CWA v. Board of Elections, 20 OCB 1 (BOC 1977) [Decision No. 1-77 (Cert.)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION
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In the Matter of

COMMUNICATIONS, WORKERS OF AMERICA, AFL-CIO

Petitioner DECISION NO.1-77

-and- DOCKET NO. RU-507-75

NEW YORK CITY BOARD OF ELECTIONS

Respondent
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A P P E A R A N C E S:

Mr. Charles Dowling
For the Union

Alan Friess, Esq.
Elaine Mills, Esq.
For the Employer

DECISION AND ORDER

On May 22, 1975, the Communications Workers of America, AFL-CIO,(CWA) petitioned the Board of Certification to add the titles of Temporary Clerk, Temporary Key Punch Operator, and Assistant Custodian to Certification No. 45-71,(as amended) a unit consisting of Clerks to the Board of Elections, which currently includes approximately 300 employees of the Board of Elections. Both parties agree that, though their office titles differ, the employees petitioned herein are all hired in the title of Temporary Clerk, and this proceeding will determine the status of all such employees.

The City of New York, on behalf of the Board of Elections opposes the petition, arguing that the Temporary Clerk's employment relationship is too casual and transient to fit the requirements of the New York City Collective Bargaining Law and the Taylor Law for public employee status.

Both parties have stipulated that if the Board of Certification finds that these employees are covered by the New York City Collective Bargaining Law, then they will be included in the existing unit. However, the Employer does not concede that the CWA would be the majority representative of the resulting combined unit.

A hearing was held before Eleanor MacDonald, Esq., Trial Examiner, on May 17, 1976, for the purpose of taking evidence regarding the unit placement of the petitioned for employees.

Following the hearing, the parties met several times at the suggestion of the OCB to try to resolve the issues raised by the Union's Petition and to attempt to reach an agreed standard for inclusion of some Temporary Clerks in the collective bargaining unit. The parties' efforts at settlement were not successful, and each party therefore submitted its suggestions to the Board for consideration in September, 1976. The Board sought to formulate standards for eligibility for representation with reference to other areas of City employment,

and various data were sought concerning employee turnover rates on a City-wide basis. Although it seemed probable that such data existed, after a delay of several months it became apparent that the desired statistics could not easily be developed, and to avoid further delay, we shall proceed to issue our decision.

## POSITIONS OF THE PARTIES

The petitioner argues that the similarity of working conditions and hiring practices justifies the inclusion of Temporary Clerks in the existing "industrial" unit. Asserting that a large number of Temporary Clerks are called back repeatedly and work for lengthy periods of time, the petitioner maintains that they share a community of interest with permanent workers. Further, alleging that a large number of Temporary Clerks become Clerks to the Board of Elections, the petitioner concludes that many temporary workers have a reasonable expectation of becoming permanent employees. The petitioner contends that past NLRB, PERB, and OCB decisions support the certification of the Temporary Clerks in the instant case.

The Employer opposes this petition on the ground that Temporary Clerks are not employees under the NYCCBL because "their employment relationship is too ephemeral to carry with it the rights and responsibilities of that law." Asserting that a large proportion of temporary workers do not return to

their positions in successive years, the Employer contends that there is not the substantial continuity of employment which is necessary to achieve public employee status. The Employer argues that "most temporaries are hire on a need basis for short times only," and "that they are not held to the same standards of attendance and performance as permanent clerks." Conceding that approximately 10% of employees hired as temporaries have attained permanent status over the last ten or fifteen years, the Employer contends that this factor does not constitute "a reasonable expectation of future employment." In addition, the Employer points to the political aspect of the employment recruitment process which allegedly compounds the casual and ephemeral nature of the Temporary Clerk's employment. The Employer argues that a denial of the Union's petition would be consistent with past PERB and NLRB decisions, especially the PERB "60% rule" which is discussed below.

## The Facts

Temporary Clerks at the Board of Elections are paid an hourly wage of $2.50. A few specialized employees (e.g. key punch operators) earn more than this, usually about $3.75 an hour. Permanent clerks at the Board of Elections earn approximately $7,200 a year, roughly $4.00 an hour.

The working conditions of permanent Clerks and Temporary Clerks are in some respects quite similar. They perform identical or similar tasks. They work side by side, using the same office facilities, and they work the same hours and enjoy the same lunch period. Ms. Betty Dolen, Executive Director of the Board of Elections, testified that permanent Clerks sometime supervise Temporary Clerks, although it appears that responsibility is delegated on an individual basis, without distinction as to temporary or permanent status.

Temporaries are not "required" to appear for work every day. That is, they are not disciplined if they miss a day of work, they merely do not get paid. However, if a Temporary Clerk is absent for a few days each week, by the second week this temporary will probably be fired.

When Temporary Clerks are needed, the county political organizations, relying upon names submitted by district leaders, send the exact number of employees needed to the Board. According to Ms. Dolen, the Board has the authority to reject unsuitable applicants. Although Dolen did not specify the frequency, she said that this had occurred. In most instances, however, it appears that the recommended applicants are accepted after a brief examination is administered. Dolen testified that the Board sometimes

requests that a particular temporary employee who had performed well in the past be rehired, but the county organization does not always honor the request.

The length of employment for temporary workers may range from one day per year to continuously throughout the year. According to Ms. Dolen, prior to 1972, Temporary Clerks worked mainly during five or six different periods during the year, covering different projects such as primaries and school board elections. Since that time, due to economic limitations on hiring permanent employees, the length of temporary appointments has been increasing. According to Dolen, beginning about 1973, many Temporary Clerks have worked for "seven, eight or nine months." In addition, both parties agree that, since 1971, roughly 90% of the temporaries worked more than 32 hours per year.

Employment figures supplied by the Board of Elections show that during the years 1973 and 1974, about 40 Temporary Clerks worked year round, 70 to 80 Temporary Clerks worked about 6 weeks a year, and 50 to 60 Temporary Clerks worked 4 weeks per year. In 1975, 160 to 200 Temporary Clerks worked almost all year. As of the hearing an May 1976, at least 50 Temporary Clerks were expected to work all year.

The number of Temporary Clerks has been declining as the average length of employment has increased. Tn 1972 there

were 769 Temporary Clerks, while there were 577 in 1973 and 382 in 1974. In 1975, there were only 270 people hired as Temporary Clerks.

The Employer presented figures concerning the return rate of Temporary Clerks over successive years; however these figures were not complete for each borough for the years surveyed. It appears that the return rate varies widely from year to year and borough to borough. Thus, in 1975, 96% of Temporary Clerks employed in Queens had been employed there in the previous year, while in 1974 only 31% of the Temporary Clerks were repeats from the prior year. Over the same period, in the Bronx the rate of returning Temporary Clerks was 39% for 1975 and 24% for 1974, while in Brooklyn the figures were respectively 50% and 27%.

On the average 10% of Temporary Clerks employed over the last 10 or 15 years have become Clerks to the Board.*

## Discussion

The issue before the Board is whether Temporary Clerks have a sufficiently stable and continuing relationship with the Employer that they can be included in the existing unit under the NYCCBL. The statute does not provide any standards pertinent to this issue.

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* Such a change would involve not only a change in title, but also placement on a permanent budget line and a higher salary.

A brief review of the Board of Elections employment relationships is necessary to a discussion of the instant case. As stated in the Board's Decision No. 19-71, which certified the existing unit of Clerks to the Board of Elections:

> "The Board of Elections was created pursuant to Article 2 of the New York State Constitution and has as its function the implementation of the purposes and provisions of that Article and of the Election Law. The Board is constitutionally and statutorily mandated to maintain absolute political balance so that the representation of the two major political parties is reflected in the personnel of the Board of Elections ...
>
> The Board of Elections is also unique in its mission. It performs the singular function of conducting two elections (primary and general) each year and of registering the persons eligible to vote in them. In recent years, the Board has also occasionally conducted elections for such agencies as the Board of Education and for various community organizations. It also conducts special elections from time to time as part of its regular duties where the courts find that there have been irregularities in an ordinary election. The year-round operation of the agency thus calls for the actual performance of the agency's chief function on only a few days of the year, the rest of the time being given to preparation and to routine internal administrative tasks. This, in turn, means that relatively great demands are made upon the staff during a few short periods of peak activity. The result is that staff assignments are fluid and that any title may be called upon to perform the duties of almost any other title in the organization; and that, in practice, no employee works throughout the year without spending a significant portion of his time working at tasks of titles other than his own.

> The four Commissioners are designated by the county committees of their respective political parties and are then appointed by the New York City Council. They have absolute and final decision-and-policy making powers in all matters concerning the Board. They have complete discretion in the hiring, firing, assignment and discipline of all Board employees. They establish the titles, ranks, duties and salaries of these employees, all of whom are in the Unclassified Civil Service ...
>
> The candidate for employment is interviewed by the Commissioners, the Administrative Manager, one of the Secretaries to the Commissioners, or one of the Senior Administrators. He is given a test which requires about five minutes to complete and which is corrected on the spot. The candidate is then invariably hired. The ease with which he is hired is balanced, however, by the ease with which he may be fired or disciplined without right of appeal. He is without benefit of tenure, and no job specifications exist for any of the titles employed by the Board..."

Within the context of this unique employment relationship, the Board must now devise a standard which distinguishes "Public employees" from "casual" workers who do not enjoy collective bargaining rights under the New York City Collective Bargaining Law because their employment is brief, intermittent and non-continuous. In both the public and private sectors, differing criteria have been used to determine these crucial distinctions, presenting the Board with a variety of approaches to these issues.

PERB Precedents

The New York State Public Employment Relations Board has in some cases defined a casual employment relationship in terms of a mathematically precise formula. Focusing upon summer lifeguards, in State of New York and N.Y. State Employees Council 50, AFSCME, AFL-CIO and CSEA, Inc., 5 PERB 3022, (1972), PERB promulgated the following standards:

> "employment is casual if (1) the season is shorter than 6 weeks a year; or (2) the employees are required to work: fewer than 20 hours a week (the Board recognized that this standard might not apply to teachers, especially in institutions of higher education); or (3) fewer than 60% of the employees in the title return for at least two successive seasons."

In a supplemental decision to that case, 5 PERB 3039, PERB clarified the application of these standards, stating:

> "The test which we impose relate-s to the occupational title, rather than to individual employees. The logic of this proposition can be seen more clearly if applied to the criteria that employment is casual if fewer than 60% of the employees in a title return for two successive years. Clearly, if more than 60% of the employees in an occupational title return for 2 successive years, the employment is not casual and all persons engaged in such employment are covered by the Taylor Law." [emphasis added]

These standards have recently been applied to deny

certification to per diem substitute teachers[1] and to certify lifeguards[2]. In the former case PERB found that approximately 40% of the substitutes work no more than 10 days per school year, and that the majority of the substitutes work for less than a quarter of the year. The Board also noted the absence of the 60% return rate over two successive seasons and the highly variable character of individual employment patterns. In Town of Islip an Local 237 (IBT), finding that the lifeguards had more than 60% return rate over two successive years, PERB held that "the lifeguards were seasonal rather than casual and therefore were 'public employees' under the Act."

However, PERB has found these aforementioned standards inapplicable in certain instances. The Board ruled that student library pages who worked less than 20 hours per week were "public employees" within the meaning of the act.[3] Because the student pages worked year-round, PERB found that the application of the criteria promulgated in the State and AFSCME and CSEA case was not appropriate. PERB stated:

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East Ramapo Central School District and Substitute Teachers Association of Ramapo No. 26, PERB 4033 (1973)

Town of Islip and Local 237, International Brotherhood of Teamsters, 8 PERB 4022 (1975)

Pearl River Library and Pearl River Public Library Page Assoc. And CSEA, Inc., 7 PERB 4034 (1974)

> ..."The employer contends that the pages fall within two of the [State standards], i.e. they work less than 20 hours per week and that their employment averages less than two years (which it equates to two consecutive seasons'). While pages work less than 20 hours per week, and even assuming that one could by tortured logic equate a 'season to a year,' the attempted application to year-round employees is not appropriate."

Thus, the PERB mathematical approach is not applied in some instances,

NLRB Precedents

In the private sector, the NLRB has focused upon differing work practice criteria in determining the certifiability of temporary employees. Concerning the representative rights of plumbers and pipefitters employed seasonally at scattered construction sites, the NLRB ordered an election, finding that "preference is given to former Daniel pipefitters and plumbers in establishing the work force for new projects. It is common practice for foremen to take plumbers and pipefitters with them when they transfer them from one project to another."[4] Y The Board concluded that "these men act as a nucleus of work force on each construction project." Similarly, in a case dealing with railroad construction employees, the

[4] Daniel Construction Co., 48 LRRM 1637 (1961).

NLRB held that employees constituted a stable work force since the employer has a nucleus of track laborers who have been employed for a substantial period of time during past years and who have continuing interest in bargaining unit, and there is no indication that the employer will not continue to employ a substantial force of track laborers in future.[5] Continuity of the work force within the year has been an important factor in the Board's decisions.

In Daniel Ornamental Iron Co., 79 LRRM 1343, (1972), the NLRB ordered an election where employees were found to have a "substantial and continuing interest in the unit." The Board stated:

> "In cases involving year round operations with a fluctuating need for extra or on-call employees; the Board has found it equitable to include in the units on the basis of available records of employment, all extra or part-time employees who had worked a minimum of 15 days in the calendar quarter proceeding the eligibility date."[6]

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Queen City Railroad Construction, Inc., 58 LRRM 1307, (1965). In this case, "of the 34 laborers employed at the time of hearing, approximately 20 had been working continuously for 3 months preceding the hearing, and 10 laborers had been employed continuously for 6 months preceding the hearing."

Daniel Ornamental Iron Co., supra p. 1344.

In another case involving retail employee, Sees' Candy Shop, 82 LRRM 1575, (1973), the Board again focused upon time spent on the job during the year as the factor which distinguishes casual employees from those with "sufficient community of interest to be included in the unit."

In that case the NLRB held that employees who worked only during peak holiday periods (Christmas, Thanksgiving and the like) were casual employees, whereas those salespersons who worked more than just during the peak periods were similar to regular part-time employees. Thus, based on calculations specific to that retail store's schedule, the Board held that employees who worked more than 350 hours in a year were entitled to an election.

More recently, however, NLRB decisions have been concerned with the employee's "reasonable anticipation of reemployment" in determining whether employees possess sufficient interest in employment conditions to warrant inclusion in a unit. Holding that support personnel, hired to work on theater productions when needed, were eligible for inclusion in an appropriate unit, the Board, in Julliard School, 005 LRRM 1129 (1974), relied upon three basic factors: "1) The employees work for periods of time which indicates repetitive employment and which permits them reasonably to anticipate

reemployment in the near of foreseeable future. 2) The Employer hires from the same labor market and some of these 'per diems' work for as long as 35 weeks." 3) Working conditions, wages, and nature of work are essentially similar to those of permanent staff. Considering the length and nature of the work, the Board extended voter eligibility to all "employees who have been employed by the Employer during 2 productions for a total of five working days over a one-year period, or have been employed by the Employer for at least 15 days over a two-year period, " 85 LRRM 1129, at 1132.

In Trans World Airlines, 86 LRRM 1434 (1974), the NLRB again applied the "reasonable expectation of reemployment" standard to find temporary employees who work more or less on a seasonal basis (throughout the year for not more than 120 days) properly included with voting privileges in a unit of full-time and regular part-time employees. The Board recognized that these employees were the employer's primary source when replacing its regular employees, and also that the Employer's hiring policy encourages temporaries to return. The Board then specified its conclusion as follows:

> "Any temporary who has been employed on a minimum of three occasions since January 1972, or is currently employed for the third time ans is receiving the regular rate of pay for the salary

> grade in which he or she has been employed, and who has not otherwise been discharged for cause will be included in the unit and eligible to vote."[7]

The NLRB has placed less emphasis than PERB upon the number of employees who return year after year. For example, in Fordham University and A.A.U.P., 87 LRRM 1643, the Board reaffirmed its earlier rulings, which held that faculty with terminal contracts are included in an appropriate unit. The Board stated:

> "Even if a probationary or temporary faculty member has his expectation of future employment clearly established by the terms of the written contract, nevertheless, it is clear that he continues to share a community of interest with other faculty members before his contract terminates." (emphasis added)[8]

In summary, the NLRB has focused upon a variety of factors in distinguishing "casual" employees from "seasonal" or "regular" temporary workers. The Board has sought a case-by-case approach which considers the nature of the industry involved and the stability of the seasonal employees. Viewing

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[7] Trans World Airlines, 86 LRRM 1434 at 1435.

[8] Fordham University, 87 LRRM at 1649.

employer hiring and rehiring practices, the return rate of employees per relevant job season, and the length of employment throughout the year, the NLRB has frequently promulgated a "reasonable anticipation of reemployment" standard. Unlike PERB, the NLRB has not relied upon a mathematically precise formula to resolve the issue.

The discussion of PERB and NLRB precedents above makes it clear that the Board must fashion a standard appropriate to the facts of each case when the issue concerns casual or temporary employees. A rigid application of standards adopted in a prior case will not resolve the issues fairly and adequately. Thus, we shall not apply the 60% standard urged by the City because the facts of the instant case require a different approach from that used by PERB in the State and CSEA case discussed above. Although some Temporary Clerks admittedly have an "ephemeral" employment relationship as urged by the Employer, there can be no question that those employees who work long and continuous periods of time have rights that must be recognized under the NYCCBL.

Although the parties were not able to settle the issue presented in this case, their joint discussions resulted in a refinement of their respective positions. The Employer and Union suggestions for determining the eligibility of Temporary Clerks to participate in collective bargaining are summarized

below. We have noted that the Employer favors adoption of the PERB 11 60% standard, "which would exclude all Temporary Clerks from eligibility. The City position given here is thus a less favored alternative.

| | Eligibility for Representation (1 year) | Eligibility for Representation (More than 1 year) | Loss of Eligibility |
|---|---|---|---|
| Employer Position | 6 months "continuous" employment in one "employment year". | 3 months "continuous" employment in each of 2 consecutive years (6 months total in 2 years). | Occurs after one year following "employment year". |
| Union Position | 3 months "continuous" employment. | 2 periods of 2 months consecutive employment in up to 2 years (4 months total in 2 years).<br><br>Total 100 days sporadic employment in up to 2 years. | Subtract 40 days credit for first year off job, then 80 days subtracted for second year, 150 subtracted for third year. |

FINDINGS

We have determined, based on the evidence before us, that there are in reality two groups of Temporary Clerks. One group consists of those Temporary Clerks who work for short, non-continuous and infrequent periods of time at the Board of Elections. This group has the "ephemeral" status cited by the employer, they are not employees under our statute, and the inclusion of members of this group in a collective bargaining unit with which they have no community of interest would not foster sound labor relations as required by our statute and the Rules promulgated thereunder.[9] Moreover, these employees do not constitute, either alone or together with any other group, an appropriate unit for collective bargaining. on the other hand, there is another group of Temporary Clerks who work for long and continuous periods of time at the Board of Elections. This group of Temporary Clerks has a community of interest with the Clerks in the existing unit, and their inclusion in the unit would foster stable labor relations.

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[9] NYCCBL §1173-5.0b, Rules 2.10.

Therefore, as a practical measure of the continuity required for stable labor relations and as a measure of their community of interest with members of the existing unit, we have formulated the following standards for inclusion of Temporary Clerks in the existing unit:

Temporary Clerks who have been in a paid employment status for at least one half of the regularly scheduled hours of work in each of the two immediately preceding twelve month periods or who have been in a paid employment status for all of the regularly scheduled hours of work in the immediately preceding twelve month period should be included in the unit. Reasonable allowances for absence from the payroll due to illness or vacation leave shall be made in implementing the above standards, provided that such absences are comparable to leave times granted to full-time Clerks to the Board of Elections. Loss of eligibility will occur after a continuous twelve month period during which the Temporary Clerk is not in a paid employment status at the Board of Elections or upon resignation with intent to be unavailable for future employment at the Board of Elections.

In order to ascertain whether an election is required to determine the majority representative of the unit found appropriate for purposes of collective bargaining, we shall order the Board of Elections to submit promptly a list of Temporary Clerks who are ~eligible for collective bargaining under the standards we have enunciated in our Order herein. If the number of eligible Temporary Clerks is such that the number of dues check-off authorizations on behalf of CWA would constitute a majority in the amended unit, we shall certify CWA as the representative of that amended unit. If not, we shall then determine what further steps, including an election are required in order to determine the representative status in the amended unit.

## O R D E R

Pursuant to the powers vested in the Board of Certification by the New York City Collective Bargaining Law, it is hereby

DETERMINED that the appropriate unit herein consists of employees in the titles set forth in Certification 45-71 (as amended by Decisions 42-75 and 49-75) and Temporary Clerks to the Board of Elections who have been in a paid employment status for at least one half of the regularly scheduled hours of work in

each of the two immediately preceding twelve month periods or who have been in a paid employment status for all of the regularly scheduled hours of work in the immediately preceding twelve-month period, provided that reasonable allowances for absence from payroll for illness or vacation leave shall be made comparable to such leave times granted to full time employees in the Board of Elections, and provided further that Temporary Clerks who leave paid employment status for a continuous period of twelve months or who resign with the intent to be unavailable for future employment shall be excluded from the appropriate unit; and it is further

ORDERED that the Board of Elections submit to the Board of Certification within 30 days of service of the within decision a list of Temporary Clerks who are eligible for collective bargaining under the standards enunciated above.

DATED: New York, New York
January 27, 1977

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

ERIC J. SCHMERTZ
MEMBER