LABOR LAW—PUBLIC EMPLOYEES—COURT ADDS "PUBLIC INTEREST" TO THE CRITERIA USED FOR DETERMINING APPROPRIATE BARGAINING UNITS—*State v. Professional Association of New Jersey Department of Education*, 64 N.J. 231, 315 A.2d 1 (1974).

In 1969, the New Jersey State Nurses' Association (NJSNA) filed a representation petition with the New Jersey Public Employment Relations Commission (PERC).[1] Although the nurses' original petition sought representation of all registered nurses employed by the Department of Institutions and Agencies, initial state objections to the unit prompted an amendment to the petition.[2] Consequently, the petition ultimately submitted by the nurses proposed two statewide units comprised of supervisory and non-supervisory employees respectively.[3]

In separate proceedings, hearings were scheduled to consider a representation petition submitted by the Professional Association of the New Jersey Department of Education. When a second education association filed for representation, both petitions were joined to include all employees covered by the separate petitions.[4] Over similar

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1 State v. Professional Ass'n of N.J. Dep't of Educ., 64 N.J. 231, 236, 315 A.2d 1, 4 (1974).

2 *Id.* Following three prior hearings, the petition was amended substituting the Jersey Nurses' Economic Security Organization (JNESO) for NJSNA. The amendment was a result of the state's initial objection, which was "whether any of the nurses in the proposed unit were supervisors and if so, where the line was to be drawn." Brief for Petitioners-Appellants at 1, State v. Professional Ass'n of N.J. Dep't of Educ., 64 N.J. 231, 315 A.2d 1 (1974) [hereinafter cited as Brief for Petitioners-Appellants].

The state's objection concerning the supervisory status of the nurses was based upon section 6(d) of the New Jersey Employer-Employee Relations Act which provides in part:

> [PERC] shall decide in each instance which unit of employees is appropriate for collective negotiation, provided that . . . no unit shall be appropriate which includes (1) both supervisors and nonsupervisors . . . .

N.J. STAT. ANN. § 34:13A-6(d) (Supp. 1973-74).

3 State v. Professional Ass'n of N.J. Dep't of Educ., 64 N.J. 231, 236, 315 A.2d 1, 4 (1974). On March 11, 1970, the petition was again amended. In this amended petition, NJSNA sought to represent a unit consisting of all supervisory registered nurses, while JNESO sought representation of all non-supervisory registered nurses. Brief for Petitioners-Appellants, *supra* note 2, at 2. This amendment eliminated the problem of distinguishing between supervisory and non-supervisory nurses. *Id.*

The nurses' organizations sought units which were statewide in scope in order to conform with a prior PERC decision which required statewide units with respect to state employees. *Id. See* notes 57-64 *infra* and accompanying text.

4 State v. Professional Ass'n of N.J. Dep't of Educ., 64 N.J. 231, 238, 315 A.2d 1, 4-5 (1974). The Professional Association of New Jersey Department of Education requested certification as bargaining agent for all "professional non-supervisory educational employees in the Department of Education and the Katzenbach School for the Deaf." *Id.* at 237-38, 315 A.2d at 4. Four months later, a representation petition was also submitted by the New Jersey Institutions and Agencies Education Association seeking certification as

objections by the state,[5] the hearing officers in both sets of proceedings found that the proposed units were appropriate.[6]

Pursuant to the applicable PERC rule,[7] both sets of applications

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bargaining representative for all "professional, non-supervisory educational employees of the Department of Institutions and Agencies." *Id.* at 238, 315 A.2d at 4. Following the joinder of these petitions, the scope of employees to be represented was enlarged to include the professional educational employees in the Department of Higher Education, thereby creating a statewide unit of approximately 1,200 persons. *Id.*, 315 A.2d at 4-5.

5 *Id.* at 238, 315 A.2d at 5. The state argued that, under the statute, it would be in the best interests of both the state and its employees to be represented by a unit composed of all professional employees rather than by many separate units. Consequently, the state proposed that

> [t]he preferable unit . . . be one of all state-employed professionals, the requisite "community of interest" being reflected by their common status as professionals and the standards, attainments and status inherent therein as such.

Id.

6 The hearing officer in the educators' case emphasized the "community of interest" among the employees in the proposed unit and found that

> [t]he unit envisaged was regarded as "a logical functional group of such employees," having no conflicts of interest.

Id. at 239, 315 A.2d at 5. In the nurses' proceeding, the hearing officer, finding the statutory requirement of "community of interest" satisfied by a unit limited to professional nurses, pointed to

> the historical recognition of nursing as a separate and distinct academic discipline, its acceptance as a recognized profession and its maintenance of organizations, such as Petitioner New Jersey State Nurses' Association, which are concerned with internal self-discipline, training and the maintenance of standards and ethics on both a national and state wide basis . . . .

Hearing Officer's Report and Recommendation, State of New Jersey, P.E.R.C. No. 68 (1971), in Brief for Petitioners-Appellants, Appendix, *supra* note 2, at Pa13. To further support his finding that the nurses' unit was appropriate, the hearing officer referred to

> previous discussions between the New Jersey State Nurses' Association and State officials that have resulted in salary increases for all Registered Nurses employed by the State . . . .

Id. at Pa14.

Furthermore, state licensing requirements for nurses and the significant number of registered nurses to be included in the proposed professional unit were factors to be considered when selecting an appropriate unit. *Id.*

7 N.J. ADMIN. CODE § 19:15-1.1(b) (Supp. 1973) provides:

> Whenever the Executive Director deems it necessary in order to effectuate the purposes of the Act or to avoid unnecessary costs or delay, he may order any proceeding to be transferred to or consolidated with any other proceeding which may have been instituted or he may in his discretion sever proceedings which previously have been consolidated.

The consolidation of the nurses' and educators' cases with three other actions properly before PERC occurred one year after the nurses' case had been transferred to the Commission. Brief for Petitioners-Appellants, *supra* note 2, at 2. The cases were consolidated in accordance with N.J. ADMIN. CODE § 19:15-3.2 (Supp. 1973) which provides:

> (a) In any case in which it appears to the Executive Director that the proceeding raises questions which should be decided by the Commission, he may, at any time, issue an order, to be effective after the close of the hearing and before decision, transferring the case to the Commission for decision.
>
> (b) Such an order may be served on the parties upon the record of the hearing.

were consolidated for disposition before the Commission. Finding sufficient community of interest in the petitioning employees' professional status, PERC rejected the recommendations of the hearing officers and dismissed both cases.[8]

On appeal, the Supreme Court of New Jersey, in *State v. Professional Association of New Jersey Department of Education*,[9] affirmed PERC's disposition of the case, holding that the Commission's requirement of broad, statewide bargaining units was well-founded based upon both statutory unit selection criteria and "pervading public policy underlying the act."[10]

Recognized as one of the most vital aspects of the collective bargaining process,[11] the negotiating unit is generally defined in terms of "appropriateness."[12] After considering several formulations of the

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8 State v. Professional Ass'n of N.J. Dep't of Educ., 64 N.J. 231, 239, 315 A.2d 1, 5 (1974). The Commission viewed the concept of "community of interest" as an elusive one, encompassing several variable factors. Therefore, unit selection is "essentially a question of weighing the facts in each case and deciding what will best serve the statutory policy." State of New Jersey, P.E.R.C. No. 68, at 6 (1972).

> The essence of PERC's decision rested upon its determination that the characteristics of a particular profession should not be the determinant in establishing units for negotiations. . . . but rather the more elementary fact that they are simply professionals and on that basis alone to be distinguished from other groups of employees.

Id. at 7.

9 64 N.J. 231, 315 A.2d 1 (1974). The appellate division had previously reversed the PERC decision in a short, unreported per curiam opinion. State v. New Jersey State Nurses' Ass'n & Jersey Nurses' Economic Security Organization, No. A-2878-71 (N.J. Super. Ct., App. Div., June 1, 1973). The effect of the supreme court's decision was to reinstate the PERC finding and overrule the appellate division's holding which was based substantially upon the hearing officer's report and recommendations. *Id.* at 1-2. Both the nurses' and educators' cases reached the supreme court by way of certification, the latter by the court's own motion while the case was still pending in the appellate division. State v. New Jersey Nurses' Ass'n, 63 N.J. 557, 310 A.2d 472 (1973); State v. Professional Ass'n of N.J. Dep't of Educ., 63 N.J. 562, 310 A.2d 477 (1973).

10 64 N.J. at 259, 315 A.2d at 16.

11 The importance of the bargaining unit issue was succinctly stated by Arvid Anderson while addressing a symposium at the University of Kentucky:

> "The determination of the appropriate bargaining unit is a critical issue in public employment labor relations as it is in private employment. One over-all unit tends to smother the legitimate interests of skilled, professional, craft and uniformed employees. Excessive fragmentation strangles the bargaining process."

Begin & Chernick, *PERC Decisions: Summary and Review*, N.J. PUB. EMPLOYER-EMPLOYEE RELATIONS 1 (Bull. No. 3, June, 1970) (footnote omitted).

Other authors have also recognized the import of unit selection in collective bargaining and its related problems. *See* Prasow, *Unit Determination in Public Employment—Concept and Problems*, in INSTITUTE OF INDUSTRIAL RELATIONS 60-61 (1969); Newman, *Major Problems in Public Sector Bargaining Units*, 23 N.Y.U. CONF. LAB. 373, 377-78 (1971).

12 2 CCH LAB. L. REP. ¶ 2601, at 6703 (1972). In the collective bargaining process, the

definition of the bargaining unit, one student of labor relations suggested the following as the most useful articulation of the concept:

> A unit is a group of employees recognized by the employer, or designated by an agency, as appropriate for representation by an employee organization for purposes of bargaining.[13]

Prior to the enactment of the nation's first comprehensive labor relations act, unit determination was largely the result of confrontations between labor and management, unfettered by government intervention.[14] After the enactment of the Wagner Act,[15] however, the government became a participant in the unit selection process.[16] As a result, on the federal level, pursuant to the limitations set forth in the National Labor Relations Act[17] (NLRA), the National Labor Relations Board (NLRB) has assumed the responsibility of determining the appropriate bargaining unit. The significance of this determination is made apparent by other provisions of the NLRA which provide that the unit certified[18] by the board is the *exclusive* bargaining agent for all employees in that unit.[19]

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employees' interests are negotiated with the employer "by unions which represent the employees grouped in what is called the 'appropriate bargaining unit.'" *Id.*

13 Prasow, *supra* note 11, at 60.

14 *Id.* The passage of the Wagner Act, ch. 372, 49 Stat. 449 (1935), *as amended,* 29 U.S.C. § 151 *et seq.* (1970), was a significant measure in the determination of bargaining units. Prior to the Act,

> unit determination in the private sector was a function of bargaining power. The bargaining units were rarely formed on the basis of rational criteria.

Begin & Chernick, *supra* note 11, at 3.

15 Wagner Act, ch. 372, 49 Stat. 449 (1935), *as amended,* 29 U.S.C. § 151 *et seq.* (1970).

16 Prasow, *supra* note 11, at 60. With the introduction of government,

> [t]he term "appropriate" took on greater significance for two reasons: (1) the value judgments of government representatives could differ from those of the parties; and (2) the very intervention of government could significantly affect the parties' attitudes.

Id.

17 29 U.S.C. § 159(b) (1970) provides in part:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation . . . .

18 The Board's decision concerning "the appropriate unit for the purposes of collective bargaining and the ascertainment by the Board of the bargaining representative" is necessary for certification. NLRB v. Prudential Ins. Co., 154 F.2d 385, 389 (6th Cir. 1946). *See*

While the NLRA was enacted to resolve labor disputes in the private sector,[20] many of the conflicts which precipitated the congressional response have re-emerged in the context of public employer-employee relations.[21] Labor relations in the public sector, however, are influenced by unique considerations which are not a part of the private collective bargaining process.[22] In the public sector, with the state functioning as the employer, questions concerning the rights of the state frequently emerge in labor disputes.[23] In the past, the concept of sovereign state power[24] has been invoked to restrict collective bargaining pressures in the public sector.[25] In the labor relations context, strict

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also Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 156 (1941); NLRB v. Ideal Laundry & Dry Cleaning Co., 372 F.2d 307, 308 (10th Cir. 1967).

19 29 U.S.C. § 159(a) (1970) provides in pertinent part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit . . . .

After a representative has been selected by a majority of employees in the proposed unit, the employer is prohibited from bargaining with any other organization. UAW v. NLRB, 394 F.2d 757, 762 (D.C. Cir.), *cert. denied*, 393 U.S. 831 (1968). *See also* NLRB v. SuCrest Corp., 409 F.2d 765, 769 (2d Cir. 1969).

20 29 U.S.C. § 152 (1970). The Act, in defining the term "employer," specifically excludes from its coverage

> the United States . . . or any State or political subdivision thereof . . . if no part of the net earnings inures to the benefit of any private shareholder or individual . . . .

Id. § 152(2).

21 Imundo, *Some Comparisons Between Public Sector and Private Sector Collective Bargaining*, 24 LAB. L.J. 810, 810-11 (1973). *See* Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, 79 YALE L.J. 805, 857-61 (1970).

22 Helsby, *A Political System for a Political World—In Public Sector Labor Relations*, 24 LAB. L.J. 504, 505 (1973). *See also* Imundo, *supra* note 21, at 810; Siegel & Kainen, *Political Forces in Public Sector Collective Bargaining*, 21 CATH. U.L. REV. 581, 582-87 (1972). Various other commentaries have also dealt with the unique nature of the public sector in relation to unit selection. *See, e.g.*, Crowley, *The Resolution of Representation Status Disputes Under the Taylor Law*, 37 FORDHAM L. REV. 517, 518-21 (1969); Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 DUQ. L. REV. 357, 367-69 (1972); Rock, *The Appropriate Unit Question in the Public Service: The Problem of Proliferation*, 67 MICH. L. REV. 1001, 1005-08 (1969); Shaw & Clark, *Determination of Appropriate Bargaining Units in the Public Sector: Legal and Practical Problems*, 51 ORE. L. REV. 151, 163-67 (1971); Sullivan, *Appropriate Unit Determinations in Public Employee Collective Bargaining*, 19 MERCER L. REV. 402, 404-10 (1968).

23 Imundo, *supra* note 21, at 811; Helsby, *supra* note 22, at 505.

24 The sovereignty theory is based on the principle that

> the government-employer, as the ultimate repose of all legitimate societal power, cannot and should not be opposed by the countervailing power of labor unions.

Edwards, *supra* note 22, at 359. *See also* Imundo, *supra* note 21, at 811-12.

25 After noting that the sovereignty theory has frequently been used to restrict public sector collective bargaining, a recent study found the following language representative of the judicial justification for the doctrine:

"The courts have said that as a general rule collective bargaining has no place in

application of the sovereignty theory places all authority to fix terms and conditions of employment in the government and

> [a]ny system of collective bargaining under which unions and government jointly determine the terms and conditions of employment is incompatible with this doctrine.[26]

Frequently criticized by legal scholars,[27] the sovereignty theory was severely undermined in 1962 when President Kennedy promulgated Executive Order 10,988,[28] which granted collective bargaining rights

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government service. The employer is the whole people. This is a government of law, not men. For the courts to hold otherwise . . . would be to sanction control of governmental functions not by laws but by men. Such policy, if followed to its logical conclusion, would inevitably lead to chaos."

2 ABA LABOR RELATIONS LAW SECTION, COMMITTEE REPORTS 285 (1973) (quoting from Dade County v. Amalgamated Ass'n of Street Employees, 157 So. 2d 176, 182 (Fla. 1963), *cert. denied*, 379 U.S. 971 (1965)).

[26] Imundo, *supra* note 21, at 812 (footnote omitted). Another significant facet inherent in the public sector is the role of the legislature, since the financial aspects of any agreement between public employees and their employers must eventually be endorsed by the legislature. Helsby, *supra* note 22, at 505. Increased labor costs in public employment are met by rising taxes. This is not a problem for consideration in the private sector, however, since it is profit rather than service-oriented. Imundo, *supra* note 21, at 814. *See also* Anderson, *Public Employee Collective Bargaining: The Changing of the Establishment*, 7 WAKE FOREST L. REV. 175, 179 (1971). For a discussion of the economic factors inherent in the public sector, see Boynton, *Industrial Collective Bargaining in the Public Sector: Because It's There?*, 21 CATH. U.L. REV. 568, 575-76 (1972).

Another facet of the sovereignty problem in public sector collective bargaining is the prohibition against strikes. Imundo, *supra* note 21, at 815-17; Helsby, *supra* note 22, at 507-09. In recent years, this prohibition against strikes by public employees has been extremely controversial. Consequently, several states have recently enacted legislation which permits a limited right to strike, provided the strike will not endanger the public health or safety. *See, e.g.*, HAWAII REV. STAT. § 89-12(c) (Supp. 1973); MONT. REV. CODES ANN. § 41-2209 (Supp. 1973); PA. STAT. ANN. tit. 43, § 1101.1003 (Supp. 1973-74); VT. STAT. ANN. tit. 21, § 1730(3) (Supp. 1973). For an informative analysis of the strike ban and its lawfulness in the public sector, see Stevens, *The Management of Labor Disputes in the Public Sector*, 51 ORE. L. REV. 191 (1971). For an exhaustive analysis of variant alternatives to strikes in the public sector, see Comment, *Collective Bargaining for Public Employees and the Prevention of Strikes in the Public Sector*, 68 MICH. L. REV. 260, 269-301 (1969). *See also* Bernstein, *Alternatives to the Strike in Public Labor Relations*, 85 HARV. L. REV. 459, 469-75 (1971); Brown, *Public Sector Collective Bargaining: Perspective and Legislative Opportunities*, 15 WM. & MARY L. REV. 57, 72-76 (1973).

[27] Arguments based on the concept of "sovereignty" as a viable basis of distinction between the public and private sectors are no longer accorded the weight they once received. For example, one commentator has stated:

> [T]he application of a strict sovereignty notion—that governmental power can never be opposed by employee organizations—is clearly a vestige from another era, an era of unexpanded government when its proprietary role was not nearly so important. The huge growth of government and its expansion into new "non-essential" services has produced basic changes in thought which make the foundations of any absolute notions of sovereignty obsolete.

Edwards, *supra* note 22, at 360 (footnote omitted).

[28] 3 C.F.R. 521 (1959-63 Comp.), 5 U.S.C. § 7301 (1970), *revoked by*, Exec. Order No 11,491, 3 C.F.R. 262 (Supp. 1973), 5 U.S.C. § 7301 (1970).

to employees of the federal government.[29] In addition to recognizing the organizational rights of federal public employees, the Order established labor guidelines similar to those governing the private sector under the NLRA.[30] Influenced by the federal example, many states have enacted legislation dealing with public labor relations;[31] and by 1973, thirty-four jurisdictions had enacted statutes "either permitting or requiring designated public employers to bargain collectively with their employees."[32]

In New Jersey, public employees are granted organizational rights by the Constitution of 1947.[33] Because the constitutional provision expressly distinguishes between public and private employees in its recognition of the right to bargain collectively,[34] the legislature in 1966 created a commission to study the problem of public employee grievances.[35] The commission report, released in 1968, recommended establishment of an effective procedure for the resolution of disputes involving terms and conditions of employment in the public sector.[36]

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29 Exec. Order No. 10,988, § 1(a), 3 C.F.R. 521 (1959-63 Comp.), 5 U.S.C. § 7301 (1970). The Order provides that

> [e]mployees of the Federal Government shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity.

30 With the promulgation of Order 10,988, the federal government "established a complete framework for management-employee relations similar to the one prevailing in the private sector under the NLRA." Blair, *State Legislative Control over the Conditions of Public Employment: Defining the Scope of Collective Bargaining for State and Municipal Employees*, 26 VAND. L. REV. 1, 3 (1973) (footnote omitted).

31 Brown, *supra* note 26, at 60.

32 Blair, *supra* note 30, at 3 (footnote omitted). For a list of state statutes permitting binding contracts to be negotiated between the parties covering matters agreed upon, see *id.* at 3 n.18. *See also* D. OGAWA & J. NAJITA, GUIDE TO STATUTORY PROVISIONS IN PUBLIC SECTOR COLLECTIVE BARGAINING 63-66 (1973); Anderson, *supra* note 26, at 176-77; Goldberg, *Public Employee Developments in 1971*, 95 MONTHLY LAB. REV. 56, 63 (1972).

33 N.J. CONST. art. 1, ¶ 19 provides:

> Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing.

34 *Id. See also* Law of June 18, 1966, ch. 170, [1966] N.J. Laws 902, in which the legislature recognized the constitutional distinction.

35 Law of June 18, 1966, ch. 170, [1966] N.J. Laws 902. The Study Commission was continued by legislation adopted in 1967. Law of March 13, 1967, ch. 8, [1967] N.J. Laws 22. *See also* INTERIM REPORT TO THE GOVERNOR AND THE LEGISLATURE, in PUBLIC AND SCHOOL EMPLOYEES' GRIEVANCE PROCEDURE STUDY COMM'N: FINAL REPORT TO THE GOVERNOR AND THE LEGISLATURE 33 (Jan. 9, 1968).

36 The commission included in its recommendations the enactment of legislation which would provide an efficient collective negotiation process in the public sector, exclusive employee representation, and the voluntary resolution of disputes between public sector labor and management. PUBLIC AND SCHOOL EMPLOYEES' GRIEVANCE PROCEDURE STUDY COMM'N: FINAL REPORT TO THE GOVERNOR AND THE LEGISLATURE 18-26 (Jan. 9, 1968) [hereinafter cited as FINAL REPORT]. The commission also proposed a merger of the agencies

In 1968, the legislature responded to the commission report by enacting the New Jersey Employer-Employee Relations Act,[37] thereby supplementing the existing Labor Mediation Act.[38] Commonly known as the PERC Act, this legislation, in addition to recognizing public employees' rights to bargain collectively,[39] established a separate agency to administer the Act.[40]

With respect to unit determination, the PERC Act empowers the Commission to "decide in each instance which unit of employees is appropriate for collective negotiation."[41] Elsewhere the Act directs that

> [t]he negotiating unit shall be defined with due regard for the com-

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supervising both public and private sector labor disputes. *Id.* at 19-21. This recommendation, however, was rejected by the legislature, and separate agencies were later established to resolve public and private disputes. *See* N.J. STAT. ANN. § 34:13A-5.1 (Supp. 1973-74).

37 N.J. STAT. ANN. § 34:13A-1 *et seq.* (Supp. 1973-74). The Act evolved from Senate Bill 746, which had been conditionally vetoed by Governor Hughes. The reasons for his objections can be found in VETO MESSAGE OF GOVERNOR RICHARD J. HUGHES CONCERNING SENATE BILL NO. 746, at 2-4 (1968). Nevertheless, the bill was passed by both houses over his veto. Stark, *The New Jersey Employer-Employee Relations Act of 1968*, in RUTGERS REPORT ON WORLD AFFAIRS 1 (Feb. 8, 1969).

38 N.J. Labor Mediation Act, N.J. STAT. ANN. § 34:13A-1 *et seq.* (1965), *as amended*, N.J. Employer-Employee Relations Act, N.J. STAT. ANN. § 34:13A-1 *et seq.* (Supp. 1973-74).

39 N.J. STAT. ANN. § 34:13A-5.3 (Supp. 1973-74). The Act states in pertinent part that

> public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity . . . .

Id.

40 *Id.* § 34:13A-5.2. The agency entrusted with the settlement of disputes in the public sector is the Division of Public Employment Relations. Within this Division, PERC is responsible for supervising matters related to unit selection, elections, certification and public employer-employee labor disputes. *Id.* §§ 34:13A-5.1, -5.2, -6(b) and (d).

> The Study Commission recommended that the administrative agency be granted wide authority to develop procedures appropriate to New Jersey's needs and to retain sufficient flexibility to respond to circumstances which cannot be fully anticipated.

FINAL REPORT, *supra* note 36, at 25.

41 N.J. STAT. ANN. § 34:13A-6(d) (Supp. 1973-74). Additionally, the Act provides for certain negative criteria in unit selection:

> [E]xcept where dictated by established practice, prior agreement, or special circumstances, no unit shall be appropriate which includes (1) both supervisors and nonsupervisors, (2) both professional and nonprofessional employees unless a majority of such professional employees vote for inclusion in such unit or, (3) both craft and noncraft employees unless a majority of such craft employees vote for inclusion in such unit.

Id. The Act also excludes the superintendent of a school from coverage under the Act, and prohibits a unit consisting of both policemen and non-policemen. *Id.* § 34:13A-5.3. *See* County of Gloucester v. Public Employment Relations Comm'n, 107 N.J. Super. 150, 158-59, 257 A.2d 712, 717 (App. Div. 1969), *aff'd per curiam*, 55 N.J. 333, 262 A.2d 1 (1970), in which PERC determined that because county corrections officers have the power and authority of policemen, they are deemed policemen for purposes of the statute and cannot join a union consisting of any members other than policemen.

> munity of interest among the employees concerned, but the commission shall not intervene in matters of recognition and unit definition except in the event of a dispute.[42]

In conformity with the pervasive desire to establish and maintain a high degree of flexibility on the part of PERC,[43] the draftsmen of the Act did not attempt to define "community of interest."[44] Consequently, PERC was charged with the duty of developing the concept on a case-by-case basis.[45]

Representative unit determination cases that have been considered by PERC under the statute reveal an interesting evolution in the application of the community of interest concept in situations where there exist competing proposals for broad state or county-wide units on one hand, and smaller single-facility units on the other. In *Camden County Board of Chosen Freeholders*,[46] the Commission had occasion to consider representation petitions submitted by two Camden County employee organizations.[47] Initially, one of the groups sought representation of a unit composed of all blue-collar employees who worked at the Lakeland Institutions, a hospital complex located in Gloucester

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42 N.J. STAT. ANN. § 34:13A-5.3 (Supp. 1973-74).

43 *See* note 40 *supra* (relating to FINAL REPORT). During public hearings held a year after the PERC Act's enactment, the flexibility approach to unit selection was again voiced:

> [T]he law now is vague and intentionally vague, so that the Commission can, on a case to case basis, determine what is the best or an appropriate unit to bargain collectively for employees of a particular group.

1 *Public Hearings Before N.J. Senate and Assembly Comms. on State Gov't on Public Employer-Employee Relations Law* 46 (1970) (remarks of Thomas Parsonnet) [hereinafter cited as *Public Hearings on State Gov't*].

44 *See* Board of Educ. v. Wilton, 57 N.J. 404, 420, 273 A.2d 44, 52 (1971). Although the Act does not define the term, one commentator suggests that

> [c]ommunity of interest is a term of art which probably defies a full fledged definition but the essence of it is that the employment relationship manifests certain characteristics that tend to identify and separate employees into a group having such similar interests that they are more susceptible to successful negotiations than disparate interests would be.

Nelligan, *PERC Decisions: A Review*, in PERC ONE YEAR LATER 16 (1970). It is significant to note that the NLRA does not define the term "community of interest" with respect to its unit selection criteria. 29 U.S.C. § 159(b) (1970). *See also* Continental Baking Co., 99 N.L.R.B. 777, 782 (1952); D. OGAWA & J. NAJITA, *supra* note 32, at 2.

45 Coleman, *A Perspective on Public Employee Unionism in New Jersey*, 4 RUTGERS-CAMDEN L.J. 289, 298 (1973). This approach has also been recognized by the judiciary. Board of Educ. v. Wilton, 57 N.J. 404, 420, 273 A.2d 44, 52 (1971) (by implication). *See also* 2 *Public Hearings on State Gov't*, *supra* note 43, at 53A (remarks of Howard Simonoff).

46 P.E.R.C. No. 28 (1969).

47 The two organizations petitioning for representation were the American Federation of State, County, and Municipal Employees (AFL-CIO) and Camden Council No. 10, N.J. Civil Service Association. *Id.* at 1.

Township.[48] The second organization, however, proposed a county-wide unit of blue and white-collar employees with the exclusion of workers employed by the Highway Department.[49] During the course of the proceedings, all parties stipulated that in the event a unit limited to Lakeland alone was selected, the unit should be limited to only those job classifications found at that institution.[50]

Characterizing the unit agreed upon as "gerrymandered,"[51] the Commission concluded that the parties' stipulation ignored the employees' community of interest.[52] After rejecting the stipulated unit, the Commission proceeded to consider the appropriateness of the county-wide unit which included both blue and white-collar employees, and then a unit restricted to blue-collar workers at Lakeland Institutions only. The Commission ultimately found that both units were appropriate and directed an election to determine whether the Lakeland Institutions' employees desired combination with other employees of the county.[53]

In finding the Lakeland unit to be appropriate over the county's objection that a limited unit would create administrative difficulties,[54] the Commission placed great reliance on the distinct community of interest of the Lakeland employees. Observing that the hospital workers' unique service "set[s] them off from other County employees,"[55] the Commission concluded:

> All of these factors . . . lend support to the conclusion that the employees of Lakeland Institutions do have a community of interest

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48 *Id.* at 2-3.

49 *Id.* at 4.

50 *Id.* at 3. Specifically excluded by the petitioning parties were "those job classifications found both at Lakeland Institutions and elsewhere in the County." *Id. See also* Harper, *What Is the Unit Appropriate for Collective Negotiations?*, N.J. PUB. EMPLOYER-EMPLOYEE RELATIONS 3, 4 (Bull. No. 12, Nov., 1972); Nelligan, *supra* note 44, at 17.

51 P.E.R.C. No. 28, at 3.

52 *Id.* In disposing of the case, PERC failed to recognize

> such a gerrymandered unit which includes some employees but which excludes others to be consistent with the statutory requirement that the Commission give due regard for the community of interest among the employees concerned.

Id. at 5. *See also* Harper, *supra* note 50, at 4; Nelligan, *supra* note 44, at 17.

53 P.E.R.C. No. 28, at 8-9.

54 *Id.* at 5. It was the county's opinion that "such a unit would cause untold administrative problems and would lead to competition among employee groups." *Id.*

55 *Id.* at 6. Other factors existed which demonstrated the separate and distinct "community of interest" between the Lakeland employees and other employees of the county. The working conditions at Lakeland varied from anywhere else in the county; grievances of Lakeland employees as well as "such matters as hire, discharge and discipline" were handled by Lakeland. *Id.* Furthermore, no employee was subject to transfer from Lakeland "other than in emergencies of a temporary nature." *Id.*

> separate and distinct from that of other County employees and that Lakeland Institutions does constitute an appropriate unit.[56]

Subsequent PERC decisions, however, indicate that the Commission's conception of community of interest is becoming more expansive in order to select broad, statewide units, rather than smaller, local units of the type advised in *Camden County*. In *State of New Jersey (Neuropsychiatric Institute)*,[57] decided in 1971, the Commission was faced with the consolidated petitions of several employee groups concerning the representation of persons employed by the State of New Jersey in various institutions and government departments.[58] After reviewing the proposals of the various petitioning organizations, which included single institution units and units confined to particular departments within institutions,[59] the Commission, with specific reference to *Camden County*, determined that the units in question, regardless of their composition, should be statewide in scope.[60] Conceding that there is "a kind of community of interest"[61] among workers at the same institution, the Commission nevertheless considered the centralized nature of the state employer and the consequent need for statewide uniformity,[62] and found a more general form of common interest:

> But [institutional community of interest] does not negate the possibility of a stronger, broader and higher level of common interest which threads through various administrative units and which de-

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56 *Id.* The Commission based its holding upon its interpretation of section 5.3 of the Act:

> The Act does not require the Commission to find the *most* appropriate unit or the *only* appropriate unit but calls for a finding that, after giving due regard for the community of interest among the employees concerned, an [*sic*] unit is an appropriate unit.

Id. at 7 (emphasis in original). *See also* Harper, *supra* note 50, at 4.

57 P.E.R.C. No. 50 (1971).

58 *Id.* at 3.

59 *Id.* at 5.

60 *Id.* at 10.

61 *Id.*

62 *Id.* In support of its determination that statewide units, rather than smaller units, are appropriate, the Commission listed as its reasons

> [t]he administrative make-up of the Employer; the concentration, at the highest level, of responsibility for policy and authority to regulate and implement the most significant aspects of labor relations; the obligation implicit in the concept of Civil Service to insure equality of employment opportunity and uniformity of treatment once employed, and in consequence of that obligation, the basic consistency of terms and conditions of employment throughout the state for employees engaged in essentially like functions—and for certain terms such as fringe benefits, a consistency regardless of function . . . .

Id.

> rives from the fact that employee terms and conditions in greatest measure are established by a central authority . . . .[63]

Finding units of less than statewide scope inappropriate for purposes of collective bargaining, the Commission established three units of nonprofessional, nonsupervisory employees.[64]

Although community of interest in the representation context has not been a frequently litigated issue in the New Jersey courts, several cases concerning this question evidence a departure from the traditional desire to give the wishes of the employees great weight in the determination of bargaining units.[65] In *Board of Education v. Wilton*,[66] administrative employees of the West Orange Board of Education formed a negotiating unit and requested employer recognition. The Board recognized the unit, but excluded " '[d]irectors who act in supervisory capacity' " over the administrators in the unit.[67] When the Director of Elementary Education sought inclusion in the unit, the Board refused the request on the ground that the Director's status as a supervisor of other unit employees required her exclusion.[68] On appeal, the supreme

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63 *Id.* at 11.

64 *Id.* at 15. The Commission found that three units would be appropriate: Health, Care and Rehabilitation Services; Operations, Maintenance and Service; and Craft Employees.

Prior PERC decisions demonstrate the various criteria which have developed in defining "community of interest." *E.g.*, City of Orange, P.E.R.C. No. 21, at 3-5 (1969) (a department-wide unit was approved due to separate administrations, lack of employee interchange, and unique department job classifications); Newark Bd. of Educ., P.E.R.C. No. 20, at 2-3 (1969) (various professional disciplines were combined with teachers based upon their functional relationship and the necessary corollation of their duties); Garfield Bd. of Educ., P.E.R.C. No. 16, at 2 (1969) (nurses and teachers were combined in a unit distinct from other county employees due to their similar working conditions, *i.e.*, same hours of work, holidays, etc.); Town of Nutley, P.E.R.C. No. 12, at 2 (1969) (two blue-collar department-wide units were established based on the lack of interchangeability between the departments, the differing job classifications, and the distinct administrations of the two departments); Perth Amboy Bd. of Educ., P.E.R.C. No. 3, at 3 (1969) (a professional unit was adopted based upon the desires of the parties in the representation dispute); State Colleges of New Jersey, P.E.R.C. No. 1, at 3 (1969) (each of the six state colleges was deemed an appropriate unit because of its distinct autonomy from the others in its day-to-day operation). *See* notes 45-55 *supra* and accompanying text (discussing *Camden County*); *see also* Begin & Chernick, *supra* note 11, at 5-6; Harper, *supra* note 50, at 4; Nelligan, *supra* note 44, at 16-18.

65 Begin & Chernick, *supra* note 11, at 6.

66 57 N.J. 404, 273 A.2d 44 (1971).

67 *Id.* at 407, 273 A.2d at 45. Included within the unit were "principals, assistant principals, subject matter directors, and administrative assistants." *Id.*

68 *Id.* at 407-08, 273 A.2d at 45. It was the Board's contention that the Director's status necessitated her exclusion since her position "invested her with such supervision over the other employees included therein and such intimacy with the managerial aspects of the Board's operation." *Id.* at 408, 273 A.2d at 45.

court recognized the potential divergence between the interests of supervisors and their subordinates. It held that when either actual or potential conflicts of interest exist between members of a proposed unit, a lack of community of interest is shown, rendering the proposed unit inappropriate under the statute.[69] In evaluating the Director's desire to be included in the unit, a significant factor in PERC's disposition of the case,[70] the court said:

> The determinative factor, so far as Miss Wilton is concerned, in ascertaining the appropriateness of a unit is neither what she wants nor what the public employer wants, but rather whether her inclusion in the unit will serve and not subvert the purpose of the Act, *i.e.*, establishment and promotion of fair and harmonious employer-employee relations in the public service.[71]

Thus *Wilton* indicates that as far as the New Jersey supreme court is concerned, while employee desires are to be considered, the broad purposes of the Act must be accorded controlling weight in public employee unit determination.[72]

In *Professional Association*, all parties recognized the statutory requirement mandating consideration of community of interest in unit selection under the PERC Act. The problem confronting the court, however, was the proper scope of the term with respect to occupational classifications, and the proper weight to be given to that "community" by the Commission in determining the appropriate unit.

Although both groups of employees were willing to accept statewide bargaining units, the nurses' and educators' organizations sought

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69 *Id.* at 427, 273 A.2d at 56.

70 *Id.* at 416, 273 A.2d at 50.

71 *Id.*

72 Gross, *Unit Determination and New Jersey Court Decisions*, in PUBLIC SECTOR LABOR RELATIONS IN THE STATE OF NEW JERSEY 13 (1971), in which the author observed that in *Wilton*

> [t]he Supreme Court recognized that consent of the employee is an element to be considered but is not controlling. The test is not, as far as any individual employee is concerned, what the employee wants or the public employer wants, but what will serve not to subvert the purpose of [the PERC Act], that is, to "establish fair and harmonious employer-employee relations in the public service."

Id. Lower courts have also followed the *Wilton* approach to the supervisory problem. In Elizabeth Fire Officers Ass'n v. City of Elizabeth, 114 N.J. Super. 33, 274 A.2d 817 (App. Div. 1971), the court, with explicit reference to *Wilton*, remanded the case to PERC for fact finding on the question of whether the supervisory status of the chief and deputy chief of the fire and police departments compelled their exclusion from the proposed negotiating unit. *Id.* at 38, 274 A.2d at 820.

In the private sector, the desire of the employees is an extremely influential factor in unit selection. When factors exist which support both a larger and a separate unit, it is often the desire of the employees that determines which unit will ultimately be selected. *See* 2 CCH LAB. L. REP. ¶ 2605, at 6708 (1972). *See also* Begin & Chernick, *supra* note 11,

unit recognition based upon distinct professional identity.[73] The nurses, in particular, argued that the community of interest in their profession, coupled with their past bargaining success, required the exclusion of professionals generally.[74] The state, however, viewed the community of interest concept much more expansively, and argued that the requisite mutuality was satisfied by the petitioners' common status as professionals. Consequently, rather than advocating separate units based upon distinct professional identity, the state suggested a broad unit composed of substantially all the state's professional employees.[75]

In considering *Professional Association*, the court recognized at the outset that the community of interest concept was " 'somewhat elusive.' "[76] Acknowledging the absence of a statutory definition for the term, the nurses pointed to the experience of the NLRB, and urged that the case law developed under the NLRA compelled recognition of the proposed units.[77] Responding to this contention, the court observed

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at 3; Kruger, *The Appropriate Bargaining Unit for Professional Nurses*, 19 LAB. L.J. 3, 4 (1968).

73 64 N.J. at 236-39, 315 A.2d at 4-5.

74 *Id.* at 237, 315 A.2d at 4. The petitioning nurses' organization noted that

> all registered professional nurses possess similar basic skills, are required to perform similar duties under substantially the same conditions, generally have the same basic educational requirements, must take the same examination in order to become registered, and share similar problems.

Brief for Petitioners-Appellants, *supra* note 2, at 4. The nurses also argued that their prior bargaining history should be taken into consideration by PERC and the courts when determining unit selection. *Id.* at 18. *See* note 6 *supra*. Both the employee organization's history of collective bargaining and the extent to which employees have organized are important criteria to be considered in the unit selection process under the NLRA. 2 CCH LAB. L. REP. ¶ 2605, 6707-08 (1972). *See also* Begin & Chernick, *supra* note 11, at 3. Kruger, *supra* note 72, at 4. It should be noted, however, that pursuant to 29 U.S.C. § 159(c)(5) (1970), "the extent to which the employees have organized shall not be controlling." Federal public employees are also precluded from relying solely upon organization status in unit determination, Exec. Order No. 11,491, § 10(b), 3 C.F.R. 267 (Supp. 1973), 5 U.S.C. § 7301 (1970), *as amended*, Exec. Order No. 11,616, 3 C.F.R. 202 (Supp. 1971), 5 U.S.C. § 7301 (1970).

75 *See* note 5 *supra*. Brief for Respondent at 37-38, State v. Professional Ass'n of N.J. Dep't of Educ., 64 N.J. 231, 315 A.2d 1 (1974).

At the time of the *Professional Association* decision, the state employee bargaining units numbered twelve. 64 N.J. at 240 n.1, 249-50 n.3; 315 A.2d at 6, 11. For an overview of collective bargaining for New Jersey state employees, see Stark, *Bargaining in New Jersey State Government: A Status Report as of the End of 1973*, to be published in NEW JERSEY PUB. EMPLOYER-EMPLOYEE RELATIONS (1974).

76 64 N.J. at 245, 315 A.2d at 9 (quoting from Board of Educ. v. Wilton, 57 N.J. 404, 420, 273 A.2d 44, 52 (1971)).

77 64 N.J. at 245, 315 A.2d at 8-9. The nurses' organizations noted that "[u]nder the Federal standard it is clear that the Commission's decision would be completely indefensible and is absolutely contrary to law." Brief for Petitioners-Appellants, *supra* note 2, at 10.

that the administration of the federal act has been marked by great flexibility, and with particular reference to unit selection, that the United States Supreme Court has cautioned against the establishment of absolute rules of law.[78] In view of the degree of discretion reposed in the Board in this context, the court concluded that the NLRB decisions had little precedential value in other federal cases, and were to be accorded even less weight in the substantially different area of public sector labor relations.[79]

In the court's view, however, there were far more compelling reasons for looking beyond the NLRB experience in order to resolve the instant controversy. The policy of the national act emphasizes the protection of the rights of industrial employees and ensures them " 'the fullest freedom in exercising the rights guaranteed by' the act."[80] In contrast, the policy expressly set forth by the legislature in the PERC Act requires consideration of the broader interests of the public in resolving disputes under the Act:

> [T]he interests and rights of the consumers and the people of the State, while not direct parties [to labor disputes], should always be considered, respected and protected . . . .[81]

Having concluded that the petitioners' reliance on federal standards of unit determination was misplaced, the court looked elsewhere for guidance. Finding a "strong analogy" between the case at bar and New York's determination of bargaining units in the public sector,[82] the court examined the New York public employment act[83] and discovered more specific criteria for the selection of appropriate units.[84]

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78 *See, e.g.*, Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947) in which the Court stated with reference to the NLRB unit selection process:

> The issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and none should be by decision. It involves of necessity a large measure of informed discretion . . . .

Id. at 491.

79 64 N.J. at 247, 315 A.2d at 9.

80 *Id.* (quoting from 29 U.S.C. § 159(b) (1970)). See note 106 *infra* for a discussion of the "an appropriate unit" policy in the private sector. This policy promotes the employees' choice of bargaining representative and thus further encourages fragmentation of units. *See also* Gross, *supra* note 72, at 15, which points out that the NLRA is basically employee-oriented.

81 N.J. STAT. ANN. § 34:13A-2 (Supp. 1973-74).

82 64 N.J. at 247, 315 A.2d at 10.

83 N.Y. CIV. SERV. LAW § 200 *et seq.* (McKinney 1973). This Act is commonly referred to as the Taylor Law.

84 The Taylor Law provides three criteria for fixing appropriate negotiating units:

> (a) the definition of the unit shall correspond to a community of interest among the employees to be included in the unit;
>
> (b) the officials of government at the level of the unit shall have the power

After reviewing the Act and the Commission's recommendations which preceded it, the court held that the New York provision which requires consideration of the "joint responsibilities of the public employer and public employees to serve the public"[85] in the unit selection process was "clearly implicit in our own statute."[86]

In applying this standard, the New York Public Employment Relations Board (PERB) has taken the position that the Act requires the selection of a small number of broad, comprehensive negotiating units. In *State of New York*,[87] for example, PERB was called upon to consider negotiating units for 167,000 state workers employed in over 3,700 job classifications categorized in ninety occupational groupings.[88] In response to the state's request for three broad units, the petitioning employee organizations sought twenty-five separate units, including one for nurses.[89] Although PERB declined to combine all of the petitioning employee groups into a single unit,[90] the Board stressed that the Act required the designation of the smallest possible number of units that would provide the employer with "a comprehensive and coherent pattern for collective negotiations."[91] Consequently, PERB found that five bargaining units were appropriate.[92] PERB's disposition of the case was ultimately sustained by the New York court of appeals.[93]

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to agree, or to make effective recommendations to other administrative authority or the legislative body with respect to, the terms and conditions of employment upon which the employees desire to negotiate; and

(c) the unit shall be compatible with the joint responsibilities of the public employer and public employees to serve the public.

Id. §§ 207(1)(a)-(c).

85 *Id.* § 207(1)(c).

86 64 N.J. at 248, 315 A.2d at 10.

87 1 P.E.R.B. ¶ 1-399.85 (1968).

88 *Id.* at 3230, 3233.

89 *Id.* at 3227-29.

90 *Id.* at 3230. It was the opinion of the Public Employment Relations Board (PERB) that

> [t]he enormity of this diversity of occupations and the great range in the qualifications requisite for employment in these occupations would preclude effective and meaningful representation in collective negotiations if all such employees were included in a single unit. The occupational differences found here give rise to different interests and concerns in terms and conditions of employment. This, in turn, would give rise to such conflicts of interest as to outweigh those factors indicating a community of interest.

Id.

91 *Id.* at 3231.

92 PERB determined that the following units would be appropriate: (1) Operational Services Unit; (2) Security Services Unit; (3) Institutional Services Unit; (4) Administrative Services Unit; and (5) a Professional, Scientific and Technical Services Unit. *Id.* at 3231-32.

93 Following PERB's disposition of the case, the Civil Service Employee Association sought judicial review of the Board's choice of five bargaining units. Since the Board rejected the single unit requested by the state negotiating committee, and selected units

Relating the Board's resolution of *State of New York* to the present dispute, the *Professional Association* court reiterated the " 'considerable parallelism' "[94] between the two Acts and reasoned that the PERB-approved units in *State of New York* were essentially the same as those advocated by the state in the instant case, and that PERC, by clear implication, approved the state's unit formula.[95] Since the foundation of PERB's resolution of *State of New York* was grounded upon the need for comprehensive rather than fragmented units[96] in the public sector, the court found it necessary to evaluate the utility of this approach in terms of the public interest.

In considering the fragmentation issue, the court identified a distinct trend in recent legislation to stress the public interest and to avoid undue fragmentation in public sector bargaining units. This tendency has been reflected in both recent state public employment statutes and federal directives.[97] The statutes of two states, Pennsylvania and Kansas, are explicit in requiring the consideration of over-fragmentation in unit determination,[98] and one state, Hawaii, goes even

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not requested by any party to the proceeding, the petitioner argued that the Board's choice was "capricious, and not supported by substantial evidence." Civil Serv. Employees Ass'n v. Helsby, 32 App. Div. 2d 131, 133-34, 300 N.Y.S.2d 424, 426 (1969). In rejecting this contention, the appellate division stated:

> It cannot be said that the board's determination of the appropriate units lacks evidentiary support, or was arbitrary or capricious, or that the board deviated from the statutory standards.

Id. at 134, 300 N.Y.S.2d at 427. The decision of the appellate division was affirmed by the court of appeals in a per curiam opinion. Civil Serv. Employees Ass'n v. Helsby, 25 N.Y.2d 842, 250 N.E.2d 731, 303 N.Y.S.2d 690 (1969).

94 64 N.J. at 249-50, 315 A.2d at 11 (quoting from Burlington County Evergreen Park Mental Hosp. v. Cooper, 56 N.J. 579, 596, 267 A.2d 533, 543 (1970)).

95 64 N.J. at 249, 315 A.2d at 11.

96 Fragmentation is the creation of numerous bargaining units based upon various distinctions—occupational, institutional, departmental, etc. Consequently, the parochial nature of the units tends to increase costs and time spent in negotiations by the public employer and the employee representatives. See note 63 *supra* for early PERC decisions demonstrating the results of such an approach.

97 64 N.J. at 250, 315 A.2d at 11.

98 The Pennsylvania Public Employment Relations Act provides that the Labor Relations Board shall

> [t]ake into consideration but shall not be limited to the following . . . (ii) the effects of over-fragmentization.

PA. STAT. ANN. tit. 43, § 1101.604(1)(ii) (Supp. 1973-74). *See* Comment, *Determination of the Bargaining Unit under the New Pennsylvania Public Employee Relations Act*, 75 DICK. L. REV. 490, 498, 502 (1971). For a study of unit selection in Pennsylvania pursuant to its new law, see Schmidman, *Collective Bargaining in Pennsylvania's Public Sector: The First Three Months*, 24 LAB. L.J. 755, 756-58 (1973).

Similarly, the Kansas statute mandates that

> the board . . . shall take into consideration . . . (5) the effects of overfragmentation and the splintering of a work organization . . . .

further by legislating small numbers of statewide bargaining units.[99] In a less direct fashion, the federal government has dealt with the problem by amending the executive order regulating federal employees. Employing language similar to that used by New York, Executive Order 11,491[100] directs that bargaining units "promote effective dealings and efficiency of agency operations."[101] Examining the justifications behind the large unit policy, the court observed that the state's ability to negotiate effectively increases when the number of bargaining units is minimized,[102] and thus concluded that if the state employer was forced to negotiate with too many separate employee bargaining units, "the whole process could well bog down on the public employer's end of the negotiating process."[103] In the court's view, this would frustrate the PERC Act's policy of " 'prompt settlement of labor disputes.' "[104]

In sustaining the PERC unit determination in *Professional Association*, the court conceded that the units sought by the petitioning organizations were not totally inappropriate.[105] The court, however, in

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KAN. STAT. ANN. § 75-4327(e)(5) (Supp. 1973). For a comprehensive listing of legislative enactments including those specifying avoidance of overfragmentization as a criteria for unit selection, see D. OGAWA & J. NAJITA, *supra* note 32, at 67-69.

99 The Hawaii public employees act has designated thirteen statewide units. HAWAII REV. STAT. § 89-6 (Supp. 1973). It is interesting to note that a separate unit is provided for "[r]egistered professional nurses." *Id.* § 89-6(a)(9).

100 3 C.F.R. 262 (Supp. 1973), 5 U.S.C. § 7301 (1970). These Orders, issued by President Nixon, updated the earlier Kennedy Order of 1962. *See* notes 27-28 *supra* and accompanying text. The new Orders provided that unit selection be made by the Assistant Secretary for Labor-Management Relations. Furthermore, criteria were added for determining appropriate bargaining units, and procedures were established for grievance arbitration and the resolution of impasses. *See* Blair, *supra* note 30, at 3 nn.15 & 16; Brown, *supra* note 26, at 59-60; Coleman, *supra* note 45, at 293-94.

101 Exec. Order No. 11,491, § 10(b), 3 C.F.R. 267 (Supp. 1973), 5 U.S.C. § 7301 (1970). For a discussion of the added criterion's purpose to avoid overfragmentization, see Shaw & Clark, *supra* note 22, at 160-61.

102 64 N.J. at 250-51, 315 A.2d at 12 (citing sources found in note 21 *supra* as related to unit selection). The court further pointed out that larger units assist the public employer "to make or effectively recommend negotiating decisions," and the newly-created Governor's Office of Employee Relations "has reduced the magnitude of the administrative problems inherent in conducting negotiations for the State as an employer." *Id.* at 251, 315 A.2d at 12.

103 *Id.* at 252, 315 A.2d at 12.

104 *Id.* (quoting from N.J. STAT. ANN. § 34:13A-2 (Supp. 1973-74)).

105 64 N.J. at 252, 315 A.2d at 12. The court also cited a private sector case, Consolidated Vultee Aircraft Corp., 108 N.L.R.B. 591 (1954), "establishing a separate unit for nurses in an industrial concern." 64 N.J. at 252, 315 A.2d at 12-13. In addition, the court did not rule out the possibility that circumstances in the future might necessitate the formation of a unit composed of less than all professional employees. *Id.* at 253 n.6, 315 A.2d at 13. It is interesting to note that subsequent to PERC's disposition of *Professional Association*, the Commission approved a bargaining unit for all professional employees performing educational services at the state's institutions of higher education, thus en-

response to the nurses' contention that PERC erroneously insisted on the *most* appropriate unit when all that is required is approval of *an* appropriate unit,[106] found this argument "difficult to understand"[107] and held that

> we have no doubt that under our act PERC was under a duty to make a determination as to the most appropriate unit.[108]

Having concluded that the Commission must select the most appropriate unit in discharge of its responsibility under the Act, the

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dorsing a unit based on distinct occupational identity. *See* Paterson State Fed'n of College Teachers, P.E.R.C. No. 72 (1972).

106 Brief for Petitioners-Appellants, *supra* note 2, at 10-16. The petitioning nurses' organization, stressing that PERC is merely required to find that a unit is appropriate, stated:

> "There is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit or the *ultimate* unit or the most appropriate unit; the Act requires only that the unit be 'appropriate.' It must be appropriate to ensure the employees in *each case* 'the fullest freedom in exercising the rights guaranteed by this Act.' "

Id. at 10 (quoting from Morand Bros. Beverage Co., 91 N.L.R.B. 409, 418 (1950)) (emphasis in original). The federal courts have also employed this approach to unit selection. *See* MPC Restaurant Corp. v. NLRB, 481 F.2d 75, 78 (2d Cir. 1973); Ochsner Clinic v. NLRB, 474 F.2d 206, 209 (5th Cir. 1973). *See also* Crowley, *supra* note 22, at 518; Shaw & Clark, *supra* note 22, at 163-64. For the application of this policy in the public sector under Exec. Order No. 10,988, see King, *The Taylor Act—Experiment in Public Employer—Employee Relations*, 20 SYRACUSE L. REV. 1, 15 & n.56 (1968); Prasow, *supra* note 11, at 60.

The *Professional Association* court, referring to section 9(b)(2), refuted the nurses' contention by stating that the NLRA leaves the Board " 'free to select that unit which it deems best suited to accomplish the statutory purposes.' " 64 N.J. at 255, 315 A.2d at 14 (quoting from 29 U.S.C. § 159(b)(2) (1970)) (footnote omitted). To support its argument that the most appropriate unit policy is also applicable in federal labor law, the court cited NLRB v. Pittsburgh Plate Glass Co., 270 F.2d 167, 172-73 (4th Cir. 1959), *cert. denied*, 361 U.S. 943 (1960), and Executive Bd., Local 1302 v. United Bhd. of Carpenters, 339 F. Supp. 613, 621-22 (D. Conn. 1972), *rev'd on other grounds*, 477 F.2d 612 (2d Cir. 1973). At least one author has agreed with this view and has suggested that broader, more inclusive units are favored over smaller units. *See* Hall, *The Appropriate Bargaining Unit: Striking a Balance Between Stable Labor Relations and Employee Free Choice*, 18 CASE W. RES. L. REV. 479, 537-38 (1967). Since "[c]ollective bargaining is to be fostered in appropriate units, and the more appropriate the unit, the better," individual free choice as to bargaining representative must yield to the policy of collective bargaining when the units in question are equally appropriate. *Id.* at 538.

107 64 N.J. at 255, 315 A.2d at 14.

108 *Id.* at 257, 315 A.2d at 15. It was the opinion of the *Professional Association* court that "in event of a dispute the Commission shall 'decide in each instance *which* unit of employees is appropriate for collective negotiation' " and that "[f]ormal hearings may be conducted 'to determine *the* appropriate unit.' " *Id.* (emphasis by court) (citations omitted). The court concluded:

> [T]he Commission had no choice but to determine the unit it deemed best and accordingly to designate either a unit proposed by one of the parties or to specify one of its own conception, as guided by the evidence, its expertise and the statutory criteria.

Id.

court summarized its views concerning the weight to be given to community of interest in unit determination disputes. What is required by the statute is " 'due regard for', not exclusive reliance upon such community of interest."[109] In placing the mutuality requirement in perspective, the court cautioned that the interests of the employer and the public are also relevant factors.[110] Acknowledging the element of agency expertise involved, and applying the appropriate standards for review,[111] the court was unable to conclude that PERC's resolution of the dispute was either arbitrary or unreasonable.

The judicial endorsement of the Commission's unit selection in *Professional Association* represents both a change in the interpretation of the Act's unit determination criteria, and a new judicial construction of the "elusive" community of interest concept. Since *Camden County* and *Wilton*, it has been clear that employee preference alone is not controlling in the unit selection process. In *Professional Association*, however, PERC and the court have further diluted the employees' desires when structuring bargaining units. The result reached by the Commission, which PERC couched in terms of a broader definition of community of interest, has been ratified by a more direct judicial approach. Undoubtedly, either approach can vindicate the Act's policy of considering the interest of the public, but while the Commission achieved this end by substituting its own conception of community of interest for that of the petitioning organizations, the court has added a new dimension to unit selection under the Act. With the judicially added requirement of *public interest* entering into future unit determinations as a distinct criterion, and a corresponding decrease in the weight given to employees' articulation of community of interest,

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109 *Id.* (quoting from N.J. STAT. ANN. § 34:13A-5.3 (Supp. 1973-74)).

110 64 N.J. at 257, 315 A.2d at 15. In addition, based upon professional employees' "common interest and character" as well as the similar terms and conditions to be negotiated, the court found that the state's concept of community of interest was not unreasonable. *Id.* at 257-58, 315 A.2d at 15.

111 In New Jersey, the scope of judicial review of administrative actions is limited. The supreme court has stated:

> If there is any fair argument in support of the course taken [by the administering agency] or any reasonable ground for difference of opinion . . . the decision is conclusively legislative, and will not be disturbed unless patently corrupt, arbitrary or illegal.

Flanagan v. Department of Civil Serv., 29 N.J. 1, 12, 148 A.2d 14, 20 (1959). Similar language has been used by the federal courts with reference to judicial review. Wheeler-Van Label Co. v. NLRB, 408 F.2d 613, 617 (2d Cir. 1969).

Moreover, the court, when reviewing the decision of an agency, must afford "due regard also to the agency's expertise where such expertise is a pertinent factor." Close v. Kordulak Bros., 44 N.J. 589, 599, 210 A.2d 753, 758 (1965). *See also* Board of Educ. v. City Council, 55 N.J. 501, 507-08, 262 A.2d 881, 884 (1970).

it is clear that more and more employee groups will be frustrated in seeking bargaining units limited to distinct occupations.

Professional Association indicates that the New Jersey courts will be hesitant to disturb a PERC unit selection decision. If it is the legislature's intent to permit more diversity in appropriate public sector bargaining units in order to reflect the employees' preference, it is clear that more explicit unit selection criteria will have to be legislatively promulgated.

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