OFFICE OF COLLECTIVE BARGAINING OF THE CITY OF NEW YORK
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Impasse
Between

THE CITY OF NEW YORK and the HEALTH AND HOSPITALS CORPORATION OF THE CITY OF NEW YORK,

Petitioner-Employer,

DOCKET I-195-89

and

IMPASSE PANEL'S REPORT AND RECOMMENDATIONS

THE LICENSED PRACTICAL NURSES AND TECHNICIANS OF NEW YORK, LOCAL 721, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Respondent-Union,

RE: Terms and Conditions of Employment of Licensed Practical Nurses After Nov. 30, 1987

BEFORE: DAVID N. STEIN, ESQ., IMPASSE PANEL

APPEARANCES:

FOR THE CITY OF NEW YORK AND ITS HEALTH AND HOSPITALS CORPORATION:

MAYOR'S OFFICE OF MUNICIPAL LABOR RELATIONS, BY:
ROBERT W. LINN, ESQ., DIRECTOR
MARC Z. KRAMER, ESQ.,GENERAL COUNSEL
ERIC WASHINGTON ESQ., ASSISTANT DIRECTOR

PROSKAUER, ROSE GOETZ & MENDELSOHN, SPECIAL COUNSEL,
BY: CAROLE O'BLENES, ESQ.

FOR THE LICENSED PRACTICAL NURSES ASSOCIATION, LOCAL 721, S.E.I.U, AFL-CIO:

MITCHEL D. CRANER, ESQ.

PROGRAM PLANNERS INC. BY: ALLEN BRAWER, ESQ., VICE PRESIDENT & MR. BURT LAZARIN, DIRECTOR OF RESEARCH

TIME, DATES & PLACE OF HEARING: 10 A.M., 110 CHURCH ST., NEW YORK, NEW YORK, JULY 20, AUGUST 3, AUGUST 4, AUGUST 7 & AUGUST 10, 1989

P A N E L S R E P O R T A N D R E C O M M E N D A T I O N S

INTRODUCTION

The City of New York and its Health and Hospitals Corporation (either "City" or "Corporation") initiated this Impasse Proceeding pursuant to the New York City Collective Bargaining Law and the Rules and Procedures of the Board of Collective Bargaining when it and the

Union (Local 721 S.E.I.U., the Licensed Practical Nurses and Technicians of New York, Inc., hereinafter the "Union") which represents the approximately seventeen hundred licensed practical nurses LPNs") employed by the Corporation and the City were unable to reach agreement on a successor labor agreement ("Agreement") to the one which expired on November 30, 1987. In accordance with the Rules of the Board of Collective Bargaining, the Union and the City designated me to act as the Impasse Panel to resolve this dispute.

Section 1173.7.0(b) of the New York City Collective Bargaining Law requires that an Impasse Panel weigh the following criteria in reaching its recommendation to resolve the dispute before it:

> (1) comparison of the wages, hours, fringe benefits, conditions and characteristics of employment of the public employees involved in the impasse proceeding with the wages, hours, fringe benefits, conditions and characteristics of employment of other employees performing similar work in New York City or comparable communities;
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> (2) the overall compensation paid to the employees involved in the impasse proceeding, including direct wage compensation, overtime and premium pay, vacations, holidays and other excused time, insurance, pensions, medical and hospitalization benefits, food and apparel furnished, and all other benefits received;
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> (3) changes in the average consumer prices for goods and services, commonly known as the cost of living;
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> (4) the interest and welfare of the public;
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> (5) such other factors as are normally and customarily considered in the determination of wages, hours, fringe benefits, and other working conditions in collective bargaining or in impasse proceedings.

As noted in the "appearances" listing above, both the City and the Union were represented by counsel and a battery of fiscal consultants

and economists throughout this proceeding, were afforded ample opportunity to present their respective cases pursuant to the flexible procedures established by the New York City Collective Bargaining Law and submitted written argument subsequent to the conclusion of the hearing. By agreement, each party transmitted post hearing data to me during the period which followed the hearing until the record was closed by the City's final submission on or about November 17, 1989.

Upon the record so established, I find the following to constitute the information which resulted in my recommendations to the parties.

BACKGROUND

Between 1975 and 1978, the wages and salaries of City employees, including the LPNs, were frozen as a result of the City's fiscal crisis and a consequential loss in confidence by the financial markets in the its credit . It is not necessary to recount the sacrifices made by the unions, City employees, citizens and other institutions which led to the City's return to fiscal health in this Report.

In 1978, the City and its municipal unions resumed the normal process of collective bargaining in which wage adjustments were negotiated. The civilian unions negotiated in a coalition which included its largest unions, District Council 37, AFSCME, the United Federation of Teachers, and Local 237 of the Teamsters.

The Union was a member of this coalition which achieved two four percent increases in each of two years of the contract.

In 1978, the New York State Nurses Association, the bargaining agent of the Corporation's registered nurses (RNS), accepted the coalition settlement after unsuccessfully seeking to revive a parity clause which would have incorporated the raises provided to nurses by the voluntary (not-for-profit) hospitals located in the City into Corporation's contract with the Nurses' Association. The Association had accepted the suspension of that provision, which had initially been implemented in 1968, during the wage freeze which had resulted from the fiscal crisis.

The Union again joined the civilian coalition for the 1980 round of bargaining in which the coalition achieved a two year contract calling for two annual increases of eight percent.* The Nurses Association did not join the civilian coalition in the 1980 round, and, in fact, has not since participated in coalition negotiations.

As a result of the 1980-82 negotiations, the City established a so-called equity fund of about eight million dollars to address recruitment and retention problems, as well as certain inequities which had arisen as an outgrowth of the tight structure of coalition bargaining. A tripartite panel appointed pursuant Section 10 of the Coalition Agreement passed on the merits of the applications of various titles for a so-called equity adjustment.

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*This does not include increases to the welfare fund which were the same for all of the City unions.

The 1980-82 equity panel awarded the LPNs a thirty dollar increase in uniform allowance, and an increase in tuition reimbursement from three hundred to five hundred fifty dollars. Many other titles benefitted from awards from the equity panel, including dieticians represented by 1199, food service supervisors represented by Local 237, as well as many groups represented by District Council 37.

The Nurses Association, in addition to the two eight per cent increases achieved by the civilian coalition, obtained an Impasse Panel Award, as well as a special equity panel decision, which provided for increases to the uniform allowance, night shift differential, experience differential and tuition reimbursement. These increase exceeded the value of the coalition contract.

The City's uniformed forces successfully negotiated, for the first time, in the 1980 round an economic package which had a greater value than the agreement bargained by the civilian group by one per cent in the first year of the contract.

The 1982-84 civilian coalition pattern provided, for the first time, for a choice of either an eight percent increase, delayed during the first two months of the agreement, or 7.5% increase on the first day of the contract, together with a seven percent increase in the second year. The first option provided for a greater going out cost, while the second had a larger cash cost to the City, and, of course, a greater cash value to the employees.

This agreement also provided for an equity fund of somewhat in excess of ten million dollars. Again, the civilian contract created an equity panel to administer the disbursement of the fund. The LPNs , whose union was again a member of the civilian coalition, were awarded the following improvements from the equity fund: an increase in the minimum wage to $16,000; an increase in tuition reimbursement from $550 to $1100; a new longevity payment of two hundred dollars for employees with ten or more years of experience; an additional $175 payment to the fifteen year longevity step and an increase in the night shift differential to $1350.

Other groups, such as pharmacists, probation officers, and titles represented by District Council 37 also received longevity adjustments. The equity awards covered some fifteen thousand employees in three hundred or so titles.

The Nurses' Association again elected to negotiate separately from the civilian coalition during the 1982 round. The City negotiated a two year pact with the Association which provided for two eight percent increases in each year (the initial increase was delayed for the first two months of the contract), a forty dollar increase in the annual uniform allowance, a new longevity of two hundred fifty dollars after seven years of service and an increase of one hundred fifty dollars in the night differential. During both the 1980 and 1982 rounds, registered nurses employed by the Board of Education (who were represented by the United Federation of Teachers) received the pattern negotiated by the Association with the City.

According to the City's chief witness, Robert W. Linn, Esq., the value of the Association's two year package fell between the cost of the civilian and uniformed deals.

Significantly, during both the 1982 and 1984 rounds of negotiations, the civilian unions attempted to delay closure on reaching a contract or contracts, as the case may be, in order to achieve a wage increase approaching or equal to that attained by the uniformed coalition. The delays were attributable, therefore, to the competition between the uniformed and the civilian unions, rather than any reluctance to settle first among the civilian groups.

In the 1984 to 1987 round, the Association, negotiating alone, received a forty-one month agreement which exceeded the three year contracts bargained by the uniformed and civilian unions. The three year contract provided for three six percent increases, compounded annually, an increase in the uniform allowance and an increase for tuition reimbursement. Although the City did not provide a calculation of the value of this settlement, it was at least four tenths of a percent greater than the civilian settlements, as the Association was credited with the value of the Martin Luther King holiday negotiated by the civilian unions who had exchanged vacation time for new employees for the new paid holiday, although the Association had not surrendered a benefit of equivalent value.

The 1984 round began with a civilian coalition consisting of the UFT, District Council 371 Local 237 IBT, the CWA and others. The uniformed coalition did not include the Transit Police or the

the Sanitation Workers. After protracted negotiations, Local 237 elected to proceed to impasse for the employees it represented at the Housing Authority before a panel consisting of Hon. Walter Eisenberg (currently a member of the Public Employment Relations Board), former Mayor Robert F. Wagner, Jr. and Mr. Arthur Barnes of the New York Urban Coalition. In April, 1985, that Impasse Panel awarded Local 237 two compounded six percent increases with a third year reopener. Central to the Eisenberg Panel's decision was its finding that the increases negotiated by Locals 32B-J of the Service Employees International Union covering similar employees (building superintendents) in private sector multiple dwellings was a significant reference point for the Housing Authority employees represented by Local 237.

Shortly after the issuance of the Eisenberg Award, the United Federation of Teachers withdrew from the civilian coalition, believing the increases which could be obtained from coalition bargaining would be insufficient when compared to the increases which were being achieved by its sister teacher locals in the surrounding suburbs of Nassau, Suffolk, Westchester, and Rockland Counties.

Following the teachers' withdrawal from the coalition, District Council 37 reached an agreement with the City covering only its locals. This signaled the end of coalition bargaining between the City and the civilian unions. The D.C. 37 contract

provided for increases of five percent or $675 in the first year, five percent or $700 in the second year and six percent or $850 in the third year, plus an additional .51 percent for an equity fund to address problems of recruitment and/or retention. The increases under this three year agreement were not compounded from year to year. The .51 percent represented about ten million dollars.

The other municipal unions which adopted this three year contract received the increases, but not the equity fund, according to Mr. Linn. In addition, D.C. 37 and those unions which accepted the parameters of its contract with the City negotiated a longevity payment of five hundred dollars for employees with fifteen or more years of service and a new holiday, Martin Luther Day in return for a vacation reduction for new hires.

On June 17, the uniformed coalition and the City reached a three year contract calling for three compounded six percent increases and other benefits.

In July, Local 237 followed with a thirty six month contract for its City employees calling for compounded increases of 5.3 percent, six percent and six percent, a non-pensionable longevity payment, a non-pensionable one-time bonus of five hundred dollars for employees who were covered by the a month contract extension and the new King holiday and the vacation reduction for new hires. This contract had the same cost as the thirty six month deal negotiated by D.C. 37. Local 237 used the equity money for .5% to help fund the settlement.

Meanwhile, the City, the Board of Education and the UFT had entered into a voluntary agreement pursuant to Section 204 of the Taylor Law to arbitrate their dispute concerning what terms and conditions of employment of the teachers should be, given the impasses which had arisen among the parties. Unlike the New York City Collective Bargaining Law, which governs mayoral agencies and others which have elected to come under its provisions, the Taylor Law does not provide for finality in the interests dispute area for public employees who are not police or firefighters.

This voluntary agreement provided for so-called last offer binding arbitration (LOBA), which requires that one of the parties' last best offers must be adopted by the arbitrator(s) in its entirety. This process is designed to provide an incentive to each party to narrow or bridge its differences with the others, since the stakes are so great, i.e. the losing party's final offer must be rejected.

Prior to entering into the LOBA agreement, the City had maintained its position that the UFT package had to conform to the precise costs of the contract initially negotiated by D.C. 37, and accepted by the municipal civilian unions. After the commencement of the LOBA process, the City increased its offer by some twenty million dollars, or somewhat less than one percent over the civilian pattern. The three member panel hearing the case ultimately adopted the City's offer,* stressing the significance of the pattern. Yet, the City's offer was, indeed, more than the pattern by something less than one percent.

*The City's offer also funded increases to the top of the schedule from givebacks imposed on lab technicians, school secretaries and teachers, among other employees in UFT represented units.

The City's LOBA offer to the teachers was bottom loaded, i.e., it was addressed to artificially lower starting and lower step salaries of teachers which had been ignored during prior rounds when the increases had been top loaded, i.e. dispropportionately allocated to teachers at the higher steps on the salary schedule. The City's Director of Labor Relations maintained that the twenty million dollars above the civilian package was a result of an employer perceived need to address recruitment problems generated by the poor wages offered at the lower steps. However, as this offer was made during the LOBA process, it is impossible to determine whether the additional sums were motivated by the pressures inherent in the LOBA process, recruitment problems or both. (LOBA Award, p. 18)

In 1986, the State Legislature enacted legislation providing for the appropriation of additional state aid for school districts for use only to fund higher payments for teachers. These funds are known as Excellence in Teaching (EIT) money. A District need not apply for EIT money. If it does, it must negotiate the disbursement of these funds with the bargaining agent for the recipients, which, with few exceptions, is the local teachers' union. Any EIT agreement must be separately negotiated from all other terms and conditions of employment. The money must be entirely used to fund salary to the exclusion of pension, compensation and other payments which are a function of wage payments, such as social security. These payments are commonly known as spinoffs.

During the life of the 1984-87 contract, the UFT and the Board

successfully negotiated an EIT Agreement. The City funded the additional salary costs caused by the spinoffs. The additional cost to the City was one percent above the cost of the contract imposed by the LOBA panel.*

In 1985, the City and Local 237 took their dispute over the third year of the wage reopener for the Housing Authority employees represented by the Teamsters to yet another impasse proceeding, known as Housing Authority II. The reopener, was the result of the contract imposed by the Eisenberg Impasse Panel.

This Panel was chaired by the former Regional Director of the Federal Mediation and Conciliation Service, Paul Yager. While concurring with the Teamsters that the Locals 32 B-J contract had to be weighed in arriving at the salaries negotiated for Housing Authority employees, the Yager Panel concluded that the City pattern was of predominant importance. The Yager Panel fashioned a third year increase which brought the three year cost of the Housing Authority Award within the rates of the contract which had been negotiated by District Council 37. Nevertheless, the Yager Panel did not disturb the decision of the Eisenberg Panel sufficiently to reduce the cash cost to the City to that of the pattern, and the Housing Authority employees represented by the Teamsters achieved a cash value of the contract that exceeded the pattern setting contract by about one percent.

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*By confining the EIT payments to the lower end of the schedule, the Board and the UFT were able to contain the cost of the spinoffs. These adjustments to the lower paid teachers freed the parties to skew the 1987-90 settlement to the rest of the schedule while remaining within the cost parameters established by the Teamsters and D.C. 37 contracts.

As a result of the additions to the top of the teachers' salary schedule which had been funded by "givebacks" as noted above, the Board of Education and the City agreed, in the 1984-87 contract to the addition of approximately one-half of one percent to the contract with the labor organization representing the teachers' supervisors, the Council of Supervisors and Administrators (CSA) to fund an increase to the lower steps of the assistant principals' salary schedule to maintain longstanding relationships between teachers at the top steps of the schedule with their immediate supervisors at the lower steps of their salary schedule.[**]

The parties concur that the LPN settlement negotiated during the 1984 round conformed to the civilian pattern established by District Council 37. The additional cost of benefits above and beyond the pattern established by the D.C. 37 contract, was, the parties agree, funded by a five month extension of the contract so that it would expire on November 30, 1987, rather than June 30. Thus, any cost of the new wage benefits achieved by the Union during the 1987 round would be delayed by five months, and, similarly, employees would not enjoy such improvements for an additional five months. By contrast, the expiration dates of contracts covering LPNs in many of the voluntary (private section, not-for-profit) "parity" hospitals in the New York Metropolitan area remained at June 30. As of June 30,1987, the Corporation's LPNs ranked seventh in base pay[*] on a list including it and these parity hospitals. When uniform

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[**]The City asserted that it granted this additional increase to avoid recruitment and retention problems.

[*]Salary after completion of the probationary period, if applicable.

allowance was taken into account, the City LPNs ranking remained the same.*

These parity hospitals were the subject of a cornucopia of charts submitted by both the City and the Union during this proceeding simply because they have been incorporated in the City's contracts with the New York State Nurses Association since the late sixties.** Section 5 of the 1987-90 Agreement between the Corporation and the Association provides, as follows:

> PARITY PROVISION
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> a. Effective July 1, 1988, January 1, 1989, July 1, 1989, January 1, 1990 and July 1, 1990, the salary rates in effect on February 1, 1988, July 1, 1988, January 1, 1989, July 1, 1989, and January 1, 1990, respectively, for the classes of positions included in this Agreement, and any other salary rates subsequently in effect as a result of the application of this provision, shall be adjusted by the addition thereto of the amount of difference, if any, by which the average entrance salary of Staff Nurse in the hospitals listed below shall exceed by $150 per annum or more the basic entrance salary of Staff Nurse (Title Code No. 50910) employed by the City of New York or by the New York City Health and Hospitals Corporation in effect for the six month period commencing with each date listed above.
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> b. The July 1 or January 1 salaries shall be determined by examining the salaries in the hospitals listed below on the preceding May 31 or November 30 that are the then current salaries or the salaries that will be effective on July 1 or January 1, if known on the preceding May 31 or November 30, in those hospitals. Adjustments made pursuant to Section 5a. above shall be effective on the succeeding July 1 or January 1.
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> HOSPITALS
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> Columbia Presbyterian Hospital
> New York Hospital
> Mt. Sinai Hospital
> St. Vincent's Medical Center
> Montefiore Medical Center
> St. Lukes-Roosevelt Medical Center

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*These are the benefits that place cash in the hands of LPNs.

**The parity provision was suspended by the parties from 1975 to 1987 due to the City's fiscal crisis and its aftermath.

Interfaith Medical Center of Brooklyn
Lenox Hill Hospital
New York University Medical Center
Beth Israel Medical Center
Mary Immaculate Hospital
Maimonides Medical Center
Booth Memorial Hospital
Terrence Cardinal Cooke Health Care Center

In addition, the City agreed to expand the parity provision to include longevity payments in the first through twentieth years of each staff nurse's employment with the Corporation, or the City. Experience differentials were also made subject to the parity provisions in that the City/Corporation agreed to provide ninety percent of the average annual experience differential for staff nurses. Superior nursing titles were to receive a ninety-five or one hundred percent of ,at the average experience differential paid by the parity hospitals. Evening and night shift differentials were also made subject to ninety percent of the average of these differentials which were to be adjusted semi-annually in accordance with base pay adjustments. The City also agreed to increase tuition reimbursement to two thousand dollars. in addition to this generous package of benefits, the City agreed to guarantee that the minimum increase to the wages of any nurse over and above their 1987 salary for 1988 would be a minimum of six percent. Finally, the contract mandated an increases of $1964 on February 1, 1988.

The parties were unable to calculate the full cost of the deal achieved by the Nurses Association because, in large part, it was based on a formula which has yet to be applied to the third year of the contract. There is no dispute that the Association achieved

a contract with the City which exceeds the value of the civilian pattern of 16.45%* for the 1987-90 contract period by an unprecedented amount, and tops the uniformed package of 16.99%, as well.** The UFT and D.C. 37 achieved wage increases above the civilian package by extending their contracts. The monthly savings credited to the extension of pacts of civilian unions for the 1987 round is .45 percent. To the extent that new EIT money has been added to UPT wages, then an additional cost must be credited to the value of that Agreement in the form of spinoffs-which had to be absorbed by the City.

During the 1987-90 round, Board of Education nurses represented by the UFT did not receive the same package as the Association. Instead, the Board and the UFT converted Board nurses to a new civil service title, and their work year was altered to more closely parallel that of other education employees. This record does not contain, nor am I aware, of the cost of the 1987-90 Board of Education contract with the UFT covering Board nurses.

This case was triggered by the City's insistence that the Union accept the cost constraints imposed by the civilian pattern of 16.45%, and the Union's steadfast refusal to accept these constraints. The City instituted this impasse process after the parties were unable to make any significant movement during five bargaining sessions. Neither party filed an improper practice charge accusing the other of a refusal to negotiate in good faith.

Prior to the commencement of this proceeding, the City filed a

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*This cost excludes increase in contributions made by the City of $50 per employee, per year to each union's welfare fund, in each year of the contract, to which the Union is entitled, the City agrees.

**The 16-99% figure was agreed to by the parties, and therefore my acceptance of it in the context of this case is predicated solely. upon their concurrence on this number. Incumbent police and firefighters received three six percent increases in each of three years.

a petition with the Board of Collective Bargaining charging that the majority of the Union's demands were not mandatory subjects of bargaining, and, consequently, could not be advanced to this Impasse proceeding. The Union and the City agreed that pending the determination of the Board, that I should issue my decision concerning the economic terms of a contract they agreed should cover approximately three years, as do the contracts of the City with the vast majority of unions which have already settled, Including the major civilian and uniformed groups.

On October 23, 1988, the Board of Collective Bargaining issued its determination finding that, with the exception of a single Union demand, that all or part of the Union's demands which had been "scooped" by the City were not appropriate for submission to this interests panel because they were non-mandatory.* The demand which the Board decided is mandatory reads, as follows:

> Demand No.22 - If the registered nurses receive a wage reopener during the course of their present contract, the LPNs shall also have a wage reopener.

Subsequent to the Board's decision, the parties mutually instructed me to resolve this demand in the course of my report and recommendations herein.

After the City initiated this Impasse, but before the commencement of formal hearings in this matter, hospitals operated by the New York Catholic Archdiocese reached a two year contract with District 1199 providing for two 8.5% increases in each of two years. At the same time, the Union waived employer

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*Two of the demands require clarification before either may be submitted to this Impasse Panel.

contributions to the Pension Fund. The contribution waiver produced a cash savings of 5.45% in the first year, and 4.86% in the second year. However, the contribution "pops-up" at the term of the Agreement, ALBEIT at a lower rate than prior to the contract. The record indicates that future savings will be limited to about 1.2%.

On October 4, 1989, District 1199 reached a three year contract with the League of Voluntary Hospitals which provided for an increase of 20.57%.in the "going out" rate, in addition to a cash bonus worth 2.19 percent. Again, District 1199 waived employer pension contributions for the life of the contract which represented a cash savings of 18.96%. However, since the employers' liability for pension contributions “pops-up" at the term of the contract, at a somewhat lower rate, much of the savings is a cash, as opposed to a continuing (rate) savings.

The wages of LPNs were adjusted according to the 1199 contracts to the extent that 1199 units represent LPNs in the League and Diocesan Hospitals. In addition, the Union produced evidence that it achieved wage increases in two voluntary hospitals, St. Luke's - Roosevelt and Columbia - Presbyterian, of $1643 and $2296, respectively, which became effective during the second year of the proposed contract between the Union and the City. During the third year of the proposed contract between the parties, the post-probationary base wages of LPNs at St. Lukes-Roosevelt will be $25,260, and at Columbia will be $25,000.

THE OFFERS

During the course of this proceeding, each party submitted

offers to me which it asserted, should constitute the economic terms of a three year contract between them.* These offers are set forth below, as follows:

THE CITY'S OFFERS

A. BASIC PATTERN (December 1, 1987 through November 30, 1990)

	12/1/87	12/1/88	12/1/89
Min. Salary	$19,280	$20,811	$21,755
Night Diff.	$ 1,969	$ 2,067	$ 2,161**
Longevity			
After 10 yrs.	$ 275	$ 350	$ 425
After 15	$ 625	$ 750	$ 875
After 20	$ 900	$ 1,100	$ 1,500

B. LPN MODIFICATION (December 1, 1987 through December 31,1990)

Min. Salary	$19,652	$20,460	$21,300
Night Diff.	$ 1,990	$ 2,208	$ 2,421
Longevity			
After 3	$ 116	$ 511	$ 880
After 7	$ 159	$ 700	$ 1,205
After 10	$ 396	$ 895	$ 1,360
After 15	$ 745	$ 1,239	$ 1,700
After 20	$ 989	$ 1,471	$ 1,920

LPN OFFER

The Union accepted the LPN Modification with an additional two thousand dollars added to the December 1, 1989 Minimum Salary so that under its proposal the Minimum Salary would be $23,500 effective December 1, 1989. The Union also sought increases in uniform allowance, tuition reimbursement and in-charge pay. The total cost of the LPN proposal, the parties agree, is 29.15 percent.

POSITIONS OF THE PARTIES

A. THE CITY

The City begins its analysis of this dispute by noting that

*Excludes the three increases of fifty dollars per year to the Union Welfare Fund.

**Forty-six percent of the unit receives a shift differential.

it has reached agreements with all of its civilian unions which conform to the pattern of 16.45% with unions representing over 235,000 employees, including over thirty thousand employees of the Health and Hospitals Corporation. The sole exception to the pattern, the City adds, was the contract with the New York State Nurses Association which represents registered nurses.

The exception, the City asserts, was limited to the restoration of the parity provision that had been suspended during the fiscal crisis. The City contends that its contract continued a special pattern which had started in the 1980 round of bargaining when the Association broke away from the civilian coalition, and was duplicated during the 1984 and 1987 rounds, where the nurses patterns exceeded the non-uniformed pattern. The special pattern for registered nurses, the City maintains, was and is justified by the unique and compelling factors which impact the retention and recruitment of RNs which is rooted in the nationwide shortage of these valuable employees. The City stresses that RNs, by virtue of sheer numbers, as well as their critical role as the principal provider of primary patient care, cannot be ignored.

The City's Director of Labor Relations, the City points out, testified, without contradiction, that, by the 1987 round of bargaining,-the wages of the City's RNs had fallen so far below those paid by the major voluntary hospitals in the City, that no application of the civilian pattern to the RN unit could adequately address the infirmities in-the City's salary structure for RNs. As a result, Mr.

Linn explained, the Corporation's inability to recruit and retain RNs had reached crisis proportions. The City concludes, that, contrary to the case with RNs, no such unique or compelling factors exist in this case.

First, although the City concedes that sociological factors, such as poverty, drug addiction and AIDS, have placed the Corporation's health care facilities under an excruciatingly heavy burden, it denies that these burdens justify a wage settlement in excess of the pattern. In point of fact, the City continues, the stress caused by these factors affects virtually every employee group, not just LPNs. Thus, it adds, groups which have already settled for the pattern also suffer under the yoke of this burden, such as nurses' aides, clerks, social workers, pharmacists, physical and occupational therapists, and laboratory and X-Ray technicians, also bear the burden of the urban pressures cited above. The City argues that its health care institutions have long serviced the City's poor and and disadvantaged, and that dealing with their problems is part of the responsibility of all Corporation employees.

The City dismisses what it characterizes as the Union's position that LPNs perform the same work as RNs, and are therefore entitled to the RN pattern, as unsupported by the record, and legally erroneous. At the same time, it agrees that both RNs and LPNs may perform many of the same tasks. The critical difference between them, the City maintains, was emphasized by the Corporation's Assistant Vice President for Nursing, Dr. Beverly Bonaparte, who

stated that the "principal differentiation between RNs and LPNs is not task-based. It is one based on the clinical judgment required to make clinically competent, knowledge-based decisions in the management of a patient's care."

Thus, the City reasons, LPNs are not trained to perform and, under existing law, may not carry out responsibilities that are essential to the delivery of comprehensive nursing care that are daily performed by RNs, such as: patient assessment and classification; the development, implementation and evaluation of a nursing care plan for each patient; coordination of care with other disciplines in the hospital; discharge planning and quality assurance.

The City stresses that an LPN must work under the supervision of an RN, as a matter of law. The City emphasizes Dr. Bonaparte's testimony that the responsibility for a patient's overall care should always rest with an RN. Consequently, the City continues, even where an LPN is placed in charge of a unit, he or she is under the direction of an RN if it becomes necessary for a clinical judgment to be made concerning the management of a patient's care.

The City charges that the Union's reliance on changes in State regulations governing the role of LPNs in the administration of intravenous medicine is flawed. The City notes that the January, 1988 changes allowing LPNs to start and add certain types of IV medication merely represents a return to the practice which existed prior to 1984. The City reasons that the return to the prior practice did not result in the performance by LPNs of work which they did not perform during

the years when the civilian pattern was accepted by the Union. The City adds that only about sixty percent of the bargaining unit has had the necessary training to be able to perform the IV therapy in question, and at some HHC facilities, LPNs may not administer IV medications, in any event.

With respect to a second regulatory amendment proposed during 1989, the City emphasizes that the Corporation has not yet determined whether it will implement the special training qualifying LPNs to perform a second type of IV procedures. The City characterizes the Union's citation to this change as speculative and premature.

The City maintains that there is no foundation for the proposition, advanced by the Union, that compelling recruitment or retention problems, similar to those with respect to RNs, warrant a departure from the pattern to cover LPNs. In this respect, the City points out that the turnover rates for the Corporation's RNs from FY 1986 TO FY 1989 exceeded twenty percent, and from December 1986 to July 1989, the Corporation suffered a net loss in RNs of approximately one thousand, despite extraordinary efforts at recruitment.

In contrast, the City emphasizes, the number of LPNs employed by the Corporation remained essentially stable from June of 1987 to June of 1989. The City points out that the turnover rate for LPNs in FY 1986 and FY 1987 was exceeded by the Corporation's turnover rate, and ran only slightly ahead of the Corporation's overall rate in 1988.

The City argues that it is only reasonable to attribute any recent difficulties experienced by the Corporation in retaining LPNs to the protracted process in reaching a new contract, stressing that the current wages have remained the same for more than three years. The City continues that had the Union acquiesced to the City's insistence that it agree to a pattern settlement, there would, indeed, be no recruitment or retention problem today.

The City notes that the Corporation has relied on its service to produce per them employees who are RNs eight times as frequently as it has to employ per them LPNs, although it employs only 3.5 RNs for every LPN. The City again cites Dr. Bonaparte's testimony that if one thousand RNs were to apply for positions in Corporate facilities, they would be immediately employed, while she could only make that statement about one to two hundred LPNs.

The City also stresses that it makes the market for LPNs locally, employing twice as many LPNs as do fourteen of the fifteen parity hospitals. Thus, the City concludes, the market is relatively inelastic with respect to increases achieved by LPNs employed in those hospitals which may be greater than those paid to the LPNs employed by the Corporation.

The City adds that the Corporation intends to alter the mix of RNs and LPNs which it employs, by increasing the ratio of RNS to LPNs, in conformance with the practices of other acute care facilities. This, the City, stresses, is its managerial prerogative, and is justified by the increasingly complex and technological nature

of patient care. As. Dr. Bonaparte testified, the City notes, it is not the Corporation's objective to increase its reliance on LPNs " when their role in the future of health care is unclear.

The City rejects the Union's reliance on the 1984-87 settlement between the Board of Education and the CSA where the City added about one half of a percent to the CSA package in order to preserve the relationship between teachers at the top of the schedule junior assistant principals. The City cites Mr. Linn's testimony that the City's decision was not made to address morale problems, as suggested by the Union, but to address problems which had already arisen in the recruitment and retention of assistant principals.

The City points to the UPT LOBA Award as supporting its position that simply because one title receives a settlement above the pattern because of recruitment and retention needs, similar titles who do not experience such problems are not rewarded with the same premium. Consequently, the City points out that while teacher salaries at the lower steps were supplemented by an additional one percent to the package, paraprofessionals, school nurses, [*]guidance counselors, school psychologists and social workers were limited to the civilian pattern.

The City reiterates that as the LPNs have traditionally followed the civilian pattern, they should be compelled to adhere to that pattern. The City stresses that since 1980, the RNs have negotiated separately, and have enjoyed increases which exceed the civilian pattern, as opposed to the LPNs. The City adds that even with parity adjustments, RNs still rank ninth on the parity list.

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[*]School nurses were in fact, removed from the LOBA, and reached a voluntary contract with the Board through mediation.

The City asserts that either of its two offers, which fall within the civilian pattern of 16.45%, are sufficient to make the wages the Corporation pays its LPNs competitive with those paid to LPNs locally by fourteen voluntary hospitals, as well as nationally. The City stresses that its obligation is to pay a competitive wage, not the highest rate.

The City's "Basic Pattern" proposal applies the Teamsters settlement to the compensation received by LPNs in a straightforward fashion: wages are increased by 15.25% over three years; night differential is likewise adjusted by 15.25%, and the equity money is applied to the longevity payments so that they are increased by 1.2% over the life of the contract.

In its second proposal, the City restructures the 16.45% pattern to provide for an increase in the basic minimum salary by 12.84% over thirty seven months, increases the night shift differential by five hundred dollars (a .72% cost) and substantially increases the longevity schedule by 3.34%,including new longevity payments after three and seven years of service.

The City claims that either of its packages would place it in a competitive positions to employ nurses, on either a national or local basis. At the hearing, Mr. Linn asserted quite forcefully, that the appropriate labor market with which to compare LPNs was with the wages and benefits paid by public hospitals in other large United States cities, relying on the LOBA Award in the teachers case.

On a national level, the City argues, its Basic Pattern offer results in an LPN salary which is 33% above the national average, assuming five percent increases for contracts which had not been settled during the pendency of these proceedings. The LPN modification represents a twenty-nine percent increment above the national average, under the same assumptions, the City adds. The Modification package also provides for a three year longevity 63% greater than the national average, as well as a twenty year longevity 151% more than the national average, the City points out.

With respect to a comparison of the compensation of the City's LPNs with that paid by the fourteen parity hospitals in the voluntary sector, the City argues that any such comparison must be viewed as irrelevant, since the range of compensation of the voluntaries is governed, in substantial part, by the recent 1199 settlements with the League of Voluntary Hospitals and the New York Archdiocese. Those deals come more than halfway through the contract which will be settled in this proceeding between it and the Union, and many months after the civilian pattern was set by Local 237 of the Teamsters, the City asserts.

Secondly, the City contends that the 1199 wage levels were earned, in part, after a brutal strike in 1984, an act in which the City LPNs may not legally engage. The City adds that the 1199 settlement with the League must be viewed in light of the fact that the wage increase for 1985 was never paid, and the League had to "make up" to its employees for that loss in the recently concluded

round of bargaining.* The City stresses that 1199 reached a pattern conforming settlement with the City for the titles it represents for the 1987-90 round of bargaining.

The City emphasizes that the 1199 settlements with the League and the Archdiocese were largely funded by waivers in pension contributions (which are detailed above at p.18 of this opinion). The City also claims that the League's failure to pay the first five percent increase of the 1984-86 contract was ignored by the Union in its analysis of this case.

In any event, the City continues, the total compensation paid by it, given the infirmities of including the recent 1199 settlements, remains competitive with the voluntary sector. (Total compensation, according to the City's charts, includes pension, welfare and uniform allowance, as well as wages). The Union's charts, the City points out, places the City LPNs seventh out of fifteen voluntaries and the Corporation in total compensation, based on the City's Basic Pattern offer. The City notes that its charts show that the total compensation which would be paid by it under its Basic Pattern Proposal is 105 percent of the average of the average paid by fourteen voluntary hospital, and the LPN Modification is 103 percent of that average.

If the analysis is focused on a similar comparison of post-probationary wages, the City continues, its Basic Pattern proposal creates a scheme of compensation ranking seventh on the list of the fifteen voluntaries and the Corporation, and representing 103% of the

*In fact, the first increase was paid as a bonus, and was never been incorporated in the employee' base wages, by subsequent agreement.

average, while the LPN Modification package also ranks seventh on the parity list, and is 101% of the average. The City's exhibits eliminate pension contributions for LPNs represented by 1199 because of the pension waiver, previously discussed above.

The City attacks the Union's analysis as misleading because, first, it fails to take into consideration the pension waiver in effect for LPNs represented by 1199, and second, it unfairly compares the second year of the 1199 agreements, which commences on July l, 1990, with the final year of the LPN Agreement which will terminate on or about November 30, or December 31, 1990.

The City disagrees with the Union's reliance on the post-probationary rates paid by the voluntaries, as opposed to first year increases, because the Union's analysis overstates the annual wage during the first year of employment. The City also dismisses the Union's comparisons because they, the City asserts, fail to take into account longevity payments. The City points out that its LPN Modification offer provides a salary which is 97% of the average of entry level wages paid by the parity voluntaries, 95% of the average of post-probationary salaries, and evening and night differentials at 100% and 99%t respectively, of the average. Under this package, the City stresses, longevity payments at three, seven, ten, fifteen and twenty years would greatly exceed the average paid to LPNs by the so-called parity hospitals in the voluntary sector.

The City emphasizes that the Union's offer would cost it

29.15%, which, the City maintains, dwarfs the civilian pattern, and would make the City's LPNs the highest paid locally. The City contends that there is no justification for making its LPNs the highest paid.

The City rejects the Union's uniform proposal of $325 per year as outlandish, as it would compel the Corporation to pay an allowance three times greater than the average paid by the 14 voluntary hospitals. The City emphasizes that the Union failed to present any evidence to support its claim for any adjustment to the uniform allowance, which, it notes, is already sixty dollars above the average rate currently paid by the parity hospitals. Likewise, the City continues, the Union did not adduce any facts which would lend credence for its demand for increases in either tuition reimbursement or "in-charge" pay.

The City points out that its proposals will allow the wages of its LPNs to grow more rapidly than the cost of living, as represented by the consumer price index (CPI). This is a criterion, the City notes, which is specifically set forth in the New York City Collective Bargaining Law and must be weighed by an impasse panel. Both the Union and the City use the CPI for all urban consumers in New York/Northeast New Jersey.

According to the City, the Union's analysis compares changes in the CPI from fiscal years 1975 through 1990 with changes in the wages paid to LPNs during that period, assuming that either its Basic Pattern or Modification proposal is implemented. The City emphasizes that even

under the Union's guideposts, the LPN minimum will have increased 158.1% while the CPI increased 138.7%.

The City's view is that the appropriate period for comparison should commence with 1967, the year that public employees achieved the right to engage in collective bargaining in New York State with the enactment of the Taylor Law.

With the implementation of the Basic Pattern proposal, the City notes that the minimum from 1967 to 1990 will have increased 411.9%, and with the Modification package 401.2%, while the CPI will have increased 317.2% through November 1990, or 319% through December 1990 (the latter two figures are, of course, estimates).

Thus, the City concludes, its two offers are more than adequate in light of both the historical changes in the CPI, CPI projections and wages.

The City argues vigorously that the public welfare is best served if I recommend adoption of one of its two major proposals, as outlined earlier in this opinion.

The City maintains that it is clear from the testimony of Bernard Rosen, Deputy Director of OMB, that the City is facing its most serious set of financial and budgetary uncertainties since the onset of the fiscal crisis. At the time of the hearing, the most recent Financial Plan (the City is mandated by law to prepare and submit to the New York State Financial Control Board plans to close any projected budgetary gaps over four year periods) projected budgetary gaps of $1.3 billion for FY 1991, $1.9 billion for FY 1992,

$2.0 billion for FY 1993 present a formidable challenge to the City to resolve these deficits and balance the budget.

Moreover, while the City concedes that it has been able to close projected deficits in the paste the public has been compelled to make extraordinary sacrifices in the level of public services in order to do so. These sacrifices were made in the context of a City which experienced substantial revenue growth in the eighties. The City stresses that with the City's financial sector in decline, the revenues are expected to remain at low growth levels which are insufficient to absorb unexpected growth in the cost of labor settlements.

While the City does not dispute that, as a technical matter, it possesses the available resources to pay for the increases demanded by the Union, the Union's proposal would add $5.7 million to the LPN contract. The City reasons that this would mean that funds would have to be transferred from another sector of the budget, with the possible result that teachers or police would be laid off, or that Corporation services would have to be reduced.

The City stresses that a pattern breaking settlement such as sought by the Union will have dire consequences for the 1990 round of bargaining where each one percent increase will cost the City approximately $133 million. Clearly, the City contends, the public interest is in the maintenance of an orderly and disciplined system of collective bargaining which fosters voluntary settlements. What union would be the first to settle, the City questions, if there were a

perception that other groups could wait until later in the negotiating round to achieve superior increases through the arbitration process.

The City emphasizes the importance of adhering to the pattern with the following excerpts from the opinions of previous impasse panels:

> OCB DOCKET I 115 74, MTR. OF P.B.A. and CITY OF N.Y. (Arbitrators Coulson, Gelhorn and E. Stein)
>
> New York City employees exist in a complicated web of relationships. Earlier cases with other bargaining units speak to the risks involved in disturbing these patterns.
>
> The tapestry of employment relationships has been created over the course of many years. Its pattern is the result of an interplay of unilateral decisions, political concessions and, more recently, bargaining agreements. The relationships among the many labor organizations are also reflected in this ancient and threadbare heirloom.
>
> The number and variety of job classifications and bargaining units in New York City creates a danger that an upwards adjustment in any one relationship will have unpredictable consequences among satellite and related job categories.

pp. 14,15

> OCB DOCKET IA 1 85, MTR. OF UNITED FEDERATION OF TEACHERS and BOARD OF EDUCATION/ CITY OF NEW YORK (Arbitrators Garrett, Gill and Schienmann)
>
> The Union has long been compared to and has in fact been a participant in the municipal coalition. This relationship surely represents one of the important factors normally and customarily considered in the determination of wages, hours, fringe benefits ... and is an important component in considering the interest and welfare of the public.

p. 33

> OCB DOCKET I 188 86, MTR. OF LOCAL 237, IBT and NEW YORK CITY HOUSING AUTHORITY (Arbitrators Yager, Wittenberg and Simon)

As a practical matter, and in the interest of fairness, the level of compensation of some must be logically and reasonably related to that of others. Thus, as is the case of employers with employees numbering in the hundreds of thousands, there is a required hierarchical system of compensation in which each title, to the maximum degree possible, is compensated in accordance with relative skills, education, stress and responsibility.

Thus, compensation for each title is logically synchronized with all other titles. Such a system pre-existed municipal collective bargaining under the statute, existed before and during the fiscal crisis and exists now. To one extent or another, this hierarchy reflects a rational relationship as among and between the rates of compensation and benefits of the hundreds of thousands of City employees. It has been and will be the cardinal structural element underlying the bargaining process, with or without coalitions.

p. 28

OCB DOCKET I 142 79, LOCAL 3, IBEW and CITY OF NEW YORK (Electrical Inspectors)(Arbitrator Glushien)

[if one union can] break the pattern which has governed everyone else, it would be rewarded for its obduracy. And it would create a catastrophic potential. Other unions, despite the City's continuing fiscal difficulties, would be encouraged to hold back from a common bargaining approach in the expectation that, by being dissidents from the generally agreed-upon settlement, they would obtain a substantially better deal. This can hardly be said to comport with the interest and welfare of the public.

The short of the matter is that to reward the [Union] here is likely to have a domino effect in the future, endangering the financial stability of the City.

p.17

THE UNION'S POSITION

The Union contends that the Impasse Panel should apply at least the patterns developed by the voluntary hospitals and District 1199 in their recently concluded rounds of negotiations with the League of Voluntary Hospitals and the New York Archdiocese, as those agreements

covered LPNs employed in many of the parity hospitals. The Union adds that its sector contracts covering LPNs in private sector health care institutions must be considered, as well. The Union emphasizes that because of a traditional relationship between the City's RNs and LPNs, the pattern breaking contract with the City's RNs cannot be ignored.

The Union rejects the City's attempt to link the salaries paid to its LPNs to the wages of LPNs employed by other municipal hospitals in major urban areas. The Union stresses that the wages of LPNs do not generally engender the type of national mobility which permits these employees to relocate to, for example, Chicago, Detroit, Houston or Los Angeles. The work decision for LPNs, the Union maintains, is between the Corporation and private sector hospitals and nursing homes in the New York-Metropolitan area.

The Union utilizes the recently concluded contract between the RNs and the City, which the City stated, generated an increase of 12.8% to the minimum salary in the first year of the contract, and an increase of 7.8% in the second year. The Union adds that the third year increase, which has yet to be determined, due to calculations which must be entered into the formula specified earlier in this Opinion, will reflect wage increases achieved by RN s at the parity hospitals which are running ahead of the increases awarded to District 1199 for employees who are not Pl~s in the recent agreements with the League and the New York Archdiocese.

The Union argues that the application of the League and New

York Archdiocese settlements to the wages of LPNS employed in the parity hospitals will place the City in a far less competitive position to recruit and retain LPNs if either of its offers are implemented as a result of this impasses procedure.

The Union dismisses the City's comparisons of the wages it pays its LPNs with those paid by the parity hospitals because, it maintains, the City compares wages paid by the parity hospitals to probationary LPNs with the City's basic minimum salary paid by the City. While the City does not have a probationary rate, the Union allows, the probationary periods of the parity hospitals are from two to six months. The Union emphasizes the current and prospective employees are highly unlikely to compare the temporary probationary rate paid by some of the parity hospitals with the city's rates. Instead, these employees, the Union asserts, will compare the wages they are likely to receive for the balance of their employment at the various institutions.

The Union's charts, it notes, show that as of December, 1989, the City's LPNs would rank tenth in wages on a list including the Corporation and fourteen parity hospitals, and, that as of July 1990, the City's LPNs would drop to thirteenth place on such a list. The average salary paid to LPNs by the parity hospitals exceeds the City's basic offer by three percent.

The Union rejects the City's suggestion, in its modification offer, that improvements in the parties' contract should be funded by a surrender of current benefits or a contract extension. Such a

course of action, the Union reasons, would merely further reduce the Corporation's potential to compete in the market place to recruit and retain LPNs.

The Union concludes that the record in this demonstrates the presence of those unique and compelling circumstances which would justify a departure from the civilian pattern, assuming that the LPNs should fall within the civilian pattern.

The Union maintains that the same shortages which apply to the case of RNs exist and will grow concerning the availability of RNs. The Union cites the Corporation's loss of ten percent of its LPN staff between January, 1989 and July, 1989. The Union stresses that a substantial portion of this loss occurred in staff with five to fourteen years of experience. This, the Union points out, is the heart of an experienced work force.

The Union stresses that when the City added .5% to the 1984-87 package between the Board of Education and the Council of Supervisors and Administrators, to prevent the reduction of a traditional parity relationship between the wages of senior teachers and the assistant principals who are their immediate superiors, there was no impact on the system of pattern bargaining in the current, and succeeding, round of bargaining. Consequently, the Union reasons, it is clear that when reasonable and practical factors exist to to justify a departure from the pattern, pattern bargaining is not disturbed, and the spectra of "leapfrogging" the City seeks to avoid does not occur.

The Union adds that, in any event, the appropriate pattern for the LPNs was set by the RNs. In this respect, the Union emphasizes, a comparison of the duties of LPNs with those of RNs reveals that the former are, in reality, assistant nurses.

In this respect, the union relies on the testimony of Janet Friedman, M.D., who is the President of the Committee of Interns and Residents, who stated:

> In my perception of the Registered Nurse shortage, my perception is that it has usually been Registered Nurse they have been talking about but in the reality HHC Licensed Practical Nurses are equally as important as Registered Nurses are.

(8/3:134,135)*

Dr. Freedman continued, the Union notes, as follows:

> It seems to us extremely short sighted that RNs and Licensed Practical Nurses are sometimes split in their consideration in collective bargaining, because the nursing shortage really can be addressed by both increasing the numbers of RNs and Licensed Practical Nurses in a hospital.

(8/3:136)

Dr. Freedman, the Union points out, stressed the significance that LPNs play in the primary care of patients in the Corporation's system, when she testified that:

> The Licensed Practical Nurses equally are as important as the Registered Nurses in caring for patients on the floor. And the RNs have a part in the health care, and they actually leave the bedsides and the Licensed Practical Nurses are there.

(8/3:136,137)

The Union cites the following testimony of Gwendolyn Smith, an LPN who works at Harlem Hospital:

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*Refers to pages in the hearing transcript of August 8. The page follow the colon.

> ... you, the nurse, whether it is an RN or LPN, are totally responsible for that particular patient's care, or both patients. How many patients you have is equal in number to the RN and LPN. You are totally responsible for that patient which includes picking up the doctor's orders, giving the IV medication, doing the fluids.

7/20:26)

The Union emphasizes that Ms. Smith, Gwendolyn Gurley (an LPN in the Emergency Room at North Bronx Hospital), Phyllis Richardson (an LPN at Bronx Municipal Hospital who works the night shift in a general mixed surgical area), and Imogene Augustine (an LPN who works at Lincoln Hospital in pediatrics and the emergency room) all testified without contradiction that LPNs and RNs are assigned the same number of patients, perform IV therapy, can be placed in charge an area if no RN is present, make decisions concerning patient care, may contact the physician directly and take patient histories.

The Union also cites the testimony of Melvin Green an LPN who cares for patients with chronic conditions at Goldwater Hospital that he and two nurses aides are assigned to the patients; that there is no regularly assigned RN, that he assigns to aides, that he takes reports, gives medication, gives feedings through a gastric tube and performs treatments.

Thus, the Union concludes, the most relevant pattern for LPNs is the one established by the City and the Nurses Association, which represents the RNs, the group of employees the Union asserts shares the greatest community of interest with the LPNs, as opposed to the City's general class of non-uniformed employees.

The Union maintains that it has demonstrated that the City has the ability to fund a settlement which exceeds the pattern of its settlements with the majority of the unions representing civilian employees.

The Union stresses that the City has not established that it lacks the funds necessary to pay for a settlement in excess of 16.45%. Instead, the Union points out, the City has confined its argument to the IMPACT such a settlement might have on the future of pattern bargaining generally, and the next round of Citywide negotiations generally. While the Union concedes that these are relevant arguments which may be raised in a proceeding such as this, it emphasizes that they are not proof that the City cannot pay for a settlement which is greater than the non-uniformed pattern.

The Union maintains that the City has consistently projected deficits prior to the beginning of each fiscal year since 1975, and that on each occasion, the City has been able to close those deficits to establish a surplus. The Union concludes there is no fiscal bar to the City's implementation of a settlement which is more than 16.45%.

The Union closes its presentation with the argument that the City is not immune to the same market forces which have created a rapid escalation in the wages aped to RNs. The only way to control the costs associated with these increases, the Union maintains, has been to shift some of the burden of providing primary patient care to LPNs, as the Corporation has done. The Union points out that

a similar trend has begun in the City's voluntary hospitals. This trend, the Union reasons, must result in a bidding war to recruit and retain LPNs on the part of the voluntaries which will have the impact of depleting the LPNs who work for the Corporation, unless the Corporation responds by offering a competitive wage. Thus, if the City desires to continue to provide a safety net of medical care to its poor, the Union argues, it must ensure the availability of nursing care to its patients, and, the Union adds, its LPNs are part of the pool who must provide that care. The Union notes that there has been no increase in the supply of either RNs or LPNs to staff the either the voluntaries or the Corporation's facilities to ease the upward pressure on the wages of either group.

DISCUSSION AND DECISION

In reaching a recommendation in this matter, I have been mindful of the significance of the pattern bargaining concept, as eloquently expressed by my colleagues in those earlier decisions cited by the City, which have been quoted above. Pattern bargaining, contrary to the view expressed by the Union in its opening statement, is not a novel practice in labor relations, newly invented by the Koch Administration to destroy the process of collective bargaining. Rather, pattern bargaining has long been followed in the private sector in steel, in the automobile industry, in mining, and in railroads, to name a few of the major areas. Even in mid-sized and small plants, the unions representing the largest, or most significant group (to the employer's operation) have long set the upper limits on what can be attained in

a particular round of bargaining. This process is entirely rational, since it provides stability, fairness and discipliner and reduces employee unrest, all of which are the goals in the private and public sectors, as pronounced by national and state legislatures in enacting laws promoting the right of employees to engage in collective bargaining.

Furthermore, pattern bargaining is not a stranger to the process of collective negotiations as it has developed in the City of New York. With the exception of this round of negotiations, District Council 37 set the civilian pattern since the enactment of the Taylor Law, simply because it is, by far, the largest representative of municipal employees. Although a smaller union, Local 237 of the Teamsters, set the pattern in the 1987 round, this group has become extremely influential.

These civilian patterns were applied to civil servants working at non-Mayoral agencies and State subdivisions within the City, such as the Board of Education, the Board of Higher Education (now C.U.N.Y.) and the Health and Hospitals Corporation. Similarly, the large unions at some of these revenue dependent but policy independent agencies were established by the largest and most powerful groups at those agencies: Board of Education/U.F.T.; S.N.A./H.H.C. and C.U.N.Y./ Professional Staff Congress. Thus, employees represented by the CSA

have had, for the most part, their terms and conditions of employment governed by the economic settlement between the Board and the U.F.T..

The impact of the fiscal crisis upon collective negotiations, in part as a result of former provisions of the then Emergency Financial Control legislative package which required the Mayor to certify the costs of each labor contract as being within the financial plan, as well as Emergency Financial Control Board ratification, set the stage for the development of sophisticated models projecting the costs of each agreement with ever increasing arithmetic precision. This process reached its zenith in the current round of bargaining, particularly with respect to the uniformed forces.

As recently as the post-crisis round of 1982, each civilian union was provided with the option to select a lower cash settlement with a greater "going out" rate, or one with a lower "going out" rate which provided more cash. Until the demise of coalition bargaining, with the 1984 round, the Equity Fund held out the possibility that the smaller, more homogeneous unions (functionally), such as the Union here, could achieve variations on the civilian pattern at a significant level, because the Equity Fund was generated across virtually the entire spectrum of titles covered by the municipal coalition.

At that point the Equity Fund worked like an insurance policy, in that a small sum was, in effect, taken from the general wage increase of each employee covered by the coalition and aggregated in a large fund which was targeted to address the needs of much smaller

groups of employees in specific titles or groups of titles. These small groups received adjustments greater than would have been possible had the Equity Fund been bargaining unit specific, based on the economics of scale.

With the current round of negotiations, each union was offered its own equity fund. Unions representing units containing homogeneous titles, such as LPNs only, were therefore confined to only the fund which could be generated by the size of the unit's aggregate payroll, which, in turn, was a function of the number of employees in the unit. Therefore, it is not possible under the 1987-90 civilian pattern to move funds from non-unit groups of employees who do not evidence recruitment and retention problems to unit employees. Whether or not the pre-1984 practice was desirable, is not the question. The fact is that for a union, such as Local 721, the flexibility built into the coalition process which made it attractive for it to participate no longer exists.

Despite the fact that in the vast majority of negotiations, the City has concluded agreements conforming to the civilian pattern with arithmetic precision, there have been exceptions. Rather than classifying these exceptions as the result of "unique and compelling" factors which justify a departure from the pattern, the City has indicated in the course of these proceedings that these instances, whether in the form of Awards or voluntary agreements, were, in Mr. Linn's words: "pattern conforming."

I must stress that each exception was clearly anchored by the

arithmetic pattern, minimally departed from that pattern and was made for good cause. In other words, I find nothing improper or questionable in the exercise of discretion by those who authorized the variances in question.

The first variance occurred in the context of the Award of the Yager Panel in HOUSING AUTHORITY II, where the Panel, in resolving the third year wage increase resulting from a reopener contained in the Award of the Eisenberg Panel, in HOUSING AUTHORITY I, recommended a three year cash cost which exceeded the cash cost of the civilian pattern by one percent. In that instance, the Panel obviously sought to soften the blow to the Union caused by its reduction in the rate of the increase in order to conform to the three year "going out" value of the contract to the civilian pattern. The Yager Panel acted reasonably in order to preserve the credibility of the impasse process, as well as the stability in the workplace. There was no suggestion, at any time in this proceeding, that the decision of the Yager Panel was in any way related to unique and compelling circumstances of recruitment and retention. In fact, the City cited it as an affirmance of pattern bargaining.

The second case also arose in the context of an interests proceeding, namely the UFT LOBA. The process of the exchange of offers which ensued after the City/Board of Education and the U.F.T. executed the Agreement to Arbitrate is extensively outlined at page 10 et seq, of this opinion. The Panel itself noted that the City's offer (as well as the UFT's) was a result of the LOBA process:

> Against this background it should be said that each party's LOBA, as initially presented to the Panel, sought to address various issues in a responsible manner. This, no doubt, was a result of the very nature of their agreed upon bargaining procedure culminating in a single package LOBA arbitration. Obviously, such a procedure, which can be an invaluable tool in stimulating truly effective bargaining short of arbitration, will be effective only if both parties fully appreciate the risk involved in failing to make an all out effort to produce as sound and realistic a LOBA as practical circumstances will permit.

LOBA Award, pp. 28,29.

As described above, the City had clung to an offer tied to the arithmetic pattern of the D.C. 37 1984 contract prior to the LOBA. It appears, at best, that its revised offer was as much tied to its litigation strategy as I to a recognition of a crisis in the recruitment and retention of teachers, which, it cannot be denied, existed.

The City characterized the acceptance of its position by the Garrett Panel as a pattern conforming victory. The text of the Panel's decision would sustain the City's position if it is understood that a collective bargaining agreement may conform to the pattern even if there is some arithmetic deviation.

Thus, the Garrett Panel wrote:

> The MCEA [D.C. 37] settlement also provides a significant reference. While WE AGREE WITH THE UNION THAT THERE IS NO ABSOLUTE PATTERN TO BE FOLLOWED, and that the settlement of a single agreement cannot require all other negotiations to follow the same path, nonetheless, we are bound under the memorandum of Agreement to consider the wages and settlements received by other private and public sector employees in New York or comparable communities. Clearly, the recent MCEA settlement package must receive considerable weight.

(LOBA Award, pp. 31,32, Emphasis Added)

The LOBA Panel continued its discussion of the importance of the civilian pattern at page 33 of its Opinion, while noting that the City had added twenty million dollars to the civilian pattern package in its last best offer to the U.F.T.:

> Each labor organization and each negotiation has its own issues and problems which need to be addressed. Often these concerns may require deviating from the general pattern. On the other hand, we are persuaded that the relationship or linkage between the major municipal unions is an important factor which cannot be ignored or minimized.

Clearly, the language of the LOBA Opinion did not endorse absolute adherence to a strict arithmetic pattern, and yet, it solidly sustained the concept that the pattern must be an important factor in the outcome of the City's negotiations with those unions which represent its civilian employees.

After the issuance of the LOBA, the City and the Board of Education and the City agreed to add .5% to the Board's contract with the C.S.A. to be applied to the salaries at the lower steps of the salary schedule of assistant principals. This was the result of increases in excess of the civilian pattern which had been added to the top of the teachers' schedule. However, the teachers had been compelled to "pay" for those increases in the LOBA Award which had accepted a Board/City proposal incorporating educational reforms providing savings to the employer. The assistant principals were provided with increases necessary to retain the existing relationship between them and senior teachers, although the CSA did not provide any savings to fund this variance from the arithmetic model of the civilian pattern.

The City attempted to portray the additional .5% it bargained with the CSA during the 1984 round as a recruitment measure. It did not submit any evidence to support this position. Unlike the case with RNs, I am unaware of any shortage of candidates for the position of assistant principal arising from compression of the salary relationship between senior teachers and junior assistant principals. In fact, the City's action precluded any compression, and so the City's characterization of its action as rooted in problems of recruitment and retention was merely speculative. Again, this does not mean that I conclude that the City's decision to add .5% to the package to preserve existing relationships between senior teachers and their immediate superiors was unreasonable. Rather, it appears to have been a justifiable application of its discretion to manage the school system.

In addition, the City appropriately undertook the obligation to fund the spinoffs arising from the EIT funds awarded to the Board of Education for teachers' wages. The City minimized its liability for spinoffs by insisting that the EIT funds be applied to the lower steps of the salary schedule. Nevertheless, the cost of the EIT spinoffs represented another departure from the civilian pattern.

Despite these minor variances in the pattern, the fact remains that the vast majority of the civilian unions subscribed to the strict arithmetic model in subscribing to the pattern for the next round, including, specifically, those unions which had received a

variance in the 1984 round. The flexibility exercised by the City with respect to a small minority of the civilian unions did not lead to a wholesale destruction of pattern bargaining in the 1987 round.

Consequently, if an adjustment is justified by this record which departs from the strict arithmetic model of the civilian pattern, but it is still anchored by it, the dire consequences predicted by the City simply will not come about.

The impasse procedure of the New York City Collective Bargaining Law , as written and expanded upon by a host of neutral panels, contains a forceful endorsement of pattern negotiations, including the application of the strict arithmetic model. This serves the pragmatic end of discouraging the resort to interest proceedings by the parties to achieve their ends at the expense of collective bargaining. The purpose of the impasse procedure is to encourage negotiations, not to supplant them.

At the same time, the process must offer balance when significant factors exist so that the arithmetic model cannot adequately address the problems which have arisen in the context of bargaining. Were the unions' potential to make their case so circumscribed as to make a variance in the pattern all but impossible without the City's consent, then, indeed, this process would lose its legitimacy, and the unions commitment to the New York City Collective Bargaining Law could well evaporate. It was the tripartite nature of this unusual statute, as well as the talent of the individuals involved, which helped the City survive the fiscal crisis. As a second era of fiscal difficulties

approaches, the City and its unions can ill afford to witness the demise of that special process which is the Board and Office of Collective Bargaining because the impasse process is used as a club, by either party. The unpredictability of placing a case before a neutral can be a catalyst to bargaining. This does not mean that a party should be automatically rewarded for taking a case to impasse. Were this to occur# the cost of the pattern would be markedly increased.

The variances in the pattern which were recounted above are of a different nature than a case of unique and compelling circumstances involving recruitment and retention, where the pattern is broken, or a separate pattern is established for a particular group. The facts indicate that only a single group has broken with the pattern, and that occurred on but a single occasion: the 1987-90 contract between the City and the New York State Nurses Association.** There is no dispute between the parties in this matter that the facts surrounding the short supply of RNs justified this pattern breaking contract, because of the public interest in maintaining a municipal hospital system which is, as is any clinical care health institution, dependent upon RNs to provide primary patient care.

An article appearing in the NEW YORK TIMES at page B 1 of the December 4, 1989 Monday issue, entitled "Nursing Shortage, Wages and Tasks Grow" sustains Mr. Linn's testimony that the City had been compelled to break the civilian pattern in its contract with the RNs.

**The 1980, 1982 and 1984 Nurses' Association contract varied from the civilian pattern similarly to the 1984 CSA, UFT and 237 contracts and the 1980 and 1982 LPN settlements with the Union.

The December 4 TIMES article indicates that the shortage of RNs is likely to continue for the remainder of this decade, as the following text indicates:

> In response to the shortage - and grueling routines - of registered nurses, hospitals throughout the New York metropolitan region are caught in a feverish round of bidding, each seeking to outdo the last in what experts say may be a futile and crippling competition.
>
> The bidding has lifted starting salaries at New York's major teaching hospitals from about $23,000 in 1985 to $34,000, this year. Recent contracts already in force will bring starting wages to $42,500 by 1992, and a precedent setting contract signed last week by Beth Israel Medical Center in Manhattan will pay experienced nurses as much as $70,000 a year.
>
> The New York metropolitan region's shortage of registered nurses is one of the worst in the nature.

The article predicts that the current shortages will be exacerbated by the relative aging of the nation's population, the decrease in the population pool which serves as a source for RNs and acute health crises caused by diseases and violence associated with drug abuse and AIDS. The impact of the large wage increases will be incorporated into the wage and benefit package received by the Corporation's RNs by virtue of the formulas which have been put in place for the basic minimum, and experience and longevity differentials. Nonetheless, I am not convinced that the Corporation's stated goal of increasing the ratio of RNs to LPNs by hiring more of the former is a realistic one. The Corporation's expectations are contrary to a basic common sense application of economic principles.

The City/ Nurses Association contract guarantees that the Corporation's RNs will receive a lower than average salary among the RNs employed in the fourteen voluntary hospitals deemed by the City to be exemplary competitors for RNs within the City. The basic minimum salary is to be one hundred fifty dollars below average, and the longevity and experience differentials are to be but a percentage of average. With competition for RNs remaining at a fever pitch, it appears extremely unlikely that the City can attract new RNs with lower than average wages.* While the attrition rate of the City's RNs may have decreased, it cannot be controlled to the extent necessary to experience sufficient permanent growth so that the Corporation can afford to ignore the need to compete in the market for LPNs.

In fact, economic principles suggest that the voluntaries will turn increasingly to LPNs to supplement their supply of nurses, and to control their overhead, which continues to mushroom at alarming rates. With senior nurses earning seventy thousand dollars, and junior nurses starting at forty two thousand, the use of LPNs, who can perform many of the same duties on the floor, appears to be fiscally prudent. Given the fiscal problems facing the City, and the Mayor's recent directives to each agency to trim the budget, the selfsame factors are at work. Thus, while the Corporation's belief that it can raise the quality of medical care it provides by increasing its ratio of RNs to LPNs may be be both laudable and desirable in an ideal world, reality exposes its plans in this regard as wishful thinking.

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*The TIMES article also suggests that working conditions in Corporation facilities may also contribute to its recruitment and retention problems.

The TIMES article appears to coincide with my conclusion

> Increasingly, licensed practical nurses, nurses' aides and a proliferating number of workers in narrow technical jobs are replacing registered nurses as drawers of blood, givers of medicine, takers of temperature and blood pressure and overseers of nutrition and therapy.
>
> “If you are paying $50,000 to $60,000 a year for an experienced nurse, you are really going to want to make sure you are using her in the most vital way possible," said Edward Salsberg, director of the state's Bureau of Health Resources Development.

In fact, in order to provide hospitals with greater flexibility in deploying their staffs, the State recently expanded the duties which LPNs may perform in the area of IV therapy. Formerly, only RNs could perform these assignments. The testimony of the LPNs in this matter, demonstrates how the Corporation utilizes LPNs to make RNs more productive and cost effective. None of the health care titles cited by the City which are covered by contracts conforming to the civilian title can possibly have the potential to mitigate the impact of the RN shortage that LPNs do. The Union notes that there was an increase of LPNs employed at the facilities it represents of approximately 24% over the nineteen month period ending in July, 1990. In my view, this is just the beginning of a trend in this area.

The City's assertion that the appropriate market for its LPNs is national must be quickly rejected. An examination of the wages paid to LPNs by the parity hospitals indicates that those wages are substantially closer to the wages paid by the City than to those paid by municipal hospitals in other urban areas. The closeness of the City wages to the parities represents the City's

long term judgment on which employers are its competition for LPNs.

The City has relied on the UPT LOBA Award to support its argument. At the same time, the City has agreed to a contract with its RNs which actually incorporates the wages paid by the parity hospitals as the basis for the wages it pays its RNs. The City has not explained how the terms and conditions of teachers are more relevant to LPNs than are the terms and conditions of RNs. Certainly, there is no large scale private sector education system which coexists with the public sector system in education (the New York City Board of Education employees 70,000 pedagogues) which competes with the latter for teachers, as there is in clinical health care. For instance, the City's research showed that the parities employed some 796 LPNs as of August 10, 1989, while the City employed 1688. Were there a system employing teachers in the private sector as large, some 44 percent of them, or about 28,500 teachers, would be working in the private sector in the City. Perhaps that is why, unlike the fairly close relationship between public and private sector LPNs in the City, the wages of public school teachers generally exceed their private counterparts in substantial amounts.*

Having found the relevant market for LPNs to include the local voluntaries, I find that it is appropriate to compare the parties' positions with the wages paid to LPNs by the parity hospitals used by the City in its contract with the RNs, as a convenient yardstick.

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*This does not necessarily mean that I agree that under current conditions, the relevant market for teachers is national. The issue is not before me, and I am merely commenting on the City's reference during this proceeding to the LOBA Award as a favorable precedent.

Before analyzing the data presented to me by the respective parties, I must dispose of two assumptions, one by each party, which do not fairly reflect the basis upon which theses comparisons should be made.

First, the Union has sought to compare the wages of the second year of-the 1199 contracts with the League and the Archdiocese with the third year of the City's proposal. This incorporates the raises which become effective on July 1, 1990, and has the effect of overstating the Union's case. The Union freely agreed to extend the expiration date of its 1984-87 contract with the City in order to fund additional benefits to those which the City had then offered. The contract therefore expired on November 300 1987, rather than June 30, 1987. Were I to concur with the Union's position, I would, in effect, countenance the denial to the City of the fruits of its bargain during the last round, i.e., the savings to be attributed to the extension. Thus, the proper comparison is between the wages of LPNs employed in the parity hospitals on July 1, 1989 with the offers of the respective parties which would be effective on December 1, 1989, the beginning of the third year of the contract.

By the same token, it is equally unfair for the City to compare the entrance level wages of LPNs at the fourteen parities with the City's basic minimum rate, because many of the former have probationary rates for new employees, while the City has no probationary rates. It would be :foolhardy for me to accept that an employee is going to elect a position that pays more for a brief period of two to six months over one that pays more after two to six months. I believe that

the only appropriate comparison is between the basic minimums paid to non-probationers. Probationers who do not become permanent, and who are terminated as a result, are not employees who have a sufficient nexus with their employer for the purpose of economic comparisons concerning issues of retention, in any event.

I reject, as well, the City's position that the impact of the 1199 settlements should not be weighed because of their appearance relatively late in the process between the City and the Union. In this respect the City has charged the Union with foot-dragging and intransigence, and as being the culprit for the recent drop in the number of LPNs working at the Corporation.

In effect, the City is asserting that any union which does not accept the City's pattern offer is guilty of intransigence and foot-dragging. Such claims allege, in effect, a refusal to negotiate in good faith, and, as I commented to the Union during the hearings with respect to its complaint that the City had unilaterally implemented a portion of. its offer as an interim wage increase, they are for the Board of Collective Bargaining, and not an impasse panel. I do note, moreover, that neither party has filed an improper practice charging the other with bad faith bargaining.

As to the City's assertion that the protracted nature of this matter are the major cause of an exodus to other employment opportunities, I can only observe that it is impossible to freeze a single moment in time to isolate a single cause for social behavior. Had the City offer

been implemented earlier, no doubt some of these employees would have remained, and others, perhaps many, would have left. This is not a rights arbitration where one can evaluate hard evidence, and decide the merits of a case with precision. in an impasse proceeding, a panel is confronted with economic facts and figures, and must use them to analyze present and project future human behavior, clearly the most imprecise of exercises, but one charged to a panel by law.

I do concur with the City that the 1199 settlements are not the appropriate patterns to be applied to the LPNs. Once a relevant City pattern has been developed, that pattern or those patterns generally have predominant weight over private sector patterns. Private sector patterns are primarily relevant only for the development of the applicable City pattern. The question in this case is, in my view, which City pattern, the civilian or RN (or perhaps both) is relevant. I accorded the 1199 settlements weight only in their impact, if any, on retention and recruitment issues.

In my view, both City offers are unacceptable because they are insufficient to address recruitment and retention problems. The City's offer would drop the basic LPN minimum from seventh among a list of fourteen parity hospitals and the City, to eleventh. The City would be $732 below average, in the case of its Basic Pattern offer, and $1,178 lower in the case of its Modified offer. To place the City ninth, with an increase of one hundred fifty dollars below average, a formula similar to that used by the City with respect to RNs, would cost 17.67%, or 1.26%*

*A 17.67% increase would generate wages of $22,212 per annum.

above the strict arithmetic model of the civilian package. Based upon the historical analysis recapped above, such a variance from the arithmetic pattern, could, as in the cases of the UFT, the Teamsters and the CSA, be considered as a pattern conforming settlement. It could also be argued that such an increase, because it employs a formula similar to that utilized by the City and the State Nurses Association, results in a relative placement of ninth on a list ranking City and parity hospital wages, conforms to the RN pattern (although such a package would not generate the percentage increases enjoyed by the RNs)and maintains the relationship between the wages of RNs and LPNs within longstanding ratios. This would leave the parties in a position of uncertainty as they enter a new round of bargaining as to which pattern is controlling, and would have the effect of promoting compromise to achieve voluntary settlement, as opposed to another impasse proceeding. Finally, a three year contract of 17.67 percent could be designed to have a cash cost of 16.45%p the precise cash cost of the civilian package, in order to avoid any retroactive impact on the current budgetary difficulties. I am recommending that the parties implement such a package which would also feature the same increase to the night and evening shift differentials, as well as a one month extension to fund a new fifth year longevity payment.

By increasing the night differential by 17.67% to $2206 per annum, the City LPNs would rank ninth, as well, in that area, with a differential $226 below the average of the parities. The night shift differential offered by the City would rank eleventh, and would be $385 less than average; the City's Modified offer

provides for a night shift differential of $2421, which is more than my proposal, and is only twenty five dollars below average. The City accomplishes this by moving money from the general wage increase, which penalizes the 54% of the bargaining unit which does not receive a shift differential with subpart wages.

I have used the City's suggested value of savings of .45% savings for a one month extension of the agreement to thirty-seven months. Based on the TIMES article which I cited earlier, and the application of economic principles, this may understate the savings of such an extension. I recommend that the savings be used to fund a new longevity payment after five years of service of $157. While this is a nominal amount, it is a beginning toward providing an incentive for LPNs with more than five years of service to remain with the City.

The package which I have recommended places emphasis on the recruitment and retention of LPNs on all shifts. The City's Modification package ignores the needs of those LPNs with less seniority who do not receive a differential payment in favor of employees who possess more than five years of experience, and who receive a shift differential. In actuality, there is a valley in the number of LPNs with five to ten years of seniority. Thus, in my view the Modification package creates a dangerous risk that the vast majority of LPNs will leave the system because the package

fails to address their needs.

Moreover, there is a large number of LPNs who are closing in on retirement eligibility. The Corporation is going to need to be competitive in the recruitment of new hires to address this decrease in staff.

Several questions are raised by the package which I have recommended. The first is: why not use a greater contract extension to fund necessary increases, as opposed to varying or breaking the civilian pattern? The answer is that an extension of more than six months seriously decreases the City's ability to compete for LPNs. As it is, the City's LPNs will lag behind six months, only to receive a below average salary. Significantly, the formula incorporated into the RNs agreement provides for an adjustment every six months. This builds a six month lag into that process.

The next question is: why not employ a formula, as the City did with the RNs in order to avoid a recurrence of this dispute, given the market conditions which will apparently affect the employment of LPNs? I view the imposition of a recurring formula upon the parties as an extension of my jurisdiction beyond the period for which these parties have designated me to serve as a neutral. If the parties find that it would be useful for them to use a formula as the City did with the Nurses Association, they are free to do so in a future round.

The final question is why are one or two rankings on a list of hospitals significant enough to vary or beark the pattern, as the case may be? The City is and will become increasingly involved in

to recruit and retain LPNs which will be played out in newspaper solicitations and in other public forums. LPNs will become aware of the wages, benefits and working conditions each facility has to offer. The City must be able to compete in that job market for new employees. In addition, it takes time to rebuild an appealing image to prospective employees. If the City allows the salaries of its LPNs to slip toward the bottom of those paid in the Metropolitan area, it will take that much longer for it to recover. In essence, the package which I recommend creates a safety net which will hopefully prevent any further deterioration in the situation. If the City is to maintain and staff its municipal system, then the public interest mandates that it have the potential to employ LPNs to fill its staff needs, as well as to increase the productivity of its increasingly expensive staff of RNs.

In this case, the City has asserted that total compensation, not just wages and uniform allowance, are the appropriate comparisons. The City makes this argument because, naturally, because it ranks better under such an analysis. Total compensation, in the City's view, compares the total amount spent by the employer on each employee, as opposed to the total dollars actually received by an employee. While total compensation may be a valid indicator when one is looking at comparables, I do not view it as valid when, in weighing public interest considerations, recruitment and retention problems become a factor. Employees then compare what they receive, and, prospective new employees are classically lacking in their concern about pension

benefits. Moreover, the City's analysis failed to compare the pension and health benefits which can be received by potential employees with those offered by the parity hospitals. It is possible that the parities offer less expensive, but more attractive options to employees, such as pensions which vest after five, rather than ten, years, as well as non-contributory rather than contributory, plans.*

There is a valley in the number of LPNs employed by the City from the sixth through the twelfth years. These employees would, if pension issues were significant to them, have the most to lose by leaving the Corporation's system, because, despite having invested a number of years in the system, most of them would not have vested. Yet, the data suggests they have left.

The City sought to attribute the valley in the number of its LPNs with six through twelve years of experience to layoffs and hiring freezes resulting from the fiscal crisis. This simply does not make sense. The layoffs occurred in 1975 and 1976. The wage freeze ended with the 1978 Coalition Agreement, and above average increases were achieved in the 1980 and 1982 coalition agreements. The hearings occurred in 1989, some thirteen years after the height of the fiscal crisis. It is difficult to envision any impact on that crisis had on the number of employees who were hired from 1979 to 1984. I have therefore attributed to the decrease in the numbers of employees with moderate seniority to the Corporation's failure to offer competitive compensation, and in spite of any superiority in pension benefits offered

*Under ERISA, private sector pensions must vest after five years of service. Under State and City Law, City pensions now vest after ten years of service, and require a 3% employee contribution.

by the City system.

The City has also stressed that the recent 1199 settlements were funded by pension waivers and modifications. The bulk of the savings resulting from the pension contribution waiver was for the period of the contract, and represented, therefore a cash savings. As there is no additional cash cost above the precise arithmetic model of the civilian pattern in the package which I have recommended, cash savings are not relevant.

There was, according to the City's letter of October 6, 1989, a permanent decrease in the pension contribution rate by League employers of 1.4%. In any event, as I have stated above, I have not relied upon the 1199 settlements as a controlling pattern, and have considered them only as they have inflated the wage rates of LPNs at some of the parity hospitals relative to the wages of City LPNs. For these purposes, I have noted my conclusion of the minor impact pension contributions and benefits appear to have had on the career decisions of LPNs with moderate seniority who have worked for the City.

It is unclear from the history of LPN negotiations whether the City or the RN pattern has been more relevant. The LPNs did negotiate as part of the civilian coalition in 1980 and 1982. However, the civilian pattern provided for far greater flexibility at that time through the use of a Citywide Equity Fundt which was not used in either the 1984 or 1987 rounds. In 1980 and 1982, the Coalition of Municipal Unions and the City used the Equity Fund to provide LPNs with similar benefits to those separately negotiated for RNs by the City and the State Nurses Association,

such as, improved longevity, increased tuition reimbursement and a greater uniform allowance.

In the 1984 round, both the SNA and the Union funded increases by a five month extension of their agreements with the City. In addition, the SNA, as recounted above received an additional increase of .4%, which is well within the limits of variances which the City has considered conforming to the civilian pattern on at least three occasions.

The Union has demanded increases and benefits well in excess of what the City can, and needs to provide. Except to the extent indicated in this package, the additional improvements sought by the Union are rejected as too costly, and unjustified by any comparison with the so-called parity hospitals. Likewise, given the exhaustive nature of the negotiations and impasse proceedings which followed, as well as the imminence of the next round of bargaining, I cannot recommend that the Union receive the right to reopen any contract which may flow from this impasse report and recommendation.

The City clearly has the ability to fund the additional 1.22 percent above its offer for the eighteen hundred employees in the LPN bargaining unit. The dire results from this recommendation predicted by the City is not justified on past performance. The SNA, UFT, CSA and Teamster contracts in excess of the pattern have had no impact on the acceptability of the strict arithmetic model of the civilian pattern by the unions representing the great majority of City employees. The other unions obviously viewed the exceptions to the rule as justified. The facts here are as strong as any in the cases

which I have just cited, save the RNs. It is the RN crisis which, in fact, precipitated my recommendation in this case.

Therefore, in accordance with this Opinion and Report, I make the following

R E C O M M E N D A T I O N S:

1. The term of the contract between the City/Corporation and Local 721 shall be for thirty-seven months commencing December 1, 1987 and ending December 31, 1990.

2. There shall be established in said contract a new longevity to be paid upon the completion of five years of service, and under the same terms and conditions as the other longevities existing in the contract, of $157.00 per year.

3. There shall be a three year increase in the basic minimum salaries and night and evening differentials of 17.67% to be applied, as follows: A 4.73% increase effective February 15, 1988; a six percent compounded increase effective December 1, 1988 and a six percent compounded increase effective December 1, 1989, which shall bring the basic minimum salary of all LPNs in the bargaining unit to $22,212 by December 1, 1989 and the night and evening differentials to $2,206.00 by December 1, 1989, which shall constitute a three year cash cost to the City/Corporation of their contract with Local 721 shall be 16.45%.

4. The City shall provide a fifty dollar increase per year in each of the three years of this Agreement to its contributions to the Union's Welfare Fund on December 1, 1987; December 1, 1988 and December 1, 1989.

5. All other economic demands of either party are hereby rejected.

Dated: Maplewood, New Jersey
January 8, 1990

DAVID N. STEIN, ESQ.
IMPASSE PANEL

STATE OF NEW JERSEY)
)ss:
COUNTY OF ESSEX)

Laurie Posner, being duly sworn, deposes and says that, on this 16th day of January, 1990, before me personally appeared DAVID N. STEIN, known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

NOTARY PUBLIC OF THE
STATE OF
AN ATTORNEY AT LAW IN
THE STATE OF NEW JERSEY