

BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD  
OF THE STATE OF KANSAS

Kansas Employees of Public )  
Employees, (KAPE) )  
 )  
Petitioner, )  
vs. )  
 )  
Department of Social and )  
Rehabilitation Services, )  
Rainbow Mental Health )  
Facility, )  
Respondent.)

Case No. 75-UCA-6-1990

**INITIAL ORDER**

ON the 30th day of August, 1990, the above captioned petition for unit clarification and amendment came on for formal hearing pursuant to K.S.A. 75-4327(c) and K.S.A. 77-517 before presiding officer Monty R. Bertelli at the Washburn University School of Law, Topeka, Kansas.

**APPEARANCES**

Petitioner: Appears by counsel Brad Avery, Kansas Association of Public Employee, 400 W. 8th St., Suite 103, Topeka, Kansas 66603

Respondent: Appears by counsel, Darrel McNeil, Department of Social and Rehabilitative Services, 6th Floor, Docking State Office Building, Topeka, Kansas 66612

**ISSUES PRESENTED FOR REVIEW**

- I. Should the employee unit established by 75-UC-5-1989 be amended by replacing the classification of

Mental Retardation Technician III  
with the classification Mental  
Retardation Trainee?

- II. Is the employee unit established by  
75-UC-5-1989 the appropriate unit  
for inclusion of the classifications  
of Activity Therapist I and Licensed  
Mental Health Technician Specialist?

### SYLLABUS

1. **EMPLOYEE REPRESENTATIVES- Employee Unit - Appropriate Unit:**  
The public employer-Employee Relations Act, (PERRA) does not  
require the determined unit to be the most appropriate unit nor  
does it indicate there can be only one appropriate unit. K.S.A.  
75-4327(c), requires the Public Employee Relations Board determine  
an appropriate unit. However, once an appropriate employee unit  
has been determined by order of the Board, a petitioner seeking to  
amend the unit through adding or removing classifications has the  
burden of proof to establish the proposed unit is "more  
appropriate" than the existing unit. This is particularly true  
when an employee organization has been certified as the exclusive  
employee representative.

2. **EMPLOYEE REPRESENTATIVES - Employee Unit - Appropriate Unit-  
Factors to be considered.** As a guide to the Public Employee  
Relations Board in determining which classifications should be  
included in an "appropriate unit, K.S.A. 75-4327(c) and K.A.R. 84-  
2-6(a) provide the factors to be considered.

### FINDINGS OF FACT

1. The Kansas Association of Public Employees (KAPE)  
petitioned the Public Employee Relations Board, pursuant  
to K.S.A. 75-4327(c), to amend the Rainbow Mental Health  
Facility Nonprofessional Unit established by order in  
Case No. 75-UC-5-1989.
2. The order in Case No. 75-UC-5-1989 defined the "appropriate unit" to  
include the following classifications:

Activity Therapy Technician  
Activity Therapy Trainee  
Automotive Driver  
Baker  
Bookkeeper  
Carpenter I  
Carpenter II

Cook  
Custodial Worker  
Electrician I  
Electrician II  
Equipment Mechanic I  
Equipment Mechanic II  
Equipment Operator I  
Equipment Operator II  
Food Service Worker  
General Maintenance & Repair Technician I  
General Maintenance & Repair Technician II  
Hospital Trainee  
Keyboard Operator I  
Keyboard Operator II  
Keyboard Operator III  
Laborer  
Laundry Worker  
Licensed Mental Health Technician I  
Licensed Mental Health Technician II  
Licensed Practical Nurse  
Lock System Specialist I  
Machinist  
Mason  
Meat Cutter  
Mechanic I  
Mechanic II  
Medical Records Technician  
Mental Health Aide  
Mental Health Trainee  
Mental Retardation Technician I  
Mental Retardation Technician II  
Mental Retardation Technician III  
Office Assistant I  
Office Assistant II  
Office Assistant III  
Office Assistant IV  
Office Specialist  
Painter  
Pharmacy Intern  
Physical Therapy Aide  
Physical Therapy Assistant  
Plumber I  
Plumber II  
Power Plant Operator I  
Power Plant Operator II  
Refrigeration and Air Conditioning Service  
Technician I  
Refrigeration and Air Conditioning Service  
Technician II  
Reimbursement Officer I  
Seamstress I  
Secretary I

Secretary II  
Secretary III  
Service Assistant  
Sheetmetal Worker  
Social Worker Aide  
Storekeeper I  
Storekeeper II  
Switchboard Operator I  
Utility Worker  
Vocational Instructor  
Volunteer Services Coordinator  
Welder

**Exclude:** All elected and management officials, and all professionals confidential and supervisory employees as defined in the Act under Section 75-4322 and also exclude all employees appointed on a temporary student and emergency basis.

3. The classification specifications for the position of Activity Therapist I include an educational requirement of graduation from an accredited four year college or university with major coursework in art or music education, music therapy, art therapy, occupational therapy, horticultural therapy, recreational therapy, recreation or physical education (Pet. Ex. 4).
4. The classification specifications for the position of Activity Therapist I include work that is predominately intellectual and requires the exercise of discretion and judgment (Pet. Ex. 4).
5. The classification specifications for the position of Activity Therapist I requires the employee be registered as an occupational therapist by the Kansas Board of Healing Arts (Pet. Ex. 4).
6. The classification specifications for the position of Licensed Mental Health Technician Specialist include an educational requirement of only one year of training (Pet. Ex 2).
7. The classification specifications for the position of Licensed Mental Health Technician Specialist require the employee hold a license or permit to practice as a Mental Health Technician in Kansas as issued by the Kansas Board of Nursing. (Pet. Ex. 2).
8. K.S.A. 75-4327(c) and K.A.R. 84-2-6(A) provide guidance in determining which positions should be included in an appropriate unit.

9. The Activity Therapist I classification is presently included in the State of Kansas - Patient Care Professional Unit established by the Public Employees Relation Board in Case No. 75-UCA-4-1989.
10. The State of Kansas - Patient Care Professional Unit is not represented by a recognized employee organization (PERB records).
11. The Licensed Mental Health Technician Specialist classification at the Rainbow Mental Health Facility is not included in any employee unit.
12. The Rainbow Mental Health Facility Nonprofessional Unit was determined by order of the Public Employee Relations Board in Case no. 75-UC-5-1989. The Kansas Association of Public Employees was certified, following an election, as the unit's recognized employee organization on October 12, 1989 (PERB records).
13. The Rainbow Mental Health Facility and the Kansas Association of Public Employees have not been involved in meet and confer proceedings concerning the terms and conditions of employment for employees in the Rainbow Mental Health Facility Nonprofessional Unit (Tr. p. 96).
14. Jack Southwick is the Superintendent of the Rainbow Mental Health Facility (Tr. p. 63).
15. Jack Southwick will be representing the Rainbow Mental Health Facility in any meet and confer proceedings concerning the terms and conditions of employment of the Activity Therapist I and Licensed Mental Health Technician Specialist classifications at the Rainbow Mental Health Facility regardless of the employee units into which they are placed (Tr. p. 96).
16. Jack Southwick presently establishes the terms and conditions of employment for the Activity therapist I and Licensed Mental Health Technician Specialist classifications at the Rainbow Mental health Facility since neither classification is represented by a certified employee organization (Tr. p. 86).
17. Paul K. Dickhoff, Jr., Director of Negotiations for the Kansas Association of Public Employees, urges that when there are units cutting across agency lines it becomes very cumbersome to reach agreements when several different agency heads must ratify any agreement (Tr. p. 48).
18. Paul K. Dickhoff testified the everyday management of employees is improved if they are within a single employee

unit because employees in different classifications will not be working under different sets of rules (Tr. p. 48).

19. Jack Southwick believes his job as Superintendent of the Rainbow Mental Health Facility would be made difficult because the Activity Therapist I and Licensed Mental Health Technician Specialist employees are considered professionals but would be represented by a nonprofessional unit (Tr. p. 76-77).
20. The Rainbow Mental Health Facility Nonprofessional Unit is located wholly at the Rainbow Mental Health Facility in Kansas City, Kansas. The facility covers seventeen acres and includes two main buildings and six cottages (Tr. p. 25, 66, 77).
21. The Patient Care Professional Unit is a statewide unit comprised of employees at twenty five (25) facilities located around the state (PERB records).
22. Richard Taylor, one of the five Activity Therapist I employees at the Rainbow Mental Health Facility, expressed the desire to have that classification included in the Rainbow Mental Health Facility Nonprofessional Unit (Tr. p. 25-26).
23. Deborah Davis, the only Licensed Mental Health Technician Specialist at the Rainbow Mental health Facility, testified on behalf of the Kansas Association of Public Employees' petition (Tr. p. 31-47)
24. Jack Southwick opposed placing the Activity Therapist I and Licensed Mental Health Technician Specialist classifications in the Nonprofessional Unit because the employees are considered professionals and therefore a different unit would be more appropriate (Tr. p. 79).
25. The Activity Therapist I and Licensed Mental Health Technician Specialist employees all work at the Rainbow Mental Health Facility and interact with professional and nonprofessional employees on a daily basis (Tr. p. 13-15, 17).
26. The only level of supervision common to all classifications contained in the Rainbow Mental Health Facility Nonprofessional Unit is Superintendent Southwick (Rainbow Organization chart).
27. The Activity Therapist I classification is within the Activity Therapy Department, and under the supervision of the Activity Therapy Director who also supervises the Activity Therapist II and Activity Therapist Technician classifications (Tr. p. 11, 67).

28. The Licensed Mental Health Technician Specialist classification is within the Department of Research and Training, and under the supervision of the Director of Nursing (Tr. p. 33, 34, 40).
29. The Licensed Mental Health Technician Specialist divides her time approximately 80% to training and 20% to patient care (Tr. p. 76). When performing patient care duties she is supervised by the Director of Nursing as are the Licensed Mental Health Technician and Licensed Mental Health Aide classifications (Rainbow Organization Chart).
30. The classification specifications for Licensed Mental Health Technician Specialist and Licensed Mental Health Technician I positions relating to required knowledge, abilities and skills contain five similar requirements (Pet. Ex. 1 & 2)
31. The Activity Therapist I performs the same duties as the Activity Therapist Technician with the exception that the Activity Therapist I can independently assess patients while Activity Therapist Technicians are required to have their patient assessments reviewed by a professional (Tr. p. 23, 71-72).
32. The Activity Therapist I and Licensed Mental Health Technician Specialist are classifications in career ladders (Tr. p. 21, 23-24, 49, 83).
33. The Activity Therapist I works with psychiatrists, psychologist, social workers, registered nurses, Licensed Mental Health Technicians and Mental Health Aides at team meetings to prepare patient programs of treatment (Tr. p. 17).
34. The Licensed Mental Health Technician Specialist trains most of the facility staff (Tr. p. 34-35).
35. The Activity Therapist I and Licensed Mental Health Technician Specialist have the following terms and conditions of employment similar to other classifications within the Rainbow Mental Health Facility Nonprofessional Unit:
  1. 8 hour work shifts, usually 8 to 5 (Tr. p. 11, 45);
  2. Monthly payment of wages pursuant to state pay plan (Tr. p. 15, 39, 100);
  3. Participation in life and health insurance programs (Tr. p. 16, 27, 39, 100);
  4. Participation in KPERS retirement program (Tr. p. 27, 100);

5. Vacation and sick leave policies and procedures (Tr. p. 28, 45, 100);
  6. Access to grievance procedure (Tr. p. 28, 46, 100); and
  7. Same personnel policies (Tr. p. 39).
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36. The classification of Licensed Mental Health Technician Specialist is not included in the nonprofessional units at other SRS institutions (Tr. p. 84-84, PERB records).
  37. The Rainbow Mental Health Facility staff is a homogeneous, heterogeneous group of people (Tr. p.65).
  38. The Rainbow Mental Health Facility Nonprofessional Unit is divisible into three distinct sub-units: facility care; patient care; and clerical activities. While contacts between employees within a classification or sub-unit are most probably regular and recurring in the normal course of their duties, contact between employees in different sub-units likely occurs only on an "as required or needed" basis.

### CONCLUSIONS OF LAW AND OPINION

#### ISSUE NO. I

Should the employee unit established by 75-UC-5-1989 be amended by replacing the classification of Mental Retardation Technician III with the classification Mental Retardation Trainee?

Prior to taking evidence, counsel for Respondent moved to amend the Rainbow Mental Health Facility Nonprofessional Unit, established by 75-UC-5-1989, by replacing the classification of Mental Retardation Technician III, there no longer being such civil service classification, with the classification Mental Retardation Trainee. There was no objection from KAPE, the recognized employee representative for the unit. The unit should be so amended.



ISSUE NO. II

Is the employee unit established by 75-UC-5-1989 the appropriate unit for inclusion of the classification of Activity Therapist I and Licensed Mental Health Technician Specialist?

The Kansas Association of Public Employees, hereinafter referred to as "KAPE", petitioned the Public Employee Relations Board, hereinafter referred to as the "Board", pursuant to K.S.A. 75-4327(c), to amend the Rainbow Mental Health Facility Nonprofessional Unit established by 75-UC-5-1989. K.S.A. 75-4327(c), in pertinent part, provides:

*"When a question concerning the designation of an appropriate unit is raised by a public agency, employee organization, or by five or more employees, the public employee relations board, at the request of any of the parties, shall investigate such question and, after a hearing, rule on the definition of the appropriate unit in accordance with subsection (e) of this section."*

In response to this statutory mandate, the Board defined the appropriate by order in 75-UC-5-1989 to be as follows:

Include: Activity Therapy Technician  
Activity Therapy Trainee  
Automotive Driver  
Baker  
Bookkeeper  
Carpenter I  
Carpenter II  
Cook  
Custodial Worker  
Electrician I  
Electrician II  
Equipment Mechanic I  
Equipment Mechanic II  
Equipment Operator I  
Equipment Operator II  
Food Service Worker  
General Maintenance & Repair Technician I  
General Maintenance & Repair Technician II  
Hospital Trainee  
Keyboard Operator I  
Keyboard Operator II  
Keyboard Operator III

Laborer  
Laundry Worker  
Licensed Mental Health Technician I  
Licensed Mental Health Technician II  
Licensed Practical Nurse  
Lock System Specialist I  
Machinist  
Mason  
Meat Cutter  
Mechanic I  
Mechanic II  
Medical Records Technician  
Mental Health Aide  
Mental Health Trainee  
Mental Retardation Technician I  
Mental Retardation Technician II  
Mental Retardation Technician III  
Office Assistant I  
Office Assistant II  
Office Assistant III  
Office Assistant IV  
Office Specialist  
Painter  
Pharmacy Intern  
Physical Therapy Aide  
Physical Therapy Assistant  
Plumber I  
Plumber II  
Power Plant Operator I  
Power Plant Operator II  
Refrigeration and Air Conditioning Service  
Technician I  
Refrigeration and Air Conditioning Service  
Technician II  
Reimbursement Officer I  
Seamstress I  
Secretary I  
Secretary II  
Secretary III  
Service Assistant  
Sheetmetal Worker  
Social Worker Aide  
Storekeeper I  
Storekeeper II  
Switchboard Operator I  
Utility Worker  
Vocational Instructor  
Volunteer Services Coordinator  
Welder

Exclude: All elected and management officials, and all  
professionals confidential and supervisory

employees as defined in the Act under Section 75-4322 and also exclude all employees appointed on a temporary student and emergency basis.

### PROFESSIONAL vs. NONPROFESSIONAL UNIT

K.S.A. 75-4327(f), in pertinent part, states:

*"A recognized employe organization shall not include: (1) Both professional and other employees, unless a majority of the professional employees vote for inclusion in the organization;..."*

*"Professional employee" is defined in K.S.A. 75-4322(d) to include any employee:*

*"(1) Whose work is predominantly intellectual and varied in character as opposed to routine, mental, manual, mechanical, or physical work; involves the consistent exercise of discretion and judgment, requires knowledge of an advanced type in a field of science or learning customarily acquired by prolonged study in an institution of higher learning; or (2) who has completed courses of prolonged study as described in paragraph (1), and is performing work under the supervision of a professional person in order to qualify as a professional employee as defined in paragraph (1) of this subsection; or (3) attorneys-at-law or any other person who is registered as a qualified professional by a board of registration or other public body established for such purposes under the laws of this state."*

Upon examination of the classification specifications for the position of Activity Therapist I one finds an educational requirement of *"Graduation from an accredited four year college or university with major coursework in art or music education, music therapy, art therapy, occupational therapy, horticultural therapy, recreational therapy, recreation or physical education."* Such would appear to meet the qualification of *"knowledge of an advanced type in a field of science or learning customarily acquired by prolonged study in an institution of higher learning"* of K.S.A. 75-4322(d) (1).

The *"Example of Work Performed"* and *"Required Knowledge, Abilities, and Skills"* on the classification specification indicates work that is predominately

intellectual and requires the exercise of discretion and judgment. Accordingly, the Activity Therapist I classification meets the qualifications of K.S.A. 75-4322(d)(1) for a "professional employee".

Additionally, since the classification also requires the employee "be registered as an occupational therapist by the Kansas Board of Healing Arts" such would meet the alternate K.S.A. 75-5422(d)(3) requirement of registration by a board of registration. The Board of Healing Arts is such a board pursuant to K.S.A. 65-5401-12.

The classification specifications for a Licensed Mental Health Technician Specialist meet the "predominantly intellectual work" and "exercise of discretion and judgment" requirements of K.S.A. 75-4322(d)(1) but the position requires only one year of training. Even Mr. Southwick agreed this training did not meet the requirement of "knowledge of an advance type in a field of science or learning customarily required by prolonged study in an institution of higher learning."

While not qualifying as a "professional employee" pursuant to K.S.A. 75-4322(d)(1), the Licensed Mental Health Technician Specialist does meet the requirements of (d)(3). One of the minimum qualifications for the classification is "License or permit to practice as a mental health technician in Kansas as issued by the Kansas board of Nursing" (Pet. Ex. 2). K.S.A. 74-1106(c)(3) authorizes the Board of Nursing to prescribe curricula and standards for mental health technician programs and K.S.A. 74-1106(c)(4) authorizes the Board to License qualified applicants.

Having met one or more of the requirements of K.S.A. 75-4322(d) the employees in the classifications of Activity Therapist I and Licensed Mental Health Technician Specialist must be considered "professional employees" for purposes of the Public Employee Relations Act. Accordingly, even if it is determined that the Rainbow Mental Health Facility Non-professional Unit is the appropriate unit for inclusion of these classifications, pursuant to K.S.A. 75-4327(f) they may be so included only if a majority of the professional employees in each classification vote for inclusion in the unit.

#### STATUTORY FACTORS TO BE CONSIDERED

An employee unit is a group of employees who may properly be grouped together for purposes of participating in a Public Employer-Employee Relations Act election or the meet and confer process.

The Public Employee Relations Board is vested with wide discretion to determine what classifications should be included in an appropriate employee unit. In the private sector the U.S. Supreme Court has given great weight to the unit determinations made by the NLRB:

*"The issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and none should be by decision. It involves of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed." Parkard Motor Car Co. v. NLRB, 330 U.S. 485, 491 (1947).*

Despite the fact that the Kansas Public Employer-Employee Relations Act contains more specific criteria to be considered in unit determinations than the NLRA, "it is rare that a PERB unit

determination is found to be so unreasonable and arbitrary that a court will reverse it." Rhyne and Drummer, The Law of Municipal Labor Relations, p. 36 (1979).

As a guide to the Public Employee Relations Board in determining which positions should be included in an "appropriate unit", K.S.A. 75-4327 (C) provides:

*"...the board, in investigating questions at the request of the parties as specified in this section, shall take into consideration, along with other relevant factors; (1) The principle of efficient administration of government; (2) the existence of a community of interest among employees; (3) the history and extent of employees' (4) geographical location; (5) the effects of overfragmentation and the splintering of a work organization; (6) the provisions of K.S.A. 75-4325; and (7) the recommendations of the parties involved."*  
(Emphasis added)

Additional guidance is found in K.A.R. 84-2-6(a):

*"(1) Any unit may consist of all of the employees or the public employer, or any department, division section or area, or part of combination, thereof, if found to be appropriate by the board, except as otherwise provided in the act of these rules.*

*"(2) In considering whether a unit is appropriate, the board shall consider the provisions of K.S.A. 75-4327(e) and whether the proposed unit of the public employees is a distinct and homogeneous group, with significant problems which can be adjusted without regard to the other public employees of the public employer, and it may consider the relationship of the proposed unit to the total organizational pattern of the public employer. Neither the extent to which public employees have been organized by an employee organization nor the desires of a particular group of public employees to be represented separately or by a particular employee organization shall be controlling on the question of whether a proposed unit is appropriate."*

While the applicable statute and regulations enumerate specific factors to be considered in making the unit determination, the weight to be assigned each factor is within the sole discretion of the Public Employee Relations Board.

1. It should be noted K.S.A. 75-4327(c) speaks only to the designation by the Board of an "appropriate unit." The statutory language does not require the Board to define the only appropriate unit or the most appropriate unit. PEERA requires only that the unit be

"appropriate". Such is the standard to be applied in the initial determination of an "appropriate" employee unit.

However, once a determination has been made and an employee unit established by order of the Board, a petitioner seeking to amend the unit by adding or removing classifications has the burden of proof to establish the proposed unit is "more appropriate" than the existing unit. This is especially true once an exclusive employee representative has been certified for the unit.

#### History and Extent of Employee Organization

The Activity Therapist I classification is presently included in the State of Kansas - Patient Care Professional Unit established by the Board in case number 75-UCA-4-1989 on February 15, 1989. That unit is not presently represented by a recognized employee organization and therefore not participating in meet and confer proceedings on conditions of employment. The Licensed Mental Health Technician Specialist classification at Rainbow has not been included in any employee unit.

The Department of Social and Rehabilitation Services - Rainbow Mental Health Facility Non-Professional Unit was determined by order of the Board in case number 75-UC-5-1989 on July 24, 1989. Following an election, KAPE was certified as the recognized employee organization on October 12, 1989. From the testimony at the hearing, it would appear KAPE and Rainbow have not been involved in meet and confer proceedings (Tr. p. 96), and presumably

no memorandum of agreement relative to terms and conditions of employment for the nonprofessional unit has been executed.

The alternatives available to the employees in these two classifications who wish to meet and confer with the employer concerning terms and conditions of employment are either to: a) seek inclusion of the classification in a unit with a recognized employee organization, here the Rainbow Nonprofessional Unit represented by KAPE; or b) seek certification of an employee organization for the statewide Professional Unit. Given the number of Rainbow employees in each classification, Activity Therapist I - 5 and Licensed Mental Health Specialist - 1, and the time required for certification of an employee organization for a statewide unit, the first alternative could reasonably be presumed preferable.

Principle of Efficient Administration of Government

Jack Southwick, Superintendent, Rainbow Mental Health Facility, will be representing the public agency in any meet and confer process concerning the terms and conditions of employment for the Activity Therapist I and Licensed Mental Health Technician Specialist classifications at Rainbow (Tr. p. 96). Since, as noted above, neither classification is represented by a recognized employee organization, it is the Superintendent who presently establishes the terms and conditions of employment for the employees in those classifications (Tr. p. 86). Assuming that these classifications are included in some unit, the question becomes whether the efficiency of administration of the Rainbow Facility will be more effected if they are included in the Rainbow



Nonprofessional Unit as compared to another unit. e.g. statewide Patient Care Professional Unit.

Paul Dickhoff, Jr. Director of Negotiations for KAPE, testified in support of inclusion of the two classifications in the Department of Social and Rehabilitation Services - Rainbow Mental Health Facility Non-Professional Unit. It was his testimony that:

*"When you have one unit that is agency or institution specific, it aids in the negotiation process. When there are units that cut across agency lines, it becomes a very cumbersome matter to try and reach agreements when you've got to have several different agency heads ratifying any agreements that you reach at the table, and any one of these agency heads can basically serve to negate any process you made at the table."  
(Tr. p. 48)*

Mr. Southwick, while stating he did not know if having these two positions in the unit would cause any problems in the meet and confer process, (Tr. p. 99), by his testimony he would appear to concur in the premise that agreement is easier to obtain the fewer parties involved in the negotiations (Tr. p.102-03), and supports the conclusion that institution specific units aid negotiations:

*"Q. Having all these in this nonprofessional unit being simply Rainbow employees, is that going to make it easier for you to negotiate, to meet and confer?"*

*"A. Easier than what?"*

*"Q. If you were working with these classifications agency - or SRS - wide...?"*

*"A. I have never been in that position. I think it would be easier if it were just Rainbow, but have not had the experience one way or the other."  
(Tr. p. 96)*

Mr. Southwick did testify *"whichever unit they're properly assigned to, I will negotiate with them"* (Tr.p. 96).

Mr. Dickhoff also testified concerning the efficiency of managing employees working under a single memorandum of agreement rather than multiple agreements:

"Q. Would it be fair to say that the more people you have in a homogeneous unit the easier it is to govern the unit involved?

"A. I would say it becomes easier to deal with that unit in terms of negotiations.

"Q. How about in terms of simple everyday managing of employees?

"A. Well, hopefully, when you finish your negotiations you will have a set of conditions of employment that will apply to everyone and you won't have different people working from different sets of rules." (Tr. p. 48).

Again, Mr. Southwick's testimony appears to support this conclusion:

"Q. Would you rather have 12 contracts representing a group of ten people for each contract?

"A. No, I wouldn't think that would be very good" (Tr. p. 103).

When asked whether it would make his job as Superintendent easier or harder if the classifications were added to the Nonprofessional Unit at Rainbow Mr. Southwick responded:

*"I deal with the staff along the lines that I described earlier in which I think the staff is being comprised -- the clinical staff is being comprised of professional staff and nonprofessional staff. It would make it difficult to have some people who were technically in the professional staff category but also in the (Nonprofessional) bargaining unit..."* (Tr. p. 76-77)

The criteria he used to classify an employee as "professional" or "nonprofessional, as discussed above, is different from the criteria established by the Public Employer Employees Relation Act (Tr. p. 91).

#### Geographic Location

An example of factors considered under this criteria is the difference in the cost of living; employees in one city may not share a community of interests in wages with employees at facilities in other cities around the state, even though they may be performing the same functions. Checker Cab of Virginia, Inc., 109 L.R.R.M. 1253 (1982).

The Patient Care Professional Unit is a statewide unit comprised of employees at twenty five (25) facilities located around the state. The Nonprofessional Unit is located wholly at the Rainbow Mental Health Facility in Kansas City, Kansas.

#### Overfragmentation

Overfragmentation is the unwieldy multiplication of employee units, Werne, Public Employment Labor Relations, Vol. 1, p. 81 (1974). This factor relates directly with the requirement that the Board consider the efficient administration of government. Efficient administration presumably requires a minimum number of employee units, Rhyne and Drummer, The Law of Municipal Relations, p. 33 (1979). The statutory requirement to consider overfragmentation indicates a legislative concern for the proliferation of small employee units and an intent to have the largest employee unit possible consistent with the community of interest of the employees involved.

In this case no new units are sought. The issue is simply into which of the existing units the classifications of Activity

Therapist I and Mental Health Technician Specialist should be placed.

The Recommendation of the Parties Involved

The effectiveness of the meet and confer process depends in large part on the coherence of the employees in the unit. Where there are two or more classifications which may be combined or left separate in establishing the appropriate unit or units, the desires of the parties must be considered. K.A.R. 84-2-6(a)(2) prohibits the desires of a particular group from being "controlling" on the question of appropriate unit composition but the regulation does not prohibit the desires of the parties from being a factor for consideration. In fact, K.S.A. 75-4327(c)(7) requires the Board consider such desires.

Richard Taylor, one of the five Activity Therapist I's, expressed the desire to have that classification included in the Rainbow Nonprofessional Unit (Tr. p. 25-26). While Deborah Davis did not specifically recommend inclusion of the Licensed Mental Health Technician Specialist in the Rainbow Nonprofessional Unit, the fact that she appeared at the hearing and testified in favor of KAPE's petition, and she is the only employee at Rainbow in the Licensed Mental Health Technician Specialist, reasonably raises the inference that inclusion of the classification in the Nonprofessional Unit is her desire.

Rainbow Superintendent Jack Southwick opposed placing the classifications in the Nonprofessional Unit believing there being "another bargaining unit in which they more properly fit" (Tr. p. 77-78); that unit,

Based upon his assertion the employees in these classifications are "professionals" (Tr. p. 79), apparently would be the statewide Patient Case Professional Unit.

Other Relevant Factors

1. **The existence of a Community of Interest**

The Board's primary concern is to group together only those employees who have substantial mutual interests in wages, hours and other conditions of employment. Commonly referred to as the community of interest doctrine, it stands for the proposition that in making a unit determination, the Board will weigh the similarities and differences with respect to wages, hours and other conditions of employment among the members of the proposed unit, rather than relying solely on traditional job classifications. Bank of America Nat'l Trust & Sav. Ass'n., 80 L.R.R.M. 1081 (1972). Common interests include similarity of job duties, wages, common supervision and common skills, educational requirements, job location, and common bargaining history, 1967 Exec. Comm., National Governor's Conference (Pub. Personnel Ass'n, 1967), Report of Task Force on State and Local Government Labor Relations, p. 12. "Community of Interest" has also been defined as a means "to group together employees who have substantial mutual interests in wages, hours and other conditions of employment," 1950 NLRB Ann. Rep. 39 (1951).

In determining if a community of interest exists, the following inquiry should be made, however, it is not necessary that all of the following elements be present:

- a. Do the employees work at a common site?
- b. Do the employees have common supervision at the work site?
- c. Do the employees have common skills, training or education requirements?
- d. Are the employees part of an integrated work process?
- e. do the employees have similar working conditions and same types of grievances?
- f. Do the employees have substantially similar conditions of employment?

**a. Common Work Site**

Where members of the proposed unit work in the same physical area, unlike those whose work area are seperated into distinct units, such as seperate facilities or institutions, it is more likely a community of interest will be found. As noted above, the Activity Therapist I and Licensed Mental Health Technician Specialist employees all work at the Rainbow Mental Health Facility in Kansas City, Kansas. They interact with the professional and nonprofessional clinical staff on a daily basis (Tr. p. 13-15, 17). There is nothing in the record evidencing interaction with their counterparts or with Patient Care Professionals at other facilities around the state.

The Nonprofessional Unit is located wholly at the Rainbow Mental Health Facility in Kansas City, Kansas. As Richard Taylor described it:

*"It's a small facility, has two adult cottages and four children and adolescent cottages..." (Tr. p. 25)*

The six cottages are all off one central building, referred to as the "B Building" which houses the dietary services and pharmacy services (Tr.p. 66) "A Building" is the other main building of the facility, and contains staff offices, administrative offices, the activity therapy program, and a special education program (Tr. p. 66). The facility covers 17 acres. (Tr. p. 77).

**b. Common Supervision**

This criteria has been established to test whether the members of the proposed unit come under the supervision of a single person or branch. It is a particularly critical inquiry when one of the proposed units consists of employees of a multi-location operation. Given the diversity of classifications in the Nonprofessional Unit at Rainbow, the only level of common supervision would be Superintendent Southwick (Rainbow Org. Chart). However, there is no common supervision among classifications contained in the statewide Patient Care Professional Unit. The Rainbow Mental Health Facility is a distinctly separate unit with substantial managerial autonomy in hiring and supervision of employees which establishes its individual identity. See, Carter HAWley Hales Stores, Inc., 118 L.R.R.M. 1348 (1985); U-Tote-Em Grocery Co., 74 L.R.R.M. 1727 (1970).

Looking solely at the Activity Therapist I classification, it is within the Activity Therapy Department under the supervision of the Activity Therapy Director. The Director also supervises the Activity Therapist II and Activity Therapist Technician

classifications (Tr. p. 11, 67); professional and nonprofessional classifications.

The Licensed Mental Health Technician Specialist classification contains only one employee, and is within the Department of Research and Training. (Tr. p. 33-34). There are only two employees in the department. Supervision comes from the Director of Nursing. (Tr. p. 40).

The Licensed Mental Health Technician Specialist divides her work time approximately 80% training and 20% patient care (Tr. p. 76). When working in patient care the classification would be supervised by the Director of Nursing when assigned to patient care duties (Tr. p. 40). The Licensed Mental Health Technician and the Licensed Mental Health Aide classifications are similarly supervised by the Director of Nursing, (Rainbow Organizational Chart).

#### c. Common Skills/Education

Similarities in the employees; skills, training, experience, education and duties are relevant in determining whether they share a community of interest. A review of the classification specifications for Licensed Mental Health Technician Specialist (Pet. Ex. 2) and Licensed Mental Health Technician I (Pet. Ex. 1) reveal five of the eight "Required Knowledge, Abilities and Skills" of a specialist are the same as those of the Technician I. The remaining three skills relate to the Specialist classifications special training duties. Each classification requires the employee possess a "License or permit to practice as a mental health technician in Kansas." When assigned to patient



care duties, the Licensed Mental Health Technician Specialist performs the same work as the Licensed Mental Health Technician or Mental Health Aide. (Tr. p. 40).

Richard Taylor testified the Activity Therapist I performs the same duties as the Activity Therapist Technician (Tr. p. 23). Superintendent Southwick agreed they perform the same duties with the exception that the Therapist I can independently assess patients while Technicians are required to have their patient assessments reviewed by a professional (Tr. p. 71-72). The Therapist I classification requires a 4 year degree because of the higher level of clinical skills required (Tr. p. 72).

Paul Dickhoff stated the opinion these two classifications were parts of career ladders (Tr. p. 49). According to Richard Taylor, the natural profession in Activity Therapy is Activity Therapy Technician to Activity Therapist I to Activity Therapist II (Tr. p. 21, 23-24). Deborah Davis testified the progression for Licensed Mental Health Technicians is Technician I to Technician II to Technician III to Technician Specialist (Tr. p. 42-43). Superintendent Southwick's testimony supports the career ladder concept (Tr. p. 83).

#### **d. Part of Integrated Work Process**

The Board will consider how essential the work of each employee is to the overall work of the proposed unit. Substantial overlap of employee job functions, frequent employee contact, and centralized supervision and administration contribute to a functionally integrated enterprise. Ramada Inns, Inc., 121

L.R.R.M. 1237 (1986); Bendix Corp., 94 L.R.R.M. 1596 (1977), (multicraft unit consisting of maintenance, craft and production employees held appropriate where the work of each group of employees was integral to the production process). The factors of job function, employee contact and supervision are discussed elsewhere. The testimony reveals the classification of Activity Therapist I is within the Activity Therapy department in which there is also Activity Therapist II's and Activity Therapy Technicians (Tr. p. 67). The Activity Therapist I employees work with psychiatrists, psychologists, social workers, registered nurses, Licensed Mental Health Technicians and Mental Health Aides at team meetings to prepare patient programs of treatment (Tr. p. 17), as well as daily contact with Activity Therapy Technicians, Licensed Mental Health Technician I & II's and Mental Health Aides concerning patient care (Tr. p. 13).

The Licensed Mental Health Technician Specialist trains most of the facility staff (Tr. p. 24-25). When performing direct patient care duties the Specialist assumes the responsibilities of the Licensed Mental Technician or Mental Health Aide.

**e. & f. Similar Conditions of Employment**

This criterion refers to the degree of similarity in working conditions of the members of the proposed unit. Employees who are paid in the same hourly, weekly or monthly manner, have the same starting times, and are subject to the same rules of conduct and disciplinary procedures are considered to have substantially the same conditions of employment. If the members of the proposed unit

receive the same fringe benefits, such as vacations, holiday pay, life insurance, hospitalization and medical insurance, there is a greater likelihood of finding common interests. Charrette Drafting Supplies Corp., 119 L.R.R.M. 130 (1985); Atlanta Hilton and Towers, 118 L.R.R.M. 1032 (1984). The testimony of Richard Taylor, Deborah Davis and Jack Southwick clearly establish the Activity Therapist I and Licensed Mental Health Specialist have the following terms and conditions of employment similar to the classifications within the Rainbow Nonprofessional Unit:

1. 8 hour work shifts, usually 8 to 5 (Tr. p. 11, 45);
2. Monthly payment of wages pursuant to state pay plan (Tr. p. 15, 39, 100);
3. Participation in life and health insurance programs (Tr. p. 16, 27, 39, 100);
4. Participation in KPERS retirement program (Tr. p. 27, 100);
5. Vacation and sick leave policies and procedures (Tr. p. 28, 45, 100);
6. Access to grievance procedure (Tr. p. 28, 46, 100); and
7. Same personnel policies (Tr. p. 39).

## 2. Nonprofessional Units at Other Institutions

Superintendent Southwick argues the classification of Licensed Mental Health Technician Specialist is not included in the nonprofessional units at other SRS institutions. Consistency would require the classification not be included in the Rainbow Nonprofessional Unit:

"As I understand it, Rainbow Mental Health Facility is the only state mental or retardation system that does not have a unit. I am opposed to seeing us handled differently than all of the other class - - the way they handle the classes in the other units. In the other facility class of Licensed Mental Health Technician Specialist is not included in this bargaining unit, and, therefore, I think the parallel -- it makes sense to have it the same way since we're all sister organizations." (Tr. p. 84-85)

A review of two nonprofessional units at other SRS institutions shows no consistency in the classifications included. In 72-UC-2-83, Kansas Neurological Institute, the nonprofessional unit contains 38 classifications as compared to 69 classifications at Rainbow. Only 17 classifications appear in both units.

In 75-UC-3-81, Winfield State Hospital and Training Center, the nonprofessional unit contains 88 classifications as compared to 69 classifications at Rainbow. Only 27 classifications appear in both units.

### 3. Homogeneous Unit

Superintendent Southwick referred to the facility staff as "a homogeneous, heterogeneous group of people" (Tr. p. 65), and testified:

"Q. Would you say that because its so small it has a special camaraderie among its employees?

A. Camaraderie?

Q. Uh-huh. I mean, esprit de corps?

A. I think that's true."

An examination of the classifications presently constituting the Rainbow Nonprofessional Unit reveals three distinct sub-units; facility care, patient care, and clerical activities. While contacts between employees within a classification or sub-unit are most probably regular and reoccurring in the normal course of their

duties, contact between employees in different sub-categories likely occurs only on an "as required or need" basis. It is not surprising then that Richard Taylor would acknowledge no contact with electricians (Tr. p. 17), and anticipated that there would be no interaction on a work-a-day basis between office assistants (clerical) and plumbers (facility), (Tr.p. 23) or bakers (facility) and Licensed Health Technician (patient), (Tr. p. 24). At the same time he would have daily contact with employees in the Activity Therapy Department.

#### Conclusion

Upon consideration of the above evidence as it relates to the factors set for in K.S.A. 75-4327(c) and K.A.R. 84-2-6(a), the weight of the evidence appears to support KAPE's petition and establishes that inclusion of the Activity Therapist I and Licensed Mental Health Technician Specialist in the existing Rainbow Nonprofessional Unit would create a unit more appropriate than the existing unit.

Pursuant to K.S.A. 75-4327(f)(1) the Activity therapist I classification and the Licensed Mental Health Technician Specialist classification being professional positions, the classifications cannot be included in the nonprofessional unit unless a majority of the professional employees of each vote for inclusion. An election to determine the desires of the five Activity Therapist I employees and the one Licensed Mental Health Technician Specialist employee should be conducted by the Board.

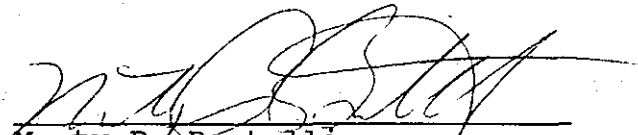
ORDER

IT IS THEREFORE ORDERED on this 4th day of February, 1991 that the Rainbow Mental Health Facility Nonprofessional Unit be amended by the classification of Mental Retardation Technician III being replaced with the classification Mental Retardation Trainee.

IT IS FURTHER ORDERED that the Public Employee Relations Board conduct an election among the employees in the classifications of Activity therapist I and Licensed Mental Health Technician Specialist at the Rainbow Mental Health Facility to determine if these professional classifications should be included in the non-professional unit.

If the Activity Therapist I employees and the Licensed Mental Health Technician Specialist employee each vote for inclusion, the Rainbow Mental health Facility Nonprofessional Unit shall be amended to include the classifications of Activity Therapist I and Licensed Mental Health Technician Specialist.

IT IS FURTHER ORDERED upon completion of the election, a new order setting both the classifications constituting the Rainbow Mental Health Facility Nonprofessional Unit be filed and copies sent to the parties interest.

  
Monty R. Bertelli  
Senior Labor Conciliator  
Employment Standards and Labor Relations  
1430 Topeka Blvd.  
Topeka, Kansas 66612

**NOTICE OF RIGHT TO REVIEW**

This is an initial order of a presiding officer. It will become final fifteen (15) days from the date of service unless a petition for review is filed with the Public Employee Relations Board in accordance with K.S.A. 77-527.

**CERTIFICATE OF SERVICE**

I, Sharon Tunstall, Secretary III for the Department of Human Resources, hereby certify that on the 4th day of February, 1991, a true and correct copy of the above and foregoing Initial Order was deposited in the U.S. Mail, first class, postage pre-paid, addressed to:

Brad Avery  
Kansas Association of  
Public Employees  
400 W. 8th, Suite 103  
Topeka, Kansas 66603

Darrell McNeil  
Department of SRS  
6th Floor, DSOB  
Topeka, Kansas 66612

Sharon Tunstall

Copies of the Initial Order were mailed to the Public Employee Relations Board members on the above-mentioned date.