H.E. NO. 2009-4

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

In the Matter of

NEW JERSEY ADMINISTRATIVE
OFFICE OF THE COURTS,

Respondent,

-and- Docket No. CO-2006-148

COMMUNICATION WORKERS OF AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find the New Jersey Administrative Office of the Courts violated Section 5.4a(5) and, derivatively (1), of the New Jersey Employer-Employee Relations Act when it unilaterally implemented a program which eliminated the possibility that Free-Lance Interpreters could become members of the collective negotiations unit currently represented by the Communications Workers of America. The Hearing Examiner also found that the unfair practice charge was timely filed.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent
Ballard Spahr Andrews & Ingersoll, attorneys
(Steven W. Suflas, of counsel)

For the Charging Party
Weissman & Mintz, attorneys
(Steven P. Weissman, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On December 7, 2005, the Communication Workers of America, AFL-CIO (CWA), filed an unfair practice charge (C-2)[1/] with the Public Employment Relations Commission (Commission) against the New Jersey Administrative Office of the Courts (AOC or

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1/ Exhibits received in evidence marked as "C" refer to Commission exhibits, those marked "CP" refer to the Charging Party's exhibits, and those marked "R" refer to the Respondent's exhibits. The transcript citation 1T1 refers to the transcript taken on May 29, 2007 at page 1, 2T refers to the October 20, 2007 transcript, and 3T refers to the March 18, 2008 transcript.

Judiciary). The CWA alleges that the AOC advised it that free-lance interpreters (FLI) who signed professional services agreements would be considered independent contractors and be ineligible for inclusion in the collective negotiations unit currently represented by the CWA. The CWA contends that the AOC's actions violate N.J.S.A. 34:13A-5.4a(1), (3) and (5)[2/] of the New Jersey Employer-Employee Relations Act (Act).

On May 22, 2006, the Director of Unfair Practices issued a complaint and notice of hearing (C-1). On June 1, 2006, the AOC filed its answer (C-3) generally denying that its actions violate the Act. The parties mutually sought and were granted multiple postponements of scheduled hearings. During that time, the parties engaged in a series of meetings attempting to resolve the underlying dispute. Ultimately, the settlement efforts proved unsuccessful resulting in hearings conducted on May 29, October 30, 2007 and March 18, 2008, at the Commission's offices in

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2/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

Trenton, New Jersey. The parties were afforded the opportunity to examine and cross-examine witnesses, present relevant evidence, and argue orally. Briefs were simultaneously submitted on July 11, 2008.

Upon the entire record, I make the following:

Findings of Fact

1. The parties stipulated that the AOC is a public employer and the CWA is a public employee representative within the meaning of the Act (1T8).

2. On February 14, 2003, the Director of Representation issued a decision finding that certain FLIs are public employees within the meaning of the Act and may be represented for purposes of collective negotiations. New Jersey State Judiciary, D.R. No. 2003-13, 29 NJPER 131 (¶40 2003). On May 30, 2003, the Commission affirmed the Director's decision finding that FLIs employed by the State Judiciary were public employees for purposes of the Act and directed an election. New Jersey State Judiciary, P.E.R.C. No. 2003-88, 29 NJPER 254 (¶76 2003).

3. In his decision, D.R. No. 2003-13, the Director of Representation found that in March 1995, and again in 1999, the AOC promulgated and revised "Guidelines for Contracting Free-Lance Interpreters in the Superior Court" (Guidelines) (CP-17). The Director and the Commission relied heavily upon the

Guidelines for establishing the work rules pertaining to the FLIs' employment with the Judiciary. The Commission said that:

> [t]he Guidelines establish a system of managing free-lance interpreters and help accomplish several objectives; the objectives include ensuring quality and availability, promoting uniformity, maintaining the number and diversity of both FLIs and staff interpreters, apportioning assignments fairly, and coordinating FLI services efficiently and cost-effectively. To implement this management system and meet these objectives, the Guidelines fix conditions for all FLIs and prohibit individual FLIs from negotiating different contractual arrangements. Every FLI must agree to follow the Code of Professional Conduct for Interpreters and to abide by every provision of the Guidelines (Guidelines at 4). The Judiciary also controls the quality of FLI services by requiring FLIs to pass a Court Interpreter Screening Examination (if one is available for the language) and to complete a seminar on the Code of Professional Conduct.
>
> The Guidelines comprehensively cover these areas: Interpreters who may be used; rotation of assignments; exceptions to the rotation policy; schedule of rates; cancellations; double payments; verification and evaluation of services; negotiation of fees; refusal of assignments; and working as a private consultant rather than through an agency. These guidelines specify working conditions such as pay, hours, evaluation procedures, and disciplinary review procedures. The parties disagree over the significance of some of the Guidelines' particulars, but as a whole the Guidelines put the Judiciary's stamp of control on FLI services and working conditions. [New Jersey State Judiciary, 29 NJPER at 260.]

4. On July 2, 2004, during negotiations, the AOC advised the CWA that the Guidelines would be rescinded. In or about August, 2004, the AOC rescinded the Guidelines (2T16; 3T16-3T18; R-2; R-10). The AOC advised that all terms and conditions for FLIs included in the collective negotiations unit would be reflected in the collective agreement and the conditions of employment pertaining to non-represented FLIs (those not included in the unit) would be set forth in Professional Services Agreements (PSAs) (3T18-3T19). While some of the provisions contained in the Guidelines never came to fruition (2T13), the AOC still follows most of the principles and operational directives contained therein (2T44-2T54; 2T62-2T63; 3T16-3T18).

5. In New Jersey State Judiciary, the Commission compared the Act's definition of public employee with the definition of employee found in the private sector. The Commission noted that N.J.S.A. 34:13A-3(d) defines both "employee" and "public employee":

> The term 'employee' shall include any employee. . . . This term, however, shall not include any individual taking the place of any employee whose work has ceased as aforesaid, nor shall it include any individual employed by his parent or spouse, or in the domestic service of any person in the home of the employer, or employed by any company owning or operating a railroad or railway express subject to the provisions of the Railway Labor Act. **This term shall include any public employee, i.e., any person holding a position, by appointment or contract, or employment in the service of a**

> **public employer, except elected officials, members of boards and commissions, managerial executives and confidential employees.** [New Jersey State Judiciary, 29 NJPER at 257. Emphasis in original.]

The Commission then asked whether the FLIs who were seeking to be represented in the petitioned-for negotiations unit held their positions "by appointment or contract, or employment in the service of a public employer." The Commission said that the ultimate answer to that question depended upon how broadly the definition of public employee is applied, or where it intersects with common law and labor relations concepts distinguishing between an employer/employee relationship and independent contractor status.

6. The Commission, in reviewing the National Labor Relation Act's (NLRA) definition of "employee" noted that the NLRA serves as a model for our Act, and is often used as a guide for construing the Act in instances where the two statutes have nearly identical language. See Lullo v. International Ass'n. of Fire Fighters, 55 N.J. 409 (1970) (Lullo). However, the Commission indicated that there were specific differences between the two statutes that could lead to differences in application. New Jersey State Judiciary, 29 NJPER at 258.

> For example, private sector employees enjoy a broader scope of negotiations than public sector employees in New Jersey and possess the right to strike, but their right to representation is limited to non-supervisors. New Jersey Turnpike Authority, 150 N.J. 331,

> 352-354 (1997). The sphere for public employee representation in New Jersey was expanded to include supervisors and some managers while the scope of negotiations was narrowed and the power to strike was withheld. [New Jersey State Judiciary, 29 NJPER at 258.]

29 U.S.C. §152(3) defines employee under the NLRA as:

> The term 'employee' shall include any employee . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or **any individual having the status of an independent contractor**, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined. [Emphasis in original.]
>
> The NLRA's definition of 'employee' expressly excludes 'independent contractors' whereas the Act's definition of 'employee' does not. [Ibid.]

The Commission went on to state that on July 1, 1968, the New Jersey Legislature expanded the Act's definition of "employee" in N.J.S.A. 34:13A-3(d). The Legislature decided that "employment" is but one of three ways to hold a position in the service of a public employer; the other ways are by "appointment" or "contract." Ibid. The Commission concluded:

> Given the definitional differences between the NLRA and our Act, common law agency cases should not be applied mechanistically, regardless of the context in which they arose, in determining whether individuals performing services for a public employer are

> public employees. We will consider common law agency cases, but with an emphasis on the labor relations cases applying those principles and the labor relations policies informing our Act. [Ibid.]

Finally, the Commission noted that the New Jersey Supreme Court has found that an individual may be an employee for one purpose, but an independent contractor for another purpose, and that the answer to the employee/contractor question will depend upon the varying consequences of that determination and the public policies engaged in each context. The Commission stated that the coverage of remedial laws should be construed broadly; an employer/employee relationship may be found under such laws even though one might not be found under common law principles. It said our Act is remedial legislation and should be liberally construed to effectuate its purposes of reducing workplace strife and improving morale and efficiency. Ibid.

7. The Commission stated that:

> [u]nder the common law, an independent contractor is 'one who, carrying on an independent business, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work.' Bahrle v. Exxon Corp., 145 N.J. 144, 157 (1996).
>
> Independent contractors 'undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods and labor and what they receive for the

> end result, that is upon profit.' [New Jersey State Judiciary, 29 NJPER at 259.]

8. The Commission, relying upon the Guidelines which were in effect in 2003 found that the Supreme Court had adopted

> . . . the principle that courts and their support services must be equally accessible for all persons regardless of the degree to which they are able to communicate effectively in the English language [Ibid.; CP-17].

The Commission found that all interpreters working for the Judiciary perform the same essential function of enabling all witnesses in New Jersey courts to be heard despite linguistic barriers and constitute an integral, indispensable part of the Judiciary's business of providing justice. Ibid.

9. In its decision, the Commission went on to analyze various elements of the work relationship between the AOC and FLIs. Weighing those various elements such as control and dependence, skills required, the source of instrumentalities and tools, the location of the work, the duration of the relationship, method of payment, hiring and paying assistants, FLI benefits, tax treatment, and the parties subjective beliefs about their employer/employee relationship led the Commission to conclude that FLIs were employees rather than independent contractors. In reaching its conclusion, the Commission said:

> The most important factors are the integral and critical nature of the interpreting services provided as part of the Judiciary's mission; the control exercised by the

> Judiciary to manage the quality and availability of interpreting services by FLIs . . .; and the lack of an opportunity for entrepreneurial gain by the way in which FLIs perform their assignments. [Id. at 262.]

The Commission explained that its conclusion

> . . . is reenforced . . . by a consideration of the Act's purposes and policies. The Act posits that work place stability, morale and efficiency may be improved by allowing a group of employees to choose representation concerning their terms and conditions of employment and it extends the right to such representation to a greater range of employees than in the private sector. The Supreme Court has stated that 'the ultimate organization of all employees who desire collective representation with the State is a logical objective of the public policy underlying the [Act].' State v. Professional Association of the New Jersey Department of Education, 64 N.J. 231, 253 (1974). [New Jersey State Judiciary, 29 NJPER at 262.]

On the basis of the Commission's decision in New Jersey State Judiciary, the Commission affirmed the Director of Representation's decision to allow all regularly employed free-lance interpreters who work a minimum of 288 hours during a 12-month period to be represented for purposes of collective negotiations.

10. On or about September 14, 2004, the AOC and the CWA executed an initial collective negotiations agreement (CP-15) which in Article II, Paragraph J, Eligibility for Membership in Unit, stated the following:

> On or about June 1st of each year, the AOC shall provide CWA with a list of names of

> those FLIs who worked at least 288 actual hours for the preceding calendar year (January 1-December 31). All FLIs on the list shall be included in the CWA bargaining unit for a period of twelve months starting July 1 of that year. FLIs who have worked less than 288 actual hours in the preceding calendar year shall not remain in the bargaining unit. . . .

11. To identify the initial complement of FLIs covered by the collective agreement, the AOC reviewed vendor invoices to identify the FLIs who were paid for 288 hours. Subsequently, the AOC modified its data collection process to enable it to identify the number of hours each FLI worked rather than the number of hours for which the FLI was paid (2T8). That change reduced the number of FLIs achieving the 288 hours threshold and thus reduced the number of FLIs eligible for inclusion in the unit (2T9; CP-1). FLIs that were already included in the unit and consistently maintained the minimum of 288 hours worked during the calendar year remained in the unit.

12. In or about August 2004, all FLIs who were not included in the negotiations unit because they did not meet the 288 hour minimum threshold (unrepresented FLIs) or were newly hired were given a document prepared by the AOC entitled Professional Service Agreements (PSA) (CP-12; 2T10). The PSA set forth all of the terms and conditions of employment applicable to unrepresented FLIs. The PSAs were subsequently changed to a document developed by the AOC entitled Professional Service

Statement of Work (PSSW) which, like the PSA, reflected all of the unrepresented FLIs' terms and conditions of employment (3T19). All unrepresented FLIs were required to sign a PSA or PSSW.[3/]

13. Joe Orlando, Chief of Labor and Employee Relations for the AOC, represented the AOC in negotiations with the CWA for the FLIs' contract (3T3-3T4). One of the issues addressed during the negotiations was the manner in which represented and unrepresented FLIs would be distinguished (3T12). It was determined that all terms and conditions of employment for represented FLIs would be reflected in the negotiated collective agreement and all "terms of engagement" pertaining to unrepresented FLIs would be reflected in the PSAs prepared by the AOC and executed by the unrepresented FLI (3T14; 3T36). The PSAs refer to the unrepresented FLIs as "contractors" (CP-12A & B). All FLIs not included within the collective negotiations unit are required by the AOC to execute a PSA as a condition precedent to engagement (CP-14A, B and C). The execution of the PSA by an FLI was considered a demarcation document for inclusion or exclusion from the collective negotiations unit (3T12-3T13; 3T16; 3T18-3T19; 3T25; 3T45).

3/ There is no substantive difference between a PSSW and a PSA and for purposes of this decision they should be considered functionally interchangeable.

14. Since the Commission issued its decision in New Jersey State Judiciary in 2003, the AOC has had difficulty administering the manner in which FLIs would be treated for purposes of coverage under State regulations and the Judiciary's policies (3T35). The AOC was uncomfortable with treating FLIs as employees under the Act but as independent contractors for purposes of unemployment, workers compensation, criminal background checks, and the application of the Judicial Code of Conduct (3T21; 3T24-3T25). For example, the Judicial Code of Conduct, if applied to FLIs, would disqualify an FLI from working for attorneys in private practice, an important source of an FLI's income, or practically any entity other than the AOC (3T20; R-3).

15. In early 2004, the AOC and the CWA started negotiations for a collective agreement covering represented FLIs. One of the AOC's objectives in the negotiations was to develop a means to reconcile the distinction between represented and unrepresented FLIs (3T37). In July 2004, Orlando told the CWA that the Guidelines for Contracting Free-Lance Interpreters was being rescinded since the collective agreement would set forth all terms and conditions of employment for represented FLIs and the PSAs would set forth all terms of engagement for the unrepresented FLIs (3T18-3T19; 3T45-3T47).

16. Pursuant to the Judiciary's June 2, 2004 negotiations proposal, the AOC would provide the CWA with a list of names of FLIs who worked at least 288 hours during the preceding calendar year (3T49; CP-22). Any FLI who did not work 288 hours or more in the preceding calendar year would either be removed from the negotiations unit if previously included, or denied membership in the negotiations unit and would be required to sign a PSA in order to receive assignments from the AOC (3T12-3T13; 3T16; 3T36; 3T51; 3T55; CP-14).

17. On July 2, 2004, the AOC presented the CWA with negotiations proposals which included the provision establishing the 288 hour requirement to be included in the negotiations unit (3T53; R-9). It was Orlando's understanding that the parties understood that provision to allow FLIs to go in and out of the unit based on the 288 hour threshold (3T53-3T54). However, since any FLI who did not meet the 288 hour minimum threshold could not be included in the unit, that FLI was required to execute a PSA if s/he wished to remain eligible to receive work assignments from the AOC. Once the FLI executed a PSA, regardless of whether the FLI had previously been included in the negotiations unit, the AOC considered that FLI as a private business entity/independent contractor and ineligible for unit inclusion under any circumstances, irrespective of the number of hours the FLI had worked during the preceding calendar year. Accordingly,

under the system implemented by the AOC, any FLI who did not meet the hours threshold was removed from the unit and would never be able to regain entry. Further, any FLI, who as a condition precedent to receiving an assignment, signed a PSA could, likewise, never be included in the unit (3T54-3T56; 3T58; 3T60). The AOC's system to deny FLIs admission into the unit once the FLI executed a PSA was never conveyed to the CWA as, at the time of the negotiations, it was not even the AOC's negotiators' understanding (3T60). Thus, only FLIs initially included in the unit at the time it was formed, and who maintained the minimum 288 hour threshold annually, remained in the negotiations unit (3T73).

18. As previously noted, the Guidelines for Contracting Free-Lance Interpreters (CP-17) was rescinded by the AOC (2T14; 2T43). Many of the operational statements reflected in the Guidelines have survived the recision (2T44-2T54). For example, the Judiciary continues to adhere to the principle that courts must be equally accessible to everyone regardless of their ability to communicate effectively in English (2T44; CP-17). The Guidelines' objectives of ". . . provid[ing] the most qualified free-lance interpreter available. . .; [p]romot[ing] uniformity in the way free-lance interpreting services are managed. . .; apportion[ing] assignments among free-lance interpreters. . .; [and] . . . implementing a system of managing free-lance

interpreters that is clear to all" remains in effect (2T45; CP-17). The Guidelines' description explaining the categories of FLIs which may be used continues with the exception of "unapproved" interpreters (2T45-2T46). FLIs are still required to pass an examination administered by the AOC and are selected for an assignment on a rotational basis maintained by the AOC and derived from the Guidelines (2T48-2T50). The rates of pay given to unrepresented FLIs are established unilaterally by the AOC and pursuant to collective negotiations with the majority representative for represented FLIs; the rates are identical (R-10; CP-22; 2T51; 3T16; 3T63-3T64). All FLIs submit vouchers to the AOC for payment and are issued IRS Form 1099 at the end of the calendar year to reflect annual compensation. The reimbursement policy for mileage and overnight lodging contained in the Guidelines continues to be applied to all FLIs as well as assignment information such as start time, assignment duration, location, case type, etc. (2T51). Certain conditions of employment for FLIs differed after the recision of the Guidelines and upon the implementation of the PSAs for unrepresented FLIs. Since the recision of the Guidelines, FLIs are given assignments in either half day or full day increments (2T27). Under the Guidelines, FLIs could have been scheduled for a minimum of two hours (2T27). Post Guidelines, FLIs are free to leave when their work assignment is concluded even if that conclusion comes before

the end of the scheduled work day. Under the Guidelines, an FLI was required to stay for the length of the assignment period even if the work had concluded (1T51-1T52; 1T75-1T79; 2T27-2T29). Sometimes the Judiciary provides the equipment used in the performance of the FLI's job; sometimes the FLI provides the equipment (1T2; 1T78).

19. Procedures exist whereby any FLI can cancel an assignment previously accepted (2T54). Rather than cancel, an unrepresented FLI can retain a qualified substitute to perform such assignment provided prior arrangement and approval of the Vicinage Coordinator of Interpreting Services is obtained (2T55). Represented FLIs do not have the option to obtain a substitute. There is no particular policy reason for this distinction other than such option is not provided for in the collective agreement (2T55-2T57). The substitute FLI receives the same rate of compensation as the scheduled unrepresented FLI.

20. The AOC considers all FLIs as practitioners of an established profession. The AOC does not supervise, monitor, or evaluate FLIs' performance and does not conduct performance reviews. FLIs are not subject to discipline (2T19-2T20). FLIs are free to turn down work offered by the Judiciary. FLIs who are regularly unavailable for assignment are removed from the Registry -- the listing of approved FLIs maintained by the AOC and used by the vicinages to recruit interpreters.

21. Many FLIs operate their own businesses and work for the federal courts, attorneys in private practice and other private sector enterprises as interpreters. As private business owners, they incorporate their businesses, take business tax deductions, have business cards and advertise (1T54-1T56; 1T58-1T59; 1T61; 1T81-1T84; 1T87-1T88; 2T33-2T35; R-1; R-8).

22. In accordance with Article, II Paragraph J, of the collective agreement, on June 9, 2005, the AOC sent a letter (CP-16) to the CWA which attached the list of FLIs who worked a minimum of 288 hours during calendar year 2004 and were included in the negotiations unit. The letter advised the CWA that four FLIs who worked 288 hours or more in 2004 were excluded from the list because they had signed PSAs.

ANALYSIS

The AOC contends that CWA's unfair practice charge fails because it has been filed outside of the six month statute of limitations. The AOC argues that as early as February 2004, during negotiations, the Judiciary advised the CWA that it intended to issue PSAs to all unrepresented FLIs, yet the CWA did not file its unfair practice charge until December 7, 2005, well beyond the six month statute of limitations.

N.J.S.A. 34:13A-5.4c provides in relevant part that:

> . . . no complaint shall issue based upon any unfair practice occurring more than six months prior to the filing of the charge unless the person aggrieved thereby was

> prevented from filing such charge in which event the six-month period shall be computed from the day he was no longer so prevented.

The statute of limitations period normally begins to run from the date of some particular action, such as the date the alleged unfair practice occurred, provided the party affected is aware of the action. The date of the action could be the date a particular event is announced and/or the date the action is implemented. The action date is also known as the "operative date," and the six-month limitations period runs from that date. Therefore, in order to be timely, a charge must generally be filed within six months of the operative date unless for some reason the limitation period was tolled or the charging party demonstrates that it was prevented from filing the charge prior to the expiration of the period. The standard for evaluating statute of limitations issues was set forth in Kaczmarek v. New Jersey Turnpike Authority, 77 N.J. 323 (1978). The Supreme Court explained that the statute of limitations was intended to stimulate the litigants to promptly adjudicate their dispute and to prevent litigation of stale claims, but it did not want to apply the statute strictly without considering the circumstances of individual cases. Id. at 337-338. The court noted it would look to equitable considerations in deciding whether a charging party slept on its rights.

In this case, there is no claim that the CWA was prevented from filing its charge against the AOC. The issue is whether the operative event triggering the commencement of the six month limitations period was the AOC's notification in February 2004 that it would require unrepresented FLIs to sign PSAs or whether it was the action of the AOC to prevent certain FLIs who had worked 288 hours or more in the preceding calendar year from being added to the collective negotiations unit. The CWA was notified of this action by Orlando's June 9, 2005 letter (CP-16).

In Warren Hills Regional Board of Education, P.E.R.C. No. 78-69, 4 NJPER 188 (¶4094 1978), the Commission considered a timeliness claim regarding a charge asserting unilateral implementation of split sessions for the seventh grade. The Commission upheld the hearing examiner's dismissal of the charge as untimely but held that the operative event was not the Board's decision to institute the split session but the actual implementation of that decision. Similarly, in Jamesburg Bd. of Ed., P.E.R.C. No. 80-56, 5 NJPER 496 (¶10253 1979), the Commission considered the timeliness of a charge alleging a unilateral change in the school calendar. The Commission found the charge was timely because it was filed within six months of the first day of school when the change was implemented. It determined the statute of limitations may run from the date a change is announced or from the date it is implemented. See also

Monmouth County Sheriff, H.E. No. 90-36, 16 NJPER 156 (¶21063 1990).

I find the operative date in this matter is Orlando's June 9, 2005 letter (CP-16). While the AOC may have notified the CWA as early as February 2004 that it would require unrepresented FLIs to sign PSAs which referred to unrepresented FLIs as contractors, it was not until the delivery of CP-16 that the CWA understood that the signing of a PSA would prevent the FLI from being included in the unit, regardless of the number of hours worked in the preceding calendar year. The testimony establishes that during the course of the negotiations, AOC representatives did not understand that the signing of a PSA would eliminate an FLI's ability to be included in the unit after crossing the minimum hours threshold. Consequently, I find that June 9, 2005 is the operative date for purposes of calculating the statute of limitations in this case and hold that the CWA's unfair practice charge is timely filed.

In New Jersey State Judiciary, the Commission found FLIs meeting certain eligibility requirements to be employees within the meaning of the Act and includable in a collective negotiations unit. The Judiciary now argues that New Jersey State Judiciary was wrongly decided. It supports its claim by arguing that circumstances have changed. The Judiciary correctly points out that the Commission's earlier decision was heavily

reliant upon the finding that FLIs' working conditions were largely controlled by the Guidelines established by the AOC. Clearly, the Guidelines were a significant factor in leading the Commission to conclude that the AOC exercised a level of direction and control over the work of the FLIs that cast them as public employees within the meaning of the Act. However, the AOC argues that to the extent that the Guidelines did operate to provide the Judiciary with the direction and control over the FLIs, upon the Guidelines' recision in 2004, that factor no longer obtains.

However, the facts show that while the Guidelines as a discrete document may have been rescinded in 2004, most of the individual directives comprising the Guidelines remain in effect. Primary, but not by way of limitation, is the fact that FLIs continue to provide services that are integral to the fundamental function of the Judiciary to provide justice to all who appear before the courts. Consequently, I find that the official recision of the Guidelines does not change the underlying premise upon which the Commission has based its initial determination that FLIs are employees within the meaning of the Act.

The Judiciary has cited a number of cases in support of its position that FLIs are independent contractors. See The Big East Conference and Collegiate Basketball Officials Association, Inc., 282 NLRB 335, 124 LRRM 1372 (1986); Young & Rubicam

International, Inc., 226 NLRB 1271, 94 LRRM 1016 (1976); and NLRB v. Silver King Broadcasting of Southern California, Inc., 85 F.3d 637 (9th Cir. 1996). The AOC correctly asserts that in Lullo, the Supreme Court found that the decisions of the National Labor Relations Board (NLRB) might well serve as a model for decisions and policies interpreting the Act. However, the NLRB's application of the NLRA serves only as a guideline for the Commission's decisional determinations and not as a mandate. See Bergen County, P.E.R.C. No. 84-2, 9 NJPER 451 (¶14196 1983). Moreover, the application of private sector cases to a determination of whether FLIs are independent contractors results in an application of a different statutory framework. In New Jersey State Judiciary, the Commission specifically dealt with differences between the definition of "public employee" in the Act (N.J.S.A. 34:13A-3(d)), and the definition of "employee" under the NLRA (29 U.S.C. §152(3)). Accordingly, while the AOC's cited cases are clearly relevant to assist in a determination of whether FLIs are independent contractors, those cases are not dispositive and can not serve as a sound basis to overturn the Commission ruling in New Jersey State Judiciary.

Therefore, since the AOC has not established a compelling rationale for modifying the Commission's decision in New Jersey State Judiciary, I find that its current system which operates to exclude any FLI from the collective negotiations unit which is

not currently in the unit to constitute a unilateral change in terms and conditions of employment.

The CWA has alleged that the AOC's conduct also violated Section 5.4a(3). The New Jersey Supreme Court has set forth a standard for determining whether an employer's action violates Section 5.4a(3) in Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984). Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected rights. Id. at 246. If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act, and other motives, contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense,

however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for me to resolve. In this case, I find neither direct nor circumstantial evidence that the AOC's actions were in any way motivated by union animus. Accordingly, there is no basis to find that the AOC violated Section 5.4a(3) of the Act.

Accordingly, based upon the entire record and the analysis above, I make the following:

CONCLUSIONS OF LAW

1. The AOC did not violate Section 5.4a(3) of the Act.

2. The AOC violated Section 5.4a(5) and, derivatively, (1) when it unilaterally instituted a program designed to eliminate the possibility of any FLI not currently included in the extant collective negotiations unit from being included in that unit.

RECOMMENDED ORDER

I recommend the Commission order:

A. That the Administrative Office of the Courts cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by engaging in any course of action which prevents free-lance interpreters from being included in the

collective negotiations unit upon their achieving unit eligibility by working 288 hours or more in the preceding calendar year.

2. Refusing to negotiate in good faith with the majority representative of employees in the appropriate unit concerning terms and conditions of employment of employees in that unit by unilaterally implementing a program which excludes otherwise eligible free-lance interpreters from inclusion into the unit.

B. That the Administrative Office of the Courts take the following affirmative action:

1. Immediately include in the collective negotiations unit representing FLIs all FLIs who have worked 288 or more hours in calendar year 2007.

2. Identify all FLIs who were wrongly excluded from the negotiations unit representing the FLIs and provide them with all benefits and emoluments such employees would have enjoyed had they been covered under the terms of the collective agreement.

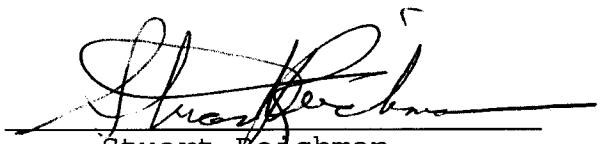
3. Make the CWA whole for any dues or fees or other losses it suffered as a result of excluding any otherwise eligible FLI from the collective negotiations unit.

4. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as

Appendix "A". Copies of such notice will, after being signed by the respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps will be taken to ensure that such notices are not altered, defaced, or covered by other materials.

5. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the respondent has taken to comply with this order.

C. The 5.4a(3) allegation is dismissed.



Stuart Reichman
Hearing Examiner

DATED: October 28, 2008
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by November 10, 2008.

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by engaging in any course of action which prevents free-lance interpreters from being included in the collective negotiations unit upon their achieving unit eligibility by working 288 hours or more in the preceding calendar year.

WE WILL cease and desist from refusing to negotiate in good faith with the majority representative of employees in the appropriate unit concerning terms and conditions of employment of employees in that unit by unilaterally implementing a program which excludes otherwise eligible free-lance interpreters from inclusion into the unit.

WE WILL immediately include in the collective negotiations unit representing FLIs all FLIs who have worked 288 or more hours in calendar year 2007.

WE WILL identify all FLIs who were wrongly excluded from the negotiations unit representing the FLIs and provide them with all benefits and emoluments such employees would have enjoyed had they been covered under the terms of the collective agreement.

WE WILL make the CWA whole for any dues or fees or other losses it suffered as a result of excluding any otherwise eligible FLI from the collective negotiations unit.

Docket No. CO-2006-148

New Jersey Administrative Office of the Courts
(Public Employer)

Date: _____ By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"