D.R. NO. 79-25

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

In the Matter of

COUNTY OF OCEAN,

Public Employer,

-and-

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

DOCKET NO. RO-78-112

Petitioner,

-and-

OCEAN COUNCIL #12, NEW JERSEY CIVIL SERVICE ASSOCIATION,

Intervenor.

SYNOPSIS

The Director of Representation, ruling upon challenges to the eligibility of individuals who cast ballots in a Commission runoff election for County white collar employees, determines that (1) Department of Health employees are ineligible voters and (2) T-80 employees who at the time of the runoff election had worked at least 45 days during one year, who had been offered employment to either another T-80 position or to a permanent position by the County prior to the runoff election, and who had indicated a willingness prior to the runoff election to accept additional employment, were eligible voters. Regarding the Department of Health employees, the Director finds that health employees were terminated as County employees on April 1, 1978, two days before the election, and that these employees were, on the date of the election, employed by an autonomous authority, the Ocean County Board of Health. The Director further observes that such employees, on the date of the election, were at best in a transitional stage and would imminently be transferred to a new employer. Under these circumstances, the health employees should not participate in the choice of an exclusive representative of County employees. Regarding the T-80 employees,

the Director finds that the employment of T-80 employees for at least one-sixth of a calendar year demonstrates the regularity of employment of such employees and that the offer and acceptance of additional employment, as either T-80 employees or permanent employees, demonstrates a continuity of employment of such employees. Where employees demonstrate a regularity and continuity of employment, they are entitled to representation rights under the Act. The Director orders that the County provide to the Commission the employment records of the challenged T-80 employees in order that their eligibility may be ascertained.

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OCEAN COUNCIL #12, NEW JERSEY CIVIL SERVICE ASSOCIATION,

Intervenor.

Appearances:

For the Public Employer
Berry, Summeril, Piscal, Kagan & Privetera, Esqs.
(John C. Sharadnik, of Counsel)

For the Petitioner
Kapelsohn, Lerner, Reitman & Maisel, Esqs.
(Jesse H. Strauss, of Counsel; Jesse Strauss and Sidney Reitman, on the Brief)

For the Intervenor
Fox & Fox, Esqs.
(Richard H. Greenstein, of Counsel)

DECISION

Pursuant to an Agreement for Consent Election, elections were conducted by the Public Employment Relations Commission (the

"Commission") on March 22, 1978, and on April 3, 1978, to resolve a question concerning representation raised by Petitioner, Communications Workers of America ("CWA"), among non-supervisory white collar employees of the County of Ocean (the "County") who comprise a collective negotiations unit represented by Ocean Council #12, New Jersey Civil Service Association ("Council #12"). 1/ The Tally of Ballots cast in the runoff election reveals that 107 valid ballots were cast for Council #12, that 105 valid ballots were cast for CWA, and that 39 ballots were challenged. The challenged ballots are determinative of the results of the election.

Pursuant to a Notice of Hearing, hearings were held before Commission Hearing Officer Arnold H. Zudick on July 7 and 13, August 1 and 2, 1978, in Trenton, New Jersey, with respect to the voting eligibility of the individuals casting the challenged ballots. At the hearing, all parties were given an opportunity to examine and to cross-examine witnesses, to present evidence, and to argue orally. Subsequent to the close of hearing, all parties filed written briefs in this matter by October 17, 1978.

The Hearing Officer issued his Report and Recommendations on December 8, 1978, a copy of which is attached hereto and made a part hereof. All parties have filed exceptions and briefs in support thereof with regard to the Hearing Officer's Report.

1/ The results of the March 22 election were inconclusive, no ballot position having received a majority of the ballots cast. Pursuant to the Consent Election Agreement and N.J.A.C. 19:11-9.3, the April 3 runoff election was conducted and the position receiving the least votes cast in the March 22 election (in the instant matter, the "neither" position) was removed from the runoff election ballot.

The Hearing Officer found as follows:

1. Although the County did not appear on the ballot in the runoff election, it nevertheless had standing to challenge the voters in that election.

2. Thomas Coccia was a supervisor within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), on the date of the second election and, therefore, the challenge to his ballot should be sustained.

3. Those employees, who at the time of the first election, had been employed by the County Department of Health were ineligible to vote in the runoff election by virtue of their transfer to a newly created Board of Health. Therefore, on April 3, the 32 voters in question were not employees of the County, but of a separate autonomous employer, the Ocean County Board of Health, and, therefore, the challenges to their ballots should be sustained. See N.J.S.A. 26:3A2-1 et seq.

4. CETA Project Employees are public employees within the meaning of the Act and the ten employees in question would have a community of interest with employees in the petitioned-for unit if they were employed by the County. However, the Hearing Officer found that they were employed by the Board of Health and, therefore, for the above reasons, were not eligible to vote on April 3.

5. Employees employed by the County in the Temporary 80-day ("T-80") title are public employees within the meaning of the Act and share a community of interest with other employees

in the unit. The Hearing Officer recommended, therefore, that ballots cast by six T-80 employees be ruled valid and counted.

CWA disagrees with the Hearing Officer's recommendation regarding the voting ineligibility of the health employees. CWA claims that these employees were County employees on the date of the runoff election and that their votes should be counted. CWA, consistent with its position that the T-80s are eligible voters, does not except to the Hearing Officer's recommendations regarding T-80 employees. The County and Council #12 except to the Hearing Officer's recommendation that T-80 employees are eligible voters. The County, additionally, excepts to the Hearing Officer's conclusion regarding CETA employees. Both the County and Council #12, consistent with their positions that the health employees were not County employees on the date of the runoff election, do not except to the Hearing Officer's recommendation as to the ineligibility of health employees. 2/

The undersigned shall consider the issues relating to the health employees and the T-80 employees in seriatim.

The first issue herein, namely whether the aforementioned 32 health employees were eligible to vote on April 3, is one of first impression. An unusual set of circumstances is presented

2/ The parties do not except to the Hearing Officer's conclusion that the County could rightfully assert challenges at the runoff election. However, this is an issue that does not relate to voter eligibility and is outside the ambit of the instant proceeding. This issue, the standing of the County to assert challenges at the runoff election, is contained in objections to the election filed by CWA and will be considered therein.

by the instant controversy. The facts are that the County on March 23, 1978, passed resolutions creating the Ocean County Board of Health and appointing its members. The Board conducted its first organizational meeting on March 30. On April 5, the County passed a resolution transferring Health Department employees to the Board, effective April 1, 1978. On April 19, the Board passed a resolution accepting the transfer of these employees.

CWA maintains that on April 3, the health employees were still employed by the County and, therefore, were eligible to vote for the representative of County white collar employees. Several legal and factual arguments are presented by CWA in support of this contention. Among these arguments, CWA claims that the Civil Service Commission was not notified of any change in the status of County Department of Health employees prior to April 3. In addition, the Board of Health took no personnel actions such as hiring, firing or disciplining prior to the runoff election which might demonstrate actual or presumed control of employee relations. According to CWA, the County Employee Relations Department continued to provide employee services. CWA also argues that the statute, N.J.S.A. 26:3A2-16, which provides for the transfer of County employees to a newly established Board of Health, requires some further affirmative act by the County to effectuate the transfer of the Health Department employees, and that the County's "transfer" resolution was not adopted until April 5 "prov[ing] in law, that the County, on April 3, had not transferred

the operation, supervision and control of the County Department of Health to the autonomous Board." Finally, CWA contends that the undersigned must restrict this inquiry to events which occurred prior to April 3, 1978. In short, the thrust of CWA's position is that, notwithstanding the imminent transfer of the Health Department employees to a new employer, the eligibility status of the employees on the date of the election, April 3, 1978, controls.

The undersigned, having reviewed the entire record, including the Hearing Officer's Report and the CWA exceptions, determines that on April 3, 1978, the date of the election, the health employees were employed by the County Board of Health. The undersigned agrees with the Hearing Officer that the significant events which effectuated the transfer of health employees from the status of County employees to Board employees occurred on March 23 and March 30. On March 23, the County created a Board of Health. On March 30, the County Board of Health underwent self-organization, including the establishment within it of a County Health Department in accordance with an organizational chart. Exhibit E-5. See also N.J.S.A. 26:3A2-3. At the March 30, 1978 meeting the following resolution was approved:

> WHEREAS, the Ocean County Board of Health was duly created by resolution of the Ocean County Board of Chosen Freeholders on March 23, 1978; and
>
> WHEREAS, N.J.S.A. 26:3A2-1 et seq., commonly referred to as the Local Public Health Services Act, requires said Board to be operational and provide the required health care services by April 1, 1978; and

> WHEREAS, in order to accomplish the foregoing, various services will be required to be provided by the Ocean County Board of Chosen Freeholders until such time as the Ocean County Board of Health can make the necessary arrangements to provide said support services in order to completely fulfill its statutory obligations,
>
> NOW, THEREFORE, BE IT RESOLVED BY THE OCEAN COUNTY BOARD OF HEALTH, as follows:
>
> 1. That said Board expresses its intent to enter into an agreement with the Ocean County Board of Chosen Freeholders to reimburse said Board for direct and indirect cost of services provided to the Ocean County Board of Health during the formation stages of said Board.
>
> 2. That a copy of this resolution be forwarded to the Ocean County Board of Freeholders.

The undersigned concludes from the above that the County Board of Health intended to, and became operational on April 1, 1978 for the purpose of providing the required health services. Based on the above, the newly created County Board of Health implemented the provisions of N.J.S.A. 26:3A2-4, which required that the existing county health agency be continued as a County Health Department within the County Board of Health. Additionally, the above facts establish that the County Health Department within the County Board of Health assumed the activities and responsibilities of providing health services which had previously been provided by the predecessor local health agency, effective April 1, 1978. Having found that the assumption of the predecessor health agency's activities and responsibilities occurred on April 1, 1978, pursuant

to N.J.S.A. 26:3A2-16, [3/] the undersigned concludes that the employment of the County health employees terminated on April 1, 1978. The April 5 resolution by the County transferring employees to the County Board of Health as of April 1, 1978 confirms the assumption by the successor agency of health service responsibilities as of April 1, 1978, the attendant termination of employment of health employees by the County, and the employment of health employees by the successor agency, the County Board of Health, on this date.

CWA maintains that the April 5 County resolution was an affirmative act required by the "shall be transferred" language of N.J.S.A. 26:3A2-16 to effectuate the transfer of these employees. The undersigned determines that the April 5 resolution was the ministerial act by the County which attended to the necessary formalities associated with recording the transfer.

3/ N.J.S.A. 26:3A2-16 provides:

> Each person who shall have been employed as a full-time employee of a local health agency whose employment by such agency was governed by the provisions of the Civil Service law and whose employment by such agency shall have been terminated by reason of the assumption of its activities and responsibilities by another local health agency shall be transferred to such other local agency, shall be assigned duties comparable to those previously performed by him, and shall be entitled to and credited with all rights and privileges accruing to him by reason of his tenure in such previous office or position, the same as if the entire period of such previous employment had been in the position to which he shall have been transferred. His compensation shall be fixed at not less than the amount received by him at the time of transfer.
>
> N.J.S.A. 26:3A2-17 concerns transfers of non-Civil Service personnel and is substantially the same with respect to the issues herein affecting non-Civil Service employees.

The CWA argument, viewed in its most favorable light, concedes that the Board of Health was in a "creative stage" on the date of the election. However, CWA maintains that the Board of Health had not, as of the date of the election, obtained the requisite "autonomy over labor relations" to establish it as the public employer. If the above argument is accepted it would nonetheless be clear that the health employees were in a transitional stage on the date of the election, and the extent of the authority of the Board of Health was in question.

Under the circumstances, the undersigned must be guided by the purposes of the Act and the concern that employees in an election conducted by the Commission be provided with free choice to effectuate self-determination of their exclusive representative. The undersigned must take into account the fact that during the critical election period the County white collar negotiations unit was undergoing a significant alteration in composition due to the removal of the Health Department employees. CWA's position, if adopted, would permit an exclusive representative to be selected by employees who imminently would not be unit employees. The undersigned cannot agree. The purposes of the Act are not effectuated solely by a technical and legalistic analysis of the facts as to which entity was, on the precise date of the election, the public employer. Rather, equitable and policy considerations are involved herein which are of overriding importance and cannot be ignored. It would be an abdication of the undersigned's responsibility to

effectuate the purposes of the Act, i.e., to allow technical, legalistic issues to control the outcome of a representation election while ignoring the broad and imposing policy questions which dominate this controversy.

A fundamental principle of labor relations is that the employees to be represented make their own selection. To place that power of selection in the hands of employees whose employment status was being altered pursuant to actions instituted prior to the election would abrogate the rights of unit members to self-determination and would undermine the democratic process by which a majority representative should be determined.

It is regrettable that the Commission did not receive adequate written advance notice prior to the April 3 election that a change in structure of the proposed unit was occurring. Had the undersigned been so apprised, the election would have been postponed until such time as the unit composition had sufficiently stabilized [4/] or until the employee eligibility status had been determined. Under this procedure, the health employees, clearly, would not participate in the determination of the exclusive

4/ See, Lullo v. Firefighters Local 1066, 55 N.J. 409 (1970), wherein the Supreme Court held that it was proper for P.E.R.C. to rely upon the National Labor Relation Board's precedent in formulating policy pertaining to representation matters. The Board's policy not to conduct an election during a period of instability would be particularly appropriate in the circumstances herein. See In re Specialty Mfg. Co., Inc., 107 NLRB No. 28, 33 LRRM 1067 (1953), where the Board determined that a representation election should not be held until after the occurrence of imminent layoffs of a certain class of employees.

representative of County employees. Although the Commission was not provided advance notice of these circumstances, the result herein should be no different.

Assuming that the CWA is correct in asserting that the actual transfer of County Health Department employees did not occur until April 5, forty-eight hours after the election, it must be noted that, under the rules of the Commission, the certification of representative could not issue before April 11, 1978, at the earliest. The Certification of Representative would cover white collar employees of the County of Ocean. Accordingly, the health employees, who concededly had in the interim been transferred to an autonomous County Board of Health, and who could not be included within the definition of the unit to be represented by the certified representative, should not play a determinative role in the selection of the exclusive representative. Therefore, the challenge to the 32 ballots in question is hereby sustained, 5/ and these 32 ballots are deemed void.

T-80 employees are County employees who may work up to a maximum of 80 days in the 12 month period following the date of employment. In the event that a T-80 employee has completed the 80 days of employment, such employee may receive another T-80 appointment during the same year provided that the Civil Service

5/ In light of the above determination, the undersigned need not reach the question concerning the voting eligibility of CETA Project Employees whose votes are among the challenged Health Department employee ballots.

Commission has approved such employment for the individual in a different T-80 position. The Hearing Officer likened the employment relationship of T-80s to per diem school substitute employees, who in In re Bridgewater-Raritan Regional High School Board of Education, D.R. No. 79-12, 4 NJPER 444 (¶ 4201 1978), were found by the undersigned to have sufficient regularity and continuity of employment to satisfy the definition of a public employee under the Act.

Although the County argues that T-80s are basically on-call personnel, and substitute for sick or vacationing employees, the exhibits in the record relating to their employment demonstrates much more than a sporadic employment pattern. Many T-80s demonstrate a regular schedule of activity. Their utilization appears to be as flexible as the 80 day maximum limit allows. The record further demonstrates that T-80s work full days when employed.

The County and Council #12 except to the Hearing Officer's recommendation that T-80 employees are eligible voters. Both argue that sufficient evidence was presented to demonstrate that all parties to the original consent agreement in fact agreed to exclude T-80s from inclusion in the unit. After thoroughly reviewing the record, the undersigned agrees with the Hearing Officer that the requisite meeting of the minds did not occur at the time the consent agreement was executed and that T-80s cannot be excluded from the unit on this basis.

The County and Council #12 maintain that T-80s are not public employees within the meaning of the Act, since they fail to satisfy the standards formulated by the undersigned in Bridgewater-Raritan, supra. There the undersigned found that substitute teachers who work 30 days or more during one school year and who indicate a willingness to serve in the succeeding year demonstrated a sufficient regularity and continuity of employment to qualify them as public employees under the Act and to entitle them to representation thereunder. While the County concedes that five of the six T-80s who cast challenged ballots worked in excess of 30 days, thereby fulfilling the first part of the Bridgewater-Raritan test, the County argues that there is no evidence to establish the existence of a continuing employment relationship beyond the expiration of the initial term of employment. The County maintains that the mere willingness of a T-80 employee to work beyond the term of employment is not an adequate indication of a continuing employment relationship and that valid grounds exist for distinguishing the instant matter from the substitute employment relationship found in Bridgewater-Raritan, supra. Therefore, the County argues that the mere expression of willingness by a T-80 employee to be available for continued employment should not be viewed by the undersigned as dispositive with regard to the continuity of employment requirement. Moreover, the County contends that the appointment of two employees as permanent employees after the runoff election should have no bearing upon the undersigned's

determination of their voting eligibility.

Although the undersigned cannot endorse the Hearing Officer's recommendation that all six T-80s were eligible to vote based on a finding that all T-80s are appropriately unit personnel, the positions advanced by the County and Council #12 for blanket exclusion are also untenable. A determination in this matter that all T-80s should either be included or excluded from the proposed unit would unjustly deny representational rights to some employees who demonstrate significant service and confer rights upon others who would not otherwise to entitled to such rights.

The decisions in Bridgewater-Raritan and In re Rutgers University v. Rutgers University College Teachers Association, E.D. No. 76-35, 2 NJPER 176 (1976) aff'd P.E.R.C. No. 76-49, 2 NJPER 229 (1976), D.R. No. 77-5, 3 NJPER 12 (1976)(dismissed election objections), aff'd App. Div. Docket No. A-1652-76 (1977) (unpublished decision), certif. den. 76 N.J. 243 (1978).provide the guidance for determining the status of employees in question herein. In Bridgewater-Raritan, the undersigned stated:

> To insure consistency in Commission determinations, the undersigned concludes that the approach utilized in In re Rutgers University, supra, should be applied to measure regularity and continuity of employment in similar situations where a determination must be made concerning the status of personnel as either casual or regular part-time employees. The Rutgers, supra, approach will be adapted to meet the requirements of the employment relationship at issue. (footnote omitted)

A standard must be devised which gives due consideration to the unique circumstances of the particular employment relationship under scrutiny and in the instant matter, neither the Bridgewater-Raritan nor the Rutgers formulas can be applied without some modification which takes into account the permutations presented by the situation herein.

Given that 80 days is the maximum number of days which T-80 employees may work during the term of their employment and given that there exists no minimum, the undersigned deems it necessary to identify a measure of regularity by which employee status under the Act is established. In accordance with Bridgewater-Raritan, service for one-sixth or more of the usual work year establishes a regularity of employment. 6/ In the matter herein, a calendar work year is approximately 260 days. Therefore, in the instant matter, 45 days of service is the minimum which would constitute significant service demonstrating regularity of employment for T-80s. However, Bridgewater-Raritan and Rutgers require that the additional factor of continuity of employment be demonstrated. Furthermore, the undersigned agrees with the County that a more rigorous standard than an employee's willingness to accept re-employment, as utilized in Bridgewater-Raritan, should be imposed herein to judge continuity of employment. The employment relationship herein provides no reasonable basis for an

6/ The usual work year for teaching personnel is 180 days.

employee to expect continued employment. 7/ Therefore, not only must a T-80 employee indicate his or her willingness to accept reappointment to another T-80 or permanent position, but, in addition, the employer must actually extend such an offer.

Based on the record evidence the undersigned concludes that 45 days of service during one year constitutes significant service demonstrating regularity of employment and an offer and acceptance of an additional T-80 appointment or permanent appointment satisfies the test of continuity. Accordingly, the undersigned finds that those T-80 employees who meet the above stated standard qualify as public employees within the meaning of the Act, are entitled to representation thereunder, and are appropriately included in the petitioned-for unit. Thus, those T-80 employees who at the time of the runoff election had worked at least 45 days during one year, who had been offered employment to either another T-80 position or to a permanent position by the County prior to the April 3 election, and who had indicated a willingness to the County prior to April 3, 1978, to accept additional employment, were eligible to vote. However, the evidence contained in the record is not adequate to establish which of the six challenged T-80 employees meet the above-mentioned criteria. In order to make such a determination, the undersigned

7/ In Rutgers, co-adjutants had already been offered and accepted re-employment for at least a second semester before the willingness to accept re-employment standard came into play. In Bridgewater-Raritan, the pattern of employment of substitutes demonstrated the retention of substitutes, who performed significant service on the master substitute list from year to year.

directs the County to file with the Commission no later than ten (10) days from the issuance of this decision, an affidavit containing the following information: (1) the entire employment record to date of each of the six challenged T-80 employees; (2) the date(s), if any, of an offer by the County of additional T-80 employment or a permanent position; and (3) the date(s), if any, on which the employee indicated a willingness to accept the employment offered in item #2 above. Copies of the affidavits shall be simultaneously served upon CWA and Council #12 and to the six challenged employees.

There being no exception to the Hearing Officer's findings with respect to Thomas Coccia, and the undersigned having reviewed the record with respect to the status of Mr. Coccia, the Hearing Officer's findings and recommendations are accepted for the reasons stated in the Hearing Officer's Report. Accordingly, this challenge is sustained and the ballot is deemed void.

The undersigned directs that, fifteen days from the date set forth below, the previously designated election agent shall open and count the ballots of those T-80 employees determined to be eligible pursuant to the standards enumerated above. Subsequently, a revised tally of ballots will be provided to the parties. In the event that the number of eligible ballots is insufficient to be determinative of the results of the election, the ballots will not be opened and a revised tally of ballots will be provided to the parties.

In accordance with the undersigned's letter of June 7, 1978, the processing of the post-election objections filed by CWA will commence subsequent to the issuance of the revised tally of ballots.

The undersigned acknowledges receipt of a request by counsel for CWA for oral argument of the challenge issues involved herein. The undersigned has determined that the issues have been fully litigated. The parties have been presented with ample opportunity to develop the factual record and to advance legal arguments. Accordingly, the request for oral argument is denied.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

Carl Kurtzman, Director

DATED: March 20, 1979
Trenton, New Jersey

H.O. No. 79-3

STATE OF NEW JERSEY
BEFORE A HEARING OFFICER OF THE PUBLIC EMPLOYMENT
RELATIONS COMMISSION

In the Matter of

OCEAN COUNTY BOARD OF CHOSEN FREEHOLDERS,

Public Employer,

-and-

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Petitioner,

Docket No. RO-78-112

-and-

OCEAN COUNCIL #12, N.J. CIVIL SERVICE ASSOCIATION,

Intervenor.

SYNOPSIS

A Commission Hearing Officer, considering the challenge to 39 voters in a Commission conducted runoff election, recommends (1) that a public employer has standing to challenge voters in a runoff election; (2) that one voter became a supervisor prior to the runoff and therefore was not in an eligible voting category and his vote should not be counted; (3) that the County created a County Board of Health prior to the runoff, that the Board was a separate public employer and employed 32 of the challenged voters prior to the runoff, and that those personnel were not eligible to vote in an election concerning only County employees; (4) that CETA Project employees are public employees within the meaning of the Act and that the 10 project employees herein would be eligible to vote if found to be County employees, but since the 10 project employees were part of the above 32 excluded voters, they were ineligible to vote on that basis only; and (5) that temporary 80-day employees (T-80) are public employees within the meaning of the Act, and have a community of interest with the instant unit.

The Hearing Officer therefore recommended that the challenge of the six T-80 voters be set aside and those votes counted.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The Report is submitted to the Director of Representation who reviews the Report, any exceptions thereto filed by the parties and the record, and issues a decision which may adopt, reject or modify the Hearing Officer's findings of fact and/or conclusions of law. The Director's decision is binding upon the parties unless a request for review is filed before the Commission.

H.O. No. 79-3

STATE OF NEW JERSEY
BEFORE A HEARING OFFICER OF THE PUBLIC EMPLOYMENT
RELATIONS COMMISSION

In the Matter of

OCEAN COUNTY BOARD OF CHOSEN FREEHOLDERS,

Public Employer,

-and-

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, Docket No. RO-78-112

Petitioner,

-and-

OCEAN COUNCIL #12, N.J. CIVIL SERVICE ASSOCIATION,

Intervenor.

Appearances:

For the Public Employer
Berry, Summerill, Piscal, Kagan & Privetera, Esqs.
(John C. Sahradnik, of Counsel)

For the Petitioner
Kapelsohn, Lerner, Reitman & Maisel, Esqs.
(Jesse H. Strauss, of Counsel)

For the Intervenor
Fox and Fox, Esqs.
(Richard H. Greenstein, of Counsel)

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

A Petition for Certification of Public Employee Representative was filed with the Public Employment Relations Commission (the "Commission") on December 15, 1977, by the Communications Workers of America (the "CWA" or the "Petitioner"), for a unit of white collar non-supervisory employees employed by the Ocean County Board of Chosen Freeholders (the "County"). A collective negotiations agreement purportedly covering the petitioned for employees was presented by Ocean Council #12, NJCSA (the "CSA" or the "Intervenor") and the CSA was thereafter granted intervenor status in the processing of the Petition.

On February 16, 1978, the parties entered into a Consent Election Agreement[1/] and agreed therein to the conduct of a secret ballot election by the Commission and

1/ Exhibit C-4A, C-4B.

scheduled the same for March 22, 1978. The results of that election as set forth in the Tally of Ballots of that date[2] indicated that none of the choices received sufficient votes to win and therefore no selection was made. Pursuant to N.J.A.C. 19:11-9.3 et seq., a runoff election was scheduled between the CWA and the CSA, and those parties agreed to the scheduling of said election to be conducted by the Commission on April 3, 1978. The results of that election as set forth in the Tally of Ballots of that date[3] indicated that the Petitioner received 105 votes, the Intervenor received 107 votes, and 39 votes were challenged, and therefore the challenged ballots were determinative of the outcome of the election.

Despite several attempts to informally resolve the challenges in question the same could not be accomplished. Thereafter, pursuant to a letter and Notice of Hearing from the Director of Representation dated May 18, 1978,[4] hearings were held before the undersigned Hearing Officer on July 7 and 13, and August 1 and 2, 1978, in Trenton, New Jersey, only on the issues relevant to the instant challenges. All parties were given an opportunity to examine and cross-examine witnesses, to present evidence, and to argue orally. Subsequent to the close of hearings all parties filed written briefs in this matter. Briefs were originally due by October 2, 1978, but an extension of time was granted by the undersigned until October 16, 1978.

Upon the entire record in this proceeding the Hearing Officer finds:

1. That the County is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, as amended (the "Act"),[5] and is subject to its provisions.

2. That the CWA and the CSA are employee representatives within the meaning of the Act and are subject to its provisions.

3. That the parties to a Commission conducted secret ballot election are unable to resolve challenges which are determinative of the outcome of the election and therefore a question concerning representation has not been resolved. The instant matter is therefore appropriately before the undersigned for report and recommendations concerning the challenges to the election.

4. That the Challenged Voter List for the second election[6] indicates that the County challenged 23 voters, and that the Commission Election officer challenged the remaining 16 voters.[7]

2/ Exhibit C-5B.
3/ Exhibit C-6C.
4/ Exhibits C-1A, C-1B.
5/ N.J.S.A. 34:13A-1, et seq.
6/ Exhibit C-6D.
7/ The County challenged 22 voters because they were allegedly not employees of the County, and challenged one voter as being a supervisor and not appropriate in the petitioned unit. The Commission Election Officer challenged the remaining 16 voters because their names did not appear on the voter eligibility list (NOL) provided by the County.

5. That the parties stipulated to the receipt of numerous joint exhibits.[8/]

6. That the major issues involved relevant to the instant challenges are:

A. Whether the County had standing to challenge voters at the second election?

B. Whether the ballot of employee Thomas Coccia should be counted?

1) Whether Coccia was in an eligible voting category on the date of the second election?

C. Whether the ballots of 32 voters should be counted?

1) Whether the Ocean County Board of Health (the "Board") existed as a separate public employer as of April 3, 1978, and whether the Board employed the 32 voters on that date, and therefore, whether the 32 voters were in an eligible category on the date of the second election?

D. Whether 10 ballots which are part of the above-mentioned 32 ballots should be counted?

1) Whether Comprehensive Employment Training Act ("CETA") Project employees are public employees within the meaning of the Act?

E. Whether 6 ballots should be counted?

1) Whether so-called Temporary Eighty Day ("T-80") employees are public employees within the meaning of the Act?

7. That the CWA argued that all 39 challenged ballots should be counted. The CWA believes that the County did not have standing to challenge voters in the second election; that Thomas Coccia was eligible to vote in said election; that the Board did not exist as a separate entity on April 3, 1978, and that it did not employ County Department of Health employees on that date; and that CETA Project employees and T-80 employees are public employees within the meaning of the Act.

8. That the County and the CSA argue that none of the 39 challenged ballots should be counted. Those parties argue that Thomas Coccia was a supervisor prior to April 3 and therefore not in an eligible category on that date; that the County Board of Health existed as a separate entity and employed former County Department of Health employees prior to April 3, 1978; and, that neither CETA Project nor T-80 employees are public employees within the meaning of the Act.

Analysis

The Standing to Challenge Question

The CWA contends that the County had no standing to challenge voters in the second election because it did not appear as a choice on the ballot.

8/ Joint Exhibits J-1 through J-10.

The CWA is well aware of the basic procedures in labor relations. One such procedure is that an employer (public or private) does not appear as a choice on a representation ballot. If an election involves only one labor organization the voters choose between being represented by that organization or no representation. If an election involves two or more labor organizations the voters choose between the organizations or vote "None" or "Neither." Although voting not to be represented, or voting for "None" or "Neither" might be construed as a vote "for" the public employer, the employer's name does not appear as a choice on the ballot. "None" or "Neither" should not be construed to mean the public employer, and a vote for that choice should only mean that the voter(s) does not wish to be represented for the purpose of collective negotiations by the labor organization(s) on the ballot.

In the instant matter the only choices on the second ballot were the CWA and the CSA. But that cannot be interpreted as excluding the County as a party at interest in the election. The County, in fact, has a vital interest in any representation election concerning its employees. The County has an obligation to provide the Commission with a list of eligible voters, and it certainly has standing to challenge any voters at any representation election conducted by the Commission involving its employees.

The instant matter is a case in point. If the County were prevented from challenging voters it could result in ballots being cast by people who (allegedly) are not employed by the County. The results of such an election would not accurately reflect the choice of the eligible voters and would not further the purposes and policies of the Act. Therefore, the County must be able to challenge voters in any election in order to ensure - among other things - that only its employees vote in a representation election.

Finally, the cases cited by the Petitioner concerning the standing question are distinguishable from the instant matter.[9/] Those cases involve the standing to challenge by labor organizations and they do not address the standing of employers.

Based upon the above discussion the undersigned recommends that the County had standing to challenge voters in the second election.

Thomas Coccia's Ballot

The County argues that on March 16, 1978, Thomas Coccia, formerly a senior mail clerk, was promoted to the position of Supervisor, Central Mail Room, which allegedly

9/ See Hellige, Inc., 96 NLRB 1216, 29 LRRM 1039 (1951); Celanese Corp. of America, 87 NLRB 552, 25 LRRM 1144 (1949).

was a supervisory position within the meaning of the Act. Although the County failed to challenge Coccia at the first election, it did challenge his vote at the second election and alleged he was a supervisor and therefore not an eligible voter.

The Petitioner acknowledged that Coccia was promoted on March 16, but it contends that his duties remained the same prior to April 3 and therefore he was not a supervisor on that date.

The question of whether Coccia's ballot should be tallied cannot be answered without determining whether Coccia was in an eligible category on April 3, 1978. The Rules provide that in runoff elections:

> "Employees who were eligible to vote in the original election and who are in an eligible category on the date of the runoff election shall be eligible to vote in the runoff election." N.J.A.C. 19:11-9.3(b).

It follows that if Coccia was a supervisor within the meaning of the Act on April 3, 1978, he would have been in an ineligible category and unable to vote since such supervisors were excluded from the unit.[10/]

Since the parties agree that Coccia was promoted to Supervisor, Central Mail Room on March 16, it need only be determined whether such position is a supervisor within the meaning of the Act. In that regard, the evidence revealed that said position was expected to be supervisory in nature. Florence Kelly, senior clerk stenographer in the County's Office of Employee Relations, testified that with his new title Coccia has the opportunity to effectively recommend hiring or firing of employees under his control.[11/] Although Mrs. Kelly admitted that she was unaware of any recommendations by Coccia, she did testify that no other representative of County management would be available daily to observe and control the functions of the mail room employees except Coccia.[12/]

Moreover, Coccia's own testimony demonstrated a supervisory authority. Coccia testified that he had the power to effectively recommend discipline and promotion prior to April 3, 1978,[13/] and he also testified that he was responsible for the first level in the grievance procedure.[14/] It would be inconsistent with Commission policy to find that an individual with Coccia's authority and responsibility was not a supervisor within the meaning of the Act.

10/ The appropriate collective negotiations unit included all white collar employees of the County and excluded - among others - supervisors within the meaning of the Act.

11/ Transcript (T) I, p. 33.
12/ T. I, p. 41.
13/ T. I, pp. 76-77.
14/ T. I, p. 83

Although the CWA contends that Coccia had no supervisory authority prior to April 3, 1978, the evidence did not support that contention. The mere fact that Coccia did not exercise supervisory authority prior to April 3 does not negate the supervisory authority in his new position.

Based upon the foregoing discussion the undersigned recommends that Thomas Coccia was supervisor within the meaning of the Act on or before April 3, 1978, and as such was not in an eligible voting category on the date of the runoff election as set forth in N.J.A.C. 19:11-9.3(b)

It is therefore recommended that the challenge to Thomas Coccia's ballot be sustained and his ballot should not be counted.

Separate Employer-Board of Health Issue

Perhaps the most important issue in the instant matter concerns the 32 challenged ballots. The County and the CSA both allege that these 32 individuals were not employees of the County as of April 3, 1978. The CWA however alleges that despite any creation of the Ocean County Board of Health (the "Board") prior to or approximately on March 23, 1978, that as of April 3rd the Board was not functioning as a separate employer, and therefore the 32 individuals were still employees of the County and were eligible to vote in the second election.

The evidence reveals that on March 23, 1978, the Ocean County Board of Chosen Freeholders passed resolutions[15] creating the Ocean County Board of Health as a separte entity concerning health related matters in the County of Ocean. The evidence further reveals that on March 30, 1978, the Board conducted its first official meeting (known as its organizational meeting) at which time it passed several resolutions concerning the formation and operation of the Board.[16] For example, the Board appointed its legal counsel, it appointed a labor negotiator, it selected several banks with which it would conduct future business, it selected dates for future official meetings, and it selected publications which would be used to make official announcements.

The CWA contends that despite the activities of the Board in its organizational meeting that not enough occurred prior to April 3rd to establish that the Board operated as a separate employer, or that it employed the 32 challenged voters in question. The CWA's argument is based on the fact that the Board was required to borrow both money and various personnel and other services from the County after the date of its creation

15/ Exhibits E-6 and E-7.
16/ Exhibits E-5.

and certainly prior to April 3rd. In fact, the CWA believes that at the very most, the Board operated as a joint employer with the County of the 32 individuals in question.

After careful review of all the evidence and briefs concerning this point the undersigned believes that certainly by April 3, 1978, the Board was not only a separate public employer, but also employed the 32 individuals in question. The evidence shows that Mr. Charles Kaufman, formerly in control of the Ocean County Health Department when it was part of the Count who subsequently became the coordinator of the new Health Department as part of the Board, testified that since March 23, 1978, it would be the Board of Health, and not the County, who could hire, fire and discipline employees of the Board, and it was the Board and not the County who would conduct labor negotiations on its behalf.[17/] Mr. Kaufman also testified that the Board requested from the County an emergency budget of $60,000 for salaries and wages, and that the Board acknowledged that it would be necessary to reimburse the County for the money and services it required during the early operation of the Board.[18/] The evidence shows that the resolutions passed by the Board on March 30th included the temporary budget of $60,000 for salaries and wages of employees, and further included an acknowledgement by the Board to enter into an agreement with the County to reimburse the County for the cost of services provided by the County during the formation stages of the Board.[19/]

The CWA contends, and the evidence shows, that it was necessary for the Board to rely heavily on the County for various personnel and operational services shortly after it was created, The CWA therefore believes that the Board was not operating as a separate entity and therefore did not employ the 32 voters in question, However, as previously stated, the evidence shows an acknowledgement by the Board to reimburse the County for all services and it is not unreasonable to believe that the only way the Board could function immediately after its creation was to borrow the necessary services from the County. The undersigned does not believe that simply because the County provided services on loan to the Board that the Board could not operate as a separate public employer within the meaning of the Act. In fact, Mr. Kaufman testified that subsequent to March 23rd he had the authority as a representative of the Board to discipline Board employees, to make work changes concerning Board employees, and that such changes and authority no longer came from the County but originated from the Board.[20/]

17/ T-II, pp. 27 and 50.
18/ T-II, pp. 17-18, 21-23.
19/ See Exhibit E-5, pp. 7 and 8.
20/ T-II, pp. 91 through 94.

The CWA also argues that only those facts prior to April 3rd should be used in determining whether the Board existed as a separate employer on that date and whether the 32 challenged voters were employed by the Board on that date. The undersigned agrees. The facts prior to April 3rd are the important facts in determining whether or not the Board was a separate entity and employed the instant employees by April 3rd, but the facts after April 3rd must also be viewed in interpreting and clarifying those events occurring prior to April 3rd. For example, the evidence shows that at the April 5th official meeting of the Board a discussion occurred concerning employees and Mr. Gasser, a Board member, questioned whether new employees should be taken on when the Board was uncertain whether it could keep present employees.[21/] The undersigned believes that Mr. Gasser was referring to employees already employed prior to the date of the meeting and the undersigned believes those are the 32 employees in question.

The CWA further contends that the 32 challenged voters were not transferred over to the Board until the April 19th meeting of the Board wherein it passed a resolution officially accepting the employees transferred from the County.[22/] The undersigned cannot agree with that interpretation. The facts show that the Board was created pursuant to statute, N.J.S.A. 26:3A2-1, and a subsequent statute specifically deals with the transfer of employees from a former health agency to a superseding agency. N.J.S.A.26:3A2-16 provides that persons employed by a health agency whose employment by such agency has terminated because another health agency is assuming the responsibility shall be assigned comparable duties and salary and credited with all rights and privileges accruing to him or her by reason of his or her tenure in the previous position.[23/] On March 23rd, and certainly by March 30, 1978, the Board was

21/ See Exhibit E-5, p. 12.
22/ See Exhibit E-5, p. 22.
23/ N.J.S.A. 26:3A2-16. Transfer of civil service employees of terminated local health agency to superseding agency

Each person who shall have been employed as a full-time employee of a local health agency whose employment by such agency was governed by the provisions of the Civil Service law and whose employment by such agency shall have been terminated by reason of the assumption of its activities and responsibilities by another local health agency shall be transferred to such other local agency, shall be assigned duties comparable to those previously performed by him, and shall be entitled to and credited with all rights and privileges accruing to him by reason of his tenure in such previous office or position, the same as if the entire period of such previous employment had been in the position to which he shall have been transferred. His compensation shall be fixed at not less than the amount received by him at the time of transfer.

The above statute concerns the transfer of Civil Service employees and N.J.S.A. 26:3A2-17 concerns the transfer of non-Civil Service employees. The statutes are substantially similar and in any event the 32 employees in question are Civil Service employees and therefore would be governed by 26:3A2-16.

operating as a separate entity from the County and the undersigned interprets 26:3A2-16 as immediately transferring the employees in question over to the new health agency. Although the Board did not officially accept the transfer of these employees until its official meeting of April 19th, the undersigned believes that was merely an official confirmation of what had unofficially already occurred pursuant to statute, and the facts. Moreover, the undersigned notes that in Grosso v. Paterson, 55 N.J. Super. 164 (L. Div. 1959), the court found that a board of health is a distinct entity, and although a municipality may appropriate money for the operation of a board of health the municipality cannot exercise control over the same and the board would control its own employees.

The CWA has made two other arguments concerning this matter. First, they argue that at most the Board is a joint employer with the County concerning the 32 challenged voters, and second, they argue that even if the Board had been created as separate employer the employees in question received no notice of the Board's creation or that they were transferred to the Board. The CWA therefore believes that they remained employees of the County. Regarding the first matter the undersigned notes that only employees of the County, and not employees of any joint employer that the County may be a part of, are eligible to vote in an election concerning only County employees. If indeed the Board and the County operated as a joint employer of the 32 challenged voters on April 3rd, then those voters would not have been eligible to vote in the election concerning only County employees. Regarding the second statement, the evidence reveals that the Board of Chosen Freeholders provided legal notice through various publications concerning the creation of the Board of Health, and several witnesses testified that a copy of the resolution (or at least of a resolution perhaps concerning the creation of the Board) was posted where interested employees could view the same.[24/] The facts also show that Mr. Kaufman conducted a meeting concerning the transfer of employees from the County to the Board and gave interested individuals an opportunity to discuss the matter. Nevertheless, the undersigned believes that the lack of any notice would not in itself negate the fact that the Board had become a separate employer and that the employees had been transferred to the Board prior to April 3rd.

In conclusion, based upon the above discussion the undersigned believes that not only was the Board of Health functioning as a separate entity prior to April 3, 1978, but certainly pursuant to statute and the facts the 32 voters in question had been transferred to the Board prior to April 3rd, and therefore were not in an eligible voting category on the date of the second election. The undersigned therefore recommends that

24/ T-III, p. 200; T-IV, p.4

the challenge to the 32 voters in question be sustained, and that their ballots not be counted.

CETA Project Employees

Although the undersigned has recommended that the ballots of the 32 challenged voters not be counted, the undersigned recognizes that if the Director of Representation does not accept that recommendation an outstanding question would remain concerning ten of the above-discussed 32 voters. The facts show that those ten voters were so called CETA Project Employees and the County and the CSA contend that those individuals are not public employees within the meaning of the Act and therefore should not be permitted to vote in a Commission conducted election. The CWA however contends that Project Employees are public employees within the meaning of the Act and were therefore entitled to vote in the April 3rd election. Considerable evidence was presented during the hearing from all parties at interest concerning the events that occurred at the time of the consent conference which was conducted in this matter on February 16, 1978. Mr. McGinnis, the County labor negotiator, testified that the parties had agreed to exclude Project Employees from the voting unit and he, in fact, testified that the parties had agreed that the word "seasonal" would include both CETA Project Employees and so-called temporary 80-day employees, and that employees holding those titles would be excluded from voting in the election.[25/] However, Edward Schultz, the representative for the CWA, testified that the parties did not intend to exclude either CETA Project Employees or T-80 employees from the consent agreement.[26/] The undersigned has reviewed all of the conflicting testimony concerning the events that occurred at the time of the taking of the consent and it is apparent that a meeting of the minds did not occur as to the inclusion or exclusion of CETA Project Employees and T-80 employees. Therefore the decision will rest with the undersigned to determine whether employees holding those titles are public employees within the meaning of the Act and may be eligible to vote, and whether they have a community of interest with the unit in question.

Regarding CETA Project Employees, the evidence shows as presented by Mr. McGinnis that Project Employees are not the same as regular CETA employees. Regular CETA employees generally have an indefinite employment status and perform the same work as regularly employed individuals. The parties agree without dispute that regularly employed CETA personnel should be included in the unit in question. However, the parties disagree as to whether CETA Project Employees are appropriate for the instant unit. Mr. McGinnis testified that Project Employees are employed for the length of a project and that projects

25/ T-III, pp. 8 and 9.
26/ T-III, pp. 109-140.

can run anywhere between 2 and 12 months.[27] Mr. McGinnis also testified that once CETA Project Employees are employed the County directs their work, they receive generally the same supervision as other employees, they follow generally the same guidelines as regular CETA employees, that the projects can be extended through future grants, but that Project Employees do not receive vacation and health benefits nor is there any guarantee for their employment beyond the termination of the project.[28] Further evidence concerning Project Employees came from Audrey Toth, one of the 32 disputed Health Department employees. She testified that as a CETA Project Employee she works with regularly employed personnel, she receives the same supervision, she performs normal duties, she works approximately the same hours as regular employees, and was given the impression that her position might become a permanent position in the future.[29]

The County and the CSA contend that because of the temporary nature of the projects that CETA Project Employees cannot be considered public employees within the meaning of the Act, but that even if they could, they would not have the requisite community of interest with the other employees in the instant unit to permit them to vote in the representation election. The Commission has considered the question of whether CETA employees are public employees within the meaning of the Act on several occasions.[30] Those cases however involve regular CETA employees and not Project Employees. Nevertheless, it is vital to consider those cases in determining whether Project Employees also fit the Commission's definition of a public employee within the meaning of the Act. A common issue raised in the CETA cases concern the source of funding for CETA employees as well as the questionable length of employment for CETA employees. The Director of Representation has considered those issues in the cited cases and has determined that those elements were not enough to prevent those employees from being considered public employees within the meaning of the Act. In the instant matter the County and the CSA contend that the Project Employees are different from regular CETA employees, and that the terms of their employment are more limited than regular CETA employees.

The undersigned has reviewed the cases concerning CETA employees as well as the testimony presented and finds that CETA Project Employees have a sufficient similarity to regular CETA employees and are therefore public employees within the meaning of the Act. In County of Hudson, supra, the Director determined that there was no real distinction between CETA employees who were employed under a CETA grant for only ten months and

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27/ T-III, p. 33.
28/ T-III, pp.34-41.
29/ T-IV, pp. 53-62.
30/ In re County of Somerset, D.R. No. 79-9, 4 NJPER 397 (¶4179, 1978); In re Twp. Mine Hill, P.E.R.C. No. 79-8, D.R. No. 79-4, 4 NJPER, 297 (¶4148, 1978); In re County of Hudson, D.R. No. 79-3, 4 NJPER 294 (¶4147, 1978); In re Passaic County, D.R. No. 78-29, 4 NJPER 8 (¶ 4006, 1977)

those CETA employees who were employed for an indefinite period of time. Likewise in the instant matter CETA employees who may be employed between 2 and 12 months of the year are no less employees than those CETA employees who have an indefinite employment status. Moreover, the testimony reveals that CETA Projects can be extended and that employees holding those positions may eventually be offered permanent employment.[31/] Certainly the evidence shows that Project Employees are more than just casual employees, they work a defined period of time, they work a fairly normal work day, and they demonstrate a continuity and regularity of employment, albeit for a shorter period of time, but sufficient to justify the finding that they are public employees within the meaning of the Act. Although the County and the CSA argue that Project Employees would not have a community of interest with the instant unit, given the Commission's broad based unit concept, it would be reasonable to find that Project Employees have a sufficient community of interest with the unit in question to justify their placement in the unit. The undersigned therefore recommends that CETA Project Employees are public employees within the meaning of the Act and have a sufficient community of interest to belong to the unit in question.

Although the undersigned has recommended that the instant Project Employees are public employees and would otherwise have a right to vote in the instant election, the fact remains that the ten Project Employees in question have been found to be employees of the Ocean County Board of Health and not of the County, and on that basis were not eligible to vote in the election conducted on April 3rd. If the Director of Representation did not adopt the undersigned's recommendation concerning Board of Health employees and were to permit those votes to be counted, then the undersigned would recommend that the ten CETA Project Employees' be eligible to vote if otherwise found eligible by the Director of Representation.

Temporary 80-day Employees

The final question to be answered concerns six voters in the election conducted on April 3rd. The County and the CSA contend that said voters were so-called T-80 employees, the classification provided by the State Civil Service Commission, and that because of their unique nature those employees were not public employees within the meaning of the Act and they did not have a right to vote in the election. The evidence concerning T-80 employees shows quite clearly that T-80's do not receive any vacation, sick leave, or health benefits provided other County employees, nor were they

31/ T-IV, p. 62.

paid on a yearly salary basis.[32] In fact, the testimony concerning the T-80's showed that employees holding those positions could be employed for no more than 80 days during a calendar year and that upon reaching the 80 days the position would be terminated. Although the evidence showed that it was possible to reappoint an individual to another T-80 position, it could not be the same position, and the individual would still be terminated at the end of 80 days. The evidence further shows that T-80's were paid either on a per diem or hourly basis and not provided a regular salary or sick leave as were full-time employees.[33]

Neither the County nor CSA believe that T-80 employees demonstrate a sufficient continuity or regularity of employment to be considered public employees within the meaning the Act. They also argue that T-80 employees lack a sufficient community of interest with other employees who are already in the unit and should therefore not have been entitled to vote in the instant representation election. Upon review of the testimony and the law concerning per diem and part-time employees the undersigned believes that T-80 employees demonstrate a sufficient continuity and regularity of employment, and community of interest with other employees, to justify their inclusion in the instant unit and their right to vote in the representation election. Stacey Werthwein, a former T-80 employee, testified that as a T-80 she worked with other full-time employees, that she received the same supervision, that she worked approximately the same hours and days, and that at the conclusion of her first T-80 position she was given a different T-80 title but performed essentially the same duties.[34] The evidence further reveals that individuals holding T-80 positions might often be given permanent positions at the termination of their T-80 positions. The undersigned believes that a T-80 position is similar to a per diem substitute position in the education field. In In re Bridgewater-Raritan Regional Board of Education, D.R. No. 79-12, 4 NJPER _____ (¶ _____ 1978), the Director of Representation found that per diem substitute teachers who worked a period of 30 days during the school year and were eligible for reemployment thereafter were public employees within the meaning of the Act. Certainly T-80 employees who work for a longer period of time during a given year, and who may receive permanent employment thereafter are entitled, as per diem substitutes are entitled, to the rights provided by the Act. The facts show that T-80's, like per diem substitutes, are paid on a per diem or an hourly basis and that they similarly receive no vacation,

32/ T-III, pp. 42-43.
33/ T-II, pp. 105, 110; T-IV p. 125.
34/ T-II pp. 102, 103.

sick time or benefits. The undersigned therefore considers T-80's to be in a similar position to per diem substitutes and therefore recommends that T-80 employees are public employees within the meaning of the Act. The evidence reveals in fact that one of the T-80 employees, Stacey Werthwein, received a permanent position effective March 30, 1978. Although the County contends that her appointment was not made permanent until the Freeholders' meeting of April 5th, the undersigned believes that effective March 30, 1978, Werthwein's position became a permanent position and therefore she would have been eligible to vote in the election as a permanent employee or as a T-80 employee. Once again, noting the Commission's preference for the broad-based unit, the undersigned believes that a sufficient community of interest exists between T-80 employees and those employees in the existing unit. Thus the undersigned recommends that the challenge to the votes of the six T-80 employees be overruled and that their votes be counted.

Recommendations

Based upon the entire record herein and for the above-stated reasons the undersigned Hearing Officer recommends the following:

1. That the County of Ocean had standing to challenge the voters in the second election.

2. That Thomas Coccia was a supervisor within the meaning of the Act on the date of the second election and was therefore not in an eligible voting category and the challenge to his ballot should therefore be sustained.

3. That the Ocean County Board of Health was a separate public employer within the meaning of the Act prior to April 3rd and employed the 32 Health Department employees by April 3rd. Therefore those 32 voters were not employees of the County of Ocean on that date, were not in an eligible voting category, and the challenge to their ballots should therefore be sustained.

4. That CETA Project Employees are public employees within the meaning of the Act and the 10 employees in question would have a community of interest with employees in the unit if they were employed by the County. However, the undersigned finds that these employees are employed by the Board and were therefore not eligible to vote on April 3rd on that basis only.

5. That T-80 employees are public employees within the meaning of the Act, and have a community of interest with employees in the unit. Therefore, the

challenge to the six T-80 employees should be overruled and their votes counted.[35/]

Respectfully Submitted,

Arnold H. Zudick
Hearing Officer

DATED: December 8, 1978
Trenton, New Jersey

35/ The six ballots that should be counted are those of Stacey Werthwein, Donna Lynn Gordon, Richard Amos, John Flynn, Charles Keilitz and Maureen McCrystal.