as typewriters, other

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[19] See A. 12, 15-25 for a fuller treatment of the utility of rule making.

[20] Indeed, the rulemaking proceeding witnessed the adoption of standards for state employee units in approximately ten weeks - a result which plainly could not have been realized under the traditional case-by-case approach. The Massachusetts experience has persuaded at least two other jurisdictions, California and Florida, to consider the utility of a rulemaking proceeding in public sector unit determinations.

[21] Consolidation of Unit 1 and Unit 2 on a statewide basis would ignore their separate concerns, alluded to supra, 1337 and preclude the effective representation required by statute. The community of interest of blue collar employees, as demonstrated in the text, is clearly distinct from that of white collar employees. Moreover, since the lines of supervisory authority for blue and white collar employees are clearly demarcated, we conclude that separate units will not cause any great administrative problems for the employer. Application of the statutory standards thus requires that blue and white collar employees, who have distinct negotiating interests, be represented in separate bargaining units.

office equipment, telephones and the like. Career ladders, promotion and transfers are almost entirely from and to other white collar jobs. Moreover, the white collar employee typically has contact in his work only with his cohorts. Although clerical positions may be widely distributed geographically, they are essentially similar and, at least at the lower pay grades, interchangeable. Finally, the position descriptions indicate that white collar employees are supervised by employees who perform - or have performed - similar duties. For these reasons we believe that, notwithstanding its size and diversity, the negotiating concerns of Unit 1 are sufficiently similar to assure a cohesive community of interest.

The regulation adopted today reflects two modifications of the earlier proposed standards for Unit 1. Thus, clerical and administrative employees who work in an institutional setting were shifted from an institutional unit to the clerical and administrative unit. Their proposed placement in an institutional unit was predicated upon the NLRB's analagous placement of so-called "plant clericals" in production and maintenance units in the private sector. At the February 10-11 hearing, however, the Employer, supported most prominently by the MSEA,[22] strongly opposed a unit structure in which the employees in the same job classification are placed in different units. See also Brief for the Employer at 42-45. The Commission acceds to the wishes of the parties and places institutional clerical and administrative employees in Unit 1 where, the Commission anticipates, their interests will be adequately protected.

Secondly, the Commission transferred "investigative" employees from Unit 1 to the Law Enforcement unit. Examination of the record persuaded the Commission that investigative employees share a greater community of interest with law enforcement personnel than with Unit 1 employees since they often work outside of the office to which they are assigned, and are responsible for assuring compliance with prescribed health, safety and welfare standards. Moreover, since code violations are punishable by fines or other sanctions, investigative employees may, - as in the case of law enforcement personnel - be required to "participate" in the criminal justice system.[23]

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[22] See testimony of Mark Dalton, General Counsel of MSEA - Tr. of Feb. 10 at p. 61-62.

[23] Although the Commission's placement of investigative employees, most of whom are non-uniformed and have limited jurisdiction in the area of law enforcement, may, to some extent, "corrupt" a pure law enforcement unit, we conclude that, on the basis of a "felt" community of interest, they should be integrated into Unit 5 where they will be less "submerged" than they would have been in Unit 1. No unit structure is ideal or comfortably embraces all employee groups. The placement of investigative employees in Unit 5 is certainly not ideal or free from doubt but, in the Commission's considered judgment, is the best available option.

State Bargaining Unit Rules

UNIT 2 --- SERVICE, MAINTENANCE AND INSTITUTIONAL

Unit 2, which represents the second major division of non-professional employees, includes all employees not engaged in clerical, administrative or office-related tasks excepting only employees engaged in (1) building trades and crafts; (2) institutional security; and (3) law enforcement. The Unit includes employees who labor with their hands under conditions which may be arduous or hazardous. Blue-collar employees have historically been interested in bargaining over safety equipment, early retirement, clean-up time, travel time to and from remote job assignments, disability benefits, employer-provided work uniforms, and other items which are typically of little or no concern to the office employee. As with the employees in Unit 1, Unit 2 employees are normally supervised by employees performing similar duties. They have little or no interchange with office and clerical employees, and most promotions and transfers are from other unit jobs.

The Commission's rule, unlike the proposed rule of December 24 (supra, p. 1322, n. 6), merges institutional and noninstitutional employees into a general "blue-collar" unit. While noninstitutional blue-collar workers have historically been represented separately from their institutional counterparts - in recognition, perhaps, of a separate "felt" community of interest[24] - the Commission, consistent with its commitment to the largest possible units which protect the right to effective representation or employees who share a community of interest, concludes that, absent a request from the historical representatives of non-institutional laborers for their separate representation, a merger of the two groups into a general blue-collar unit is appropriate.

UNIT 3 --- BUILDING TRADES AND CRAFTS

As with the basic division between blue-collar and white-collar employees, the creation of a separate bargaining unit for traditional craft employees is justifiable primarily on historical grounds. Unlike other blue-collar employees, workers in the building trades possess highly-developed skills, which traditional trade-entry requirements reflect. Normally, either a formal or informal apprenticeship is a condition precedent to entry into a trade. There is little or no inter-craft transfer - carpenters, for example, do not perform the tasks of an electrician, plumber, painter, pipe-fitter, or bricklayer. Higher-level tradesmen earn significantly more than other blue-collar employees - a factor which evidences their distinct interests. Craft occupations are traditionally jealous of their jurisdiction within the trades, and have always resisted inclusion with other, less skilled employees. In view particularly of their separate bargaining history, their strong concern with the preservation of craft lines, and possession of a high level of skill, the Commission concludes that craft employees have sufficiently distinct interests to warrant their placement in a separate unit.[25]

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[24] Thus, noninstitutional laborers work on various projects, mostly outdoors, and are not assigned to a particular institution.

[25] The Maintenance Trades Council of New England, AFL-CIO expressed strong support for a separate building trades and crafts unit (See Letter and Motion to Dismiss of Edward McManus on October 8, 1974 and Tr. of Feb. 10 at 148).

State Bargaining Unit Rules

UNIT 4 --- INSTITUTIONAL SECURITY

Institutional security employees, most of whom are employed by the Department of Corrections, have such unique interests and concerns that their placement in a separate unit scarcely requires justification. Unlike other blue-collar, non-professional employees, the correction officers perform largely custodial duties, and, to a lesser extent, counseling and educational functions. Indeed, the Commission submits that their performance of combined custodial and counseling functions persuasively evidences their unique status. The conditions under which correction employees labor are nearly unique. Most work within institutions or other correctional facilities in direct contact with prisoners or inmates who have been confined for anti-social behavior. As a consequence, they face a continuing risk of physical harm. Because of the nature of these institutions, correctional employees have work contact only with their colleagues. Moreover, to a greater extent than with other occupational groups of state employees, the correctional officer's terms and conditions of employment are influenced by the individuals they "serve". Thus, the inmates are frequently strongly organized (e.g., National Prisoners Rights Association - SCRX 2) and utilize their collective strength in a manner that may have a significant impact upon the employment conditions of the correctional employees. Indeed, representation of correctional employees in a separate unit also benefits the Employer because the employee organization with which it negotiates has - or will quickly develop - the specialized knowledge and expertise in the corrections field which is indispensable to the intelligent negotiation and administration of "uniquely - correctional" contract provisions. The Commission, accordingly, concludes that correction employees enjoy a clearly identifiable and perceived community of interest, which dictate their representation in a separate unit,[26] including therein only security personnel more appropriately placed here than elsewhere.

UNIT 5 --- LAW ENFORCEMENT

The Law Enforcement Unit, whose unique character is apparent, is comprised largely of the state police in the Department of Public Safety, the Registry inspectors in the Registry of Motor Vehicles, and the MDC police officers. They are all, by and large, armed and uniformed, and subject to a rigid chain of command and quasi-military discipline. Although assigned to a particular location, they travel widely in the course of their duties, normally by automobile. They are primarily concerned with the enforcement of the laws of the Commonwealth, in the course of which they participate in the criminal justice system. Their job is arduous and dangerous, and demands compliance with rigid training requirements and high standards of conduct. Specialized contract requirements concerning safety regulations, required overtime, details, use of firearms, or emergency situations are difficult to integrate with provisions

[26] The Commission notes additionally that numerous employee organizations expressed an interest in representing an exclusively "corrections" unit. See SCR 110; SCR 118.

typically incorporated in contracts negotiated for a general nonprofessional unit.

Experience in municipal collective bargaining and examination of the unit structures in other jurisdictions (A. 34, 35, 36, 37) confirm that law enforcement employees are seldom grouped in units with non-law enforcement personnel. In Massachusetts, for example, the three major groups identified supra have historically been represented in units containing only law enforcement employees. In short, since all three groups are concerned with law enforcement, have powers of arrest, participate in the criminal justice system, and have public safety responsibilities, the Commission concludes that they may be appropriately combined in a separate unit for purposes of collective bargaining. While so concluding, we are not unaware that their benefit structure is not entirely uniform[27] and that they do discharge separable responsibilities and obligations. We note, however, that the statutory standard requires only a community - not an identity - of interest, and that no inherent conflict precludes the consolidation of the three groups in a single unit. A combined law enforcement unit, we submit, is the largest possible unit consistent with the statutory standards.

Professional

1. An Overview

Collective bargaining by professional employees presents distinct questions of unit determination, as reflected by the special requirements for professional employees in almost every labor relations statute in both the public and private sectors. For example, the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, et seq.) provides that professional employees may not be included in bargaining units of nonprofessionals unless they vote for inclusion (Section 9(b)(1)). The labor relations laws of the Commonwealth - including, of course, the statute with which we are now concerned - and of other jurisdictions have similar provisions. See, e.g. Mass. Gen. Laws Ch. 150E, Section 3 and 150A, Section 5(b). While Chapter 150E makes clear that the legislature intended the creation of at least one unit of professional employees, it is silent with respect to the appropriateness of several professional units.

Nonetheless, the Commission, adopting the approach of Wisconsin (A. 34-35), concludes - contrary to the Employer (Brief at 48-49) - that application of the Section 3 criteria plainly warrants creation of a limited number of professional units, which recognize the disparity of negotiation interests and which, again, strike a reasonable balance between overly-fragmented units incompatible with "efficiency of operations and effective dealings" and monolithic units inconsistent either with a predominant community of interest or with the employees' right to "effective representation". The Commission's grouping of employees

[27] For example, state police participate in a separate retirement plan.

by function, rather than by professional designation, also reflects, we submit, a reasonable accommodation of the particular needs of the various constituencies within the units. Moreover, it is widely accepted that in the earlier stages of organizational activity smaller units are more practical and sensible. See, e.g., Rock, The Appropriate Bargaining Unit Question in The Public Sector: The Problem of Proliferation, 67 Mich. L. Rev. 1001, 1013 (1969). Accordingly, to force professional employees, who are not now organized for wage bargaining into an all-inclusive unit might will unjustifiably retard their organization. Finally, as discussed elsewhere (supra p. 1330), the Commission does not deem unduly burdensome the employer's task of bargaining with a limited number of units.[28]

The Commission's earlier proposed rule retained the flexibility to combine professional groups - a concept which was strongly opposed by most parties who expressed a view. See, e.g., Testimony of Mark M. Grossman, General Counsel of OER (Tr. of Feb. 10, at 104). In light of the Commission's stated objective to provide a unit structure which will expedite the commencement of collective bargaining, and in accordance with the wishes of the parties, we have determined to establish fixed professional units. On the other hand, avoidance of an unwarranted fragmentation precludes creation of the requested further subdivisions of the professional units.[29]

2. The Units

UNIT 6 --- ADMINISTRATIVE

The "Administrative" unit combines the proposed units 6(a) and (b)[30] (supra, p. 1322, n. 6) for essentially two reasons. First, the proposed legal unit contained only approximately 100 employees widely dispersed throughout every department and agency - a circumstance, which, the Commission concluded, strongly militated against their representation in a separate unit and which, in any event, would likely have precluded an effective exercise of their collective strength in negotiations with the Employer. Secondly, and more importantly, a combined Unit 6 creates a professional unit which substantially complements the nonprofessional clerical and administrative unit (Unit 1) in that they perform correlative functions in an integrated policy-making process. Indeed, Unit 6 professionals frequently supervise, and enjoy significant interchange with, Unit 1 employees.

Like their nonprofessional counterparts, Unit 6 employees are employed in an office environment, rather than in the field or in an "institution". They

[28] In any event, when collective negotiations finally commence, the Commonwealth will have had ample opportunity to prepare itself.

[29] Nearly every profession, including registered nurses, psychologists, educators, scientists, and engineers, urged upon the Commission units comprised exclusively of its members. See, e.g., Tr. of Feb. 10, at 57, 111. Local 509 of the SEIU suggested a combined unit of social and rehabilitative employees.

[30] Proposed units 6 (a) and (b) were derived from the Wisconsin model, upon which, as noted above, the Commission's professional units are generally patterned.

serve a staff function which focuses upon the management and administration of state government rather than upon the "client service" functions largely performed by the other four professional units. The Commission concludes that, notwithstanding a conceded diversity in Unit 6, a community of interest exists, including similarity of working conditions, functional integration and a common purpose and role, sufficient to warrant creation of a combined unit.

UNIT 7 --- HEALTH CARE

The "Health Care" Unit, which combines the proposed units 6(c) and (d) (supra, p. 1322, n. 6), includes all health care professionals who, we submit, share a predominant community of interest which will enable them to secure effective representation.[31] Thus, most health care professionals work in a hospital setting, rather than in an office, and have frequent interchange and contact in furthering their mutual goal of providing health care services to patients. Indeed, it cannot seriously be questioned that health care professionals perform substantially complementary functions, which, consistent with the oft-repeated statutory criteria, justify their inclusion in a single unit, notwithstanding a history of separate representation.[32]

UNIT 8 --- SOCIAL AND REHABILITATIVE[33]

UNIT 9 --- ENGINEERING AND SCIENCE

UNIT 10 --- EDUCATION

Unit 8 includes professional employees who are responsible for administering social welfare programs, and distributing benefits provided thereunder, as well as for providing counseling services to juveniles, elderly, the handicapped and other disadvantaged groups. The work is often performed in the field, with personnel assigned from widely-scattered branch offices of the departments within Human Services and the Public Health/Mental Health agencies. Productivity

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[31] The inclusion of related technicals in Unit 7, pursuant to the first proviso of the regulation, creates the potential for an even stronger, more comprehensive health care unit which will better serve the interests of the employees, the Commonwealth and the public.

[32] Thus, registered nurses and physicians in the Commonwealth have been represented separately for several years. Indeed, the charter of the Massachusetts Nurses Association expressly restricts units to members of their profession (See Tr. of Feb. 10, at 116). Recognition of the separate bargaining history of physicians and nurses, reflected in the proposed creation of separate patient treatment and patient care units, respectively, was foreclosed by the apparent resistance of separately represented health care employees to inclusion in a combined unit. See, e.g., Tr. of Feb. 10, at 119-120.

[33] The proposed designation of a "social Services" unit, adopted from the Wisconsin model, was changed to "Social and Rehabilitative" to reflect more accurately the composition of the unit.

is frequently measured in terms of "caseload" and emphasis is placed upon developing a continuing relationship with the "service" population. Educational and experience requirements for employment are generally uniform, with specialization occurring at the higher-pay levels. Finally, supervision is typically accomplished by employees with similar background and training. Accordingly, the Commission concludes that the strong, distinct community of interest shared by social and rehabilitative professionals warrants their placement in a separate unit, which will maximize their effectiveness in negotiating issues of general concern.

Unit 9 is composed primarily of engineering professionals, who have a separate bargaining history and share conditions of employment identifiably distinct from those of Unit 7 and 8 employees engaged in clinical and field work, respectively. In addition, the duties of engineers are "project", rather than client or parient, oriented and do not, as in Unit 6, typically require the performance of staff or administrative functions. Finally, the engineers, who are largely employed in the Public Works Department, are sufficiently numerous to justify separate representation.[33]

A separate "Education" unit requires little justification. Municipal and state employees engaged in providing educational services enjoy a history of collective bargaining through several employee organizations which compete vigorously for representation status among educators alone. A similarity of training and educational requirements for employment, coupled with common skills and supervision, close contact, interchange, and promotion and transfer within the occupation, comprise a substantial community of interest. Additionally, unlike their counterparts in the health care profession, employee organizations in the field of education have previously displayed a willingness to represent related professional employees. For example, municipal education units have included librarians, guidance counselors and, less frequently, school nurses - a flexibility which supports the Commission's optimism that they are capable of representing the diverse professionals who provide educational services for the Commonwealth. Finally, the Commission concludes, consistent with its mandate to avoid fragmentation and preserve "efficiency of operations", that the education unit is sufficiently broad to warrant separate representation.[34]

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[33] Conversely, the scientists, like the lawyers, are too few in number to constitute a separate unit and, accordingly, have been combined with engineers largely because of the similarity of their training and education. In any event, the Commission notes that the designation "scientist" does not reflect a homogeneous, identifiable class which might form a coherent unit. Instead, "scientist" embraces a range of specialists, who have diverse interests.

[34] The Commission eliminated a proposed "technical" unit (supra, pp. 1320, n. 3,; 1322, n. 6) primarily on the grounds that the technical employees who would have comprised such a unit have little or no separate and distinct community of interest and, in fact, have proven difficult to identify. Additionally, the Commission notes the absence of significant organizational interest in representing technical employees in a separate unit, rather than in a unit of allied professionals. Accordingly, technical employees - unless included in one of the professional units - will be placed either in Unit 1 or 2, depending upon the nature of the work performed.

State Bargaining Unit Rules

THE PROVISOS

The first proviso, which contemplates the inclusion of technical employees in units of related professionals, permits a consolidation of employees performing functionally-integrated duties and sharing frequently similar career objectives. The proviso, which was supported by several organizations and strongly opposed by none, does not contemplate the creation of additional units. Accordingly, the Commission adopts the proviso and retains the flexibility to "accrete" technicians to related professional units.

The second proviso, which permits the creation of one or more supervisory units, reflects the importance the Commission attaches to the issue of unit placement of supervisory employees, which has an evident impact upon the effective operation of state government. See, e.g., Rains, Collective Bargaining in the Public Sector and the Need for Exclusion of Supervisory Personnel, Labor Law Journal (May 1972)(p. 275); City of Chicopee School Department, MCR-1228 (Nov. 18, 1974). Nonetheless, the issue received little or no attention at the hearings, although MSEA did express the view that separate supervisory units would be appropriate Tr. of Feb. 10, at 63. In light of the inadequacy of the record and the public significance of the issue, the Commission retains the second proviso to its rule.

Finally, under the third proviso, the Commission may find appropriate separate units for employees of Constitutional officers, the judiciary and the General Court - a flexibility which is clearly warranted in view of the substantial constitutional questions, and practical difficulty, presented by their inclusion in units which negotiate with the Commissioner of Administration and Finance. The record, moreover, is of no assistance to the Commission. Thus, Bennett testified that OER had contacted the other Constitutional officers and that they had expressed a desire to be represented by OER in matters of collective bargaining. Tr. of Feb. 10 at 11-12. Conversely, however, representatives of Local 254 of SEIU testified that, at least with respect to employees of the State Lottery Commission, both the Employer and the employee organizations desired to retain their separate status. Tr. of Feb. 10 at 89. Moreover, after the close of the hearing, the Auditor of the Commonwealth, the Attorney General, and the State Treasurer informed the Commission that they do not wish to be represented in collective bargainlng by the Commissioner of Administration and Finance and that, in any event, such an arrangement was of questionable constitutional validity. Because of the difficult legal issues presented and the conflicting state of the record, the Commission retains the proviso of the proposed regulation (supra, p. 1322) and includes within its scope employees of the judiciary and the General Court.[35]

[35] Except with respect to proposed separate units for employees of the judiciary and of the General Court, the provisos adopted herein were set forth in haec verba in the December 24 regulation.

CONCLUSION

The standards for appropriate state employee units adopted herein reflect, we submit, a fair compromise between several competing interests. On the basis of the record before it, the Commission further submits that ten units are the fewest it can create which are internally consistent, and yet comprehensive, or which, stated otherwise, do not contain the seeds of potentially destructive conflicts of interest. Finally, the Commission submits that a ten-unit structure is indisputably compatible with the legislative design reflected in Chapter 150E, Section 3.

No unit structure, however, is immutable. The Commission recognizes the fallibility of its judgments in public sector unit determinations and states its willingness to re-examine the matter herein if experience establishes that it has significantly erred. Without the benefit of that experience, however, the Commission is at least secure in the knowledge that the interests of its constituences - the Commonwealth, the public, the executive brance and the employee organizations - have been fully and fairly considered in a proceeding which was peculiarly adapted toward that end.

The end product is one of compromise, - acceptable, we hope, to many but totally satisfactory, we realize, to few. Yet the result is the most equitable we can achieve consistent with our responsibilities under the law. Its effectiveness will depend upon cooperation among groups which historically are strongly independent and jealous of their prerogatives. Only with their cooperation, however, will the unit structure created today be able to serve as an effective vehicle for the expanded state employee collective negotiations which Chapter 150E mandates.

APPENDIX

I THE COMMISSION PROPERLY EXERCISED ITS STATUTORY RULE-MAKING AUTHORITY

A. Statutory Authority to Adopt Rule

Section 2A of Chapter 1078 of the Acts of 1973, amending Section 9R of Chapter 23 of the General Laws, provides, in pertinent part:

> "The commission shall have authority from time to time to make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of...Chapter 150E."

The statutory grant of general rule-making power is supplemented by a specific grant of authority contained in Chapter 150E, Section 3, which provides that the Commission:

> "...shall prescribe rules and regulations and establish procedures for the determination of appropriate bargaining units..."

The Commission respectfully submits that the foregoing statutory provisions

establish beyond peradventure its authority to promulgate the attached rule creating standards for state employee units - a position which is fully supported by applicable court decisions and is in accord with the intent and wishes of the Legislature.[1]

In American Trucking Associations v. U.S., 344 U.S. 298 (1953) the Supreme Court, rejecting a challenge to the authroity of the Interstate Commerce Commission ("ICC") under a grant of general rule-making power[1a] to promulgate a rule controlling leasing practices of motor carriers, stated:

> "...[A]ppellants have framed their position as a broad-side attack on the Commission's asserted power. All urge upon us the fact that nowhere in the Act is there an express delegation of power to control, regulate or affect leasing practices [footnote omitted], and it is further insisted that in each separate provision of the Act granting regulatory authority there is no direct implication of such power. Our function, however, does not stop with a section-by-section search for the phrase 'regulation of leasing practices' among the literal words of the statutory provisions. As a matter of principle, we might agree with appellants' contentions if we thought it a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. But no great acquaintance with practical affairs is required to know that such prescience, either in fact or in the minds of Congress, does not exist [citations omitted]."

Accordingly, the Court concluded that notwithstanding the absence of a specific statutory reference to leasing practices, the Commission acted within its authority under Section 204 (a)(6) of the Motor Carrier Act by promulgating the challenged rule. In so concluding, the Court rejected the contention that the rules - whose purpose was "to protect the industry from practices detrimental to the maintenance of sound transportation services consistent with the regulatory system" established by Congress - represented "an attempt by the Commission to expand its power arbitrarily" (344 U.S. at 310). Rather, in the Court's view, the purpose of the rule, which was reasonably adapted to the administration of the Act and not inconsistent with any statutory provision,

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[1] The constitutionality of legislative delegation of rule-making authority to an administrative agency has been sustained by the Supreme Judicial Court. See, e.g., Brodbine v. Inhabitants of Revere, 182 Mass. 598, 603 (1903). Compare Lichter v. United States, 334 U.S. 742, 785 (1948); Avent v. United States, 266 U.S. 127 (1924). The touchstone in determining the constitutionality of the delegation is whether the legislative body articulated an "intelligible principle" to guide the agency. J.W. Hampton & Co. v. U.S., 276 U.S. 394, 409 (1928).

[1a] Section 204 (a)(6) of the Motor Carrier Act required the Commission "[t]o administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration."

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strongly supported the proposition that its promulgation was authorized by Congress. More recently, the Supreme Court has stated that a rule promulgated under a general grant of rule-making power is valid if it is "reasonably related to the purposes of the enabling legislation" Mourning v. Family Publications Service, 411 U.S. 356, 369 (1973);[2] Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 280-281 (1968). Compare In re Dalomba's Case, 352 Mass. 598, 603 (1967).

The oft-expressed judicial preference for rule-making over adjudication in the development of new agency policy provides further support for the Commission's assertion of its authority to promulgate substantive rules. Thus, in National Petroleum Refiners Association v. F.T.C., 482 F2d 672, 683 (C.A.D.C., 1973) the Court, while conceding that the "judicial trend favoring rule-making over adjudication for development of new agency policy" did not dispose of the question of the Commission's authority to promulgate rules, nonetheless concluded that the trend suggests that:

> "...contemporary considerations of practicality and fairness - specifically the advisability of utilizing the Administrative Procedure Act's rule-making procedures to provide an agency about to embark on legal innovation with all relevant arguments and information, 5 U.S.C. Section 553 - certainly support the Commission's position...[that it has the authority to promulgate the rule in question]."

The judicial trend favoring rulemaking is reflected in a series of Supreme Court decisions. Thus, in SEC v. Chenery Corp., 332 U.S. 194 (1947), the Supreme Court concluded that the choice between proceeding by adjudication or rule-making "lies primarily in the informed discretion of the administrative agency." Moreover, the Court urged that

> "...[t]he function of filling in the interstices of the Act should be performed, as much as possible, through the quasi-legislative promulgation of rules to be applied in the future..."

More recently, in N.L.R.B. v. Wyman-Gordon Co., 394 U.S. 759 (1969) the Court, rejecting the claim of the National Labor Relations Board that it has discretion to promulgate rules in adjudicatory proceedings, observed that the rule-making provisions of the Administrative Procedure Act were designed to "assure fairness and mature consideration of rules of general application." While sustaining the application of the "Excelsior" rule to Wyman-Gordon in a

[2] In Mourning v. Family Publications Service, supra, the Court upheld the authority of the Federal Reserve Board to promulgate rules under the Truth-in-Lending Act, 15 U.S.C. Section 1601 et. seq, specifying new cost and financing disclosure requirements for merchants selling goods payable in more than four installments. Section 1604 directs the Board to "prescribe regulations to carry out the purposes of this subchapter."

subsequent adjudicatory proceeding,[3] six of the justices indicated that under some circumstances formulation of new agency policy must be accomplished by rule-making rather than by adjudication. Indeed, Justice Douglas, admonishing the Board for its long-continuing failure to utilize its rule-making powers, stated:

> "The rule-making procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that are forthcoming. It gives an opportunity for persons affected to be heard...Agencies discover that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice...This is a healthy process that helps make a society viable. The multiplication of agencies and their growing power makes them more and more remote from the people affected by what they do and makes more likely the arbitrary exercise of their powers. Public airing of problems through rule-making makes the bureaucracy more responsive to public needs and is an important brake on the growth of absolutism in the regime that now governs all of us...Rulemaking is no cure-all; but it does force important issues into full public display and in that sense makes for more responsible administrative action."

And in N.L.R.B. v. Textron, Inc., 416 U.S. 267 (1974) the Court, although sustaining the Board's use of adjudicative, rather than rulemaking proceedings to determine whether an employer's "buyers" are managerial employees excluded from coverage of the Act, observed that "...there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act..." (85 LRRM at 2955). The Court also reaffirmed the principle of Chenery that an agency's use of either its adjudicative or rulemaking authority to formulate policy lies "within its informed discretion." See also State v. Hubschman, 195 A.2d 913, 915-916 (1963) (Courts look favorably upon the power of administrative agencies to promulgate rules in furtherance of purposes for which they have been created); Cammarata v. Essex County Park Comm., 26 N.J. 404, 140 A.2d 397 (1958).[4]

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[3] In Excelsior Underwear, Inc., 156 NLRB 1236 (1966) the Board announced a new policy, which it declined to apply retroactively, requiring an employer to submit, prior to a Board election, a list of the names and addresses of employees eligible to vote in the election.

[4] One commentator articulated the factors which an agency might consider in determining whether to proceed by rulemaking or adjudication:

> "Determination of whether an agency should proceed in the development of policy on an ad hoc basis or through the more formal route of rule-making involves the exercise of judgment on a multitude of factors; among them are the nature of the problem presented, the information available concerning that problem, the practicability of formulating from that information a principle of general applicability, the advantages to the public gained from promulgation of definitive guides, the necessity of speed in the disposition of problems, the desirability of avoiding retroactive changes of law, and the soundness or justice of the policy as developed

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Applying the foregoing principles, we submit that the Commission's authority to promulgate rules creating standards for state employee bargaining units is clearly established. As a threshhold matter, it is settled that a duly adopted rule or regulation of an administrative agency enjoys a presumption of validity. See, for example, Druzik v. Board of Health of Haverhill, 324 Mass. 129 (1949); Hoffenberg v. Kaminstain, 396 F.2d 684, 685 (C.A.D.C., 1968), cert. denied 393 U.S. 913; United States v. Boyd, 491 F.2d 1163, 1167 (C.A. 9, 1973). Thus, in Druzik the Supreme Judicial Court stated:

> "The regulation stands on the same footing as would a statute, ordinance or bylaw. [citations omitted] All rational presumptions are made in favor of the validity of every legislative enactment. Enforcement is to be refused only when it is in manifest excess of legislative power. [citations omitted] It is only when a legislative finding cannot be supported upon any rational basis of fact that reasonably can be conceived to sustain it that a court is empowered to strike it down. [citation omitted] If the question is fairly debatable, courts cannot substitute their judgment for that of the Legislature." (324 Mass. at 138-139).[5]

And, as noted above, an agency which has been granted a general rule-making power "to carry out the provisions" of the Act possesses thereby the authority to promulgate a substantive rule, which, if reasonably related to the legislative design, is not subject to challenge. See, for example, Mourning v. Family Publications Service, supra. Compare Rex Chainbelt, Inc., v. Volpe, 482 F.2d 757, 761 (C.A. 7, 1973); Johnson's Professional Nursing Home v. Weinberger, 490 F.2d 841, 844 (C.A. 5, 1974); Barry & Barry, Inc., v. State Dept. of Motor Vehicles, 81 Wash. 2d 155, 500 P.2d 540, 542 (1972) ("We are convinced that in a situation such as this, where an administrative official is authorized by statute to approve contracts or fee schedules in specified individual cases, and is also authorized to issue rules and regulations to carry out the purposes of that statute, then he may issue rules or guidelines delineating the types of contracts or fee levels for which approval will be automatic under usual circumstances."); Boehl v. Sabre Jet Room, Inc., 349 P.2d 585, 587-588 (Alaska, 1960).

The "reasonable relationship" of the Commission's rule to the legislative purposes of Chapter 150E cannot seriously be questioned. Thus, in enacting Chapter 150E, which greatly expanded the scope of bargaining for state employees, the Legislature contemplated that the exercise of the rights provided state employees therein not be unduly deferred. Accordingly, we submit that

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[4](cont'd)
in one manner or the other. [footnote omitted] Such an exercise of judgment produces no black and white distinctions; it yields instead results which are entitled to respect only as the product of an informed discretion. [footnote omitted] " Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 Yale L.J. 729 (1961).

[5]As Kenneth C. Davis stated: "Courts are and should be reluctant to find legislative intent to forbid rules that in no way conflict with the statute." Davis, Administrative Law Text, 145 (3d ed. 1972).

utilization of a rule-making proceeding - rather than case-by-case adjudication - to develop standards for appropriate units will more fully effectuate the legislative design by facilitating the formation of units and thereby expediting the commencement of collective bargaining. Indeed, by "particularizing statutory standards through the rulemaking process" (Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 609, 626 (1973) the Commission avoids the delay which would result if it were required to elaborate standards under Section 3 on a case-by-case basis and dismiss petitions seeking certification in units not appropriate for collective bargaining. Compare National Nutritional Foods Association v. Weinberger, 376 F.Supp. 142, 147 (SD. N.Y., 1974).[6]

None of the objections raised by employee organizations to the Commission's assertion of its rulemaking authority withstands analysis. Thus, it was objected that the specific grant of rulemaking power contained in Chapter 150E, Section 3 merely authorized the Commission to prescribe "procedural" rules. Such a construction, however, ignores the clear dichotomy between "substantive" and "procedural" that the Legislature created in mandating the Commission to "prescribe rules and regulations and establish procedures..." for the determination of units. If the Legislature had intended to limit the scope of the Commission's rule-making authority to procedural matters, it could readily have done so by appropriately restrictive language. By the same token, the Commission also rejects the contention that absent a "question concerning representation" the Commission is without statutory authority to promulgate its rule. The short and conclusive answer to this contention is that the Commission's rule merely establishes standards or guidelines for units which will define the circumstances under which representation petitions filed pursuant thereto will be processed. Compare National Petroleum Refiners Association v. F.T.C., supra, 482 F.2d at 675 in which the Court sustained the legality of the Commission's practice of promulgating rules "defining the statutory standard of illegality" and thereby "narrow[ing] the inquiry" in subsequent adjudicative proceedings.

> "The Commission's assertion that it is empowered by Section 6(g) to issue substantive rules defining the statutory standard of illegality in advance of specific adjudications does not in any formal sense circumvent this method of enforcement. For after the rules are issued, their mode of enforcement remains what it has always been under Section 5: the sequence of complaint, hearing, findings, and issuance of a cease and desist order. What rule-making does do, functionally, is to narrow the inquiry conducted in proceedings under Section 5(b)."

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[6] Rules which are reasonably adapted to the administration of a legislative act and are not inconsistent with any express statutory provisions have the force and effect of law. In re DaLomba's Case, supra, 352 Mass. at 603; GSA v. Benson, 415 F.2d 878, 880 (C.A. 9, 1969); Whattoff v. United States, 355 F.2d 473, 478 (C.A. 8, 1966).

Compare F.P.C. v. Texaco Inc., 377 U.S. 33, 39 (1964) ("The statutory requirement for a hearing...does not preclude the Commission from particularizing statutory standards through the rule-making process and barring at the threshold those who neither measure up to them nor show reasons why in the public interest the rule should be waived"). See also Barry & Barry, Inc. v. State Department of Motor Vehicles, supra. Only upon receipt of a petition, and investigation thereof, must the Commission determine "reasonable cause to believe that a substantial question of representation exists..." Chapter 150E, Section 4. Moreover, the related suggestion that promulgation of the proposed rule is inconsistent with Chapter 150E, Section 2, which, it is contended, places upon employees the initiative for self-organization, again ignores the fact that the creation of standards for state employee units in no manner circumvents the policy underlying Section 2 but merely serves to "narrow the inquiry" in the processing of petitions which substantially conform to the established guidelines.

Finally, an objection was raised that creation of standards for state employee units through rulemaking rather than ad hoc adjudication would "thwart" application of the statutory criteria which the Commission must utilize in determining the appropriateness of units.[7] The Commission, however, fails to perceive how use of its rulemaking authority either conflicts with, or precludes application of the enumerated statutory criteria. Indeed, the adaptability of rulemaking proceedings to unit determinations was considered by Davis, a leading authority on administrative law, who concluded:

> "The Labor Management Relations Act provides: 'The Board shall decide in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . .' [footnote omitted] Do the words 'in each case' mean that the Board is prohibited from classifying problems, from developing rules or principles, or from relying on precendent cases which establish narrow or broad propositions? The answer has to be clearly no; the Board may decide 'in each case' with the help of such classifications, rules, principles, and precedents as it finds useful. The mandate to decide 'in each case' does not prevent the Board from supplanting the original discretionary chaos with some degree of order, and the principal instruments for regularizing the system of deciding 'in each case' are classifications, rules, principles, and precedents. Sensible men could not refuse to use such instruments and a sensible Congress would not expect them to." K.C. DAVIS, Administrative Law Text 145 (3d. ed. 1972).

Certainly, if the Board, under a statute which directs it to decide the appropriate unit "in each case", may, in establishing units, rely upon principles embodied in a rule, a fortiori the Commission has the similar authority under a statute which expressly requires it to "prescribe rules and regulations and

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[7] Chapter 150E, Section 3 requires that the appropriate bargaining unit "shall be consistent with the purposes providing for stable and continuing labor relations, giveing due regard to such criteria as community of interest, efficiency of operations and effective dealings, and to safeguarding the rights of employees to effective representation."

establish procedures for the determination of appropriate bargaining units..." In any event, as pointed out above, the rule adopted herein merely establishes standards or guidelines for the determination of appropriate units, which will serve to "narrow the inquiry" in subsequent representation proceedings.

The Federal Trade Commission ("FTC") rejected a similar challenge to its statutory authority to conduct a rule-making proceeding in conjunction with its adoption of a trade regulation which required disclosure to the consuming public of the hazards of cigarette smoking. In support of its claimed authority to promulgate the challenged regulation, the FTC pointed not only to a legislative grant of general rule-making authority[8] but also to the "basic purpose and design of the Trade Commission Act as a whole...[which indicated] that the Commission should not be confined to quasi-judicial proceedings" (at 8369). Thus, the FTC argued that it was created not "as a simple law-enforcement agency" but as an administrative agency which has the power and the duty "to perform a positive role of policy formulations" which was beyond the capacity of the courts in the trade regulation area. The FTC further argued that the specific delegation by Congress of the function of defining and enforcing the requirements of the Trade Commission Act justified the inference that "Congress did not intend to deny to the Commission the use of procedures, such as the trade regulation rule procedure, which may be necessary to fulfill that function." Finally, the Commission discerned from the "detailed structure" of its enabling statute, which vested in the agency extensive powers of "investigation and inquiry", a Congressional design not to "force the Commission within a narrowly adjudicative mold." Nor, the FTC concluded, did the specific provision of a procedure for obtaining cease-and-desist orders warrant the negative inference that no other procedure was authorized.

On the basis of the foregoing, the Commission respectfully submits that its statutory authority to promulgate rules creating standards for state employee units is fully established not only under Chapter 150E, Section 3 and Section 2A of Chapter 1078 of the Acts of 1973 but also on the basis of the apparent harmony between the purposes which the rule is designed to accomplish and the legislative scheme reflected in the enactment of Chapter 150E.

B. Appropriateness of the Commission's Exercise of its Rulemaking Authority

In order to make the administrative process work more successfully, an increasing number of scholars, judges and bar groups have urged those agencies which possess both rule making and adjudicatory authority - notably the National Labor Relations Board, which has functions similar to those of the Commission -

[8] Section 6(g) of the Trade Commission Act authorizes the Commission "to make rules and regulations for the purpose of carrying out the provisions of this Act." The FTC noted that the challenged procedure was "clearly embraced by the literal terms of the section, and nothing in the legislative history of the Trade Commission Act requires that the provisions be read other than as written." 29 CFR at 8369.

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to make greater use of their rule making powers.[9] The potential for a flexible approach to statutory enforcement is, after all, the raison d'etre of any quasi-judicial agency such as ours. The term "quasi-judicial" may mean less than a court in terms of authority, but it also should mean more than a court in terms of information gathering.[10] Thus, we should not refrain from using quasi-legislative rule-making powers, since it is axiomatic that "where legislatures are unable to devine precise rules for an unforeseen future, administrative agencies are supposed to concentrate their energies on filling out the legislative design."[11]

The same observer has noted that administrative agencies, such as the Labor Relations Commission, were established at a time when the courts were widely regarded as unable to formulate new policy and discharge regulatory functions because of judicial attitudes toward social change, the episodic exposure of the courts to empirical data, and the lack of technical expertise of most judges.[12] Perhaps the most pertinent factors about an administrative agency as compared with a court are the various and potentially more effective means it has for gathering and disseminating information bearing on policy through rule-making proceedings.

As Davis enthusiastically described the advantages of rule-making:

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[9] H. FRIENDLY, The Federal Administrative Agencies, 146-147 (1962); K.C. DAVIS, Administrative Law Treatise, Section 6.13 (1965); Recommendation of Section of Labor Relations Law, American Bar Association, 42 Lab. Re. Rep. 513 (1958); PECK, "The Atrophied Rule Making Powers of the National Labor Relations Board" 70 Yale Law Journal 729 (1961); SHAPIRO, "The Choice of Rule Making or Adjudication in the Development of Administrative Policy," 78 Harvard Law Review, 921, 942 (1965); BERNSTEIN, "The NLRB's Adjudication-Rule Making Dilemma under the Administrative Procedure Act," 79 Yale Law Journal 571 (1970); KAHN, "The NLRB and Higher Education: The Failure of Policymaking Through Adjudication," 21 UCLA Law Review 63 (1973); SILVERMAN, "The Case for the National Labor Relations Board's Use of Rule Making", Labor Law Journal (October, 1974).

[10] BERNSTEIN, Ibid, at 581.

[11] BERNSTEIN, Ibid at 572. SHAPIRO, Footnote 9 supra, at 972, delcares that administrative efforts to give content to general statutory provisions, and to stretch them if necessary to accomplish basic legislative objectives, should be encouraged rather than thwarted. If not persuaded to do so through rule making... agencies may resort to other, less happy alternatives to reach their goal. The result may well be a lack of the deliberation, precision and firm guidance that the legislature sought to obtain when it first established an agency to administer the law."

[12] See also J. Landis, The Administrative Process, 33-34 (1938).

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"The rulemaking procedure is one of the greatest inventions of modern government. It can be, when the agency so desires, a virtual duplicate of legislative committee procedure. Or it can be quicker and less expensive. Affected parties who know facts that the agency may not know or who have ideas or understanding that the agency may not share have opportunity by quick and easy means to transmit the facts, ideas, or understanding to the agency at the crucial time when the agency's positions are still fluid. The procedure is both democratic and efficient.

For making policy affecting large numbers, rulemaking procedure is superior to adjudicative procedure in many ways, including the following six: (1) All who may be interested are systematically notified; for instance, the Administrative Procedure Act requires that notice of rulemaking be published in the Federal Register. Notice to non-parties of contemplated policymaking through adjudication is unusual. (2) Tentative rules are usually published and written comments received before final rules are adopted. In an adjudication a tribunal may adopt a policy without knowing and without having means of discovering what its impact may be on unrepresented parties. (3) Rulemaking procedure which allows all interested parties to participate is democratic procedure. Adjudication procedure is undemocratic to the extent that it allows creation of policy affecting many unrepresented parties. (4) An administrator who is formulating a set of rules is free to consult informally anyone in a position to help, such as the business executive, the trade association representative, the labor leader. An administrator who determines policy in an adjudication is usually inhibited from going outside the record for informal consultation with people who have interests that may be affected. In policymaking through adjudication, either the quest for understanding is likely to be impaired or the tribunal's judicial image is likely to be damaged. (5) Even when retroactive lawmaking through adjudication is not so unfair as to be a denial of due process, the retroactive feature may still be sufficiently unfair that good administrators ought to try to avoid it. Much law-making that is now retroactive can and should be avoided. For this reason alone, prospective rules often should be preferred to retroactive lawmaking through adjudication. (6) Congressional committees often provide useful supervision of administration, even though it is usually unsystematic and spotty. Such supervision can be quite effective in reaching contemplated rulemaking, but is almost always ineffective in influencing administrative lawmaking and policymaking through adjudication."

Davis's endorsement of rulemaking as an expeditious, efficient and democratic vehicle for formulating agency policy reflects the consensus of the commentators. Thus, as identified by Siverman, a primary advantage of rulemaking is

that it exposes the agency to participation in the deliberative process of all those who may be affected by the rule.[13] Apart from considerations of fairness, participation of interested parties in the rule-making process assists the agency in formulating a practical and sound rule. As identified by Bernstein, the principal advantage of rulemaking is that "it provides a clear articulation of broad agency policy", which "should reduce litigation."[14] Kahn, in turn, criticized the NLRB's reliance upon adjudication in Long Island Univ. (Brooklyn Center), 189 NLRB No. 110 (1971), in which the Board concluded, upon an inadequately developed record, that department chairmen were "supervisors." As Kahn noted:

> "The inadequate presentation of the parties in the Brooklyn Center case is a specific example of how the adjudicative process failed to provide the NLRB with an adequate basis for its decisions in its faculty cases. Moreover, the case demonstrates and highlights the inadequacies of the process. The adjudicatory process is heavily dependent upon the skill and willingness of the parties to argue the novel issues of law. Sometimes, however, it is tactically disadvantageous or just too expensive for the parties to provide the Board with the comprehensive data that they desire. Thus, the Board must, in the critical case, sometimes make important policy decisions based on an inadequate record". Kahn, supra, at 101-102.

Perhaps the most comprehensive and carefully documented statement in support of the utility of rulemaking, however, is that prepared by the Federal Trade Commission ("FTC") in conjunction with its adoption of the trade regulation described supra. Statement by Federal Trade Commission of Basis and Purpose of Trade Regulation Rule, 29 Fed. Reg. 8325 (1964). The FTC enumerated several disadvantages - "both to the agency and to the persons subject to its jurisdiction" - in formulating substantive standards and principles "exclusively as a by-product of adjudication" (29 CFR at 8366):

(1) Adjudicative proceedings do not require that all interested persons be given an opportunity to express their views on a proposed "rule" prior to its adoption. Accordingly, not only are parties directly affected by the rule denied the opportunity to critize it or offer alternatives but also the agency is denied the assistance in formulating policy of the very persons most knowledgeable in the area in which the policy will operate.

(2) The record developed in an adjudicative proceeding is not adapted to the needs of developing policy. Accordingly, standards are frequently promulgated which do not accurately or fully reflect the relevant considerations.

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[13] Silverman, supra, at 610.

[14] Bernstein, supra, at 590.

(3) A related disadvantage is that "adherence to the adjudicative method of rule-making precludes the agency from utilizing those methods of gathering and assessing facts that are peculiarly appropriate to the needs and conditions of rule-making" (at 8367).

(4) Formulation of policy exclusively by adjudication may divert an agency from performing "perhaps its primary and most salutary function, which is to provide guidance to the...[persons] subject to its jurisdiction as to the requirements of law and thereby obviate the waste and uncertainty of litigation" (at 8367). The clarification of agency policy, which is best accomplished by a rulemaking proceeding in which all interested parties may participate, discourages litigation and conserves the resources of agency, judiciary and private litigant alike.

(5) Since the focus in adjudication is on "settling a dispute", any policy which may be announced in the course thereof "tends to be done incidentally and without sufficient concern for laying down clear guidelines for the future" (Id.). Indeed, the scope or application of policy which is formulated in a specific factual context necessarily requires many subsequent adjudications for its refinement and clarification.

(6) "Rule-making through adjudication may often be a prohibitively time-consuming, costly and inefficient method of dealing with a problem common to an entire industry." In contrast, a rule-making proceeding "affords an economical method of consolidating common issues of fact and law in a streamlined, but comprehensive and fair, proceeding having few of the cumbrous attributes of litigation" (at 8368).

After summarizing the general disadvantages and correlative advantages of, respectively, adjudication and rulemaking in promulgating policy, the FTC supported its choice of rulemaking as the preferred method for dealing with the problem before it on the grounds that the problem was common to the entire industry and presented novel issues of policy. Accordingly, the FTC concluded that "the trade regulation rule procedure offers a more practical approach to the effective fulfillment of the Commission's statutory responsibilities in the area of cigarette advertising and public health than the conventional method of separate lawsuits" (at 8369).

The reasons advanced by the FTC in support of its action apply with equal force to the Commission's announcement of unit standards through rulemaking. Thus, the Commission was confronted with the problem of how to effectuate most fully the clear legislative intent that the exercise by state employees of their expanded collective bargaining rights under Chapter 150E not be unduly deferred. Primarily because of this broader scope of bargaining, including wages, hours, standards of productivity and performance and other terms and conditions of employment, the "employer", by law, is no longer the "department or agency head" but "the Commonwealth, acting through the Commission of Administration." Accordingly, the Commission was persuaded that a crazy quilt pattern of 250 bargaining units, created under the then-effective Chapter 149 which permitted only limited negotiations over localized working conditions, was no longer appropriate. However, after July 1, 1974, the effective date of Chapter 150E, employee organizations displayed a reluctance to seek the broader

units appropriate under the new law - a reluctance attributable, perhaps, to the fact that no union can comfortably seek a unit which might exclude employees it presently represents.

Upon due consideration, the Commission determined that a case-by-case processing of representation petitions would substantially delay exercise by state employees of their collective bargaining rights primarily because the absence of any clear guidelines or standards with respect to appropriate units for state employees would result in the dismissal of many petitions seeking certification in units not appropriate for collective bargaining. By promulgating its rule, the Commission avoids the delay inevitably attendant upon an elaboration of standards under Section 3 on a case-by-case basis.[15] As the FTC pointed out, clarification and refinement of policy by adjudication requires consideration of many cases and invites prolonged litigation with respect to the scope of "rules" laid down in a specific factual context.

Additionally, the Commission points out that the problem with which it was presented - formation of a coherent unit structure for state employees - was of general concern to the Commonwealth, state employees, employee organizations and, of course, the public, whose interest in the uninterrupted delivery of vital government services is potentially jeopardized by a prolonged deferral of the fruits of collective bargaining which state employees expected to enjoy under Chapter 150E. Accordingly, in view of the nature of the problem and the vital questions of public policy raised, the Commission, cognizant of its responsibility under the law, concluded that a rulemaking proceeding was peculiarly adapted to an equitable and expeditious resolution of the issues. For example, the procedure utilized by the Commission afforded the maximum number of interested parties an opportunity to present data, views or arguments in regard to the Commission's proposed action.[16] Apart from the fairness of providing a vehicle for the presentation of views by all interested persons, the Commission anticipated that maximum participation would greatly facilitate its task in adopting standards which reflected all the relevant criteria. In fact, the Commission had the benefit of presentations, including many very detailed and comprehensive written statements, from the Commonwealth and several employee organizations. Relying upon the presentations of the parties, as well as upon information gleaned from the experience of several states and the analyses of several commentators, the Commission was able to develop what it strongly contends are coherent standards for appropriate units - standards which strike an appropriate balance between the right of employees who share a community of interest

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[15] The Commission typically experiences delays of several months in preparing transcripts of extended hearings. The Commission anticipates that adoption of its rule, with its consequent narrowing of the issues, will greatly expedite disposition of the petitions filed in accordance therewith.

[16] See Note, "The Use of Agency Rule Making", 54 Iowa L. Rev. 1086, 1097, 1098 (1969): "An agency may consider and decide many broad policy issues in adjudicatory proceedings...(but) formulating these broad policies in an adjucication eliminates or defers the participation of many parties who ultimately are affected by the decision. Making these same decisions in a rule making proceeding gives all interested parties notice and a chance to participate in the agency decisions."

to "effective representation", which a proposed two-unit structure would inadequately preserve, and the imperative of safeguarding, for the Commonwealth and the public, "efficiency of operations", which an overly-fragmented unit structure would foreclose.

II THE EXPERIENCE OF OTHER STATES AND SCHOLARLY AUTHORITY CONFIRM THE PROPRIETY OF THE COMMISSION'S UNIT STANDARDS

The adoption by the Commission of a regulation creating standards for 10 state-wide units fully reflects the experience of several states and is supported by leading commentators on the subject of unit determinations in the public sector. The Commission was persuaded that the unit structures for state employees in New York, New Jersey, Wisconsin, Hawaii et al, providing for units ranging in number from five to thirteen, avoided the hazards and difficulties of the present fragmented structure, on the one hand, and the problems of ineffective representation created by consolidation of state employees into two units, on the other.

In applying these dual considerations to the problem of unit determination for their employees, states have generally utilized one of three basic approaches: (a) statewide units along occupational lines; (b) departmental units; (c) occupational units within departments. The recent trend, however, has been toward broad, statewide units because of a recognition that excessive fragmentation and proliferation of units places an undue burden upon the state in carrying out its necessary public purposes while trying to cope with the demands of many competing unions representing employees in units which frequently do not accurately reflect the broad community of interest shared acress unit lines.[17]

Thus, of the 22 states that have formal procedures for recognizing state

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[17] Shaw and Clark identified several reasons favoring the establishment of broad bargaining units in the public sector:

(1) The terms and conditions of employment which are often established pursuant to civil service rules and regulations apply uniformly to broad categories of employees;

(2) The tax revenues of a public employer "uniformly govern financial capacity throughout much of a government..." ("That there is only one pot from which to finance wage increases in the public sector strongly argues for limiting the number of competitors who seek a share of the pot");

(3) A multiplicity of units unnecessarily encumbers the entire negotiation process; and

(4) Unlike the private sector, there is generally no requirement in the public sector that the appropriate unit be determined so as to "assure to employees the fullest freedom in exercising the rights guaranteed by this Act..."
(NLRA, Section 9(b))
Shaw & Clark, Appropriate Bargaining Units in the Public Sector, 51 Ore. L. Rev. 151, 173-174 (1971).

employee organizations, 7 provide exclusively for statewide units either by statute or agency determination: New York; New Jersey; Pennsylvania (with exceptions); Wisconsin (by statute); Kansas; Alaska and Hawaii (by statute). The other 15 states, where the scope of bargaining is frequently narrower,[18] have job classification or department-wide units. As far as the Commission's research discloses, no state's employees are grouped into less than five units.

Perhaps the experience of New York, as described in great detail by Jerome Lefkowitz, Deputy Chairman of the New York Public Employment Relations Board ("PERB"), is most instructive.

Thus, PERB was faced with the task of determining the appropriate barbaining units for 167,000 state employees employed in over 3,700 job classifications representing approximately 90 occupational groupings.[19] Following enactment of the Taylor Law in 1967, the State recognized the Civil Service Employees Association ("CSEA") as bargaining agent for a "general unit" composed of all state employees, excluding members of the state police and professional employees of the State University of New York. Within a few weeks thereafter, PERB received petitions challenging the appropriateness of the general unit and requesting recognition in 25 different bargaining units. The proposed alternate units included diverse occupational, departmental or institutional groupings. Hearings conducted on the various petitions extended for approximately a year and a half, during the course of which both the State and CSEA persuasively argued that "fragmentation would neither be in the public interest nor in the interest of employees," Lefkowitz, The Legal Basis of Employee Relations of New York State Employees 10 (1973). As a consequence, many petitioners modified their positions or withdrew their petitions when it became apparent that "no petition would be granted unless it was supported by evidence that the employees within the petitioned-for unit were unique and that there was a conflict of interest between them and the balance of the employees in the general unit." (Id.) After the completion of the hearings and an initial review of the evidence and the arguments of the parties, the hearing officer reached tentative conclusions concerning the matter before him, as described by Lefkowitz:

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[18] New Hampshire state employees, for example, do not have the right to bargain as to wages. New Hampshire Laws of 1969, Chapter 98-c:4.

[19] The New York statute ("Taylor Law") provided the following criteria to guide the Board in its unit determination:

> "(a) the definition of the unit shall correspond to community of interest among the employees to be included in the unit;
>
> (b) the officials of government at the level of the unit shall have the power to agree or to make effective recommendations to other administrative authority or the legislative body with respect to the terms and conditions of employment upon which the employees desire to negotiate; and
>
> (c) the unit shall be compatible with the joint responsibilities of the public employer and public employees to serve the public."

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> "A determination which opened the door to a multiplicity of units was undesirable. On the other hand, evidence describing the operations of the general units of municipal employees of the cities of Rochester and Philadelphia indicated that there were conflicts of interest among diverse groups of employees and that an attempt to join all the diverse groups in a single unit denied effective representation to large numbers of employees. Contemplation of this evidence in the light of the State's persuasive arguments that the door must be closed to excessive fragmentation led the hearing officer in a direction that he had not contemplated during the course of the hearings... He began to think of a limited number of units, each of which would be cohesive and each of which would encompass a large number of occupations; there would be a substantial conflict of interest between the employees of any one of these units and the employees in any other unit, and the aggregate of these several units would be the totality of State employment in the classified civil service. The intention of the hearing officer was that a small number of units, perhaps no more than eight, could be identified, which units would be sufficiently large to protect the labor relations procedures of the State and sufficiently stable so that further fragmentation would not be invited." Lefkowitz, supra, p. 11.

On the basis of the foregoing analysis, the hearing officer rejected not only the State's request for the establishment of three units - (1) professional employees of the State University; (2) state police; and (3) a general unit of the remaining 149,270 state employees - but also the proposals of various unions for some 25 units. Instead, the hearing officer, with the assistance of PERB's Research Director, identified the "broad outlines" of six units:

(1) "Administrative Services" Unit, comprised of white-collar clerical positions.

(2) "Operational Services" Unit, comprised of blue-collar jobs.

(3) "Inspection and Security Services" Unit, which included correction officers, park police, employees engaged in protection and security functions, and field staffs of departments with responsibility for assuring compliance with prescribed health, safety and welfare standards.

(4) "Health Services and Support" Unit composed of nonprofessional employees "engaged in recreational, educational, vocational and social programs... [for] the physically or mentally ill or handicapped."

(5) a unit combining various professional, scientific and technical occupations.

(6) a unit of seasonal employees of the Long Island State Park Commission.

Upon appeal of the hearing officer's determination, the Board

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> "Had little difficulty in agreeing...that a limited number of statewide, inter-departmental units, each containing related groups of occupations, was the most appropriate uniting structure for State employment...[which alone] could maximize the representation rights of the employees while preventing the eventual emergence of multiple units," Lefkowitz, supra at p. 13.

Accordingly, in November 1969 the Board issued its unit determination,[20] sustaining, with modifications,[21] the hearing officer's proposed unit structure, which was redesignated:

(1) Operational Services Unit

(2) Security Services Unit

(3) Institutional Services Unit

(4) Administrative Services Unit

(5) Professional, Scientific and Technical Services Unit.

In its decision, the Board noted, on the one hand, that it was important to avoid the "fragmentation" and the concomitant "unwarranted and unnecessary administrative difficulties" that would result if the units recommended by many of the unions were found appropriate. On the other hand, the Board noted that the "enormity of this diversity of occupations and the great range in the qualifications requisite for employment in these occupations would preclude effective and meaningful representation in collective negotiations if all such employees were included in a single unit." Accordingly, the Board concluded that "implementation of the rights granted by the Act to all public employees mandates a finding that a single unit would be inappropriate."

The unit structure for New Jersey state employees, (excluding the faculty

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[20] See State of New York, 1 PERB 3226 (11/27/68), aff'd. per curiam sub nom Civil Serv. Employees Ass'n v. Helsby, 32 App. Div. 2d 131, 300 N.Y.S. 2d 424, aff'd. per curiam 25 N.Y. 2d 842, 303 N.Y.S. 2d 690 (1969).

[21] Most significantly, the Board eliminated the hearing officer's proposed unit for seasonal employees of the Long Island State Park Commission. The Board also shifted employees engaged in inspection from the Security Services Unit to the Administrative Services and Professional, Scientific and Technical Services Units.

[22] In rejecting a single unit, the Board determined that the statutory mandate that the bargaining unit be "compatible with the joint responsibilities of the public employer and public employees to serve the public" required the designation of "as small a number of units as possible consistent with the overriding requirement that the employees be permitted to form organizations of their own choosing" in order to achieve effective representation. GERR No. 279, at G-1, G-4.

of the state college system and the employees of Rutgers, N.J. College of Medicine and Dentistry and N.J. Institute of Technology) consists of the following 10 statewide units:

(1) Health, Care and Rehabilitation Services

(2) Operations, Maintenance and Services

(3) Craft Employees

(4) Administrative and Clerical Services

(5) Inspection and Security

(6) Law Enforcement (excluding State Police)

(7) State Troopers

(8) Non-Commissioned State Police Officers

(9) Primary Level Supervisors

(10) Professional Employees

While the New Jersey unit structure is nearly identical to that proposed several years ago by the New Jersey Public Employment Relations Commission, it evolved primarily through the consent election process. Where parties have taken issue with PERC's unit determination, the courts have upheld the balance struck by PERC. Thus, the New Jersey Public Employment Relations Commission, relying upon the New York model, rejected the argument that separate institutional units were appropriate, finding instead that: (1) all health, care and rehabilitation service employees should be in one unit; (2) all operations, maintenance and service employees should be in one unit; and (3) all craft employees should be in one unit.

In Wisconsin the legislature established 14 statewide units, 9 of which reflected different occupational groupings. Thus, Wis. Stat. Ann. Section 111.81 (3)(a) (Supp. 1971), in accordance with the legislative policy "to avoid excessive fragmentation wherever possible", provided that "bargaining units shall be structured on a statewide basis with one unit for each of the following occupational groups:

1. Clerical and related
2. Blue collar and nonbuilding trades
3. Building trades crafts
4. Security and public safety
5. Technical
6. Professional:

    a. Fiscal and staff services
    b. Research, statistics and analysis
    c. Legal
    d. Patient treatment
    e. Patient care

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f. Social services
g. Education
h. Engineering
i. Science."

The legislature also authorized the Wisconsin Employment Relations Commission to establish additional units and modify the units established by the legislature, after two years' experience with the statutory bargaining units. In considering petitions for the establishment of additional or modified statewide units, however, the Wisconsin Commission is required by statute to consider the "declared legislative intent to avoid fragmentation whenever possible." Moreover, although under the Wisconsin Act supervisory personnel are not considered employees, the Commission "may consider petitions for a statewide unit of professional supervisory employees and a statewide unit of nonprofessional supervisory employees" provided that the labor organization is not affiliated with organizations representing employees in the other units.

In Hawaii the legislature created 13 statewide units, including 5 which it designated "optional" because of "the nature of the work involved and the essentiality of certain occupations which require specialized training..." Thus, HRS Section 89-6(a) provides that "[a]ll employees throughout the state within any of the following categories shall constitute an appropriate bargaining unit:

(1) Nonsupervisory employees in blue collar positions;

(2) Supervisory employees in blue collar positions;

(3) Non supervisory employees in white collar positions;

(4) Supervisory employees in white collar positions;

(5) Teachers and other personnel of the department of education under the same salary schedule;

(6) Educational officers and other personnel of the department of education under the same salary schedule;

(7) Faculty of the University of Hawaii and the Community college system;

(8) Personnel of the Univeristy of Hawaii and the community college system other than faculty;

(9) Registered professional nurses;

(10) Nonprofessional hospital and institutional workers;

(11) Firemen;

(12) Policemen; and

(13) Professional and scientific employees, other than registered professional nurses.

Units (9)-(13) were designated "optional" and the employees therein had the choice of voting either for a separate unit or for inclusion in the appropriate white-collar or blue-collar units. Uniquely, the Hawaii Act provides the option of having supervisors in the same unit with the employees they supervise, provided both the rank-and-file employees and the supervisors agree - an option that has, in fact, been exercised.

And in Michigan, as a result of dissatisfaction on the part of both employee representatives and management with representation and unit determination procedures for state classified employees, the Michigan Civil Service Commission recently appointed an advisory Employment Relations Committee to submit recommendations on how to improve those procedures. After investigation and consideration of information submitted by 20 interested parties in public hearings, the Committee recommended that the state's 51,300 classified employees be placed in 11 statewide occupational units: (1) Office and Clerical; (2) Technical; (3) Administrative; (4) Operations and Enforcement; (5) Institutional-Support Services; (6) Institutional-Medical and Mental Care; (7) Institutional-Penal and Rehabilitative Care; (8) State Police-Enlisted Officers; (9) State Police-Command Officers; (10) Supervisory; and (11) Professional. With respect to the question of the inclusion of supervisory personnel in the same unit as rank-and-file employees, the Committee recommended that "true supervisors" - i.e., those who exercise independent judgment in carrying out their supervisory duties - should be placed in a separate unit. The final report submitted by the Committee concluded that:

> "The combination of the increasing likelihood of harmful proliferation, inappropriate representation on central issues, and the tendency toward increasing centralization of significant aspects of employment relations, led the commission to seek a system of unit determination congruent with the changing nature of the employer-employee relationship." Report and Recommendations on Unit Determination and Representation in the State Classified Service 8 (1/31/74) (hereafter cited as "Report")

The Committee's recommendation of 11 statewide occupational units was predicated, in large part, upon its "desire to provide for effective employee representation and input into the decision-making process on state-wide issues which are standardized across departments." The Committee's recommendation also reflected a recognition that unit determinations must reach an accommodation between the "two extremes" of a very few units and multiple, fragmented units. As the Committee put it:

> "If units are too few and too large to take account of diverse interests and working conditions of employees, negotiations or meaningful consultation will suffer. If, on the other hand, a system permits units without limitation as to number and size, excessive fragmentation and proliferation may result, to the detriment of both employees and management. The problem, of course, is where to draw the line between the two extremes." Report, at p. 14.

Justifications for a policy favoring large statewide units and rejecting

1 or 2 monolithic units have been advanced by several commentators. Thus, one commentator, in a carefully reasoned analysis of the problem of unit determinations in the public sector, reviewed the experience of the employees of the State of New York, discussed supra, p. 1358 et seq., and concluded that:

> "[T]here seems to be little questions, however, that the size and nature of the five designated statewide units insure adequate authority, on the side of the state's negotiating representatives, to make meaningful agreements or recommendations with respect to a large portion of the substantial issues normally deserving of consideration in an effective collective bargaining relationship. Moreover, since the employees were geographically dispersed and because the general unit presented serious problems of providing direct representation, the PERB's breakdown of the employees into five large families of jobs probably maximizes the possibilities for self-determination and adequate union responsiveness in representing the various segments within each family.
>
> The New York experience is also note-worthy because the direct confrontation between the two opposite extremes presented by the requested pattern at the inception of newly formalized public sector collective bargaining afforded an opportunity to weigh the basic implications of excessive fragmentation. In contrast to policy makers in cities like New York and Detroit and in some of the departments at the federal level, the New York State PERB was able to adopt a coherent policy at a time when the damage had not yet been done. At the same time, the Board's decision rejected a monolithic bargaining unit which would have been neither proper nor realistic for public employees at this stage of history." Rock, The Appropriate Unit Question in the Public Service: The Problem of Proliferation, 67 Mich. L.Rev. 1001, 1012 (1969).

While strongly opposed to "Balkanization" of bargaining units in the public sector, Rock also strongly rejected the creation of monolithic units:

> "From the foregoing examination of some of the problems and practical experience associated with the appropriate unit issue in the public service, it seems relatively clear that the answer, at least for the present, cannot lie in 'instant' creation of large single bargining units, however desirable that solution might be from the standpoint of administrative convenience." Rock, supra, at p. 1012.

Instead, Rock concluded that a balance must be struck between "the twin necessities of providing freedom of choice for employees and accommodating the practical realities of bargaining in the public sector." Id at 1014.

A similar position was taken by Arvid Anderson, head of the New York City Office of Collective Bargaining and formerly Chairman of the Wisconsin Employment Relations Board:

> "The determination of the appropriate negotiating unit is as critical an issue in public employment relations as it had been in private employment. The determination of the bargaining unit determines the bargaining structure and has a tremendous impact not only on the bargaining relationship, but on the administration of the agreement and the mission of the agency. One all-encompassing bargaining unit tends to smother the legitimate interests of skilled, professional, craft and uniformed employees. On the other hand, excessive fragmentation strangles the bargaining process and results in a situation where the major issue at the bargaining table becomes one of "me-too" and one-upmanship. Units established on the basis of broad occupational groups which take into account the respective needs and interests of the employer and employee organizations ought to be established." Anderson, "Public Employee Bargaining: The Changing of the Establishment" 7 Wake Forest L.Rev. 175 (1971).

Anderson has elsewhere expressly rejected the concept of single, monolithic units:

> "I make no argument for one single bargaining unit represented by one union of all of the employees of a public or nonprofit employer. The private sector is replete with illustrations of the problems created when a large industrial union, such as the United Auto Workers, fails to accord recognition to the wants and needs of craft unions...and other skilled workers,...What I am suggesting is that efforts should be made to avoid excessive fragmentation of bargaining units which clearly have little reason for existence except their extent of organization." Anderson, "Selection and Certification of Representatives in Public Employment" N.Y.U. Conference on Lavor, vol. 20 280 (1967).

Finally, Clyde W. Summers, a highly respected authority in the labor field, rejects the notion that establishment of several bargaining units will create insurmountable administrative obstacles:

> "From the political perspective it might first appear that all employees of a public employer should be united in a single bargaining unit. [footnote omitted] Closer examination, however, suggests that if there is adequate centralized coordination of bargaining on the public employer's side, then fragmentation of the employees into a number of bargaining units, each represented by its own union, creates no unmanageable problems. Indeed, multiple bargaining units may serve both the bargaining and budgeting problem better than a single unit represented by a single union [footnote omitted]." Summers, "Public Employee Bargaining: A Political Perspective", 83 Yale L.J. 1156, 1189-90 (1974).

As the above survey indicates, determination of the scope of appropriate units for state employees is fraught with policy considerations requiring

delicate balancing. In charting a course between the "strangulation" of fragmented units and the "smothering" of a two-unit monolith, the Commission has adopted standards for appropriate units which, in accordance with the statutory criteria, will not only preserve "efficiency of operations" but also, to a far greater extent than feasible under a two-unit approach, "safeguard the rights of employees to effective representation." The Commission is strongly persuaded that its rule, which reflects the experience of other states and the consensus of scholarly opinion, will provide the most suitable framework within which meaningful collective bargaining can be conducted without unduly burdening the Commonwealth.

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