

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF REPRESENTATION

In the Matter of

COUNTY OF HUDSON,

Public Employer,

-and-

FRATERNAL ORDER OF POLICE,
LODGE NO. 77,

DOCKET NO. RO-78-107

Petitioner,

-and-

POLICEMEN'S BENEVOLENT ASSOCIATION,
LOCAL NO. 109,

Intervenor.

SYNOPSIS

The Director of Representation reaffirms his decision in In re Passaic County Board of Chosen Freeholders, D.R. No. 78-29, 4 NJPER 8 (14006 1977), wherein he found that CETA employees are appropriate for inclusion in a unit with regular employees. The Director emphasizes that there is no real distinction between CETA employees who are employed under a CETA grant for ten (10) months and those CETA employees who are employed for an indefinite period of time. All such CETA employees qualify as public employees and are appropriate for inclusion in a collective negotiations unit. The Director also finds that CETA employees employed as correction officers have the requisite police powers to be included in a police unit.

Moreover, the Director finds that, in defining the appropriate unit, reliance could not be placed upon one employee representative's internal requirements for organization membership. The Director indicates that an employee representative's internal structure cannot dictate the definition of an appropriate unit because the Act mandates that the majority representative shall be responsible for representing all unit members without discrimination and without regard to employee organization membership.

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Furthermore, the Director finds that a second employee representative cannot be deprived of its opportunity to represent an appropriate unit merely because an intervening organization does not grant membership rights to certain individuals, whether they be CETA or probationary employees.

Finally, the Director reviews the Commission's policy regarding the fixing of payroll period eligibility dates utilized in secret ballot elections.

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Appearances:

For the Public Employer,
Murray, Granello & Kenney, Esqs.
(Malachi J. Kenney, of Counsel)

For the Petitioner,
Joseph Flynn, President

For the Intervenor,
Vitale & Wilewski, Esqs.
(Vincent A. Vitale, of Counsel)

DECISION AND DIRECTION OF ELECTION

On December 5, 1977, a Petition for Certification of Public Employee Representative was filed by the Fraternal Order of Police, Lodge No. 77 (the "FOP") with the Public Employment Relations Commission (the "Commission") seeking to represent a

unit of all correction officers below the rank of sergeant employed by the County of Hudson (the "County"). The Petition was accompanied by an adequate showing of interest. Policemen's Benevolent Association, Local 109 (the "PBA") the current exclusive representative of an existing unit of correction officers, has intervened in the instant proceedings. Pursuant to N.J.A.C. 19:11-2.6, the undersigned has caused an investigation to be conducted into the matters and allegations involved in the Petition in order to determine the facts. All parties have been advised of their obligations under N.J.A.C. 19:11-2.6 and have been afforded an opportunity thereunder to present documentary and other evidence as well as statements of position relating to the Petition.

On the basis of the administrative investigation herein, the undersigned finds and determines as follows:

1. The County of Hudson is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., as amended (the "Act"), is the employer of the employees involved herein, and is subject to the provisions of the Act.

2. The Fraternal Order of Police, Lodge No. 77 and the Policemen's Benevolent Association, Local 109, are employee representatives within the meaning of the Act and are subject to the provisions thereof.

3. A Petition for Certification of Public Employee Representative having been filed, and the parties not having agreed

to the conduct of a secret ballot election, a question concerning representation exists and the matter is appropriately before the undersigned for determination.

4. The Commission has received a request to intervene from the PBA. That request, being supported by a copy of a recently expired collective negotiations agreement covering certain of the petitioned-for employees, is in accordance with N.J.A.C. 19:11-2.7 and has been approved.

5. The County, on April 24, 1978, indicated that approximately 84 "regular" correction officers are employed by the County at its Correctional Facilities. Additionally, there are approximately 11 correction officers paid, in part, from CETA funds (persons employed under the Federal Comprehensive Employment and Training Act).

6. At an informal conference held with the parties by the assigned staff member on February 23, 1978, concerning a matter involving superior officers (Commission Docket No. RO-78-108), the County and the PBA raised a question regarding the timeliness of the filing of the instant Petition. Subsequently, the parties submitted statements of position to the undersigned. By letter dated March 21, 1978, the undersigned advised that the submission of a collective negotiations agreement between the PBA and the County, which was not executed by the parties, did not constitute sufficient evidence under the contract bar rule, N.J.A.C. 19:11-2.8(c), to bar the filing of the instant Petition, and directed

the assigned staff member to continue the processing of this Petition, as well as RO-78-108 involving superior officers.

7. At a second informal conference held on April 13, 1978, the parties each advanced their respective positions concerning the Petition, including the composition of the negotiations unit.

The FOP stated that the appropriate unit should include all correction officers, both "regular" and Federal Comprehensive Employment and Training Act ("CETA") employees. The County did not oppose the inclusion of CETA correction officers in the negotiations unit. The PBA indicated that it would not enter into any Agreement for Consent Election in which CETA employees were not specifically excluded from eligibility, and further stated, that it opposed the participation by any CETA employees in a secret ballot election which might be conducted by the Commission as a result of a Direction of Election. The PBA asserted that CETA correction officers may not appropriately be in a unit with other correction officers because (1) they are not permanent employees -- that is, they could lose their positions any time federal funding is eliminated; (2) they are not covered by Civil Service Rules; and (3) the PBA constitution does not allow membership for CETA employees.

8. On May 19, 1978, the undersigned notified the parties of the above enumerated facts ascertained in the investigation. Additionally, all parties were advised of their responsibilities

under N.J.A.C. 19:11-2.6 to provide to the undersigned documentary and other evidence, as well as statements of position, regarding the instant matter. The undersigned stated that in the absence of the presentation of substantial and material disputed factual issues which would warrant the convening of an evidentiary hearing, a decision would issue on the basis of the administrative investigation. For the following reasons, the undersigned determines that the appropriate unit herein is a unit of all correction officers, including CETA personnel.

In a recent decision, In re Passaic County Board of Chosen Freeholders, D.R. No. 78-29, 4 NJPER 8 (¶4006 1977), the question as to whether CETA employees are appropriate for inclusion in a unit with "regular" county employees was examined in detail. The PBA's contentions herein regarding permanency of CETA employment and the lack of Civil Service coverage were also addressed in the Passaic decision. In that decision, the undersigned noted the requirements of the Federal Comprehensive Employment and Training Act at 29 U.S.C. §848 (a)(2) and (4), that CETA employees receive "coverage under collective bargaining agreements and other benefits at the same levels and to the same extent as other employees similarly employed, and to working conditions and promotional opportunities neither more nor less favorable than such other employees similarly employed..." Analyzing the above in light of Passaic County's argument relative to CETA funding termination possibilities and non-Civil Service coverage, the

undersigned stated as follows:

"These factors, which compel a determination of community of interest of both CETA and non-CETA personnel outweigh the distinguishing factors proffered by the County. First, in the light of record evidence of the continuity of employment of the instant employees, the undersigned cannot distinguish the community of interest between CETA and non-CETA personnel based upon a speculation that the funding source for the continued employment of these CETA employees may at some time terminate. It would seem to the undersigned that the CETA employees share the same concerns as other employees in the unit over the current and future terms and conditions of employment applicable to them. Second, the Commission's practice has been to certify units of employees on the basis of generic employment classification regardless of whether such units contain mixtures of employees who may be identified as regular full-time, probationary, temporary, or regular part-time employees. Moreover, in instances where a public employer's employees are covered by Civil Service, the Commission, in establishing negotiations units, has not distinguished between those employees who are in the classified Civil Service and those employees who might be unclassified."

Accordingly, the PBA's arguments concerning the above have previously been considered by the undersigned, and do not raise any substantial and material factual issues in the instant proceeding that require further analysis.

Regarding the PBA contention that its constitution does not allow membership of CETA employees, the undersigned observes that the Act requires that the Commission determine the appropriateness of collective negotiations units "with due regard for the community of interest among the employees concerned." N.J.S.A.

34:13A-5.3. Further, N.J.S.A. 34:13A-5.3 mandates that "a majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership." Given the requirement of the Act that the employee representative represent the appropriate unit regardless of employee organization membership, the undersigned, in defining the appropriate unit, cannot place reliance upon the employee representative's internal requirements for organization membership. Otherwise stated, the employee representative's internal structure cannot dictate the definition of unit appropriateness, the determination of which has been mandated to the Commission by the Legislature with appropriate guidelines. In addition, it should be noted that the FOP, as Petitioner, cannot be deprived of its opportunity to represent an appropriate unit simply because an intervening organization has chosen not to grant membership rights to certain individuals. ^{1/}

1/ The undersigned notes that the CETA legislation does not disqualify a CETA employee from obtaining membership in the union which represents employees in the classification to which he/she is assigned. To the contrary, the CETA regulations, at 20 C.F.R. §98.23(e), relating to labor disputes provide that "...participants belonging to labor unions involved in the dispute shall be treated in the same manner as any other person who is a member of the union." The fact that the PBA restricts organization membership does not, under the circumstances here presented, disqualify it from representing the appropriate unit. The undersigned cannot speculate that the PBA will not assume its responsibility, if certified, to represent all employees without discrimination and without regard to employee membership. To the contrary, on the

9. Although no other evidence or statements were provided by the County or the FOP in response to the undersigned's May 19, 1978 letter, the PBA submitted additional statements regarding the composition of the proposed unit. The PBA again argued that CETA employees should not be permitted to belong to the proposed unit because of the tenure of their employment. Specifically, the PBA argued that the instant CETA employees can only be employed for ten (10) months and should therefore not be allowed to vote in a secret ballot election. Additionally, the PBA claimed that the CETA employees lacked police powers. The PBA further questioned the eligibility of probationary employees, stating that these employees lacked police powers during a ninety (90) day probationary period.

The undersigned has considered the PBA's position regarding the tenure of CETA employees. It is the judgment of the undersigned that the fact that these CETA employees are currently employed under a CETA grant for only ten months as contrasted to the CETA employees in the Passaic County matter whose CETA employment was indefinite does not present a distinction which would warrant a change in the Commission's enunciated policy. The ten month period of guaranteed employment continues to qualify these CETA personnel as public employees, and since all other factors of the CETA

1/ (Cont'd)

basis of the record presented, the undersigned must presume that the PBA, if certified will represent the appropriate unit in accordance with its statutory responsibility. Cf. AFSCME v. PERC, Docket No. A-986-72 (App. Div. February 27, 1973) (unreported), aff'g PERC letter decision in Docket No. RO-496 (November 30, 1972).

employment relationship remain the same as described in Passaic County, the determination therein as to unit appropriateness is applicable in the instant matter. Second, the PBA has not submitted evidence to substantiate its claim the CETA employees do not have police powers. Given the requirements of CETA that CETA employees are required to assume the same terms and conditions of employment as equivalently employed "regular" personnel, and given the Supreme Court's determination that correction officers are police within the intendment of the New Jersey Employer-Employee Relations Act, the undersigned is not convinced that CETA personnel should be accorded different treatment under the Act. Third, with regard to probationary employees, the PBA again asserts its internal rules prohibiting PBA membership until the probation period is concluded. The undersigned has previously addressed this issue with specific reference to the PBA's refusal to accept CETA personnel as organization members and finds the same analysis controlling.

The PBA has also raised the issue of which payroll period eligibility date should be used in the scheduling of any secret ballot election. The Commission's policy regarding the fixing of payroll period eligibility dates is as follows:

- (1) If the parties have entered into a consent election agreement the payroll period for eligibility is the last date of the last payroll period ending before the date the consent is taken.
- (2) If the parties have not consented to a secret ballot election and an election is directed by the undersigned, the payroll period for eligibility is the

last payroll period immediately preceding the date of the Directed Election decision.

Accordingly, the undersigned has reviewed the PBA's recent contentions and finds that there are no substantial and material factual issues in dispute which may more appropriately be resolved after a hearing. Accordingly, the undersigned finds that the disposition of this matter is properly based upon the administrative investigation herein. Therefore, the undersigned finds that the appropriate unit for collective negotiations is all correction officers, including CETA corrections officers, below the rank of sergeant employed by the County of Hudson, but excluding all other County employees including sergeants, captains, and deputy wardens of the County Jail, managerial executives, confidential employees, and supervisors within the meaning of the Act.

Pursuant to N.J.A.C. 19:11-2.6(b)(3), the undersigned directs that an election be conducted among employees described above. The election shall be conducted no later than thirty (30) days from the date set forth below.

Those eligible to vote are employees set forth above who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation, or temporarily laid-off, including those in military service. Employees must appear in person at the polls in order to be eligible to vote. Ineligible to vote are employees who quit or were discharged for

cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Pursuant to N.J.A.C. 19:11-9.6, the County is directed to file with the undersigned and with FOP and PBA an election eligibility list, consisting of an alphabetical listing of the names of all eligible voters together with their last known mailing addresses and job titles. In order to be timely filed, the eligibility list must be received by the undersigned no later than ten (10) days prior to the date of the election. A copy of the eligibility list shall be simultaneously filed with FOP and PBA with statement of service to the undersigned. The undersigned shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.

Failure to comply with the foregoing shall be grounds for setting aside the election whenever proper objections are filed pursuant to N.J.A.C. 19:11-9.2(h). Additionally, the undersigned may in the exercise of his reasonable discretion, issue a subpoena or direction requiring the production of the eligibility list and in the event of noncompliance therewith, may institute appropriate enforcement pursuant to R 1:9-6.

Those eligible to vote shall vote whether or not they desire to be represented for the purposes of collective negotiations by the Fraternal Order of Police, Lodge No. 77, or the Policemen's Benevolent Association, Local No. 109.

The exclusive representative shall be determined by a

majority of the valid ballots cast. The election directed herein shall be conducted in accordance with the Commission's Rules.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Carl Kurtzman, Director

DATED: July 27, 1978
Trenton, New Jersey