GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	)	
Teamsters, Local Union No. 639 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO,	)	PERB Case No. 94-R-04
	)	Opinion No. 411
Petitioner,	)	
and	)	
District of Columbia Public Schools,	)	
Agency.	)	FOR PUBLICATION

DECISION AND ORDER ON CHALLENGED BALLOTS

Pursuant to an Order of the District of Columbia Public Employee Relations Board (Board) issued on September 14, 1994 [1], a secret mail ballot election was held in the above-captioned proceeding with the tally, conducted by the Board's staff, taking place at the Board's offices on November 4, 1994.

The results of the tally of votes were as follows:

"Teamsters	Undetermined
No Union	Undetermined
Undisclosed Ballots	1
Challenged Ballots	7
Void Ballots	2 "

The parties were unable to resolve challenges by the District of Columbia Public Schools (DCPS) to the votes of seven employees. The Board's agent ruled that the challenged ballots were sufficient

[1] Slip Op. No. 346, PERB Case No. 94-R-04 (1994).

in number to affect the outcome of the election since the challenged ballots exceeded the margin of difference of valid ballots cast for or against union representation. The results of the election were reported to the parties in a "Report on Election Results" issued on November 7, 1994. On November 14, 1994, pursuant to Board Rule 515.2, the DCPS filed objections, based solely upon the challenged ballots.

Pursuant to Board Rule 515.4, the Board's Executive Director directed the parties to file briefs on the objections, including supporting documentation and affidavits, for the purpose of making findings and recommendations concerning determinative challenges. Specifically, the parties were requested to address the following issues: (1) whether or not the employees whose ballots are challenged are in fact temporary employees; (2) whether or not any of the challenged employees may be appropriately included in the collective bargaining unit and (3) any procedural issues with respect to raising this issue as a post-election challenge.

In response to the Board's directive, the Teamsters submitted a letter asserting that the challenged employees are temporary only by classification; and, that in fact these employees are long term employees appropriately included in the unit. [2]/ DCPS submitted a brief and exhibits in support of its contention that these challenged employees should be excluded as temporary. The Board's staff has completed the investigation and a report of findings has been presented to the Board. Based on the evidence, we hereby

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[2]/ The Teamsters also assert that by not challenging these employees as ineligible prior to the election, DCPS has waived its right to do so. Although the appropriate time to raise such issues is prior to the Board's Decision and Order on unit determination and direction of election, the CMPA and Board Rules are silent on when issues concerning the eligibility of an employee to vote in a directed election must be raised. The National Labor Relations Board has adopted a policy, the **Norris-Thermodor** rule, which finds a waiver of the right to challenge the eligibility of a voter at the polls only upon a prior written agreement between the parties, which expressly provides that issues of eligibility resolved therein be final and binding.

We find this approach suitable to determining the existence of a waiver under the CMPA. In the instant proceeding, no such agreement exists, and DCPS should not be deemed to have waived its right to challenge the eligibility of these employees notwithstanding its inclusion of these employees on the list of eligible employees and DCPS' failure to raise the issue before the Board prior to the Decision and Order and election.

overrule the challenges.[3]/

To justify its challenges, DCPS must establish that these seven employees, classified by DCPS as "temporary indefinite", have no expectation of continued employment, thereby precluding a finding that they share a community of interest with regular employees in the unit. The Board has not excluded employees based merely on their classification as temporary employees. As early as 1981, the Board found temporary employees (13-month appointments) appropriately included in a unit where their "conditions of work and employment interests, including fringe benefits, are like regular employees." District Council 20, American Federation of State, County and Municipal Employees, AFL-CIO and D.C. Office of Management, PERB Case No. 80-R-02 (Certification of Representative, 1981). See, also, Committee of Interns and Residents and D.C. General Hospital Commission, 37 DCR 740, Slip Op. No. 237, PERB Case No. 89-R-02 (1990)(unit found appropriate included fixed term medical and dental interns and fellows, on the payroll a minimum of 6 months out of a year, with regular employee residents). To exclude employees as temporary, the Board has held that it is not sufficient that the employees in question "are temporary only in the sense they receive temporary appointments." American Federation of State, County and Municipal Employees, Council 20 and D.C. Public Schools, 31 DCR 2287, 2288, Slip Op. No. 70 at 2, PERB Case No. 83-R-08 (1984). A history of reappointment establishes a strong expectation of reemployment and thereby the substantial interest in working conditions necessary to establish a community of interest with their regular employee counterparts. Id.

Citing NLRB case law, DCPS acknowledges these criteria. It presents no evidence, however, that these employees fail to meet these criteria, merely asserting that "the challenged employees do not have reasonable expectation of continued employment which would justify inclusion in an appropriate unit for bargaining." (DCPS Resp. at 4.) The only evidence submitted by DCPS are the personnel action forms for the challenged employees, which reflect a 12-month reappointment history for each of them for the following years:

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[3]/ In Opinion No. 346, the Board found appropriate a unit of employees consisting of EG-9 Career Placement Specialists. The employees on the alphabetical list provided by DCPS, pursuant to Board Rule 502.3, included the employees that DCPS later challenged as ineligible to vote, and their names also appeared on the subsequent voter eligibility list provided by DCPS. In our view, it is incumbent upon DCPS to provide evidence to support challenges to employees it had previously considered eligible.

1983, 1985, 1988, 1989, 1990 and 1993.[4]/ Five of the six employees that remain in issue have employment histories through regular reappointments that range from 5 to 11 years without a break in service. We find that these employees clearly have a reasonable expectation of continued employment.

DCPS further argues that temporary EG-9 Career Placement Specialists, unlike their regular counterparts, neither have nor obtain job tenure or acquire seniority. These disparities, DCPS contends, would put these employees at a disadvantage with other members of the bargaining unit. The Board has held that "some dissimilarities of a particular group of employees or the absence of a factor that is not shared to the same extent as the remainder of the unit is not controlling where, under the totality of the circumstances, a general community of interest prevails." District 1199E-D.C. National Union of Hospital & Health Care Employees International Union and Department of Human Services, Commission on Public Health, 39 DCR 8651, Slip Op. No. 293 at n. 5, PERB Case No. 91-R-01 (1991). The distinctions noted by DCPS are not sufficient to warrant disturbing the Board's finding that this unit of regular and temporary employees is appropriate and would promote effective labor relations and efficiency of agency operations. See, Washington Teachers' Union, Local 6 and D.C. Public Schools, 36 DCR 6497, Slip Op. No. 233, PERB Case No. 88-R-09 (1989).

In view of the above, the Board overrules the six remaining challenges made by DCPS. Accordingly, these ballots shall forthwith be opened (along with the ballot no longer challenged by DCPS), commingled with the undisclosed ballot and tallied. The Executive Director shall issue a Certification of Election Results and, if appropriate, issue a Certification of Representative.

ORDER

IT IS HEREBY ORDERED THAT:

1. Based on the foregoing discussion, the D.C. Public Schools challenges to six ballots are overruled;

2. All valid ballots shall forthwith be opened and counted and a certification of election results issued; and

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[4]/ In its response, DCPS withdrew one of its challenges, leaving six challenged ballots for determination by the Board.

3. If appropriate, the Board shall simultaneously issue a Certification of Representative.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

January 17, 1995