OFFICE OF COLLECTIVE BARGAINING

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In the matter between *

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Licensed Practical Nurses and Technicians *
of New York, Local 721, SEIU *

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-and- *

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The City of New York/Health and *
Hospitals Corporation *

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I-218-94

Before: Mark M. Grossman, Esq. - Arbitrator

Appearances:

For the Union - Mitchel B. Craner, Esq.

For the Employer - Carole O'Blenes
Proskauer Rose Goetz & Mendelsohn

INTRODUCTION

After five bargaining sessions, New York City and the Health and Hospitals Corporation ("NYC/HHC, " "HHC" or the "City") and the Licensed Practical Nurses and Technicians of New York, Local 721, SEIU (the "Union") were unable to reach agreement on a successor collective bargaining agreement to their collective bargaining agreement that expired on March 31, 1992. The Union and the NYC/HHC agreed that an impasses had been arrived at and applied to the New York City Office of Collective Bargaining ("NYCOCB") for the designation of an impasse panel. In August 1994, NYCOCB informed the undersigned that he had been selected as a one-person impasse panel (the "Panel") to hear and make a report and recommendations regarding the Union/Employer contract dispute.

An informal meeting was held on October 4, 1994, at which time formal hearings were scheduled and ground rules agreed upon. At the formal hearings, the parties were afforded a full opportunity to present evidence, give testimony under oath and present oral argument in support of their respective positions The hearings were stenographically reported and transcribed. The Union presented its direct case on February 7, 8, and 9, 1995. The City presented its direct case on February 14, and 15, 1994. The City concluded its direct case and presented its rebuttal on March 16, 1995 and the Union presented its rebuttal on March 17, 1995. Both the Union and the City submitted post-hearing briefs and the City submitted a short rebuttal brief.

The dispute presented to this Panel is limited to economic modifications to the parties' prior collective bargaining agreement. The City's position is that the Union should accept the pattern settlement already covering all the City employees covered by collective bargaining except the Registered Nurses ("RNs"). The Union contends that, consistent with the manner used for setting wages for City RNs, the LPNs wages should be set at an equivalent level to the wages paid to LPNs by the voluntary hospitals in New York City.

BACKGROUND

The Union represents the bargaining unit comprised of all Licensed Practical Nurses ("LPNs") working for the Employer. The vast majority of the LPNs work for HHC. HHC currently employs approximately 50,000 people, the majority of whom are involved in direct or indirect patient care. Nursing care within HHC facilities is provided by approximately 8,700 registered nurses ("RNs"), 1,450 LPNs and 3,200 nurse aides. HHC operates 11 acute-care facilities, five long-term care facilities and six diagnostic and treatment-care centers.

- bargaining history

The City had a fiscal crisis in the early 1970s which resulted in the lay off of thousands of employees and had a impact on collective

bargaining. Between 1974 and 1976, the LPNs, along with all other City employees, participated in a settlement known as the Americana Agreement. All City employees in bargaining received the same settlement.

In 1976-78 an agreement, known as the Hilton Agreement, also provided that all City employees, including the LPNs, would receive the same contract modifications.

In the negotiations for the 1980-82 collective bargaining agreement the City bargained with two separate coalitions, one representing the civilian employees (which included the LPNs) and one representing the uniform force employees. As part of the civilian settlement, the parties agreed to set up a tripartite panel to review salaries. This panel was known as the salary review panel or equity panel. Individual coalition member unions could apply for benefit adjustments. The City and the civilian coalition set aside a specific amount of money which the salary review panel could distribute to classifications where it found recruitment or retention problems or where there were unique considerations. The tripartite panel was limited by the monies set aside in the coalition agreement. The LPNs, as well as many other titles, received increased benefits pursuant to the panel's decision. LPNs were awarded a $30 increase in uniform allowance and an increase in tuition reimbursement from $300 to $500. At the suggestion of the salary review panel, a separate review panel was set up solely for the RNs. From this point on the RNs were treated as in a unique situation.

In the 1982-84 round of bargaining, the City once again bargained with two coalitions. The civilian coalition included the LPNs but not the RNs. The uniform forces coalition's settlement was a little higher than the civilian coalition's settlement. The RNs received the same across-the-board wage increases as the uniform forces coalition but less in benefits, making their settlement somewhat higher in value than the civilian coalition's and somewhat lower than the uniform forces coalition's. Once again, an equity panel was set up and the LPNs were granted an adjustment. The equity awards covered some 15,000 employees in about 300 titles.

In the 1984-87 round of bargaining, District Council 37, AFSCME, the largest civilian union representing approximately 130,000 employees,

negotiated a contract which established the pattern for the civilian employees. LPNs and a number of other unions settled contracts which were consistent with the civilian pattern. The uniform forces had a separate pattern which was a little higher than the civilian pattern.

The 1984-87 bargaining round had different results for RNs and Housing Authority employees in unique titles. The RNs settled for a contract which contained monies somewhat greater than the civilian pattern but less than the uniform forces pattern. Housing Authority employees in unique titles went before an impasse panel with an agreement that the recommendations of the impasse panel would not be appealed. That impasse panel recommended a three year contract with wage increases during the first two years greater than the civilian pattern. Instead of any specific wage adjustment for the third year, the panel recommended that the parties have a wage reopener in the third year. When the parties could not agree upon the wages for the third year, the dispute was submitted to another impasse panel. This impasse panel recommended a smaller increase than the civilian pattern so that the three year wage increases for the Housing Authority employees in unique titles was precisely the same at the end of the three years as the District Council 37 employees and others who accepted the pattern. The Housing Authority employees did get more cash during the three years.

In the 1987-90 round of bargaining, there were once again separate civilian and uniform forces patterns. There was also a special development affecting the RNs. There was an explosion in the demand for RNs. An unprecedented bidding war commenced in which the voluntary (private) hospitals and the NYC/HHC gave bonuses to attract RNs. Prior to collective bargaining, the RNs' wages were determined by a parity provision which mandated that the City establish RN wages at the average RN wages in 14 voluntary hospitals in the New York City area minus $150. Twice a year, a survey was conducted of the voluntary hospital RN wage rates and HHC adjusted their RN rates accordingly. This process continues in effect unless superseded in collective bargaining. The parity clause had been suspended in the prior bargaining rounds, but was reactivated in the 1987-90 round of bargaining.

The LPNs and the City could not agree upon a settlement in the 1987-90 round of bargaining and their impasse was submitted to a one-person impasse panel (the "LPNs' prior Impasse Panel"). The LPNs' prior Impasse Panel recommended a contract which contained the precise same cash value as that in the civilian pattern, but also provided a higher going out rate. The LPNs' prior Impasse Panel rejected the Union's position that it should given the same kind of parity treatment that RNs have. The LPNs' prior Impasse Panel also rejected the City's argument that the LPNs should receive the pattern settlement. The LPNs' prior Impasse Panel stated that it based its recommendation of a higher going out rate rather than the pattern on "the RN crisis which, in fact, precipitated my recommendation in this case." That panel anticipated that economic principles would influence the voluntary hospitals (and therefore NYC/HHC also) to turn increasingly to LPNs to supplement their supply of nurses. The panel concluded that the City offers were unacceptable as a basis for settlement because they were insufficient to address the LPNs "recruitment and retention problems."

The 1990-91 round of bargaining was begun with a settlement of the teachers' contract. As the City's fiscal condition began deteriorating, there were increasing complaints about the teachers' settlements. As a result of the complaints, the City settled a contract with a coalition of District Council 37 and the International Brotherhood of Teamsters for less than the teachers' settlement. Except for the RNs, this became the pattern for all other civilian settlements including the LPNs. The RNs continued to have the parity clause set their wages, the only change being that the parties agreed that the salary adjustment would be made once a year instead of twice a year. This change saved the City some cash and left it in a position to compete in the recruitment of RNs.

In the 1990-91 round, the PBA and the City went before an impasse panel and that panel recommended that the police receive a contract consistent with the civilian pattern. All other uniform force unions settled on contracts consistent with the pattern which covered both the civilians and uniform forces.

- this round

For the contract period covered by these proceedings, the City reached contract settlements (that generate a 8.25% increase) with other unions covering over 100 bargaining units. The only exception to these pattern settlements was the RN settlement in June 1993 that was based upon the parity clause. The pattern settlement for this round of negotiations covered 39 months. There is no wage increase during the first 18 months of the contract. Thereafter the following applied:

2% rate increase on the 19th month;

2% rate increase on the 31st month;

3% rate increase on the 36nd month;

$700 lump sum;

two $100 welfare fund increases;

lump sum $125 welfare fund increase;

freeze of minimums; and a

deferred compensation agreement.

(City Exhibit #33 details the settlement and the suggested ways that the Union might adopt the 8.25% increase to suit its needs.)

The pattern settlements covered 316,000 employees and involved 23 unions each representing over 1,000 employees, in addition to other unions representing smaller units. The only union in bargaining not covered by the pattern settlement besides the RNs is the Union (presently before this panel).

All unions representing employees (other than the RNs and LPNs) at HHC have agreed to the pattern settlement. This includes Local 1199 which represents the majority of the LPNs in the voluntary hospitals. Local 1199's bargaining unit at HHC covers approximately 800 Pharmacists and Dietitians. The Pharmacists and Dietitians represented by Local 1199 in the HHC are either the lowest or next to lowest paid when compared with the voluntary hospitals in New York City.

- city flexibility

The City's offer to the Union consists of an 8.25% economic package for the 39 month contract period. NYC/HHC noted what it considered to be flexibility in how the package was arranged so long as 8.25% over 39 months was the ultimate value of the package. The Union did not view the NYC/HHC position as demonstrating any flexible. The Union views the City's position as merely permitting it either to take money from some members in the bargaining unit to give more money to other bargaining unit members or to take from one benefit in order to provide more in another benefit. The Union strenuously objected to the limitation of 8.25% contained in all of the NYC/HHC offers.

UNION POSITION

The Union's presentation was primarily directed to the relationship between RNs and LPNs. To support its case, the Union elicited testimony from numerous HHC employees who testified regarding the similarity between LPNs and RNs in areas of orientation, giving medication tests, and training. The witnesses also testified to the similarity of LPN and RN work in admitting and discharging patients, doing assessments, and compiling health care plans. Various LPNs take reports, count narcotics, do medications, refer patients to pre-op for evaluation and for ambulatory surgery, admit and assess patients, take care of babies, give medications, feed and take vital signs, and chart and ventilate patients. Witnesses emphasized that both LPNs and RNs report to the same supervisors and both actually call doctors directly in an emergency. LPNs, in some cases, receive charge pay and act independent.

LPNs generally handle one side of the wards while RNs handle the other side. LPNs have the same standards applied and are required to demonstrate the same competencies as RNs. There is no interaction between the LPNs on one side of the ward and the RNs on the other side of the ward. Each performs similar duties in their respectively assigned areas. There is no monitoring of LPNs by RNs. Patients are generally randomly assigned to the LPN or the RN without any consideration of job title.

In the Operating Room LPNs scrub and circulate the same as the RNs. In surgery, there is no distinction between RNs and LPNs – they are interchangeably responsible for gunshot wounds, stabbings, and special surgery, including the same acuity level and caseload. In Emergency Rooms, LPNs work by themselves with a doctor just as RNs do.

Whether district nursing or primary nursing is utilized, LPNs are assigned to the same work as RNs. The LPNs are assigned at least an equal number of patients as the RNs. The patients assigned to the LPNs have at least the same acuity level as the patients assigned to RNs.

Due to their longer years of service, a seasoned LPN often has more experience that some RNs.

Fardhere Ceus, a physician and a certified internist, Board certified in psychiatry, testified that he has worked at various City hospitals and, at those hospitals, doctors do not identify or differentiate between LPNs and RNs. They are interchangeable. If a doctor needs a nurse, he does not inquire whether it is an LPN or RN. A call from an LPN is treated the same as a call from an RN. The doctor responds the same regardless of the classification of the employee who called him.

Testimony also established that LPNs newly hired at various non-NYC/HHC hospitals are coming from the NYC/HHC hospitals. These non-NYC/HHC hospitals are looking for experienced LPNs and the LPNs are leaving the NYC/HHC hospitals for substantial increases in pay.

The purpose of the Union's position is not to demand equal pay with the RNs, but rather to have the Panel accept the almost identical functions and performances of LPNs and that of RNs, and to allow the LPNs to break the pattern, as RNs have been allowed. LPNs should be treated on the same basis as RNs. The LPNs be able to use the same methodology for determining their wages as the RNs. The NYC/HHC LPNs wages should be determined solely by the rates paid in the voluntary hospitals.

The pattern for RNs should be applied to LPNs. LPNs are nurses as are RNs. LPNs perform substantially the same duties as RNs and are often interchangeable. LPNs should be placed in the same pattern category as RNs and not lumped together in the same pattern with the remaining municipal employees.

The pattern that the employer would have imposed on the LPNs has already been broken a number of times without dire consequences. LPNs broke the pattern when they received experience pay from the salary review panel. This was in addition to the pattern settlement. It is conceded that the RNs obtained a wage increases that far exceeded the pattern of the municipal employee settlement and that the municipal employee unions "accepted" this higher wage increase for RNs. Furthermore, in the late 1960s and early 1970s there were modifications of the pattern for the uniform forces. In addition, the Housing Authority Impasse Panel exceeded the pattern when it awarded a two year wage increase to employees in unique titles.

For each 1% that the pattern is exceeded for LPNs, the cost to the NYC/HHC will be $360,000-$370,000. The City continues to find money for the RNs to exceed the pattern. To give the LPNs equivalent parity to private sector LPNs would cost a fraction of the RNs pattern overage.

The employer's argument that the comparisons should be made with other government hospitals within the five boroughs must be rejected as that suggestion was rejected by the LPNs' prior Impasse Panel.

In conclusion, the Union insists that the NYC/HHC LPNs should receive the equivalent wages that are paid to LPNs at the parity hospitals used by the NYC/HHC in determining the parity wages paid by it to Registered Nurses employed by NYC/HHC. This would be equivalent to wages of $30,000 a year less $150. If the Panel recommends the NYC/HHC proposal of the municipal employee pattern, LPNs employed by NYC/HHC will earn less than $25,000 at the end 1995.

EMPLOYER POSITION

While the City takes a much different position than the Union regarding the issues before the Panel, it emphasizes that it considers the LPNs to be hard working, dedicated employees whose contribution is recognized and appreciated. The interest and welfare of the public mandates a pattern conforming award that does not exceed the City's ability to pay. The City has already taken extraordinary, indeed unprecedented, measures in an effort to close the FY 1995 budget cap. Despite the

extraordinary measures taken to date, the fiscal circumstances confronting the City as FY 1996 approaches remain ominous.

Although the City had adopted a balanced budget for FY 1995, by October 1994 a 1.1 billion gap was projected. The City's plan to close that budget gap included $809 million in expenditure reductions. In November 1995 the projected budget gap for the City of New York was $400 million for FY 1996 and 3.9 billion by FY 1998. Since then the budget gap has increased to $600 million for FY 1996.

In January 1995, the City learned that the HHC budget was being reduced $825 million or 22% of its budget from proposed state cuts in Medicaid funds. Given the tenor of statements from Albany and Washington, DC, there is reason to fear additional cuts and little or no increased support.

The fiscal crisis is so grave that the very survival of HHC is uncertain. To address its own budget gap, HHC has already implemented operating expenditure cuts and productivity increases at its facilities, as well as extensive downsizing in its central office. The City is even considering the privatization of three hospitals.

The Union had not even purported to show that the award it seeks is within the City's ability to pay or consistent with the public interest. The funds in the budgeted labor reserve are based on the established settlement pattern for unions with outstanding contracts. The reserve contains not one dollar beyond that.

The Union ignores the domino effect on future settlements of a deviation from the pattern as the City begins a new round of collective bargaining. An award that deviates even 1% from the NYC/HHC's proposal if applied to all municipal unions would create recurring annual budget gaps of $150 million in the future. The effect of such an award, in addition to destabilizing labor relations in the City of New York, would be to undermine hopes of economic recovery, in clear contravention of the interest and welfare of the public.

The current administration is keenly aware of the fiscal responsibility it bears with respect to the over 7.3 million citizens of this City. Subsumed within this responsibility is the obligation to provide such

essential services as education, fire and police protection, sanitation, health and human services, as well as the delivery of a myriad of services to protect the welfare of our City's citizens and those who visit our City.

The City's proposal, providing modest and fair wage increases to the members of the LPN bargaining unit in line with the increases to the rest of the municipal workforce, is within the City's ability to pay and thus will not damage its fragile economy or prevent the delivery of essential services.

The award issued by the panel must be consistent with the civilian and uniformed settlements that constitute the pattern for this round of bargaining. Required to negotiate with many uniformed and civilian bargaining units – each seeking to achieve the best possible settlement for its members – the City and its unions cannot rationally operate outside a framework that does not adhere to the concept of pattern bargaining. All the workers and the municipal unions that represent them have creative and ingenious arguments as to why they are more deserving of wages and benefits beyond a pattern settlement. Adherence to the pattern is particularly critical here, as the 1991-95 round of bargaining comes to a close and the next round begins. No union would want to settle its contract first, if it were not assured that the City would stick with the pattern that emerged and defend it against efforts by other unions to best it. Each labor leader, particularly if he or she has the courage to make the first settlement in a round of negotiations, is always concerned that his or her credibility will be diminished in the eyes of the membership should another union later be permitted to achieve a richer settlement. If the pattern is destroyed, the City may never again achieve balance in its labor relations as each union will seek to achieve its own goals in the absence of the discipline and stability a pattern provides.

This does not mean that the City has demanded lock-step uniformity. To the contrary, the City has recognized that the needs of various bargaining units differ and it has attempted, within the parameters of the pattern, to meet those needs whenever possible.

The LPNs have voluntarily accepted the civilian pattern in every round of bargaining before and after the 1987-90 round, when they

requested the appointment of an impasse panel. This includes the 1990-91 bargaining round.

The mere fact that LPNs work with RNs and perform some of the same work does not justify a deviation from the pattern. Indeed, the Union's own expert witness conceded that because of differences in level of skill and responsibility, RNs and LPNs are not interchangeable.

Even putting aside their very different educational requirements, State Law mandates that RNs and LPNs perform different roles in planning, delivering, and evaluating nursing care for patients and at wholly different levels of skill and responsibility.

The LPNs testified that they, at times, perform all aspects of a patient's bedside care during their tour of duty; NYC/HHC does not dispute that may be the case. However, those tasks are performed by the LPN in accordance with the nursing plan of care for which the RN is responsible, and they are performed under the supervision of a RN. LPNs simply do not exercise the same level of skill, judgment, and responsibility for patient care activities as do the RNs. The RN decides what role the LPN will play at all times and, regardless of how familiar an LPN may be with a unit, it is the RN who is responsible for that unit both as a matter of law and as a matter of NYC/HHC policy.

A comparison with LPN compensation with that of other government-employed LPNs, as well as that of LPNs in the region and in other large cities, plainly supports the NYC/HHC position. It bears emphasis that NYC's system of municipal health care facilities is sui generis. No other municipality (or other unit of local government) operates a public hospital system that even approaches the size, scope, or complexity of that of the New York City Health and Hospital Corporation. Nor is there any other entity–pubic or private, urban or suburban–that operates such a system subject to the difficult problems with which the NYC/HHC is consistently confronted. In particular, we refer to the budgetary constraints and the competing demands that inevitably flow from the City's need not to only provide health services to a large and diverse urban population, but also to educate its children, and to provide, among other things, the necessary police, fire, sanitation, and welfare services.

Thus, it is clear that the community of interest of NYC/HHC LPNs is much more closely aligned with the employees of the City than any other group of employees, whether in the public or private sector. Accordingly, the most relevant and compelling comparability analysis applicable here is with the pattern settlements accepted by 322,000 other City employees, including 33,000 HHC employees who work side by side with the LPNs and who have accepted the pattern established for this round of bargaining.

Looking at total compensation per hour worked, the NYC/HHC offer yields compensation for LPNs that compares favorably with that paid by the federal and state governments to LPNs employed in New York City at all levels. Comparisons of NYC/HHC LPNs with LPNs paid by government employers nationally and other major cities show NYC/HHC to be competitive.

The City presented the testimony of Mary Dougherty, the Director of Nursing to explain the differences between the role and responsibilities of the RNs and the LPNs in planning, delivering, and evaluating nursing care for patients. Ms. Dougherty reviewed the educational, legal, regulatory, and practice standards that apply to the RNs and the LPNs. The LPN program can be completed at either the high school level or post-high school level. The high school program consists of practical nurse's training integrated with two years of normal high school courses.

RNs typically prepare to take the licensing exam by attending college and receiving an associate or bachelor of science in nursing. Most of the RNs employed by the HHC are graduates of a four-year program and have a BS or a master's degree.

Ms. Dougherty testified that graduates of RN programs have a much more in-depth knowledge of health and illness, physiology and the role of different disciplines in patient healing and wellness. RN are also educated to deliver nursing care in a variety of settings and to assess managed patient care, direct care, do health counseling and anticipatory guidance, to collaborate with other health team members and serve as patient advocates.

Ms. Dougherty explained that although RNs are permitted to delegate and assign certain of the patient care duties, the bottom line is that the RNs

remain accountable for the performance of any duties that they delegate or assign to other nursing staff.

The Union has adduced no evidence that would justify any departure from the established pattern. The Union's principal argument seems to be that the LPN should be treated the same as the RN because they work side-by-side with them and perform the "same" work. The LPNs do not in fact perform the same work as RN; they only perform some of the same tasks as do Nurse's Aides and Technicians by way of example.

STATUTORY CRITERIA

In determining an appropriate increase, the Panel has considered and applied the standards as defined in the New York City Collective Bargaining Law ("NYCCBL"). Under section 1173-7.0C (3)(b) of the NYCCBL, impasse panels are required to review the following factors in determining settlement terms:

> (1) comparison of the wages, hours, fringe benefits, conditions and characteristics of employment of the public employees involved in the impasse proceeding with the wage, 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;
>
> (4) the interest and welfare of the public;
>
> (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.

ANALYSIS AND OPINION

- pattern in general

In order to maintain stable labor relations in New York City, the general approach in collective bargaining must be strict adherence to the pattern. The history of public sector collective bargaining in New York City clearly indicates a recognition by the City, the unions, and labor neutrals of both the logic and necessity of pattern bargaining. It is essential to the public interest that the normal and customary consideration of pattern bargaining be the general rule applied to New York City collective bargaining.

Pattern bargaining permits the City to plan budgets and determine the level of services it may offer to the public while protecting those unions who are last to resolve their negotiations from the claim that there is no money left for them. It is clearly in the interest of the public that pattern bargaining be one of the major, if not the major, consideration applied to the LPN-NYC/HHC impasse.

The bargaining unit structure in New York City, which consists of an enormous number of bargaining units, is very unusual. Nearly every unit can point to something that makes it unique and different from all other units. But the bargaining units have much more in common in that they are all part of the New York City collective bargaining system with the same employer, they work under the same overall budget, and they each represent but a small percent of the overall City workforce.

The Union has the luxury of being able to isolate its situation and not be concerned with the impact of its position if it were to prevail in this matter. However, the interest of the public mandates that this Panel consider the likely impact of a break in the pattern.

Any other approach than pattern bargaining would create unrestrained competition between City unions. Unions would be forced to engage in leapfrogging and whipsawing, and their members will not be satisfied unless they are successful. (Leapfrogging is where competitive unions each receive more than the other and apply relentless and continual pressure to the employer to obtain higher benefits. Whipsawing is the practice whereby one union receives a benefit merely because another has

the benefit.) Unions would try to one-up each other. To the extent the Unions are successful, or are perceived by the public to be successful, there would be public backlash pressuring the City to bargain "tougher" and obtain concessions to take back some of the advances the Unions accomplished.

A deviation from the pattern for one union will be the basis for many other unions to rationalize and justify similar increases. While the result of a deviation from the pattern would initially be gradually, it would have far reaching consequences. If one union successfully convinces the employer and/or an impasse panel of the justification of granting a benefit based upon the uniqueness of its situation, all other unions will argue that the situation is not unique and the benefit should be applied to all employees uniformly.

Employees judge the results of collective bargaining in comparative terms rather than absolute. When the City is able to treat all city employees the same, even increases limited substantially by fiscal exigencies will be accepted as fair. If each City union negotiated in total isolation from the other unions, the results of its negotiations would be scrutinized by its members in comparison to other settlements and the most important factor in determining worker satisfaction (which is one important factor in a successful labor relations system) would be their evaluation of the results of the bargaining with the results of other City unions. Were a union likely to succeed in getting "more," there would be enormous pressure on unions to magnify superficial and minor differences in an attempt to outdo the other unions. Employee discontent, poor attendance, low morale, low productivity and, possible major labor/management confrontations, would likely result. The interest and welfare of the public require that, in the context of NYC collective bargaining, pattern bargaining be the general rule.

- this pattern

It must be remembered that the pattern before the Panel in this case is particularly meaningful because it has not been established either by the City unilaterally or by the City bargaining with one or two other unions.

All the city unions (with the exception of the RNs), covering over 320,000 employees, together with the City established the pattern for the relevant time period. The LPNs represent less than one half of one per cent of the total City workforce. Certainly, there is a substantial burden on the Union to show by compelling and convincing evidence that it should be able to disregard the dozens of other settlements and receive greater increases in compensation than the 316,000 other City employees.

- equity panels (flexibility within the pattern)

One of the ways the City and the unions have provided some flexibility within the pattern approach is through the establishment of the salary review panels during a number of rounds of bargaining. This approach did not represent a deviation from the pattern as the LPNs contend but reflected flexibility within the pattern.

There was a finite amount of money allocated to the salary review panel so that the City could anticipate and plan for the spending generated. The panel had the obligation to consider each unions request within the context of the entire compensation system.

Acceptance of the pattern was a condition of participation in the equity award process. This was part of the deal to which the city unions, including the LPNs, agreed. This did not represent a deviation from the pattern which would support the LPNs case that compliance with the pattern is not so important, but indicates flexibility within the pattern that makes it easier and more equitable to apply the pattern approach.

- exceptions valid

Having said all of the above in support of the concept of pattern bargaining being essential to collective bargaining in New York City, that does not mean that a pattern (once clearly and legitimately established) must in every instance be applied without variation to every union. Applying a general approach of following the established pattern does not mean that no exceptions are permitted. On the contrary, the only way pattern bargaining can be justified is if there is the possibility and

flexibility to deal with compelling and unique situations without doing damage to the particular pattern established.

City unions in general, and the LPNs in this case specifically, have an absolute right to attempt to establish that there are compelling reasons why the pattern should not be applied to them. There is significant presumption that the pattern ought be extended to each individual unit and, therefore, a heavy burden of proof on any union (or the City if it were in the position) seeking to justify an except to the pattern for itself.

- ability to pay

Ability to pay is a factor normally and customarily considered in the determination of wages and working conditions by the parties and by neutrals in impasse. The City argues that its ability to pay is to be judged solely on the basis that it has budgeted money for pattern settlement and not one dollar more. According to the City, once its budget is set it should not be required to raise additional funds.

The City has to anticipate what its costs and obligations will be in order to project a budget. These estimates may even be moderated by the fact that once it make a commitment to or shows a willingness to spend a specified amount of money, that tends to become the floor that others will pressure to increase. In any event, the City's estimate of the costs for the LPNs contract cannot and will not have a major impact on this Panel. Any other decision would have the effect of permitting the City to dictate the results of the bargaining merely by projecting what it unilaterally determined should, or ought, to be the result of the bargaining.

Clearly, the amount of money it would take to fund the Union's proposal is a minimal part of the overall City budget. It is granted that any increase in the projected $600 million deficit will be difficult to deal with. However, if the justification exists and this Panel makes an award costing more than the City had projected, the City will have to treat the additional expense as any other expense that has high enough priority to be considered necessary.

The fact that the City's budget allocation is not dispositive of the issue in this case does not detract from the legitimate City view that, when considering ability to pay, consideration should not be limited to the short term. The Panel should consider the impact an award beyond the pattern might have on long term budget issues that result from pressure from other City unions. Whether it is considered under the criteria of ability to pay or under the interest of the public, any recommendation which can cause labor unrest and spiraling wage increases that would have an adverse affect on the City's budget is a consideration for the Panel.

- comparisons

Another statutory criteria to apply to the parties' impasse is that of comparisons of the wages and benefits of City LPNs with the wages and benefits of other employees performing similar work in New York City or comparable communities

The Union argues that the sole criteria this panel should base its recommendation on is the comparison of City LPN wages with the wages paid LPNs in the voluntary hospitals in New York City. The reason cited by the LPNs for such a limited and selective use of the statutory criteria is the fact that the RNs have their wages determined solely be a comparison with the voluntary hospitals and the LPNs' work assignments and responsibilities are more similar to RNs than any other City employees. Although the private sector comparison urged by the Union is required to be considered by the authorizing statute, that statute certainly does not mandate that it be the sole consideration. On the contrary, the statute mandates that a number of criteria be utilized. Before other comparisons are discussed, a review of the RN situation is warranted based upon the Union's contention that the LPN deserve similar treatment to RNs.

Most of the Union's presentation during the Panel's hearings was made by individual LPNs who testified to the similarity in, and at time identical, nature of the work, between LPNs and RNs. There was no challenge to the credibility of these witnesses, only to the conclusions that may be drawn based upon their testimony.

While there are many similarities between RN and LPN work, there are also important distinctions. LPNs work alongside RNs but also work under the supervision of RNs. The principal differentiation between RNs and LPNs is not task-based, but one based on the clinical judgment required to make clinically competent, knowledge-based decisions in the management of a patient's care. LPNs do not have the same training to perform and, under existing law, may not carry out all the responsibilities that are essential to the delivery of comprehensive nursing care that is performed daily 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; and, discharge planning and quality assurance. Even if some LPNs perform some of these duties, the ultimate responsibility over these areas still rests with the RN in charge.

As explained by a NYC/HHC witness, LPNs play principally a task-based role and are not expected to exercise the type or level of critical thinking and independent judgment that a RN is trained and required to exercise.

This testimony of the City's witness was basically consistent with the testimony of the Union's expert witness. The expert witness presented by the Union testified that LPNs and RNs work in a collaborative effort; as training for LPNs increases, the RNs are freed to perform work that LPNs cannot perform; LPNs contribute in many of the same areas that the RNs work, but the ultimate responsibility falls on the RNs; the RNs are required to use leadership skills; it is not uncommon now for RNs to have master's degrees; even if no RN is present, LPNs always work under the supervision of an RN; the RN is responsible to know that the person assigned particular tasks are capable and competent to follow the plan of care; if there are any changes to be made in the plan, the RN is the one to make the change. Thus, the LPN and RN are not interchangeable.

It is important to remember that the Union does not contend that LPNs and RNs are identical or interchangeable. The Union only argues that, because of the great similarities between LPN and RN jobs, the LPNs should have their wages based upon the wages of private sector employees performing the same job just as RNs do.

RNs enjoy a parity provision that predates collective bargaining. This arrangement was suspended during the fiscal crisis of the 1970s. The reactivation of the parity provision for RNs in the 1987-90 round of bargaining was necessitated by the extreme competition to recruit and retain RNs which had resulted from a severe, persistent shortage of RNs. Voluntary hospitals offered signing bonuses as well as free or low-cost housing and attempted to recruit RNs from overseas. When the City started bargaining with the RNs for the 1987-90 contract period, it faced a situation in which there were at least one thousand nursing vacancies, 24.9% of the RNs who were on the payroll in March 1987 had left by March 1988, and during the same year, RNs with tenure of less than one year had an attrition rate of 41.9%. The evidence demonstrates that the recruitment and retention problems for RNs continued to exist throughout the 1993 and 1994 fiscal years.

There is no justification for basing the salaries of LPNs solely on the salaries of private sector LPNs. The Union's reliance on the RNs parity provision as a basis for its position is misguided. The RN situation represents an anomaly. The incredible competition and resulting retention and recruitment problems do not make the RN situation the model that others should follow, but a unique situation which because of its uniqueness becomes almost totally irrelevant to the other City employees/unions. There is no significant evidence of a recruitment or retention problems of LPNs.

The Union's position does not acknowledge that the RN are in an unusual and unique situation. The RN parity clause arrangement was not given to the RNs because of anything unique about their work or their employment with the HHC. The parity clause exists because of the very practical problem that the City has had recruiting and retaining RNs. Neither the LPNs or any other union have ever argued that the RN crisis was not unusual or that it was not legitimate.

The Union argues that other city unions will understand if the LPNs break the pattern as they have understood when RNs received settlements in excess of the pattern. What is the proof of this assumption that the Union puts forth to support its position.? The only thing to which the Union points to substantiate its position is the similarity between RN and LPN

duties. But there are a multitude of job titles in city employment, including those in health care professions, who would obviously argue that they are in situations analogous to that of the LPNs were the LPNs to receive a wage adjustment in excess of the pattern.

Local 1199, the union that represents many LPNs in the private hospitals acknowledges, by its actions, the difference between private and public sector bargaining in New York City. Local 1199 represent 800 Pharmacists and Dietitians who receive lower compensation than their private sector counterparts. If LPNs would be able to establish their salaries solely by a comparison with the voluntary hospitals, why wouldn't the Pharmacists and Dietitians have the same right?

Indeed, many of the LPNs who testified had been promoted from the position of Nurses Aide. If the LPNs had the right to establish their salaries solely by a comparison with the voluntary hospitals, why shouldn't Nurses Aides have the same right? Couldn't the Nurses Aides argue that the LPNs are most similar to them in terms of work assignments and, therefore, their wages should be determined by the same process as the LPNs.

The argument could continue. If the Pharmacists, Dietitians, and Nurses Aides (who are primarily employed at HHC) were successful in having their wages determined by a comparison with the voluntary hospitals, how should the social workers and clerical employees employed at HHC be treated? Should those who work in HHC have their wages determined using the same method as most other HHC employees? Should those employed in Mayoral agencies have their wages determined by a different method?

The record does establish that other City unions have accepted the RN situation to be an anomaly. Only the LPNs cite the RNs' situation as a precedent to be used for their benefit. There is no evidence on the record which would lead to the conclusions that, if the LPNs were permitted to mirror the RNs' situation, other unions would accept the LPNs' position as being unique.

Attention now is returned to comparisons between City LPNs and other LPNs. As previously stated, the comparisons mandated by the statute

are not limited to private sector comparisons. Public sector comparisons are also relevant.

There is no doubt but that the LPNs in the voluntary hospitals make significantly higher wages than the City LPNs. While no one voluntary hospital has anywhere the number of LPNs that the City employs, together the voluntary hospitals employ a significant number of LPNs. Therefore, a comparison of City LPNs with LPNs employed by the volunteer hospitals in New York City meet the statute criteria and should be considered.

The City offered comparisons with state and federal LPNs working in the New York City area. These comparisons show City LPNs to be paid a competitive wage and are, at least, as important as the comparison with the LPNs at the voluntary hospitals. Public sector employers have more in common with the City than do private sector employers.

The City also presented comparisons with over 70 public sector jurisdictions from across the country The survey showed that the City LPNs were eighth out of 71 jurisdictions as of February 1995, assuming the salaries of the LPNs had been increased by the pattern settlement in New York City.

Additionally, the City surveyed the largest 20 cities and received responses from 14 of those jurisdictions. The City LPNs were generally between 4 and 6 out of the 14 who responded to the survey.

The public sector employers from across the country are less likely to compete with the City for the recruitment of LPNs than the public and private employers located in the New York City vicinity. But, to the extent that they employ LPNs in the context of a government operation which has to provide a variety of services to the public, the public employers from across the country are clearly comparable communities and are to be considered under the criteria in the statute.

The totality of the comparisons do not provide either compelling or convincing reasons for the City LPNs to receive salary increases that are above the pattern.

One of the other statute criteria to be considered is the change in the cost of living. Increases in the consumer price index do not justify wage

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- cost of living

One of the other statute criteria to be considered is the change in the cost of living. Increases in the consumer price index do not justify wage increases greater than the City's offer. Over an extended period of time, the LPNs have more than kept up with the increases in the consumer price index.

- other City unions

Another argument the Union presented in support of its position that the pattern should not be applied to the LPNs was that the pattern has not always been applied to every single City union. Although in this round of bargaining the pattern was agreed to by all unions other than the RNs, the Union cites what happened in prior rounds of bargaining as supporting its position.

The Uniformed Forces have at various times established their own pattern which was different (and usually better) than the civilian pattern. It is not uncommon for uniformed force employees to be treated differently from non-uniformed force employees. In any event, the LPNs are certainly not part of the uniformed forces and cannot justify their being separated from the City's civilian employees on the basis that uniformed employees have been dealt with differently from time to time.

The Union cites the employees in unique titles at the Housing Authority as a precedent which supports its case before this Panel. Although the first Housing Authority Impasse Panel recommended a settlement that was more than the civilian pattern for the first part of the bargaining round, they purposefully left the final settlement for the entire bargaining round vague. The second Housing Authority Impasse Panel clearly saw no reason to vary the pattern and did its best to put the parties back into the pattern. There is certainly nothing about the House Authority Impasse Panels' recommendations that would be a precedent in support of the LPNs' arguments in this case.

- LPNs' prior Impasse Panel

The final point to be discussed is the relevance of the award of the LPNs' prior Impasse Panel. The Union cites the LPNs' prior Impasse Panel's recommendations as a basis to support its position in this case. The LPNs' prior Impasse Panel recommended that the LPNs receive the same cash increase as all other city employees but receive somewhat more in going out rate. This recommendation was based upon 1) the RN crisis; 2) a recruitment and retention problem in the LPNs; and 3) the anticipated use of LPNs to replace RNs in order to save money.

The conclusion of this Panel is that all three bases used by the LPNs' prior Impasse Panel are either immaterial or inaccurate in regard to the instant case. In regard to the first reason, this Panel respectfully disagrees with the LPNs' prior Impasse Panel. As has been explained, the fact that the RNs have been placed in an unique and unusual position, provides no justification for the LPNs to be treated the same.

This Panel also finds no support in the record of this case to indicate that there is any recruitment and retention crisis presently relating to LPNs. In this regard, the record indicates that although the number of LPNs in the New York Metropolitan Area has been consistent the last few years, there are almost 6,000 more LPNs in the New York Metropolitan Area presently than there was in 1988. This represents a 20% increase in the number of LPNs available in 1988.

In regard to the ratio of RNs to LPNs, the record reveals that, on December 31, 1990, there were 5,978 RNs and 1,386 LPNs employed by HHC or a ration of 4.3 RNs for every LPN. On December 31, 1994 (prior to reductions due to the voluntary severance program) the HHC employed 8,744 RNs and 1,458 LPNs or a ratio of 6.0 RNs for every LPN. The change over the four years shows that the HHC is now employing proportionately more RNs in contradiction to the prior LPN Impasse Panel's prediction.

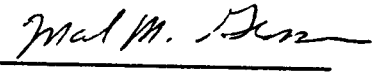
- conclusion

In conclusion, based upon the public and private sector comparisons, the ability to pay, cost of living, and interest and welfare of the public, the Union has not presented a persuasive case that there exists compelling and convincing reasons for it to receive a wage settlement in excess of the other 316,000 city employees.

RECOMMENDATION

The City and the Union shall apply the pattern settlement to the LPNs as outlined in City Exhibit #4 and #33.

Dated: October 10, 1995



Mark M. Grossman, Esq.