

ALASKA LABOR RELATIONS AGENCY

3301 EAGLE STREET, SUITE 208

P.O. BOX 107026

ANCHORAGE, ALASKA 99510-7026

(907) 269-4895

FAX (907) 269-4898

ALASKA NURSES ASSOCIATION,)

)

Petitioner,)

)

vs.)

)

FAIRBANKS NORTH STAR BOROUGH)

SCHOOL DISTRICT,)

Respondent,)

and)

)

EDUCATION SUPPORT)

STAFF ASSOCIATION/NEA-ALASKA,)

)

Intervenor .)

)

Case No. 01-1080-RC/RD.

DECISION AND ORDER NO. 258

This matter was heard on July 30, 31, and August 1, 2001, in Fairbanks, Alaska, before the Alaska Labor Relations Board. The panel hearing the matter included board Chair Aaron Isaacs, Jr., and members Dick Brickley and Raymond Smith. Hearing Examiner Mark Torgerson presided. The record closed on August 1, 2001.

Appearances: Sarah Josephson and William Jermain, attorneys for the Alaska Nurses Association (the Association); William B. Schendel, attorney for the Fairbanks North Star Borough School District (the District); and Clarence Bolden, Uniserv Director, for the Education Support Staff Association (ESSA).

Digest: The petitioner has not satisfied the requirements in AS 23.40.090 and 8 AAC 97.025(b) to sever the school nurses from the District's wall-to-wall unit currently represented by ESSA. The fact that the proposed unit is a group of professionals does not warrant carving them out from the larger unit.

DECISION

Statement of the Case

The Association filed this petition to represent the District's school nurses, who are currently represented by ESSA. The District and ESSA object to the petition. The Association contends severance is justified based on the professional status of the nurses, their distinct education and training requirements, and job duties. The District contends fragmentation would not be appropriate, because the nurses have not satisfied the requirements for severance under AS 23.40.090. ESSA objects because it believes it has provided adequate representation to the nurses. The District and ESSA also assert that the nurses share a community of interest with other employees in the ESSA bargaining unit.

Procedure in this case is governed by 8 AAC 97.350.

Issues

1. Is the unit that the Alaska Nurses Association seeks to represent an appropriate unit under AS 23.40.090?
2. Does the Alaska Nurses Association meet the requirements for severing a bargaining unit from an existing bargaining unit under 8 AAC 97.025(b)?

Findings of Fact^[1]

The panel, by a preponderance of the evidence, finds the facts as follows:

1. ESSA currently represents a wall-to-wall unit of employees who work for the District. The Association has petitioned to sever the school nurses who are included in the wall-to-wall unit. ESSA and the Association are recognized as labor organizations under AS.23.40.250(5). The District is recognized as a public employer under AS 23.40.250(7).
2. The wall-to-wall unit represented by ESSA consists of a variety of positions that range from clerical and blue-collar employees to professional employees, including the nurses. The unit the Association seeks to carve out from ESSA and represent is described as "nurses working in elementary and secondary schools of the Fairbanks North Star Borough School District." Those employees excluded are described as follows: "The existing unit is a broad unit which includes a variety of support staff. For example, kitchen aides, receptionists, clerk typists, maintenance helper, purchasing clerk, day custodian, are some examples of those in the current ESSA represented unit." (Petition filed March 1, 2001).
3. The nurses currently comprise 33 of the approximately 672 members of the ESSA bargaining unit.
4. The nurses comprise the fourth (4th) most numerous of the 90 position numbers in the ESSA unit (tied with Teacher Aide/Special Education). Individual positions with more members include Administrative Secretary (37); Custodian/12 month (79); and Teacher Aide/Severely Profound (72).
5. The 33 nurses work at 28 different school-building locations. The individual schools are spread over a Borough encompassing 7,361 square miles. Other ESSA employees also work at each of these locations.
6. At 24 locations, there is one and only one full-time school nurse. At each of two schools (Two River and Salcha), there is only a part-time nurse. At Nordale and Woodriver Elementary Schools, two nurses job-share a full-time position. At Lathrop, there are 1.5 nurses. At West Valley, there are also 1.5 nurses.
7. The nurses' duties, responsibilities, training, their common purpose, and working conditions in the District provide a strong community of interest among the nurses. However, the nurses also work with other ESSA employees and share a significant community of interest with them.
8. The nurses' "primary working contacts" are described in their job description as follows:

Daily contact with students, and frequent contact with parents and health and social services agencies.
Frequent contact with attendance secretary for absentee follow-up, maintenance staff for environmental safety concerns, custodial staff for health and sanitation monitoring, other schools regarding student health or concerns, resource staff and building principal regarding health and

medical concerns of students.

(Exh. AF, Exh. 129).^[2]

9. School nurse Liz Engle has daily contact with her school's administrative secretary and attendance secretary. Both of these secretaries are members of ESSA. She also has frequent contact with the kitchen manager and special education aides, who are in the ESSA bargaining unit. She has frequent contact with other school nurses, sometimes daily, sometimes weekly.

10. The Head Nurse position was formerly entitled Districtwide Nurse Coordinator. The Head Nurse position has historically been treated as part of the ESSA unit. The Head Nurse has received administrative support from a Secretary (ESSA) in the Curriculum Department office and from the Executive Assistant to the Superintendent (a confidential, exempt employee).

11. The building principal performs annual evaluations of permanent nurses (including the Head Nurse). School nurses are supervised by the building principal at the school where they work. (Exhs. AF and 129). Several other ESSA members are also supervised by the building principal or the principal gives input into the employee's evaluation. These include the Behavior/ Intervention Teacher Aide – Districtwide (Exh. 121, Bilingual/Bicultural Program Tutor/Instructor (Exh. 123), Elementary Library Media Associate (Exh. 124), High School Registrar (Exh. 126), Substance Abuse Prevention Program Specialist (Exh. 130), Sign Language Interpreter/Transliterater (Exh. 132), various Teacher Aides (Exhs. 133 – 136), and Teacher Assistant (Exh. 138).^[3]

12. Nurses are not required to wear special uniforms while working for the District. Some school district employees, including school nurses, wear name tags. Some nurses wear name tags indicating they are nurses.

13. The Head Nurse (currently Suellen Geis) reports to the Assistant Superintendent/Secondary Schools (Ernie Manzie).

14. The District's Medical Advisor (until June 30, 2001, Dr. Peter Marshall) assists the Assistant Superintendent, the Head Nurse, and, sometimes, the individual nurses.

15. Before 1972, the District required nurses to have teachers' certificates; that has not been the case since 1972.

16. Nurses are licensed and subject to regulation by the state Board of Nursing. (Exh. 5).

17. Nurses in the Fairbanks North Star Borough School District are not certified by the state Department of Education, and are not subject to regulation by the state Professional Teaching Practices Commission.

18. There is a wide variation in the skills and duties of the nurses and other positions in ESSA. Some positions, such as the school nurses, require specialized training and skills while other positions in the unit do not call for special requirements. However, the position of school nurse is not the only position that requires specialized training. Several other ESSA positions have specialized training, licensing, or education requirements.

19. Nurses have specialized training that differs from that of other ESSA employees. The nurses' general responsibilities state that they promote, protect, maintain, and attain "optimal care for the physical and mental health" of students. (Exh. 129). Examples of their duties include, but are not limited to, providing emergency medical services, consulting with parents on students' health, reporting and following-up on child abuse and neglect, conducting first aid for staff and students, performing tuberculin testing, scoliosis and audio/visual screenings, and maintaining a daily medical log. They must have a current State of Alaska Registered Professional Nurse license and at least two years relevant experience in the nursing field. Although the District required a Bachelor of Science degree at one time, this degree is now preferred but not required.

20. Some ESSA employees, such as maintenance mechanics, are technically skilled in one or more specific areas of the building trades, including building controls, carpentry, electrical, electronics, hearing plants, locksmith, plumbing, or auto repair. (Exh. 127). Employees in these positions must perform at the journeyman level, or equivalent. The amount of time required for an electrician or plumber to become a journeyman is 8000 hours.

21. Occupational therapists "work with students who are physically, mentally, developmentally, emotionally, socially, learning, visually, hearing, and/or multiply disabled." (Exh. 128). They consult school personnel and families, implement therapy programs, and function "in accordance with the philosophy, laws, rules, and regulations of this profession." (Exh. 128).^[4] Occupational therapists must possess a State of Alaska Occupational Therapy Assistant license.

22. A Secondary Drug Prevention/Intervention Specialist "assists the substance abuse prevention program specialist in implementing the substance abuse program for the district." (Exh. 130). These ESSA employees "[m]ust make independent decisions; protect confidentiality of student issues and records; and make appropriate referrals/reports to parent, Division of Family and Youth Services, law enforcement, and/or school administrators and counselors." They work closely with building administrators, department heads, parents, students, and other district personnel. They are supervised by the substance abuse prevention program specialist, with input from the building principal. They must have a bachelor's degree and must hold or be eligible for certification as a qualified chemical dependency counselor.

23. Some job descriptions in the ESSA unit only require a high school diploma or equivalent, with no specialized training. These include, but are not necessarily limited to, teacher aides and teacher assistants. (Exhs. 121-122, 133-136, and 138). Other descriptions, such as Bilingual/Bicultural Program Tutor/Instructor, Elementary Library Media Associate, Fixed Asset/Accounting Technician, and High School Registrar, require additional education or skills, but not the more complex type of skills required of grade 9 employees. (Exhs. 123-126).

24. The scope of the services provided by School District nurses is illustrated by the School Nurses Services Manual. The Manual establishes protocols for various medical tests and procedures, and for a variety of administrative tasks associated with District programs (such as Special Education).^[5]

25. The School Nurses Services Manual was drafted with the assistance of the then-Head Nurse and several permanent nurses.

26. Nurses perform the medical screening (hearing and vision tests) that is mandatory for determination of eligibility for Special Education Services; the Special Education "Intervention (or Child Study) Team" sometimes includes ESSA members (Intervention Specialist, Alaska Native Education School Liaison, and/or Bilingual Specialist) as well as others (teachers).

27. For those students who are determined eligible for Special Education services (especially those with medical issues), most nurses work on the IEP team that determines the nature of services to be provided and that reviews the student's progress.

28. The nurses coordinate with the building secretary when ordering supplies for the following year.

29. The nurses coordinate transfer of student medical records with the appropriate building secretary.

30. Nurses work directly with students with medical problems, or possible medical problems. Nurses administer medications. However, other ESSA employees and non-ESSA school personnel may administer medications when the nurse is unavailable, if the school personnel are trained in administering medications. (Exh. 106, page 75). School nurse Liz Engle has trained a couple of teachers, an administrative secretary, and the building principal in administering medications. The administrative secretary is a member of ESSA.

31. The compensation of nurses does not distinguish them from other members of ESSA. Nurses and other bargaining unit members are paid on an hourly basis and share identical pay periods.

32. The salary schedule for the 2001 to 2003 collective bargaining agreement between ESSA and the District starts with grade 1 and progresses to grade 9, the highest pay level. (Exh. 105, at 46-54). Receptionists are paid at grade 1, with an hourly wage range from \$8.52 to \$13.81 for the 2001-02 school year. Nurses are paid at grade 9, which ranges between \$18.69 and \$24.43 for the 2001-02 school year, and \$19.01 to \$24.86 for the 2002-03 year. Eight other ESSA classifications are also paid at grade 9, including Certified Occupational Therapist Assistant, Maintenance Mechanic, Network Technician, Operations Equipment Repairperson, Secondary Drug Prevention/Intervention Specialist, Secondary Prevention/Intervention Specialist – START/Re-Entry, Video Production Technician, and Warehouseperson II. In a Letter of Understanding between ESSA and the District, nurses and network technicians will receive a \$2 per hour increase in pay. The Letter of Understanding expires on June 30, 2003. (Exh. 3, at 45; exh. 105, at 66).

33. The school nurses are paid the second lowest range of hourly wages when compared to six other groups of

nurses working in the Fairbanks area. They receive the third lowest starting wage, and the second lowest maximum wage. (Exh. 119). There was no evidence submitted that compared the school nurses' benefits, job requirements, hours, or other working conditions with all the other nursing positions. However, the District's nurses are among the highest paid positions in the ESSA unit.

34. All ESSA employees who work six or more hours per day receive medical benefits provided by the District.^[6] This applies uniformly to all job classifications, including the nurses. (Exh. 3, at 24-25).

35. All ESSA members, including the nurses, are eligible for vacation and sick leave accrual, which differs from that available to the teachers and to the administrators. The vacation and sick leave accrual is identical for all ESSA employees.^[7] (Exh. 3, at 19-23).

36. All ESSA members, including the nurses, participate in the Public Employees Retirement System. Principals and teachers participate in the Teachers Retirement System.

37. The District's school board has been in a budget-cutting mode since 1996.

38. The District's negotiators worked hard with the school board to obtain a \$2 per hour increase for nurses in the current contract. This increase, given to nurses and network technicians, is contained in a letter of agreement.

39. During recent negotiations, ESSA was very active in seeking pay increases for its members. Many ESSA employees received promotions to higher pay grades due to a reclassification effort. (Exh. 4, at 83).

40. Nurses are assigned to work a 7.5-hour day, during hours established by their supervisors.

41. The collective bargaining agreement and position descriptions address hours of work. (Exhs. 1 - 4). The agreement addresses the workweek, days of work, overtime, lunch break, and shift differential for the current bargaining unit. (See, e.g., Exh. 3, Article 7). The collective bargaining agreement does not distinguish or differentiate among job classifications; in other words, nurses are not assigned work hours or work shifts different from those of any other job classification in the bargaining unit.

42. Nurses are paid on an hourly basis and are eligible for overtime. All other members of the ESSA bargaining unit are also paid on an hourly basis, and are eligible for overtime. Teachers and the administrators are exempt under the FLSA^[8] as professionals and administrators/executives. Teachers and administrators are not in the ESSA unit.

43. The hours of the nurses do not distinguish them from other members of ESSA. The nurses do not always

receive time off for their breaks and lunches, although the collective bargaining agreement between ESSA and the District grants employees the right to duty-free breaks and lunch. (Exh. 105, Article 7.4, at 19). Article 7.1(c) of the parties' collective bargaining agreement provides for overtime to be paid for hours exceeding 7.5 hours worked per day. (Exh. 105, at 16). School nurse Liz Engle will not ask for overtime to compensate for working through breaks or lunches because she does not want to damage her relationship with her employer. ESSA has instructed her to request overtime when her work necessitates working through a break or scheduled lunch period.

44. Although the nurses share working conditions by virtue of the type of work they perform, they each work in separate schools in the school district. Nurses do interact on a frequent basis with other ESSA employees, and also share working conditions with them in their specific school locations.

45. The nurses and all other members of the ESSA unit are class III employees under AS 23.40.200(a)(3), and are eligible to strike under AS 23.40.200(d).

46. The District and ESSA hold the nurses in high esteem. The morale of the school nurses is low due to the nurses' belief that they do not receive adequate recognition from ESSA or the District.

47. The School District has bargained with three units since 1972 - the Principals' Association, the Fairbanks Education Association, and the Educational Support Staff Association (previously known as the Classified Personnel Organization.).

48. The School District nurses have been part of the ESSA or CPO bargaining unit since 1972; before that, they were part of the teachers' bargaining unit in the District. Neither the ALRA nor the SLRA has ever certified any nurses-only units.^[9] There are no separate bargaining units for school nurses in Alaska. Nurses are included in wall-to-wall bargaining units in the Kenai Peninsula School District, the Kodiak Island Borough School District, the Lower Kuskokwim School District, and the Sitka School District. (Exhs. X, Y, Z, and AA). In the Anchorage School District, nurses are included in a bargaining unit with the teachers.

49. The nurses' bargaining history includes a previous effort to sever from ESSA. The nurses filed a petition in 1997 to sever from ESSA and be represented by the Fairbanks Education Association.^[10] (Exh. 9). However, the petition was dismissed because it was not filed within the time limits allowed under PERA.

50. Nurses receive better than adequate representation from ESSA.

51. Nurses have received some separate recognition in the parties' collective bargaining agreements, but other job classifications have also received recognition. This recognition is received in the form of pay increases or grade promotions. (Exhs. A - G, K - W).

52. ESSA attempted to get a promotion for the nurses to pay grade 10. However, the District would not agree

to this promotion. The District was concerned that other classifications would then clamor for a promotion to grade 10.

53. The Association is qualified to represent a unit of nurses.

54. The Association does not represent any nurses in any public school system in Alaska. The Association does represent nurses in private hospitals in Anchorage, Soldotna, and Ketchikan.

55. The Association does not represent any nurses employed by any employer in the City of Fairbanks or the Fairbanks North Star Borough.

56. The State of Alaska employs nurses, including registered nurses, licensed practical nurses (LPN) and psychiatric nurses. Its general government unit (GGU) has 478 nurses in a unit that totals 8,083 employees. The unit contains a wide variety of classifications. The State's supervisory unit has 24 nurses in the bargaining unit of 1,535 employees.

57. The nurses desire to sever from ESSA and affiliate with the Association. All nurses signed showing of interest cards. The Association's nurse witnesses all expressed a preference to sever and form their own unit under affiliation with the Association.

58. If severance is granted, the District would be required to bargain with an additional bargaining unit. This would require additional bargaining time for the District's negotiators.

59. The District is concerned that if severance is granted, other classifications of employees would also be allowed to sever. The District is concerned that severance would complicate the negotiating process and require negotiation with additional bargaining units.

60. Severing the nurses from ESSA will result in unnecessary fragmentation.

Discussion

The issues in this case, as in other cases to sever a group of employees from an existing unit, are whether the proposed unit is appropriate under AS 23.40.090, and whether the petitioner has satisfied the conditions of 8 AAC 97.025(b).

As a preliminary issue, we address whether to accept and allow the testimony of Dawn Jeffress, a rebuttal witness called by the Association. The District and ESSA objected to the testimony because it was not rebuttal in nature, and the

witness should have been called during the Association's presentation of its witnesses.

In *Sirotiak v. H.C. Price Company*, 758 P.2d 1271, 1277 (Alaska 1988), the Alaska Supreme Court described the nature of rebuttal testimony:

"[R]ebuttal testimony is any competent evidence which explains, is a direct reply to, or a contradiction of material evidence introduced by ... a party in a civil action." *Riffey v. Tonder*, 36 Md.App. 633, 375 A.2d 1138, 1145 (1977); 6 J. Wigmore, *Evidence* § 1873 (Chadbourn rev. ed. 1976) (usual rule excludes all evidence which has not been made necessary by the opponent's case in reply). Cf. *Van Horn Lodge, Inc. v. Ahearn*, 596 P.2d 1159 (Alaska 1979). The focus of rebuttal is to respond to new points or material first introduced by the opposing party. *Chrisler v. Holiday Valley, Inc.*, 580 S.W.2d 309, 314 (Mo.App.1979); *Souza v. United Electric Railways Co.*, 49 R.I. 430, 143 A. 780, 782 (1928). Rebuttal should not merely contradict or corroborate evidence already presented, instead it should be evidence in denial of some affirmative fact which the answering party endeavors to prove. *Yeomans v. Warren*, 87 A.D.2d 713, 448 N.Y.S.2d 889 (1982).

We have reviewed the testimony and agree with the District and ESSA. We find that the testimony is not rebuttal in nature. The testimony was the same as, and redundant to testimony provided on direct examination. It did not "respond to new points or material first introduced" by the District or ESSA. Therefore, the testimony will not be considered in the determination of this petition. [\[11\]](#)

A. Is the unit that the Alaska Nurses Association seeks to represent an appropriate unit under AS 23.40.090?

The Association must establish that the proposed nurses bargaining unit would be appropriate for purposes of collective bargaining. In doing so, it must satisfy the factors in AS 23.40.090, including community of interest, wages, hours, and other working conditions of the employees involved, the history of collective bargaining, and the desires of the employees. In addition, units must be as large as is reasonable and avoid unnecessary fragmenting. AS 23.40.090.

We have previously addressed whether to sever a group of employees from the wall-to-wall unit represented by ESSA. In *International Brotherhood of Electrical Workers vs. Fairbanks North Star Borough*, Decision and Order No. 153 (March 24, 1993), we dismissed petitions by the International Brotherhood of Electrical Workers and Teamsters Local 959 to carve two groups of employees, including mechanics and custodians, from the ESSA unit. [\[12\]](#) The Board denied the petition, primarily based on its conclusions that employees in the proposed units 1) were represented adequately by ESSA; 2) they have not traditionally been represented by their own representatives; 3) they had a community of interest identical with that of employees in the existing unit; and 4) granting the petitions would result in unnecessary and excessive fragmentation of the existing unit. [\[13\]](#)

The proposed unit of nurses is different from the units petitioned for in Decision and Order No. 153. Nonetheless, after considering the evidence presented by the parties in this petition, we again deny the request to carve out an employee group from the wall-to-wall unit, based on the following discussion.

1. Community of Interest.

The Association's primary argument is based in large part on its assertion that the nurses are "professional" employees, who should be permitted to have a separate bargaining unit from "non-professional" and blue-collar employees. (Association's Prehearing Brief at 11-12).^[14] The Association asks us to analogize "to the findings of the National Labor Relations Board (NLRB) with regard to acute care facilities." (*Id.* at 10).^[15] In this regard, it points out that the NLRB has declared that eight specified units will ordinarily be considered appropriate units in health care institutions: 1) physicians, 2) registered nurses (RNs), 3) other professional employees, 4) technical employees, 5) business office clerical employees, 6) service and maintenance employees, 7) either maintenance department employees or stationary engineers, and 8) guards. (*See* I Patrick Hardin, *The Developing Labor Law*, at 475 (3d ed. 1992).

The fact that the nurses may be deemed professional employees does not by itself support placing them in a bargaining unit that is separate from other ESSA employees. The National Labor Relations Act (NLRA) specifically addresses the bargaining unit status of professionals. Under section 9(b)(1) of the Act, a unit that includes both professional and other employees is inappropriate "unless a majority of such professional employees vote for inclusion in the unit." *See* discussion in *Id.* at 456-458 (3d ed. 1992). In other words, professional employees have the option to vote on whether to combine into a unit containing "nonprofessional" employees, or to have their own separate unit. The labor relations laws of several other states contain a similar statutory provision.^[16]

We find a marked difference between the NLRA and Alaska's Public Employment Relations Act (PERA) regarding the determination of an appropriate bargaining unit for professional employees. PERA clearly departs from the NLRA and the other states in this respect. Unlike the NLRA, PERA does not distinguish between professional and non-professional employees, regarding composition of bargaining units or otherwise. Contrary to the NLRA, PERA does not contain a definition of "professional employee,"^[17] nor does PERA provide for separate units of nurses or other professional employees. We find it would be inappropriate for this Agency to mandate, by decision and order, that nurses and other public employees deemed "professional" should have separate units due to this status alone. Whether PERA should provide distinctions for employees based only on their professional or other status is a decision that should be left to the legislative process. Barring any future amendments to PERA, we will continue to apply the traditional factors contained in AS 23.40.090, in determining appropriate units.^[18] Accordingly, we will not give great weight to decisions of the NLRB or federal courts on this issue. 8 AAC 97.450(b).

Further, if we were to begin allowing parties to petition to carve out professional from nonprofessional employees in bargaining units, there could be a major restructuring of the public employee bargaining units under our jurisdiction. Absent a statutory mandate from the legislature, we believe it would be inappropriate for this agency to suddenly decide that bargaining units must be based in primary part on the professional or nonprofessional status of an employee. This change would create an unstable labor relations atmosphere. For all the above reasons, we reject the Association's assertion that we should grant its petition based upon the nurses' status as professionals.

We also decline to analogize to the NLRB on this issue because we find there are clear distinctions between the community of interest the District's school nurses share and the community of interest shared by nurses under the jurisdiction of the NLRB. The Association cites to *McLean Hospital Corporation*^[19] to support its argument for analogizing. In *McLean*, the NLRB concluded that the petitioned-for unit, limited to registered nurses, was an appropriate

unit for bargaining. In *McLean*, the nurses worked in an acute psychiatric care facility that included patients who were suicidal or violent. The nurses were the only professionals in the hospital in *McLean* who were required, as a group, to be on duty 24 hours a day, 7 days a week, and were required to regularly work overtime. They had different working hours than the other professionals. They therefore had a unique interest in scheduling, shift differentials, and floating.^[20] The nurses in *McLean* also had continuous contact with patients, providing round-the-clock care. The acute care facilities have a department of nursing managed by RNs, and nurses reported to a hierarchy of other registered nurses "to whom no other professionals report." *Id.*, 311 N.L.R.B. at 1112. While some McLean Hospital nurses worked in other departments, the vast majority was ultimately responsible to the director of nursing. The nurses were administratively segregated within a department of nursing. Finally, nurses were the only professionals other than physicians who could administer medications.

Based on the evidence in the record, the McLean Hospital facility and its nursing environment contrasts significantly with the environment in the various schools at the District. The District's nurses work shifts identical to other ESSA employees. Although the nurses have the important responsibility to promote, maintain, and attain optimal care for the District's students, they do not have the 24 hour-per-day responsibility of caring for psychiatric patients. They share common supervision with many other ESSA employees: they are supervised by their individual building principal, instead of other nurses, and they are not in a hierarchy of nurses. There is no separate department of nursing, and they are not administratively segregated from other employees. Finally, ESSA nurses train other district employees, who are non-medical personnel, to administer medications. Based on these differences, we find it would be inappropriate to analogize the District's nurses to NLRB nurses who work in acute care facilities.

The Association asserts that nurses maintain a strong sense of community "very different from other ESSA members," due to their similarity in duties, working conditions, licensing requirements, continuing education requirements, one-on-one contact with students, and "many issues they face in their profession." (Association's Prehearing Brief at 4). However, this assertion does not support the conclusion that the proposed unit of nurses shares a community of interest so distinct from the existing bargaining unit as to support granting their petition. The evidence supports finding a community of interest in the current bargaining unit.

Although the school nurses share a strong sense of community with other nurses within the unit, they also share a significant community of interest with other unit employees. The individual nurses at each school have frequent contact with each other, but they also interact with and communicate frequently with administrative secretaries and other ESSA employees in the performance of their duties at their individual schools. They share common supervision with many other employees. They work with other ESSA employees, the teachers, and the building principal to serve the needs of the District's students.

The nurses do have a unique and important profession in the District. They have licensing requirements that are different from other ESSA employees. However, that is the nature of a wall-to-wall unit. Other ESSA employees perform unique duties too. Many of the various classifications, particularly some of the grade 9 employees, have licensing or other requirements that are unique. These classifications also have a variety of education or training requirements. While the nurses are no longer required to have a bachelor's degree, some other ESSA positions do have that requirement.

Weighing all the evidence on community of interest, we find that the evidence supports the existing bargaining unit structure.

2. Wages.

The Association argues that the nurses' wages differ "in material ways" from many ESSA members' wages because they are being paid "well below what is warranted or is the standard in the industry . . ." (Association's July 16, 2001, Prehearing Brief at 6). We disagree that this factor somehow distinguishes nurses from other bargaining unit members. The nurses' wages do not differ from wages of other ESSA employees in material ways. School nurses are paid at grade 9, the same grade as 8 other ESSA classifications. The fact that nurses, along with network technicians, received an extra \$2 per hour pay raise in a letter of agreement does not distinguish them significantly from other employees.

Further, the fact that the nurses are paid more or less than their counterparts in other nursing positions in Fairbanks or other areas of the United States does not distinguish them from other employees in their current bargaining unit for purposes of determining the outcome of a severance petition. All job classifications in the ESSA unit could conceivably make this same argument in an attempt to sever from ESSA.

The wages of all ESSA employees are governed by the collective bargaining agreement with the District. Nurses are paid at an hourly rate, the same as all other ESSA employees. The fact that the nurses received an extra \$2 per hour (along with network technicians) during the current agreement reflects a recognition by the District of their skills and abilities. It does not reflect a material difference from other ESSA employees regarding wages.^[21] Nurses share the same overtime eligibility and shift rules, and they have the same pay periods, retirement and health benefits as other ESSA employees. This factor supports the status quo.

3. Hours.

All employees in the existing bargaining unit are paid on an hourly basis and work a 7.5-hour day. (Exh. 105, Article 7.1 at 16). The parties' collective bargaining agreement also provides that all bargaining unit employees "shall be paid" time and one-half for hours worked over 7.5 in a day. In addition, Article 7.4 requires that all employees "shall receive a duty-free lunch period of at least 30 minutes," and two 15-minute breaks, the time "to be determined by the supervisor and employee on a prearranged posted schedule." (Exh. 105 at 19). There was testimony that a nurse may sometimes work through breaks and experience an interrupted --or no-- lunch hour because of work duties. One nurse refused to pursue an overtime request because she did not want to damage her working relationship with her supervisor (the building principal). Nonetheless, the contract clearly provides that nurses as well as all other bargaining unit employees have a right to lunch and rest periods. We conclude that this factor supports the existing bargaining unit structure.

4. Other working conditions.

The other working conditions of the nurses and other bargaining unit employees support the status quo. Like all ESSA employees, nurses are class III employees with the right to strike under AS 23.40.200(d). They share common supervision (the building principal) with many employees.^[22]

The Association contends the nurses working conditions differ because they must adhere to a code of ethics. (Association's Prehearing Brief at 7). There was no evidence other employees must adhere to a code of ethics. However, this difference, weighed with the similarities noted above regarding strikes and common supervision, supports the existing bargaining unit structure.

5. History of collective bargaining.

The history of collective bargaining supports the status quo. The nurses have been part of the ESSA bargaining unit since 1972. Although the nurses have petitioned previously to sever from ESSA, this fact alone does not support granting the Association's petition.^[23] During the 29-year period that ESSA has represented the nurses, ESSA has successfully negotiated special raises or grade promotions for the nurses. ESSA has also negotiated similar raises and promotions for some of the other classified positions.

There are no separate units for school nurses in Alaska. Nurses are part of wall-to-wall bargaining units in the Kenai Peninsula School District, the Kodiak Island Borough School District, the Lower Kuskokwim School District, and the Sitka School District. (Exhs. X, Y, Z, and AA). In the Anchorage School District, nurses are included in a bargaining unit with the teachers. Despite the fact that some Alaskan school nurses are in a bargaining unit with teachers, the history of bargaining in the Fairbanks North Star Borough School District supports keeping the nurses in ESSA's wall-to-wall unit.

6. Desires of the employees.

Those nurses who testified specifically expressed their desire to sever from ESSA and be represented by the Association. Further, the parties stipulated that the nurses desire to sever from ESSA. This factor supports granting the petition.^[24]

7. Unit size and fragmentation.

Units must be as large as is reasonable and must avoid unnecessary fragmenting. AS 23.40.090. Based on a preponderance of the evidence, we conclude that the proposed unit would cause unnecessary fragmentation.

ESSA is a large, wall-to-wall unit containing almost 700 employees. The nurses encompass a relatively small group within ESSA, approximately 33 employees. The evidence shows that ESSA has represented the nurses in the District for almost 30 years. While ESSA's representation of the nurses has not been perfect, it has been adequate.^[25] The nurses are disgruntled, and they believe the Association would understand their legal and medical concerns better than does ESSA. While this may be so, it does not mean ESSA is not representing the nurses adequately.

The evidence shows ESSA and the District have developed a stable bargaining relationship over a long period. If severance were granted to the nurses, ESSA would lose a small but articulate group of professional employees who, until the recent past, were often active in ESSA and who enhance the quality of the current bargaining unit. Severance could have a negative effect on the remaining unit employees and on the stability of the ESSA/District relationship.

Moreover, in determining whether to fragment an established unit, we must consider the effect of severance on the employer. The District's Superintendent of Schools, Jim Holt, expressed concern that carving out the nurses would require additional negotiating time and expense. He also expressed concern that other classifications of employees would attempt to carve out from ESSA. We find the concerns warranted. We find that to carve out this unit may result in petitions by other employee units. We have previously expressed similar concern: "This Agency and its predecessor have been reluctant in the past to create new bargaining units, fearing a proliferation of units." See *Public Safety Employees Association vs. State of Alaska, Department of Corrections*, Decision and Order No. 211, at 19 (January 16, 1997). In *Public Safety Supervisory Association vs. State of Alaska*, Decision and Order No. 188 (May 25, 1995), aff'd in *Public Safety Supervisors Ass'n vs. State of Alaska*, 3AN 95-6653 CI (January 22, 1997), we denied a severance petition by trooper supervisors in part because it could promote excessive fragmentation. (Decision and Order No. 188, at 24). In affirming this decision, the Alaska Superior court stated: "There was compelling testimony about the overburdening of the State with so many units and negotiations lasting years. . . There was . . . credible testimony from the State as to the increased burden in labor negotiations with more units. 3AN 95-6653 CI, at 8.^[26] New Jersey's Superior Court has uttered similar concerns. In *State v. Professional Ass'n of N.J. Dep't of Educ.*, 64 N.J. 231, 250 (1974)^[27] the court affirmed the denial of an application by New Jersey's state registered nurses to seek their own bargaining unit. The court reasoned that it was in the public interest to "avoid undue fragmentation of negotiating units in the public sector" since the State of New Jersey may more effectively make negotiating decisions when the unit is large rather than small.^[28]

Generally, this Agency gives great weight to relevant decisions of the NLRB and federal courts. 8 AAC 97.450(b). However, we have departed from that practice where there are significant differences between the federal law and PERA.^[29] We do so here. Unlike the NLRA, PERA specifically requires us to consider if unnecessary fragmentation would result if we granted a petition to carve out a group of employees.^[30] Clearly, there would be more fragmentation if we granted the Association's petition. The question is whether this fragmentation is necessary. We find that the evidence supports a conclusion that fragmentation is unnecessary.

This Agency and its predecessors have seldom granted severance petitions. One example of an exception is *Public Safety Employees Association v. State of Alaska, Department of Corrections*, Decision and Order No. 211 (January 16, 1997). We found a separate bargaining unit of correctional officers would not result in excessive fragmentation because the employer and union representing the State's general government unit were already negotiating separately for the correctional officers.

Furthermore, we found several other factors justified granting severance. Among them were: the correctional officers worked 40-hour week instead of the 37.5 hours most other employees worked; they worked a week on and week off schedule, consisting of seven 12-hour workdays during the week worked, instead of five 7.5 hour days; they had a different retirement plan; they were paid for lunch breaks whereas other GGU employees were not; and they had a pay scale separate from other employees. The correctional officers also maintained a separate identity within the general government unit. Finally, correctional officers were class I employees for strike purposes. They therefore were prohibited from striking, in contrast to most other GGU employees who were eligible to strike by virtue of their class III status. The correctional officers also had a national tradition of separate representation.

In contrast, the Association's petition and the evidence before us does not establish that severance is appropriate, for the reasons previously stated. In summary, we conclude that the nurses have not proven by a preponderance of the evidence that fragmentation is necessary, or that the existing unit is unreasonable or inappropriate. While there may be other circumstances or petitions that establish the necessity of fragmentation, the evidence in this case shows that allowing

the nurses to carve out would result in unnecessary fragmentation.

B. Does the Alaska Nurses Association meet the requirements for severing a bargaining unit from an existing bargaining unit under 8 AAC 97.025(b)?

If the Association had established that the proposed unit was an appropriate unit, because it seeks to sever a group of employees from an existing unit, it would also have to satisfy the requirements of 8 AAC 97.025(b):

In addition to the requirements of (a) of this section, if a petition for certification proposes to sever a bargaining unit from an existing bargaining unit, the petition must state:

- (1) why the employees in the proposed bargaining unit are not receiving adequate representation in the existing unit;
- (2) whether the employees in the proposed bargaining unit are employed in jobs that have traditionally been represented in the same unit;
- (3) why the employees in the proposed unit have a community of interest that is not identical with that of the employees in the existing unit;
- (4) how long the employees in the proposed bargaining unit have been represented as part of the existing unit; and
- (5) why the grant of the petition will not result in excessive fragmentation of the existing bargaining unit.

1. *Adequacy of representation.*

As we have stated above, the nurses are disgruntled, and those ESSA nurses that testified believe they would receive better representation in a unit represented by the Association. However, these complaints by themselves do not demonstrate that ESSA's representation of the nurses has been inadequate and, they do not justify disrupting the existing unit structure.

2. *Tradition of representation in the same unit.*

There is a tradition of representation of school nurses in Alaska in either wall-to-wall units or in units with teachers. The nurses have been represented by ESSA in Fairbanks since 1972.

3. *Community of interest.*

See discussion in section A, above.

4. Bargaining history.

See discussion in section A, above. The existing unit has a long history of bargaining with the District, and this unit has included the nurses since 1972.

5. Excessive fragmentation.

See discussion in section A, above. Granting the nurses' petition would create unnecessary fragmentation.

6. Mallinckrodt Chemical Works.

This Agency also takes into account the factors the National Labor Relations Board considers in craft severance cases under *Mallinckrodt Chemical Works*, 162 N.L.R.B. No. 48, 64 L.R.R.M.(BNA) 1011, 1016 (1966). *RPM v. State*, Decision and Order No. 216, at 21 (Feb. 19, 1997). The evidence did not establish that the nurses are a distinct and homogenous craft.

Conclusions of Law

1. The Fairbanks North Star Borough School District is a public employer under AS 23.40.250(7); the Alaska Nurses Association and the Education Support Services Association are organizations under AS 23.40.250(5). This Agency has jurisdiction under AS 23.40.090 and AS 23.40.100 to consider this case.

2. The Alaska Nurses Association's petition was timely filed within the window period in AS 23.40.100(e) and 8 AAC 97.060(e)(3).

3. The Alaska Nurses Association as the petitioner has the burden to prove each element of its claim by a preponderance of the evidence. 8 AAC 97.350(f).

4. Based on such factors as community of interest, wages, hours, and other working conditions of the employees involved, the history of collective bargaining, and the desires of the employees, we conclude on balance that the existing bargaining unit of wall-to-wall employees in the District is the appropriate unit for the nurses.

5. Based on such factors as community of interest, wages, hours, and other working conditions of the employees involved, the history of collective bargaining, and the desires of the employees, a bargaining unit composed solely of nurses is not an appropriate unit.

6. Creating a separate bargaining unit of nurses would result in excessive fragmentation at the District. A general wall-to-wall unit in the District is as large as is reasonable and avoids unnecessary fragmenting. Severing the nurses from the Education Support Services Association will result in excessive or unnecessary fragmentation.

7. The Alaska Nurses Association has not satisfied the requirements in 8 AAC 97.025(b) to sever the nurses from the wall-to-wall unit represented by the Education Services Support Association.

8. The Alaska Nurses Association has not established the requirements needed to sever a group of employees from an existing bargaining unit and has not established that such a group, if so severed, would be an appropriate bargaining unit under AS 23.40.090.

ORDER

1. The petition of the Alaska Nurses Association to sever school nurses from the wall-to-wall bargaining unit at the Fairbanks North Star Borough School District and represent them separately in bargaining is DENIED and DISMISSED.

2. The Fairbanks North Star Borough School District is ordered to post a notice of this decision and order at all work sites where members of the bargaining unit affected by the decision and order are employed or, alternatively, serve each employee affected personally. 8 AAC 97.460.

ALASKA LABOR RELATIONS AGENCY

Aaron Isaacs, Jr., Chair

Raymond Smith, Board Member

Dick Brickley, Board Member

APPEAL PROCEDURES

This order is the final decision of this Agency. Judicial review may be obtained by filing an appeal under Appellate Rule 602(a)(2). Any appeal must be taken within 30 days from the date of filing or distribution of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of *Alaska Nurses Association v. Fairbanks North Star Borough School District, Respondent, and Education Support Staff Association/NEA-Alaska, Intervenor*, Case No. 01-1080-RC/RD, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 30th day of January, 2002.

Earl Gibson, Jr.

Administrative Clerk III

This is to certify that on the 30th day of January, 2002, a

true and correct copy of the foregoing was mailed,

postage prepaid to

Sarah Josephson, Alaska Nurses Association

William Schendel, Fairbanks North Star Borough School District

Clarence Bolden, Education Staff Support Association/NEA-AK

Signature

[1] The parties filed a stipulation of facts. We accept the stipulation and include it in the record of this decision, except for that part of stipulation number 25 that states nurses are paid at grade 9 along with 6 other ESSA classifications. We find that the salary schedule in the parties' collective bargaining agreement contains 9 job classifications paid at grade 9. See exhibit 105 at 53-54, and Finding of Fact number 32.

- [2] Exhibits AF and 129 are the same document.
- [3] The building principals may supervise other employees in the bargaining unit in addition to those listed. We did not receive job descriptions for all 90 positions in the ESSA unit.
- [4] Exhibit 128 does not specify who supervises the occupational therapist.
- [5] Exhibit 106 is a partial copy of the Manual.
- [6] The District pays \$480 per month per employee for health and life insurance. This amount could change if employees represented by the Fairbanks Education Association (FEA) receive a greater amount. The District would, in that event, pay ESSA employees the same amount as employees in the FEA.
- [7] There are distinctions in sick and vacation leave for full and part-time employees, and nine and twelve-month employees. (Exh. 3, 19-23; exh. 105, 32-39).
- [8] FLSA is the Federal Fair Labor Standards Act.
- [9] ALRA is the Alaska Labor Relations Agency, and SLRA is the State Labor Relations Agency, one of the agencies that preceded ALRA.
- [10] The FEA is the Fairbanks school district teachers bargaining unit.
- [11] Even if we considered the testimony, it would make no difference in the outcome of this decision.
- [12] The IBEW petitioned to sever various mechanics, carpenters, a warehouseman and other employees. The Teamsters petitioned to carve out custodians from the unit. *See* Decision and Order No. 153, at 26 for citations to carve-out decisions of the former State Labor Relations Agency.
- [13] *Id.* at 28. Board member James Elliot dissented.
- [14] The Association stated in its prehearing brief that some schools in Massachusetts, Minnesota and the District of Columbia had bargained "nurse agreements with employers[.]" (Association's Prehearing Brief at 10). However, we could not find any evidence in the record to support this assertion. Regardless, such evidence would not change the outcome of this decision.
- [15] The Association cites to *McLean Hospital Corporation*, 311 N.L.R.B.1100, 145 L.R.R.M. (BNA) 1262 (1993). The hospital in *McLean* was a psychiatric hospital, rather than an acute care facility. However, the NLRB found that the factors supporting a separate nurses unit in prior acute care facility cases also supported the separate unit in this psychiatric care facility.
- [16] *See*, e.g., statutes and cases from Illinois, Florida, Pennsylvania, New Jersey, and Ohio.
- [17] *See* section 2(12) of the NLRA.
- [18] This is not to say that the status of "professional employee" carries no weight in unit determinations. *See, e.g., Millard v. International Brotherhood of Electrical Workers, Local Union 1547 and Kodiak Island Borough*, Decision and Order No. 183, at 18 (December 21, 1994) ("mental health clinicians are specially educated and trained professionals"); *Public Safety Employees Ass'n vs. State of Alaska, Department of Corrections*, Decision and Order No. 211, at 23 (January 16, 1997)("there is substantial support for PSEA's assertion that [corrections officers] are gaining recognition as a separate group of professional employees"); *Alaska State Employees Ass'n AFSCME Local 52, AFL-CIO v. State of Alaska*,

Decision and Order No. 200, at 10 (February 9, 1996)(the State of Alaska's General Government Unit contains many professional employees).

[19] 311 N.L.R.B. 1100, 145 L.R.R.M. (BNA) 1262 (1993).

[20] *Id.*, 311 N.L.R.B. at 1111.

[21] Superintendent Jim Holt said the District holds the nurses in high esteem, and it worked hard to get them the increase.

[22] See exhibits 121 (Behavior/ Intervention Teacher Aide - Districtwide), 123 (Bilingual/Bicultural Program Tutor/Instructor), 124 (Elementary Library Media Associate), 126 (high school registrar), 129 (nurse), 130 (Substance Abuse Prevention Program Specialist), 132 (Sign Language Interpreter/Transliterator), 133 (Teacher Aide - Intensive Resource and Severe/Profound Disabilities), 134 (Teacher Aide - Intervention Room), 135 (Teacher - Special Education), 136 (Teacher Aide - Special Education/Emotional Disturbance), 138, (Teacher Assistant), for examples of positions either supervised directly by the building principal or where the principal gives input in the employee's evaluation.

[23] Exhibit 9 contains a copy of the 1997 petition submitted to the Agency.

[24] During the hearing in this matter, we found the nurses were articulate, compassionate witnesses who handled themselves professionally. We urge them to communicate their concerns to ESSA. We also urge ESSA to meet with the nurses and address their concerns.

[25] We strongly recommend that ESSA sit down with the nurses and establish better communications. There was testimony by the nurses that they did not even know that ESSA carried a \$1 million malpractice insurance policy for them, at no additional cost.

[26] *Compare Placer Hills Union Elementary School District*, 8 Pub. Employee Rep. for California 15013 (1983), where the California Board held that testimony regarding cost of negotiations was speculative where there had never been another classified unit in the school district.

[27] Cited in *In the Matter of Ocean County Sheriff*, 26 NJPER 31067 (March 14, 2000).

[28] Michigan's Employment Relations Commission has traditionally granted registered nurses separate unit status, despite its policy against undue fragmentation of units. *See Marquette County Health Dept*, 7 MPER 25012 (December 7, 1993). However, we could not find a case that specifically addressed whether this applied to school nurses. In New York, school nurses were denied severance, in part because the petitioning union could not show a compelling reason to fragment the existing bargaining unit. *In the Matter of Kenmore-Tonawanda School Nurses Ass'n*, 24 NYPER 4025 (May 20, 1991).

[29] See discussion in *Public Safety Employees Ass'n v. State of Alaska*, Decision and Order No. 233, at 29-30 (November 24, 1997).

[30] However, Congress and the federal courts have expressed a desire to avoid undue proliferation of bargaining units in the health care industry. *See St. Catherine's Hospital of Dominican Sisters of Kenosha, Wisconsin, Inc.*, 217 N.L.R.B 787, 89 L.R.R.M. (BNA) 1070 (1975); *Crittenton Hospital*, 328 N.L.R.B. No. 120, 162 L.R.R.M. (BNA) 1022 (1999); and *California Pacific Medical Center v. National Labor Relations Board*, 87 F.3d 304, 152 L.R.R.M. (BNA) 2593 (9th Cir. 1996).