STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COMMUNICATIONS WORKERS OF AMERICA, PSYCH TECH UNION, LOCAL 11555, AFL/CIO, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF DEVELOPMENTAL SERVICES), Respondent.	)	Case No. S-CE-86-S PERB Decision No. 484-S January 24, 1985
CALIFORNIA STATE EMPLOYEES' ASSOCIATION, Joined Party.	)	

Appearances: Kanter, Williams, Merin & Dickstein by Nancy Kirk for Communications Workers of America, Psych Tech Union, Local 11555, AFL/CIO; Jeff Gunther, Attorney for State of California (Department of Developmental Services).

Before Tovar, Jaeger and Morgenstern, Members.

DECISION

MORGENSTERN, Member: This case is before the Public Employment Relations Board (PERB or Board) on an appeal filed by the Communications Workers of America, Psych Tech Union, Local 11555, AFL/CIO (CWA) to a portion of the attached proposed decision of an administrative law judge (ALJ). Specifically, CWA excepts to the dismissal of its allegation that the State of California (Department of Developmental Services) (DDS) violated the State Employer-Employee Relations

Act (SEERA)[1] by unilaterally transferring work out of the psychiatric technician unit to hospital workers in another unit at Stockton State Hospital.[2]

The Board has carefully reviewed the entire record in this case. We conclude that the ALJ's findings of fact are free of prejudicial error and adopt them as the findings of the Board itself. We affirm the ALJ's dismissal of this charge for the reasons set forth below.

DISCUSSION

On appeal, CWA's sole claim is that DDS made an unlawful unilateral change by deciding to hire hospital workers to replace psychiatric technicians, through a process of attrition, at Stockton State Hospital. Critical to its theory, CWA contends that: (1) this decision constitutes a change of policy within the meaning of Grant Joint Union High School District (2/26/82) PERB Decision No. 196; (2) the decision is negotiable as a transfer of work under Rialto Unified School District (4/30/82) PERB Decision No. 209, Solano County Community College District (6/30/82) PERB Decision No. 219, and Mt. San Antonio Community College District (3/24/83) PERB

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[1]The SEERA is codified at Government Code section 3512 et seq. All references herein are to the Government Code unless otherwise indicated.

[2]CWA does not except to the dismissal of its allegations regarding the change in the hospital worker job specification or regarding any change at State hospitals other than Stockton. Therefore, those matters are not before us.

Decision No. 297; and (3) the decision had an adverse impact on psychiatric technicians. We find, as did the ALJ, that each of CWA's contentions is lacking in merit.

No Change of Policy

Nothing in CWA's contract with the State defines bargaining unit work, reserves any particular duties exclusively to members of the unit, or evidences an intention to maintain 100 percent licensed staffing at Stockton State Hospital. Indeed, the only relevant contract provision merely requires maintenance of minimum adequate levels of staffing (including hospital workers) as established by the Department of Health. Thus, CWA's claim of a policy change is not substantiated by the labor-management contract. Still, any unilateral change in an established, even though noncontractual, practice could constitute a violation.

However, contrary to CWA's contentions, the evidence does not indicate the existence of an established practice of not hiring hospital workers at Stockton State Hospital. While no hospital workers were employed at Stockton for a period of six months from 10/1/81 - 4/1/82, previous to that time, hospital workers had been employed at Stockton, as at the other State hospitals, though in fewer numbers.

As the ALJ found, the overall departmental policy and practice was to employ 70-90 percent licensed staff and 10-30 percent hospital workers. Stockton's temporary deviation from this statewide policy is insufficient to establish a separate

policy or practice at that hospital, and DDS' conduct to bring Stockton into compliance with the statewide practice did not constitute a change of policy.

CWA misreads the ALJ's decision as requiring that "a policy change must be implemented statewide to be bargainable." In fact, as indicated above, he simply found no consistent policy or practice at Stockton which was changed.

No Transfer of Work

In Eureka City School District (1/15/85) PERB Decision No. 481, a recent case closely analogous to the instant case, the teachers association charged that the district had unlawfully transferred work out of the certificated unit to a teacher's aide in another unit. The Board dismissed this charge, finding no evidence that the teacher in question ceased to perform any duties which had been assigned to her in the past or that the aide in question had been assigned any new duties which had previously been performed only by teachers. As the Board stated:

> [I]n order to prevail on a unilateral transfer of work theory, the charging party must establish, as a threshold matter, that duties were, in fact, transferred out of the unit; that is, that unit employees ceased to perform work which they had previously performed or that nonunit employees began to perform duties previously performed exclusively by unit employees. However, where, as here, unit and nonunit employees have traditionally had overlapping duties, an employer does not violate its duty to negotiate in good faith merely by increasing the quantity of work which nonunit employees

perform and decreasing the quantity of work which unit employees perform.[8]

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[8]. . . the Association should have filed its charge at the time that nonunit employees first began performing unit work, not long after such a practice became established. (Pp. 15-16.) (Emphasis in original.)

Here, as in Eureka, supra, at all relevant times, many of the same duties were performed by both psychiatric technicians and hospital workers. Indeed, while psychiatric technicians performed certain nursing functions which unlicensed hospital workers were not permitted to perform, hospital workers performed no duties which were not also properly performed on occasion by psychiatric technicians. Thus, we find no evidence that any particular duty or function was ever removed from psychiatric technicians and transferred to hospital workers. Both United Auto Workers v. NLRB (D.C. Circuit 1967) 381 F.2d 265 [64 LRRM 2489], cert. den. 389 U.S. 857 and Awry Bakeries, Inc. (1975) 217 NLRB 730, relied on by CWA, are distinguishable on this basis.

Similarly, during the relevant period, no new duties were assigned to hospital workers which they had not previously performed. As the ALJ found, any change in hospital worker duties occurred prior to CWA's certification as exclusive representative. Thus, Plumbers, Local 669 v. NLRB (D.C. Circuit 1982) 676 F.2d 826 [110 LRRM 2125] is also distinguishable from this case. There, the employer maintained

a double-breasted operation, a union shop to bid on jobs that required union labor, and a second which operated nonunion. Over time, the number of employees and the amount of work shifted from the union to the nonunion operation. The NLRB dismissed, finding that the union had acquiesced in the double-breasted operation, and that there was no evidence that union work had been transferred to the nonunion operation. The court disagreed. It held that whether the assignment of work constitutes a transfer of work must depend on the pattern of allocation established by the past practice of the employer. Citing evidence that the nature of the work assigned to the nonunion operation had changed from "small installation jobs and noninstallation services" to "large jobs," the court remanded to the NLRB to determine whether the employer deprived the union of work which, in light of past practice, it would otherwise have been expected to perform.

Here, as noted, there is no evidence of any change in the nature of the work performed by hospital workers or in the "pattern of allocation established by past practice." Therefore, there is no transfer of work.

No Adverse Impact

CWA excepts to the ALJ's ultimate finding that the record contains insufficient evidence of adverse impact on the working conditions of psychiatric technicians, as well as several specific findings which lead to this conclusion. The ALJ's

findings are reasonable based on the record. We find no reason to disturb them.

Though there was testimony that psychiatric technicians felt less safe working with hospital workers and believed they were deprived of reemployment opportunities as a result of the increased use of hospital workers, the ALJ found this evidence "speculative" and "unconvincing." There was also testimony as to increased workload; namely, that psychiatric technicians were responsible not only for their own patients but also for those patients assigned to hospital workers, and that psychiatric technicians had to provide on-the-job training and to "check behind" hospital workers to see that their clients were properly cared for. However, this evidence of increased workload was essentially rebutted by evidence that DDS has employed one psychiatric technician for every two clients consistently since 1979.

As CWA contends, psychiatric technician jobs were, in fact, lost at Stockton. However, having found that the hiring of hospital workers at Stockton was not a change of policy but merely the application of longstanding statewide policy at that hospital, it is, therefore, necessary to consider impact on a statewide (i.e., unit-wide) basis. Statewide, the ratio of psychiatric technicians to hospital workers actually increased from 10:1 to 11:1 during the period 1981 to 1983. Thus, no diminution of the unit is shown.

No Negotiable Effects

Finally, CWA argues in the alternative that, even if the changes were within DDS' managerial prerogative, DDS had a duty to negotiate regarding the effects. However, we conclude, as did the ALJ, that CWA failed to demonstrate that any action taken by DDS during the period following the certification of CWA had an effect upon a matter within the scope of representation.

ORDER

The unfair practice charge in Case No. S-CE-86-S is DISMISSED.

Members Tovar and Jaeger joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

COMMUNICATIONS WORKERS OF AMERICA, PSYCH TECH UNION, LOCAL 11555, AFL/CIO,	)	
Charging Party,	)	Unfair Practice Case No. S-CE-86-S
v.	)	
STATE OF CALIFORNIA (DEPARTMENT OF DEVELOPMENTAL SERVICES),	)	PROPOSED DECISION (12/13/83)
Respondent.	)	
CALIFORNIA STATE EMPLOYEES' ASSOCIATION,	)	
Joined Party.	)	

Appearances: Nancy Kirk, Attorney (Kanter, Williams, Merin & Dickstein), for CWA Psych Tech Union, Local 11555; Jeff Gunther, Attorney, for the State of California (Department of Developmental Services); Jeff Fine, Attorney, for the California State Employees' Association.

Before Ronald E. Blubaugh, Hearing Officer.

PROCEDURAL HISTORY

An exclusive representative here contends that the employer has transferred bargaining unit work to a unit represented by another union. The employer, joined by the second union, denies that any transfer of work has occurred.

This case has a lengthy procedural history, during which both the nature of the allegations and the identity of the Respondent were changed. When first filed on October 19, 1981, by the CWA Psych Tech Union, Local 11555 (hereafter CWA), the

charge alleged that the State of California, Department of Mental Health, had commenced hiring untrained, unlicensed, inexperienced student assistants at Atascadero State Hospital. The hiring of such persons was alleged to have adversely affected the working conditions of psychiatric technicians. At that time, CWA was not yet the exclusive representative of psychiatric technicians.

On January 20, 1982, the charge was amended to add the State Department of Developmental Services (hereafter State or Department) as a Respondent. The factual allegations were amended to add the contention that job positions in state employee negotiating unit no. 18, the Psychiatric Technician Unit, were being filled by hospital workers who were not unit members. By the date of the amendment, CWA had been certified as the exclusive representative of negotiating unit no. 18 and the charge alleged that the change was made without meeting and conferring.

On April 9, 1982, the State moved to dismiss the charge on two grounds: that the charge involved nonnegotiable matters within the constitutional jurisdiction of the State Personnel Board and secondly, that the Charging Party was itself trying to take work from employees in other units.

On April 30, 1982, CWA amended the charge to add the contention that in December of 1981, without notice to CWA, the Department had initiated a change in the job description for

hospital workers. According to the amendment, the changed job description permits a greater intrusion by hospital workers into the work of psychiatric technicians.

On May 5, 1982, a Public Employment Relations Board (hereafter PERB) hearing officer issued an order partially granting and partially denying the motion to dismiss. The motion was granted insofar as the amended charge contested the action of the State Personnel Board in changing the job specifications of hospital worker. The hearing officer reasoned that changes in job specifications are an inherent part of the State Personnel Board's constitutional power to classify. The motion was denied insofar as the charge alleged that the Department had transferred work from one unit to another and that the assignment of additional duties to hospital workers and others had an impact on workload and safety.

On June 29, 1982, CWA again amended the charge, this time adding allegations that the employer had significantly increased the proportion of patient care work done by unlicensed workers at seven hospitals, including Stockton State Hospital. The effect of this change, the amendment asserted, was to diminish the size of unit no. 18.

On July 1, 1982, the parties entered an agreement to settle the case. However, the terms of that agreement permitted either party to reactivate the case not later than 90 days

subsequently. On September 29, 1982, CWA exercised its option to renounce the agreement and requested that the matter be set for a hearing.

On December 14, 1982, CWA again amended the charge. The amendment, which can be reasonably read as supplanting all earlier versions of the charge,[1] deleted the Department of Mental Health as a Respondent and set out two concise allegations:

(1) That the Department of Developmental Services had initiated changes in the job description of hospital workers, permitting hospital workers for the first time to perform "level of care" functions without supervision of licensed employees. This change allegedly resulted in additional work

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[1]In its reply brief, CWA seems to raise the contention that the State denied CWA the right to represent its members by alleged unilateral changes which occurred after CWA filed its representation petition but prior to CWA's certification as exclusive representative. During a discussion at the hearing, counsel for the Charging Party tacitly acknowledged that the December 14, 1982, amendment to the charge was the only matter at issue. See reporter's transcript at pp. 400-402. For a respondent to be found guilty of an uncharged violation, the wrongful conduct must be intimately related to the subject of the complaint or arise from the same course of conduct and the matter must have been fully litigated at the hearing. San Ramon Valley Unified School District (8/9/82) PERB Decision No. 230. The December 14, 1982, amendment to the charge contains no reference to events which predate CWA's certification as exclusive representative. The question of alleged changes which occurred prior to CWA's certification was not litigated and was briefed only by CWA. For this reason, the proposed decision does not consider whether CWA was denied the right to represent its members by events which occurred prior to certification.

for psychiatric technicians, decreased safety, reduced job opportunities and reduced opportunity to work overtime.

(2) That because of the change, hospital workers, who are not members of unit 18, began performing unit 18 work.

The employer filed timely answers to the charge and its various amendments, consistently denying that it had made any change in a negotiable matter. A complaint and notice of hearing originally was issued by the chief administrative law judge on December 1, 1981. An amended complaint was issued by the PERB General Counsel on September 8, 1983.

A hearing was conducted on September 12, 13, 14, 15 and 16, 1983, in Sacramento. At the start of the hearing, CWA made one final amendment to the charge, correcting an error in the citation of the State Employer-Employee Relations Act provision which the employer's conduct is alleged to have violated. As finally amended, the charge alleges violations of SEERA subsections 3519(a), (b) and (c).[2] The amendment was answered on the record by the Respondent.

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[2]Unless otherwise indicated, all references are to the Government Code. The State Employer-Employee Relations Act (hereafter SEERA) is found at section 3512 et seq. In relevant part, section 3519 provides as follows:

> It shall be unlawful for the state to:
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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce

At the start of the hearing, the California State Employees' Association, the exclusive representative of hospital workers, was granted admission to the hearing as a joined party under Title 8, California Administrative Code section 32164.3

The parties filed responsive briefs, the last of which was received on December 6, 1983, upon which date the case was submitted for decision.

FINDINGS OF FACT

The State Department of Developmental Services, an employer under SEERA, operates eight state hospitals which care primarily for persons with developmental disabilities. At the time of the hearing, approximately 7,500 of the persons under the Department's care were developmentally disabled and approximately 2,000 were mentally ill. The Department's

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> employees because of their exercise of rights guaranteed by this chapter.
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> (b) Deny to employee organizations rights guaranteed to them by this chapter.
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> (c) Refuse or fail to meet and confer in good faith with a recognized employee organization.

[3]The regulation permits the joinder of a party where it is determined that the,

> . . . party has a substantial interest in the case or will contribute substantially to a just resolution of the case and will not unduly impede the proceeding.

clients range in disability from ambulatory adults who are capable of feeding, dressing and bathing themselves to bed-ridden, incontinent persons who must be fed, diapered and given total, personal care by the hospital staff.

The Department's hospitals are organized by program. The basic organizational structure is called a "unit" or "ward" which, depending upon the disability of persons served, is a residential setting with 32 to 36 clients. There are four to five units in a program and from four to thirteen programs in a hospital. Each program provides all of the direct services a client receives on a daily basis.

Duties of Psychiatric Technicians.

The employees who provide the primary care and treatment for hospital clients are registered nurses, licensed vocational nurses, psychiatric technicians and hospital workers. As of the time of the hearing, there was a substantial amount of overlap in their respective duties, particularly between psychiatric technicians and hospital workers.

Depending upon the needs of individual clients, psychiatric technicians perform such nursing procedures as the administration of medications and treatments, both orally and by hypodermic injections, catheterizations, enemas, and taking and charting vital signs. Psychiatric technicians also develop, encourage and lead patient participation in group programs and activities and assist patients in eating, bathing

and dressing. As required, they also clean patients and patient living areas and they escort patients on the hospital grounds and into the community.[4]

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[4]Testimony by the various witnesses establishes that psychiatric technicians perform all of the duties listed in the position job specification. Under "typical tasks," the job specification for psychiatric technician lists the following:

> Gives a basic level of general and psychiatric nursing care to mentally ill, emotionally disturbed and mentally retarded patients; works with other disciplines as part of the treatment team to provide an overall treatment program for the patient; under supervision, performs nursing procedures such as administering medications and treatments, including oral medications, hypodermic injections, catheterizations and enemas, taking and charting temperature, pulse and respiration; observes patients' conditions and behavior; reports significant changes to unit supervisor or physician and records nursing notes on patients; prepares patients and cares for them during treatment; gives first aid as needed.
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> Helps to create a safe and therapeutic environment for patients; applies mental hygiene principles in all relationships with patients; motivates patients to develop self-reliance in daily living; develops, encourages participation in, and supervises on-the-unit group and individual program activities for patients; assists rehabilitation therapists in occupational, recreational, and industrial therapy programs for patients; assists patients with feeding, habit training, and maintaining a well-groomed appearance; keeps patients and their beds, clothing, and living area clean; follows safe practices; protects patients from personal injury; receives visitors and encourages their interest in the patients' welfare; escorts patients on the hospital

Psychiatric technicians are required to have a state-issued license. Prior to the institution of the licensing requirement in about 1968, psychiatric technicians learned their duties and developed their skills through 300 hours of on-the-job training. Following the institution of licensing, prospective psychiatric technicians were required to complete a year-long community college curriculum that includes both academic and clinical education. The academic portion of the program includes classes in anatomy, nursing, behavioral science and treatment of the mentally ill. In the clinical portion of the program, students are supervised in the care of individual patients.

In 1981, CWA became the exclusive representative of state employee unit no. 18, the psychiatric technician unit.[5] The representation process which led ultimately to CWA's certification commenced on November 14, 1979, when the California State Employees' Association (hereafter CSEA) filed

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> grounds, and to and from the community; orders supplies as needed; keeps records; and participates in in-service training programs.

[5]State employee unit no. 18 contains persons in the following job classes: Psychiatric Technician Instructor, Senior Psychiatric Technician I, Psychiatric Technician, Pre-Licensed Psychiatric Technician, Psychiatric Technician Trainee, Psychiatric Technician Apprentice, Psychiatric Technician Training Candidate, Psychiatric Technician Student, Child Care Practitioner, Child Care Practitioner-Trainee, Developmental Specialist.

a petition to represent a unit of state employees that included psychiatric technicians. CWA filed an intervention on February 22, 1980. The ballots for an initial election between the competing unions were counted on June 29, 1981. A runoff election was required and the ballots for the runoff were counted on October 22, 1981. CWA won the runoff, was certified as exclusive representative for unit no. 18 on November 17, 1981, and has retained that status continuously to the present.

Duties of Hospital Workers.

In 1968, at about the same time as the state instituted the licensing program for psychiatric technicians, a new job class - hospital worker - was created. Creation of the hospital worker classification was the result of a consensus among several advisory groups concerned with governmental efficiency. Job surveys completed prior to 1968 concluded that a portion of the work being performed by psychiatric technicians could be performed by employees in lower-paying positions. It was believed that transfer to other employees of responsibility for such duties as cleaning and bed-making would afford psychiatric technicians more time for treatment. No pre-hire credentials or licenses were required for hospital workers. At first they were instructed entirely by on-the-job training. Later, hospital workers in at least one hospital were required to complete an instructional course for nursing assistants.

Although the initial focus of the hospital worker position was on the cleaning of client living areas, some hospital workers provided a minimal amount of client care even in the early days of the position. The first job specification for the position listed among typical tasks, the assisting of "nursing personnel who are bathing, dressing, feeding, toileting patients." Testimony at the hearing established that by the early 1970's, some hospital workers were assisting psychiatric technicians by bathing and feeding clients on their own. The job of hospital worker thus gradually evolved from one primarily focused on the cleaning of things to one primarily focused on the care of people. CSEA Representative Dick Hall credibly testified that by 1976 hospital worker duties included the dressing, feeding, grooming, escorting and toileting of hospital residents.

The changing nature of hospital worker duties was accelerated when the state employed janitors, housekeepers and food service workers following the 1978 approval of the Torres Act.[6] The statute provided a $19 million augmentation to the 1977-78 budget of the State Department of Health. With the addition of the janitors, hospital workers lost a substantial portion of their responsibilities for cleaning, affording them more time for patient care.

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[6]Chapter 71, Statutes of 1978.

The Job Specification Change.

The State Personnel Board became aware of the changing nature of hospital worker duties as the result of a test validation study which was completed in December of 1980.[7] A routine Personnel Board duty, test validation is a process which seeks to ensure that job entry requirements are consistent with the skills actually needed to perform job duties. The hospital worker position was selected for validation study under normal Personnel Board procedures and hospital staff, including both hospital workers and psychiatric technicians, were interviewed as part of the study.

Among the recommendations in the study was the suggestion that the job specification for the position of hospital worker be updated "to reflect changes that have occurred." It is a common Personnel Board practice to change job specifications in order to bring them into line with how job duties actually are performed. The Personnel Board report suggested revision of the "typical tasks" portion of the hospital worker job specification as follows, with added material in underline and deleted material in strikeout:

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[7]The State Personnel Board report on the job validation, CWA Exhibit No. 1, in describing the methodology for the study, states that 22 incumbent hospital workers were interviewed by the Personnel Board staff in 1977. An additional eight were interviewed in 1979. On the basis of these statements, it is obvious that the test validation study was in progress as early as 1977.

Typical Tasks:

Performs routine housekeeping tasks such as sweeping, mopping and waxing floors, washing walls and windows, cleaning bathrooms and lavatories; cleans, dusts, and polishes furniture, fixtures, and woodwork; operates scrubbers, buffers, waxers, and other equipment and machinery; empties and cleans waste receptacles; assists in moving and arranging furniture and equipment; handles cleaning and housekeeping supplies; receives, counts, folds, stores, and issues clean linen and clothing; handles and sorts soiled linen and clothing; changes bed linen and makes and washes beds; marks, mends and irons clothing; operates clothes washers and dryers; transports food carts to and from ward unit; cleans tables and dirty dishes; operates dishwashers; disposes of garbage; assists in the ward unit dining room as needed; assists nursing services personnel who are in bathing, dressing, grooming, feeding, toileting, and implementing behavioral, developmental and social training programs of patients; escorts selected patients to and from ward unit; empties bedpans; runs off-ward unit errands; assists on the ward unit as needed.

Department of Developmental Services administrators reviewed the Personnel Board study and recommendations and concluded that the proposed job specification change was acceptable. The Department suggested several minor[8]

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[8]In its brief, CWA argues that "the significant changes that were ultimately adopted by SPB in the job description were those recommended by DDS."

Probably the most significant change in the job description is a revision which makes it clear that hospital workers are not required to be in direct proximity to nursing services personnel when performing certain duties. This change occurred in two places on the job specification. In a section where "typical tasks" of hospital workers are described, the

modifications in the proposed revision and the job specification change was approved by the State Personnel Board at its December 16, 1981 meeting. CSEA, as exclusive representative of hospital workers, was consulted prior to the change and agreed with the proposal. CWA was not consulted.

Overlap Between the Jobs.

Both by job specification and by actual practice since the late 1970's, there is a great deal of overlap between the duties of psychiatric technicians and hospital workers. Both types of employees assist hospital residents in feeding, bathing, dressing, maintaining a clean appearance and in toileting. Both types of employees may escort clients to and from their living units. Testimony at the hearing established that if a psychiatric technician performed all the duties of a hospital worker, he or she would still be working within the job description for psychiatric technician. Department administrators believe this overlap in functions provides flexibility and reduces costs.

Personnel Board staff proposed removal of words which suggested that hospital workers should perform certain tasks while in close proximity to nursing services personnel. When Department administrators received the Personnel Board recommendation, they accepted that change and suggested a similar change be made in the "job characteristics" portion of the job specification.

On the basis of the sequence of the changes, the hearing officer concludes that this key change originated with the State Personnel Board. The Department's suggestion merely brings the other part of the job specification into conformity with what the Personnel Board already had proposed.

For all the commonality between psychiatric technicians and hospital workers, there are two significant distinctions between the positions. First, psychiatric technicians are empowered by their licenses to perform certain medical functions which the unlicensed hospital workers are precluded from performing. Second, psychiatric technicians are empowered to operate with a level of independent judgment in the care of hospital residents. Hospital workers are supposed to care for patients only under the guidance of licensed persons.

There was no persuasive evidence that hospital workers perform any of the medical duties of psychiatric technicians. Only psychiatric technicians or other licensed employees give medications to patients or perform such nursing services as administering hypodermic injections, catheterizations and enemas. There was evidence that hospital workers count and log incidents of certain types of client behavior, such as self-destructive hitting. This practice, which is known as "data collection," is within the scope of hospital worker duties. There also was evidence of isolated instances where hospital workers have made entries in client charts. However, the practice is stopped when discovered by higher administrators and it is clear that such acts are against Department rules.

More difficult is the question of whether hospital workers are encroaching upon psychiatric technician duties by the

assumption of an improper level of independence. It is Department policy that hospital workers are to assist licensed employees and not to work independently. Hospital workers at all times are supposed to work under the guidance of a licensed person when they are caring for a client.

Nowhere is the controversy about hospital worker independence more apparent than in their work with groups of residents. The job specification for psychiatric technician states that a technician ". . . develops, encourages participation in, and supervises on-the-unit group and individual program activities for patients. . . ." There is no comparable statement of duties in the job description for hospital worker. It is in this context that most of the dispute arises.

In an effort to establish that hospital workers lead groups of residents, CWA witnesses testified about practices at both Stockton and Camarillo State Hospitals. Marjorie Jackson, a psychiatric technician at Stockton, was the acting shift manager when a hospital worker was assigned to her shift on September 2, 1983. She said she assigned him responsibility for eight clients on his first day on the job. She said this was consistent with prior instructions that psychiatric technicians were to show new hospital workers how to feed, position and change the diapers of the severely disabled clients in her unit. She testified that the only limitation on

hospital workers was that they were not to give patients medications or treatments. Other than that, the hospital worker feeds, bathes and cares for his eight clients the same as the licensed psychiatric technicians. She testified that whichever psychiatric technician is working near the hospital worker "checks on him to make sure that he's doing what he's supposed to with his clients." She said that the shift lead has the ultimate responsibility for the eight clients assigned to the hospital worker.

James McWilliams, another Stockton psychiatric technician, testified that in early 1982, hospital workers were assigned the independent responsibility for groups of clients. After about six months, he said, the hospital discontinued the practice of allowing hospital workers to have their own primary groups and stopped them from making entries on client medical charts. After the change, hospital workers continued to work with groups of clients but they no longer had the primary responsibility for them.

Gerry Brown, a program director at Stockton called by the State, testified that hospital workers currently perform the same types of services at Stockton as performed in the 1970's by hospital workers at Napa State Hospital. He testified that in both hospitals the hospital workers bathed and fed clients and changed the clothing of clients. In neither place did hospital workers give medical treatments, administer

medications or make entries in the medical charts of clients. Always, he testified, a licensed person had the ultimate responsibility for the care of clients.

Barbara Long, a psychiatric technician at Camarillo State Hospital who was a witness for CWA, testified that hospital workers escort large groups of residents for long periods of time, make decisions about when to implement a treatment program, make recommendations about the use of a chemical restraint and generally function as group leaders. On cross-examination, Ms. Long testified that with the exception of taking vital signs, she has not seen hospital workers perform any of the nursing duties which are limited to licensed persons. With respect to taking vital signs, she testified that she had seen hospital workers perform this task "some of the time." Regarding her testimony that hospital workers make decisions about implementation of treatment programs, she acknowledged that hospital workers in fact only carry out behavioral plans designed by professional employees. It also became clear on cross-examination that even when hospital workers are assigned to work with a group of residents, a licensed person must approve any unusual activity, such as taking clients for a walk or using restraints on a particular client.

Beverly Doran, a unit supervisor at Camarillo who was called as a witness for the State, testified that hospital

workers in her unit perform both cleaning and patient care. She said they have done both types of duties for the six years she has been at Camarillo. She said when hospital workers are caring for a group of clients they are under the guidance of a psychiatric technician or of the shift lead.

To some degree, the question about whether hospital workers are independently responsible for groups of clients has been brought into focus by changing physical conditions within the hospitals. When hospital workers first began to work with residents on a one-to-one basis, hospital units contained large dormitories. Bathrooms had no partitions and showers had no stalls. Client care activities such as dressing, bathing, grooming, toileting were performed in front of other clients and other employees. In that work environment, psychiatric technicians and hospital workers could join as a team with the hospital worker directly assisting the psychiatric technician.

Beginning in 1979-80, the Department commenced the rennovation of its hospitals in order to bring them up to modern fire, life safety and environmental standards. In the process, significant steps were taken to afford residents more privacy. Partitions were installed in the toilets, stalls in the showers and the large dormitories were divided into four-person bedrooms. Changes in resident care followed the structural rennovations. No longer were patients taken to the bathroom or the showers in large groups. Residents slept and

dressed in the smaller rooms. Under the new living arrangement, it often is impossible for psychiatric technicians and hospital workers to work in close proximity as a team. In order to assist a psychiatric technician with dressing or bathing a resident, the hospital worker may now be in a different room. Hospital workers and psychiatric technicians often do not work within line of sight under the new hospital configurations, although they typically remain within sound of voice.

Efforts to Stop Out-of-Class Assignments.

The Department acknowledges that hospital workers have sometimes been placed in charge of groups of residents. The practice has been challenged from as long ago as 1978 by several employee organizations, including the California Association of Human Services Technologists and the California State Employees' Association. A major attack on the practice was mounted in 1980 by Local 411 of the Service Employees International Union (hereafter SEIU). On August 4 of that year, SEIU filed a grievance contending that hospital workers were performing out-of-class duties at Lanterman State Hospital.

Following investigation of the SEIU out-of-class claims, the Department sent a series of memos to hospital executive directors, instructing them not to assign hospital workers as the independent leaders of groups of clients. In a December 8, 1980, memorandum to the acting executive director of Lanterman

State Hospital, Department Deputy Director Bamford Frankland complained that despite departmental instructions to the contrary, some units at Lanterman continued to assign out-of-class duties to hospital workers. He stated that 18 of 67 hospital workers at Lanterman had been assigned questionable duties. Frankland wrote that assignment of hospital workers as group leaders "is clearly out-of-class for a hospital worker, except under emergency circumstances."

The memo states that "disciplinary action could be taken against managers and supervisors who repeatedly and knowingly assign or condone out-of-class work." Mr. Frankland warned that he would "request that appropriate disciplinary action" be taken against responsible supervisors.

On February 14, 1981, the Department responded to the out-of-class complaint made the previous summer by SEIU. The Department agreed that the four named grievants had performed out-of-class work at Lanterman and directed their reimbursement in the pay category of hospital aide. Specifically, the Department acknowledged that the hospital workers had improperly been assigned responsibility for groups of patients and the union was informed about the December 8 directive to the hospital executive director.

In a further effort to halt the use of hospital workers in out-of-class assignments, Deputy Director Frankland on June 26, 1981, sent a memorandum to the executive directors of all

hospitals. The memo discussed the overlap of hospital worker duties with the duties of other classes and specifically stated that hospital workers should not be assigned to work alone with groups of patients. In relevant part, the memo reads as follows:

> . . . only licensed staff are to be assigned alone to a group of residents. If necessary, groups should be combined so that Hospital Workers will never be alone with residents, but it should not be routinely scheduled and should only occur for brief periods of time. When a Hospital Worker is alone with residents, he/she should be within voice range and preferably within the same room as a licensed staff member. The only exception is when a Hospital Worker is escorting a resident on the grounds, but judgment should be exercised about the type of resident left with the Hospital Worker.

Linda Stephenson, the department labor relations specialist, who composed the June 26 memorandum for Mr. Frankland, testified that the purpose of the document was to stop the use of hospital workers as group leaders. She said the number of out-of-class claims by hospital workers dropped significantly following the issuance of the memorandum. Prior to its issuance, the memo was reviewed by CSEA and SEIU which then were in competition to become exclusive representative of state unit 15 which contains hospital workers.

Ms. Stephenson testified that the policy contained in the June 26, 1981, memorandum remains the departmental rule on whether hospital workers can be assigned responsibility for a group of residents. She said the Department makes efforts to

halt the use of hospital workers as group leaders whenever it learns of such practice. This contention was confirmed by Dick Hall, a CSEA staff employee called as a witness by the State. Mr. Hall said that whenever he learns of and complains about the use of a hospital worker as a group leader the practice is halted.

Distribution of the Workforce.

Within the state hospital system there are significantly more psychiatric technicians than hospital workers. Indeed, in recent years the number of psychiatric technicians has increased relative to the number of hospital workers. On December 1, 1979, the Department employed 5,631.75 psychiatric technicians and 648.5 hospital workers, a ratio of nine psychiatric technicians per hospital worker. On October 1, 1981, the closest date to the time of CWA's certification for which figures were available, the Department employed 5,682.65 psychiatric technicians and 562.75 hospital workers, a ratio of 10 psychiatric technicians per hospital worker. As of July 1, 1983, there were 5,034.8 psychiatric technicians and 469.5 hospital workers, a ratio of 11 psychiatric technicians per hospital worker. The number of clients declined by 13 percent over the three-and-one-half years.

Deputy Director Frankland testified that although the Department affords the individual hospitals a great degree of latitude in hiring, he does have a guideline by which he

monitors the local decisions. Since about 1977-78, the Department has attempted to ensure that between 70 and 90 percent of the treatment staff at each hospital is comprised of licensed employees, primarily psychiatric technicians and nurses. Although there are year-to-year and hospital-to-hospital fluctuations, all but three hospitals - Fairview, Agnews and Stockton - have stayed within the desired range. Mr. Frankland testified that Fairview in particular has had great difficulty in enticing licensed applicants to accept jobs because housing costs are very high in the surrounding community. He said that on occasion the proportion of the Fairview staff which is licensed has fallen to as low as 52 percent. Over the period covered by the charge, however, there has been a significant increase in the number of psychiatric technicians per hospital worker at Fairview. On December 1, 1979, there were 4.7 psychiatric technicians per hospital worker at Fairview. By July 1, 1983, there were 9.6 psychiatric technicians per hospital worker.

The Stockton Changes.

At Stockton, the Department has encountered the opposite problem from Fairview, more licensed applicants than needed. Over a six-month period in late 1981 and early 1982, Stockton employed no hospital workers, giving it a treatment staff that was 100 percent licensed. Recruitment of licensed employees at Stockton is easy because the Department operates a training

program for psychiatric technicians at the hospital and its graduates are a ready source of trained employees.

A small hospital, Stockton ranges in size from 500 to 550 residents whereas other Department hospitals have more than 1,000 residents. In part because of small size and loss of economy of scale, client care at Stockton costs about $5,000 more per client per year than at other Department hospitals. In an effort to reduce costs, the Department has encouraged hospital administrators at Stockton to review their staffing as a possible way of bringing the hospital's per client treatment costs closer to the statewide norm. Following this suggestion, more hospital workers were hired at Stockton. On December 1, 1979, Stockton had 397 psychiatric technicians and two hospital workers, a ratio of 198.5 psychiatric technicians per hospital worker. On October 1, 1981, the date closest to the time of CWA's certification for which figures were available, Stockton had 329.5 psychiatric technicians and no hospital workers. As of July 1, 1983, the hospital had 314 psychiatric technicians and 27 hospital workers, a ratio of 11.6 psychiatric technicians per hospital worker. This change was brought about through normal attrition and subsequent replacement hiring. There were no layoffs.

Effect on Psychiatric Technicians.

CWA presented evidence intended to show that the alleged expansion of hospital worker duties throughout the system

adversely affected the job safety of psychiatric technicians, hampered their ability to be reemployed and resulted in a loss of overtime. CWA also presented evidence to show that the alleged change increased the duties of psychiatric technicians.

Barbara Long, a psychiatric technician at Camarillo State Hospital, testified that she voluntarily transferred from one program to another because the hospital worker with whom she worked did not understand "the sophistication of any behavior modification plan." James McWilliams, a psychiatric technician at Stockton, testified that he "felt threatened" when he worked in a unit with two hospital workers. He said that as a union representative he has had complaints from other psychiatric technicians about their fears for safety.

The record establishes that hospital workers get the same amount of training in the management of assaultive behavior as do psychiatric technicians. However, probably more important than training is experience in working with developmentally disabled patients. More experienced employees have a greater ability to recognize the signs of an incipient problem and thus ward it off. In this regard, new employees in any job class present problems for more experienced workers, although a new psychiatric technician enters a hospital with some clinical experience which a new hospital worker does not possess.

With respect to reemployment, Joan LeGrand testified that she had been unsuccessful in her efforts to obtain a

psychiatric technician job at Stockton. She had been employed as a psychiatric technician at the hospital from 1979 to 1982. She resigned in order to care for her seriously ill mother. In July of 1983, she requested reinstatement as a psychiatric technician. Her request was denied. She attributed the denial to the replacement of psychiatric technicians by hospital workers at Stockton. Ms. LeGrand did not seek employment as a psychiatric technician at any other state hospital. Despite denial of reinstatement to Ms. LeGrand, the Department hired eleven psychiatric technicians at Stockton in June of 1983, four in July and five in August. The only testimony regarding overtime was that of Ms. Long who, when asked if her overtime decreased, responded, "Yes, it has, dramatically."

With respect to increased duties, it is uncontested that psychiatric technicians and other licensed employees have the ultimate responsibility for all clients for whom hospital workers care. Thus, a psychiatric technician who is assisted by a hospital worker has ultimate responsibility not only for his or her own clients but also for those under the hospital worker. However, this arrangement for responsibility has existed since hospital workers first began to assist psychiatric technicians in the care of clients in 1976 and thereafter.

During the relevant period of December 1, 1979, through July 1, 1983, the Department has consistently employed one

psychiatric technician for every two clients under its care. The reasonable inference which can be drawn from this ratio is that although there may be variations among hospital treatment units, the caseload of psychiatric technicians has not changed.

No notice was given to CWA about the change in job description of hospital worker nor about any planned changes in the ratio of psychiatric technicians per hospital worker at any state hospital. Mr. Frankland testified that he did not afford the union any specific notice of either action because he did not consider either to be a policy change.

LEGAL ISSUES

1. Did the state employer fail to meet and confer in good faith and thereby violate Government Code section 3519(c) and/or (a) and (b) by unilaterally:

A. Initiating changes in the job specification for the position of hospital worker?

B. Transferring work from state employee unit no. 18 to state employee unit no. 15?

C. Converting psychiatric technician positions at Stockton State Hospital into hospital worker positions?

2. Alternatively, did the state employer fail to meet and confer about the effects of the change in job specification, transfer of work and conversion of positions and thereby violate Government Code subsection 3519(c) and/or (a) and (b)?

CONCLUSIONS OF LAW

Change in Job Specification.

CWA argues that under PERB precedent a change in job description is a negotiable matter. Alum Rock Union Elementary School District (6/27/83) PERB Decision No. 322. Where an employer makes such a change unilaterally, CWA reasons, the employer has failed to negotiate in good faith.

Here, however, the job description at issue was that of hospital worker, a position contained in state unit no. 15 which is represented by CSEA, rather than CWA. Prior to the change, CSEA was consulted and agreed to the revision of the job specification. CWA represents state employee unit no. 18, which covers psychiatric technicians. Ordinarily, an employer has no obligation to negotiate about matters affecting persons outside the negotiating unit. "[I]t has repeatedly been held that the scope of bargaining unit controls the extent of the bargaining operation. . . ." Chemical Workers v. Pittsburgh Plate Glass Co. (1971) 404 U.S. 157 [78 LRRM 2974, 2977]. See also, NLRB v. Western Electric Co. (8th Cir. 1977) 559 F.2d 1131 [95 LRRM 3230]. Thus, the state ordinarily would have no obligation to negotiate with CWA about matters involving hospital workers.

Nonetheless, CWA argues, the change in the hospital worker job description led to changes in the work of psychiatric technicians. Following the change in job description, CWA

argues, hospital workers routinely were assigned responsibility for groups of employees. This change increased the job duties of psychiatric technicians who became responsible for supervising the hospital workers, according to CWA. In addition, the union argues, the change decreased the amount of overtime which psychiatric technicians could work and made their jobs less safe. Changes which affect either the amount of overtime or employee safety are mandatory subjects of negotiations. State of California (Department of Transportation) (11/28/83) PERB Decision No. 361-S. Because of these effects upon the position of psychiatric technician, CWA contends, the Department had an obligation to negotiate with CWA prior to the revision of the hospital worker job specification.

The State mounts a two-pronged response. As a threshold argument, the State contends that the changes in job description were made not by the Department but by the State Personnel Board. The State argues that because the Personnel Board was acting under its constitutional power to classify (Cal. Constit. Art. VII, Sec. 3), the Department and CWA could not have reached a negotiated agreement contrary to the Personnel Board's decision. The subject of the proposed change in job description was thus outside of the scope of representation and therefore nonnegotiable, the State concludes.

Alternatively, the State argues that the job description change had no effect upon the duties of psychiatric technicians

and was therefore nonnegotiable in any event. The State contends that the change merely updated the job specification and brought it into conformity with current practice. In the absence of a change in duties, the State argues, there is no obligation to negotiate about the job description. CSEA joins in this contention, arguing that the modification of the duties of hospital workers had occurred sometime prior to the change in job specification and considerably before CWA's certification as exclusive representative.

The question of whether the Department had an obligation to negotiate about Personnel Board ordered changes in job description was resolved in the May 5, 1982, partial dismissal. No exceptions were filed to the 1982 ruling and that ruling is binding upon the parties and the undersigned hearing officer. The evidence establishes that the change in job specification was originated by the Personnel Board and that the modifications proposed by the Department were in accord with changes already set out by the Personnel Board staff. Thus, no violation can be found in the change of the job description itself.

A more substantial question not resolved in the earlier ruling is whether the Department made a change in the duties of hospital workers which resulted in a change in the duties of psychiatric technicians. A significant change in an employee's actual job duties is a matter within the scope of

representation. Rio Hondo Community College District (12/31/82) PERB Decision No. 279, Mt. San Antonio Community College District (3/24/83) PERB Decision No. 297. Here, it is clear that there has been a change in the duties of hospital workers. The critical factor, however, is when the change occurred.

It is fundamental to CWA's theory of the case that the change in hospital worker duties, and the alleged effect upon psychiatric technicians, took place following CWA's certification as exclusive representative. An employer's duty to negotiate with an organization does not arise until the organization attains the status of exclusive representative. In both its opening statement at the hearing and in its initial post-hearing brief, CWA describes the change in duties as the consequence of the change in job description. According to CWA, the change in the job description "precipitated an actual change in job duties."

The State does not fully concede that there has been a change in the duties of hospital workers. However, the State argues, even if a change did occur, it "pre-existed CWA's certification as exclusive representative" and was "of longstanding duration and practice." The weight of the evidence supports the State's position. It is concluded that the revision of the job specification merely reflected a development that already had occurred.

When the hospital worker position originally was created in 1968, persons employed in that class were engaged primarily in janitorial and housekeeping duties. While hospital workers of that era performed some client care duties, the primary focus of their position was on housekeeping. By 1976, however, hospital workers were engaged in the dressing, feeding, grooming, escorting and toileting of patients. The shift toward patient care accelerated in 1978 when the Department employed janitors, housekeepers and food service workers to assume many of the duties formerly performed by hospital workers.

By 1978, hospital workers were engaged in client care with such frequency that employee organizations representing hospital workers commenced the filing of complaints that their members were working out of class. The gist of those complaints and others filed in 1980, was that hospital workers were engaged in such psychiatric technician duties as leading groups of clients. Some of those out-of-class claims were sustained and the Department commenced a series of measures designed to stop hospital administrators from assigning out-of-class duties to hospital workers. As CSEA correctly argues, evidence that hospital workers occasionally are still employed as group leaders "does not reflect a change in policy but rather a violation of that policy."

Disputes about hospital workers performing the duties of psychiatric technicians would not have occurred in 1978 and

1980 had not the nature of hospital worker duties already shifted toward client care. The occasion for hospital workers to perform psychiatric technician-type duties simply would not have arisen if hospital workers were still limited primarily to housekeeping duties.

It is thus apparent that hospital worker duties had changed long before the December 16, 1981, revision in job specification. The process was under way by 1976 and was virtually complete by 1980. Contrary to CWA's argument, the change in job description did not precipitate "an actual change in job duties." The change already had been made.

Similarly, insofar as the gradual change in hospital worker duties affected the duties of psychiatric technicians, it is self-evident that any effect on psychiatric technicians would have occurred simultaneously with the hospital worker changes. Since the change in hospital worker duties was virtually complete by 1980, it is inherent that the effect on psychiatric technicians likewise was complete by 1980.

Moreover, the specific evidence that the change in the hospital worker job description affected psychiatric technicians was unconvincing. As CSEA argues in its brief, "the impact of the various alleged changes must be demonstrated." CWA has failed to meet this burden of proof.

Several witnesses testified that their jobs became less safe because of the changing nature of hospital worker duties.

During cross-examination, however, it became apparent that any safety problems were not due to the changing nature of hospital worker duties but to the inexperience of some hospital workers. The evidence establishes that regardless of job classification, a new employee is less able to anticipate and deal with violent behavior by clients. New hospital workers are given the same instruction as new psychiatric technicians for dealing with assaultive behavior of clients. After that, the principal teacher for both groups is experience.

Also unconvincing was the testimony of one witness that a change in hospital worker duties had brought about a reduction in the amount of available overtime. As the State argues, "no causal relationship was established" between the change in duties and the loss of overtime. There could be a myriad of explanations for why an individual employee might work fewer hours of overtime from one year to another. Employers typically authorize overtime when there is an increase in the workload or a decrease in the number of available workers. The witness might have lost her overtime because of changes in either the amount of available work or the number of available workers. In any event, it is too speculative to link the loss of overtime to a change in the duties of hospital workers.

Nor was any convincing evidence presented that the job description change has required psychiatric technicians to supervise hospital workers. The supervision responsibility

which psychiatric technicians carry is for clients, not for hospital workers. Psychiatric technicians maintain this responsibility whether or not they have a hospital worker to assist them in client care. There is no evidence that the use of hospital workers has increased the number of clients for whom hospital workers must care. Indeed, the record establishes the opposite. Consistently since December 1, 1979, the Department has employed one psychiatric technician for every two clients under its care.

An employer has no obligation to negotiate about a change in a job specification which does not change any condition of employment. Alum Rock School District, supra, PERB Decision No. 322. Accordingly, the contention that the change in job specification violated subsection 3519(c) and, concurrently (a) and (b) must be dismissed.

Transfer of Unit Work.

CWA argues that the Department transferred work from unit 18 to unit 15 when it permitted hospital workers to undertake client care duties formerly performed by psychiatric technicians. Citing Rialto Unified School District (4/30/82) PERB Decision No. 209, CWA argues that the transfer of work from a bargaining unit is a negotiable subject. Because the Department did not negotiate about the transfer, it failed to negotiate in good faith, the union concludes.

In making this argument, however, CWA once again is confronted by the problem of when the alleged change in duties

took place. It is without challenge that hospital workers over the years have gradually assumed some of the client care duties which once were performed almost exclusively by licensed employees. However, the preponderance of the evidence establishes that the duties now conducted by hospital workers are substantially the same as those regularly carried out by hospital workers in 1980. The change in duties thus predates CWA's certification as the exclusive representative in 1981.

Accordingly, it is concluded that during the period since the certification of CWA, the Department has not transferred work from unit 18 to unit 15.

Conversion of Positions at Stockton.

It is undisputed, CWA argues, that when CWA was certified as exclusive representative there were no hospital workers employed at Stockton State Hospital. In the summer of 1982, CWA continues, the hospital began to implement a decision to replace some psychiatric technicians with hospital workers as a cost reduction measure. CWA argues that the replacement of psychiatric technicians with hospital workers was a policy change, citing Grant Joint Union High School District (2/26/82) PERB Decision No. 196, which was made without prior negotiations. The hiring of hospital workers at Stockton, therefore, was a failure to negotiate in good faith.

In making this argument, CWA in effect contends that regardless of when any other changes were made, it is

absolutely certain that at a date after CWA's certification psychiatric technicians were replaced by hospital workers at Stockton. The action was taken as a result of an administrative decision to cut costs and at no time, CWA argues, did the Department inform the union of the change or offer to negotiate.

The PERB has yet to consider the transfer of work in a case where jobs which share overlapping duties are located in different units.[9] The rationale of Rialto, supra, PERB Decision No. 209, and other PERB cases is rooted in the transfer of duties, not positions, from the unit. Here, there is no convincing evidence that duties which are exclusively those of psychiatric technicians have been transferred to hospital workers at any time since CWA's certification. As both the State and CSEA argue, there is a wide overlap of duties between the two job classifications. The record simply

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[9]Rialto, supra, PERB Decision No. 209, involved the transfer of attendance counselor duties from certificated employees to classified employees. Classified employees had not formerly performed such work. In CSEA v. Solano Community College District (6/30/82) PERB Decision No. 219, the transfer of duties went the other way. Following the layoff of certain classified employees, their former duties were assigned to certificated employees who previously had not performed such work. In Mt. San Antonio, supra, PERB Decision No. 297, administrators who were not members of the bargaining unit were directed to teach certain overload assignments. Teaching previously was not a part of an administrator's regular duties and administrators who did teach overload classes did so only after full-time faculty had been given and rejected the opportunity to teach the overload classes.

will not support the conclusion that the duties of hospital workers have changed since certification.

The events at Stockton actually present the different question of whether a change in the allocation of positions is a negotiable matter. At the time CWA was certified, there were 329.5 psychiatric technicians and no hospital workers at Stockton State Hospital. By July 1, 1983, the hospital had 314 psychiatric technicians and 27 hospital workers. Clearly, there was a change in the allocation of positions.

The State is obligated to negotiate about the change in the allocation of positions if it affects a matter within the scope of representation.[10] Under section 3516, the State is obliged to negotiate with an exclusive representative about

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[10]The SEERA scope of representation provision, which is found at section 3516, read as follows at the time this case arose:

> The scope of representation shall be limited to wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

This section has been amended, effective July 21, 1983, to provide as follows:

> The scope of representation shall be limited to wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include either of the following:
>
> (a) Consideration of the merits, necessity,

"wages, hours and other terms and conditions of employment," except there is no obligation to negotiate about "consideration of the merits, necessity or organization of any service or activity provided by law or executive order."

A term and condition of employment will be found within the scope of representation if it involves the employment relationship, is of such concern to both management and employees that conflict is likely to occur, and if the mediatory influence of collective bargaining is an appropriate means of resolving the conflict. Such a subject is mandatorily negotiable unless requiring negotiations would unduly abridge the State employer's freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the State's mission. State of California (Department of Transportation), supra, PERB Decision No. 361-S.

There is no showing that the redistribution of job classifications at Stockton had any effect on the wages or hours of unit members.[11] CWA's contention that the change

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> or organization of any service or activity provided by law or executive order.
>
> (b) The amount of rental rates for state-owned housing charged to state employees.

[11]One former psychiatric technician testified that she was unable to obtain reemployment in Stockton subsequent to the redistribution of positions. Even assuming a change in

affected employee workload and safety is found unpersuasive for the reasons discussed supra.

More significant is the CWA contention that as a result of job redistribution, the organization's "strength and vitality" will be progessively diminished at Stockton. It is well established that an employer must negotiate about changes that affect "the collective strength of employees in the unit and their ability to deal effectively with the employer and . . . the viability of the unit itself." Rialto Unified School District, supra, PERB Decision No. 209. Citing federal precedent with approval, the Board concluded in Rialto that a weakening of the collective strength of a unit impacts upon work conditions and thus is logically and reasonably related to enumerated subjects within scope.

The replacment of psychiatric technicians by hospital workers clearly presents the potential for an adverse impact upon the collective strength of employees in the unit. The distribution of the workforce is a matter of significant concern to management and a subject over which conflict easily could arise if not resolved by negotiations. In order to

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reemployment rights is negotiable under Jefferson Elementary School District (6/19/80) PERB Decision No. 133, CWA has not offered convincing evidence of a change. In the same month the witness was rejected, four psychiatric technicians were hired at Stockton. Five more were hired the following month. It is unreasonable, therefore, to attribute the failure of the witness to obtain reemployment to the redistribution of job classifications at the hospital.

contest the unilateral change, however, CWA must demonstrate that the extent of the redistribution of the workforce was of sufficient scope to have a significant impact on the unit. Small fluctuations are inevitable and the State would be unduly handicapped if it had to maintain the relationship between the two job classes with mathematical precision. However, a significant shift in workforce would have an obvious impact upon the collective strength of the unit and thus be negotiable. Here, CWA simply has failed to show a significant shift in the distribution of jobs in the Departmental workforce. Considering the system as a whole, there were more psychiatric technicians per hospital worker in July of 1983 (11 to 1) than there were at the time CWA was certified in the fall of 1981 (10 to 1).

Moreover, as the State notes in its brief, the Department for some time has attempted to ensure that between 70 and 90 percent of the treatment staff at each hospital is comprised of licensed persons. Stockton has been notable for its deviation toward a higher percentage of licensed staff members whereas other state hospitals, particularly Fairview, have been notable for a deviation toward a lower percentage of licensed workers. During the period after CWA's certification, successful efforts were made to bring both hospitals more closely into the desired range. Although the number of psychiatric technicians declined relative to hospital workers at Stockton, it increased at Fairview.

Thus, although the percentage of the treatment staff comprised of psychiatric technicians has declined at Stockton since CWA's certification, the change merely brought the hospital into line with systemwide practices. It cannot be described as a policy change, Grant High School District, supra, PERB Decision No. 196. Similarly, the evidence cannot support a conclusion that the action at Stockton had an impact upon "the collective strength of employees in the unit" or upon the "viability of the unit itself."

In the absence of evidence that the redistribution of positions was a policy change affecting a matter within the scope of representation, the charge that the Department failed to negotiate in good faith by its action at Stockton cannot be sustained.

Failure to Meet About Effects.

As its final line of attack, CWA contends that even if it is held that the Department was under no obligation to negotiate about the decisions at issue, it nonetheless was obligated to negotiate about the effects of those decisions upon unit members.

Numerous PERB decisions support the principle that the effects of a nonnegotiable decision upon matters within the scope of representation are themselves negotiable. See, e.g., Solano Community College District, supra, PERB Decision No. 219 and Oakland Unified School District (7/11/83) PERB Decision No. 326.

Here, however, CWA has failed to demonstrate that any action taken by the Department during the period following the certification of CWA had an effect upon a matter within the scope of representation. In the absence of such a showing, the employer had no obligation to negotiate. Accordingly, the contention that the Department failed to negotiate about the negotiable effects of nonnegotiable decisions must be dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record in this matter, unfair practice charge S-CE-86-S filed by the Communications Workers of America, Psych Tech Union, Local 11555, AFL-CIO, against the State of California (Department of Developmental Services) and the companion PERB complaint are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on January 3, 1984, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on

January 3, 1984, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, section 32300 and 32305.

Dated: December 13, 1983

Ronald E. Blubaugh
Hearing Officer